Chapter 2

SPECIAL NEEDS TRUST BASICS: TESTAMENTARY TRUSTS AND PAYBACK TRUSTS

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Table of Contents

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I. INTRODUCTION

Planning for individuals with disabilities is a multi-faceted endeavor comprising a wide range of issues and challenges. Proper planning involves much more than Special Needs Trusts (a.k.a. "Supplemental Needs Trusts"), which may or may not be necessary or appropriate for a particular disabled individual. However, in the appropriate circumstance, a Special Needs Trust can dramatically increase a disabled person's quality of life.

Special Needs Trusts come in many shapes and sizes, influenced by a variety of factors. To begin with, every disabled person faces a different set of health challenges and care needs. Added to that natural variation is the complexity and ever-changing nature of the law relevant to special needs trusts, which includes federal and state statutes and administrative rules, Social Security regulations, and local court rules. Although special needs trusts comprise only one part of a disability planning practice, they are a world unto themselves.

These materials are not intended as an exhaustive guide to the full array of special needs trust issues, but rather as an introductory primer on the appropriate use of special needs trusts (hereafter, "SNTs"); the primary types of SNTs; and on the basics of drafting SNTs. (Previous Elder Law Section CLE materials provide more comprehensive treatment of SNTs generally, and of SNT administration specifically.) [1]

II. WHEN TO USE A SPECIAL NEEDS TRUST

The primary purpose of a special needs trust is to provide a fund for a disabled person that will enhance his or her quality of life, while simultaneously protecting the individual's entitlement to certain government benefits. SNTs frequently have other purposes as well, such as providing financial management and oversight for individuals whose disabilities preclude self-management. However, what sets SNTs apart from other trusts is their ability to protect assets from being considered *available* for purposes of means-tested public benefits.

Means-tested public benefits are government programs that limit the pool of eligible recipients by imposing financial eligibility rules. Eligibility for means-tested benefits is determined after a review of the assets and income of the person applying for help. If assets and income are *available* to the person for basic needs, such as food and shelter, then generally the person is expected to use the available funds for those basic needs, thus reducing his or her need for government benefits.

Originally, SNTs were developed by lawyers who realized that if a trust, by its terms, makes the trust estate *unavailable* for basic needs such as food and shelter, the existence of the trust should not affect an

[1] For detailed discussions of Special Needs Trust administration, see:

A. Donna R. Meyer's materials, "Special Needs Trusts," Chapter 12 in the Administering Trusts in Oregon Handbook, OSB CLE, Revision 2007; and

B. Cinda Conroyd's materials, "Administration of Supplemental Needs Trusts" in the OSB Elder Law Section's 2008 CLE Materials, entitled "Elder Law 2008: Advancing the Plan."

individual's eligibility for needs-based public benefits. Today, as these materials will explain, federal and state laws contain specific provisions governing special needs trusts, setting out criteria under which SNT assets will be treated as *unavailable*.

Because a primary function of a SNT is to preserve means-tested public benefits, and because not all disabled individuals receive means-tested benefits, SNTs are not always necessary or appropriate. In order to properly plan for a disabled person, an attorney must have a basic understanding of the government benefit programs available, including the level of services provided and the eligibility rules applicable to each one. Only after determining that a particular disabled individual receives means-tested benefits, or is likely to receive them in the future, should a special needs trust be drafted.

A. The World of Government Benefits

The world of government benefits is vast, and a full description of the benefits available to disabled individuals is beyond the scope of these materials.[2] Broadly speaking, however, government benefits for the disabled can be divided into two categories: "means-tested" or "needs-based" benefits, which impose strict financial eligibility limits, and "entitlement" benefits, which generally do not.

Following is an overview of some of the most common government benefits programs available to disabled individuals. Note that each of these programs has complex rules (well beyond what is included here), and that those rules should be closely analyzed in deciding whether and when to use a SNT. This overview is not intended to provide comprehensive details on eligibility rules for the various programs, but rather to identify their general characteristics for basic SNT planning purposes.

1. Means-Tested Benefits

a. **Supplemental Security Income ("SSI").** Supplemental Security Income ("SSI") is a federal program of cash assistance for aged, blind, or disabled individuals who have little income and few assets. Eligibility depends upon status (age, disability, etc.) and financial need, but is not related to an individual's work history (*i.e.*, an individual need not have "paid into the system" in order to qualify). The SSI program provides monthly checks from the federal government of up to $674 for an individual, and up to $1011 for a married couple (in 2010). Typically, a person who is eligible for SSI benefits automatically qualifies for Medicaid benefits as well.

SSI is administered by the Social Security Administration (SSA), through local Social Security branch offices. To be eligible for SSI, a single

[2] For more information on Medicaid in Oregon, see:

A. The OSB Elder Law Section's 2005 CLE Materials, entitled "Tools of the Trade for the Elder Law Practitioner;" and

B. Penny Davis' materials, "Medicaid and Other Public Benefits" in the OSB Elder Law Section's 2010 CLE materials entitled, "Elder Law Round Up: Substance and Practice."

individual cannot have "countable resources" worth more than $2,000, and a married couple cannot have countable resources worth more than $3,000 (in 2010). Additionally, a single individual cannot have "countable income" in a month of more than the federal benefit rate ("FBR"). The FBR for an individual is $674 and for a married couple is $1011 (in 2010).

The legal authority for the Supplemental Security Income program is contained in Title XVI of the Social Security Act, 42 USC §1381 *et. seq.* Regulations implementing the program are found at 20 CFR §416.101 *et seq.* Internal Social Security Administration policy guidelines are found in the Program Operations Manual System (POMS) SI 00500.000 *et seq.*

> **Practice Tip:** POMS provisions are written in plain English, making the POMS the easiest-to-understand source of legal authority on the SSI program. The POMS is available on SSA's website at: *https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05.*
>
> The SSI-specific provisions can be found at: *https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05*

b. **Medicaid.** Medicaid is a joint federal-state program of medical assistance. Medicaid is not a single program, but rather, a group of programs, each of which has unique benefits, rules, and eligibility requirements. As with SSI, eligibility for Medicaid is based upon financial need (low income and assets). Unlike SSI, however, Medicaid does not provide cash benefits to beneficiaries. Rather, Medicaid pays for a variety of health care and long-term care services through its different programs, all of which are administered in Oregon by the Oregon Department of Human Services ("DHS").

Among the most common of Oregon's Medicaid programs is the Oregon Health Plan (OHP), which provides basic health insurance to certain disabled and low-income individuals. Under the broad umbrella of "Oregon Health Plan" are several sub-programs, including OHP Standard, OHP Plus, and the no-cost public assistance option of Oregon's new Healthy Kids Program (for children under age 19).

Another common Medicaid program is the Oregon Supplemental Income Program Medical (OSIPM), which provides both basic health insurance and, in some cases, assistance with long-term care costs. Disabled individuals who receive SSI are automatically eligible for OSIPM. OAR 461-135-0010(6)(a).

There are other Medicaid programs as well, all with varying eligibility rules. Income limits, in particular, vary dramatically from one Medicaid program to another. However, the asset limits applicable to OHP and OSIPM (the two Medicaid programs most often involved in SNT planning) are the same as in the SSI program. OAR 461-160-0015.

The legal authority for the Medicaid program is contained in Title XIX of the Social Security Act, 42 USC §1396 *et seq.* Oregon's applicable

statutes and rules appear in ORS Chapter 411 and OAR Chapters 410, 411, and 461. As a practical matter, the Oregon Administrative Rules governing Medicaid are the most important source of law in the SNT planning context, as they provide the specific income limits and other requirements for the various Medicaid programs.

> **Practice Tip:** The Oregon Administrative Rules governing Medicaid programs change frequently, and should be reviewed often. Notices of changes to these rules can be obtained by visiting the DHS website and requesting e-mail notifications in advance of proposed rule changes. *http://www.dhs.state.or.us/policy/healthplan/rules/notices.html*

c. **Housing Assistance Programs.** Several different federal housing programs are available to help disabled individuals obtain affordable housing. The rules governing these programs are a complex web of statutes, regulations, and "program circulars" issued by the Department of Housing and Urban Development ("HUD"). A complete list of the various federal housing assistance programs can be found at: *http://www.hud.gov/offices/lead/enforcement/1012housinglist.cfm*

Federal housing assistance programs are administered by local Public Housing Authorities ("PHAs"), and the PHAs are empowered to set policies and procedures according to the needs of their specific communities. 24 CFR 982.1(a). Accordingly, the specific requirements for each program vary significantly from state to state, and even within a given state.

One of the most common housing programs for individuals with disabilities is the Section 8 Voucher Program. In general (and in contrast to both SSI and Medicaid), eligibility for the Section 8 voucher program is based on income, and not on assets. General information on this program can be found at: *http://portal.hud.gov/portal/page/portal/HUD/topics/housing_choice_voucher_program_section_8*

d. **Food Stamps/Supplemental Nutrition Assistance Program.** The Supplemental Nutrition Assistance Program ("SNAP"), formerly referred to as the Food Stamp program, is a federal nutrition program intended to provide low-income individuals (including many disabled individuals) a means to meet their nutritional needs. In Oregon, the SNAP is administered by the Oregon Department of Human Services Children, Adults and Families Division. As with the federal housing programs, eligibility for the SNAP is based primarily on income, and not on assets.

2. **Entitlement Benefits**

a. **Social Security Disability Insurance ("SSDI").** Social Security Disability Insurance ("SSDI") is a federal insurance program that pays cash benefits to disabled workers under the age of 65. The monthly payment amount depends on an individual's work record and the amount he or she paid into the Social Security system while working. Disabled individuals who receive SSDI for at least 24 months automatically qualify for Medicare benefits (see below).

Like SSI, SSDI is administered by the Social Security Administration, through local Social Security branch offices. Unlike SSI, however, eligibility for SSDI does not depend on an individual's assets or *unearned* income. Thus, a disabled individual can own any amount of resources without jeopardizing his or her eligibility for SSDI benefits.

> **Practice Tip:** Recipients of SSDI frequently also receive SSI (if a recipient's work record results in a monthly SSDI payment of less than the "FBR" discussed above, the individual often receives SSI to bring the total income up to the FBR). Attorneys should never assume that because an individual receives SSDI, he or she is not also receiving SSI (or other means-tested benefits).

The legal authority for the Social Security Disability Insurance program is contained in Title II of the Social Security Act, 42 USC §423. Regulations implementing the program are found in 20 CFR §404.1 *et. seq.* Internal Social Security Administration policy guidelines are found in the Program Operations Manual System (POMS) DI 00100.000 *et seq.*

> **Practice Tip:** The SSDI-specific provisions of the POMS can be found at: *https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=04.*

b. **Medicare.** Medicare is a federal health insurance program providing basic coverage to individuals over age 65, as well as certain disabled individuals under age 65 who have received SSDI benefits for at least 24 months. (The 24-month "waiting period" for SSDI-linked Medicare eligibility is waived for individuals with end-stage renal disease or ALS, a.k.a Lou Gehrig's disease.)

Medicare consists four basic "parts," A-D, which provide hospital insurance, medical insurance, and prescription drug coverage. Medicare recipients must pay monthly premiums, co-payments, and deductibles, which vary depending on the particular "parts" in which they are enrolled.

Medicare is administered federally by the Centers for Medicare and Medicaid Services ("CMS"). However, the Social Security Administration is responsible for determining Medicare eligibility and processing the monthly premium payments required of Medicare recipients.

Unlike Medicaid, Medicare is not means-tested. Accordingly, a disabled individual can qualify for (or retain) eligibility for Medicare regardless of asset and income levels. However, Medicare generally does not cover the full cost of a recipient's health care, and most Medicare recipients require additional coverage. Often, this additional coverage takes the form of a Medicare supplement policy—a private insurance plan intended to cover the gaps in Medicare's coverage. But in some cases, the gaps in coverage are filled by Medicaid. Medicare recipients who also receive Medicaid benefits are sometimes referred to as "dual-eligibles."

Practice Tip: Attorneys should never assume that because an individual receives Medicare, he or she is not also receiving Medicaid (or other means-tested benefits).

B. The Benefits Direct the Process

1. **Obtaining Current Benefits Information.** Attorneys representing disabled individuals (or family members of disabled individuals) must always obtain a clear understanding of the individual's benefits ***as a first step*** in every disability planning case. Before discussing or preparing an SNT, it is critical to answer the following questions:

- Which public benefits (if any) is the disabled individual currently receiving?
- Which public benefits might the disabled individual qualify for in the future?
- Are any of the public benefits identified above "means-tested?"
- Are the public benefits identified above critical to the support and care of the disabled individual, or does the individual have **non-**means-tested alternatives to meet basic support and care needs?

The answers to the questions above are frequently difficult to obtain, for several reasons. Many public benefits programs have names that sound similar to each other (Medicare/Medicaid; SSDI/SSI), and clients routinely confuse them. Clients enrolled in the Oregon Health Plan may not realize that they are receiving Medicaid assistance. Finally, as mentioned above, many disabled individuals receive benefits from multiple programs simultaneously, and may not be aware of the distinct sources of those benefits.

Because disabled individuals and their families are often confused about exactly which benefits they receive, attorneys must not rely solely on clients' statements in identifying benefits. Instead, this information should be obtained by asking the client questions that will elicit "clues" as to the nature of the benefits received. For example, an attorney can ask about the amount of income received by the disabled person. If a client reports income of more than $674 (the maximum SSI payment in 2010), the attorney knows the person is not receiving SSI, but likely receives SSDI. Alternately, an attorney can ask about the disabled person's resources. If the individual has assets (other than a home, a car, and certain other "exempt" assets) in excess of $2000, there is a strong possibility his or her benefits are not means-tested. The key point is that follow-up questions are required in every case, since clients are not always able to provide accurate information about the benefits being received.

After informally soliciting additional information about the benefits received by the disabled individual, an attorney should always follow up and verify the information by communicating directly with the agencies providing the benefits. This generally requires a Release signed by the disabled individual or his or her legal representative. However, obtaining a Release and requesting confirmation of benefits from the relevant agencies is time well spent, as it can avoid costly errors.

Practice Tip: Benefits information regarding SSDI, SSI and/or Medicare can be obtained from the Social Security Administration using the official "Consent for Release of Information" form, available at: *http://www.ssa.gov/online/ssa-3288.pdf*, and reprinted in these materials as Appendix A. Benefits information regarding the various Medicaid programs administered by Oregon DHS can usually be obtained using a general Release. One example of a general Release, used regularly by the authors, is attached as Appendix B.

2. **Thinking Ahead about Future Need for Benefits.** Although obtaining accurate information about current public benefits is critical, it should not end an attorney's analysis of whether a SNT is necessary or appropriate. In order to properly determine the advisability of a SNT, the disabled person's future care needs must be considered, as those needs can change dramatically over the course of a disabled person's life.

It is not uncommon to encounter disabled individuals who, though not currently receiving means-tested benefits, are likely to require them in the future. In those cases, preparation of a SNT may be advisable even though the most significant advantages of the trust may not be realized until later. For example, suppose an individual is receiving SSDI and Medicare (two entitlement benefits that are not means-tested) and is privately paying for a Medicare supplement policy using a combination of SSDI income and savings. Now suppose this individual has a progressive illness, such as Primary Progressive Multiple Sclerosis, and is expected to deteriorate to the point where independent living becomes impossible. A SNT might make sense for such an individual even if he is not currently receiving benefits, since there are foreseeable long-term care costs that could be financially devastating.

Thinking ahead can also be important in the case of minor children. Disabled children under the age of 18 often do not qualify for means-tested benefits because most public benefits programs "deem" the income and assets of the parents to be available to the children. However, upon reaching the age of 18, these children are often eligible for SSI, Medicaid, and/or other benefits. Parents, grandparents or other relatives and friends of disabled minors may want to consider including a SNT in their estate plan, even though the minor is not currently receiving means-tested benefits.

In some cases, planning needs to account for the possibility that a disabled individual may improve, and no longer require public benefits. If significant improvement is a possibility, attorneys should factor this into their advice regarding SNTs, and if a decision is made to create a SNT, attorney should consider allowing for early termination (see discussion of early termination provisions in the "Drafting Tips" section, below).

III. PRIMARY TYPES OF SPECIAL NEEDS TRUSTS

There are two primary types of Special Needs Trusts; "first-party" trusts, and "third-party" trusts. They share many common features, but they differ in important ways, as this section will explain. The most important distinction between first-party and third-party SNTs is the source of the funds comprising the trust estate: first-party trusts are funded with money that belongs to the beneficiary (*i.e.*, the disabled person), and third-party trusts are funded with money that belongs to someone else, such as a parent or family member of the beneficiary. There are several varieties of each type of trust, but broadly speaking, all SNTs fall into one of these two categories.

The distinction between first-party and third-party SNTs is critical, because they are treated quite differently for purposes of means-tested government benefits. This section will discuss both types of trusts, highlighting their similarities and their differences. In addition, this section will discuss alternatives to SNTs, which may be more appropriate in certain situations. Finally, this section will provide a general description of some common varieties of both first-party and third-party SNTs.

A. Third Party Trusts

The most common of the two primary types of SNTs is the third-party trust. Parents, grandparents and other family members often want to set money aside for the benefit of a disabled individual. However, as explained above, a SNT is not always required, and the determination of whether a SNT is appropriate depends on whether the disabled person is receiving, or is expected to receive, means-tested government benefits. In some situations, the individual may not be receiving means-tested benefits, and may be physically disabled but otherwise able to manage his or her finances. In these cases, if the person's health condition is stable and is not expected to worsen (thereby possibly triggering a need for needs-based public benefits such as assistance with long-term care), it may be appropriate to simply leave assets outright to the disabled person. More often, however, a trust—either a SNT or some other type of trust—is desirable.

1. **Discretionary Support Trusts.** Even in situations where a disabled individual is neither receiving nor expected to receive means-tested government benefits, a trust may necessary to provide management of funds for his or her benefit.[3] In these cases, the limitations of a special needs trust (discussed in more detail below) may be unnecessarily restrictive, and may fail to meet the goals of the person creating the trust. If so, a discretionary support trust ("DST") can sometimes be a good alternative to a traditional special needs trust.

A discretionary support trust gives the trustee the authority to expend funds for the disabled person's benefit in whatever manner the trustee deems appropriate. In short, the distribution standard for a DST can be specifically tailored to the needs of the disabled person without

[3] This is often the case when the disabled person is receiving SSDI and Medicare (entitlement benefits), and simply requires assistance managing financial affairs.

worrying about the impact upon a disabled person's (non means-tested) benefits.

An unresolved question in the area of DSTs is whether assets in these trusts should be considered *available* to a disabled person who ***is*** receiving (or who is planning to receive) means-tested public benefits. Arguably, if the beneficiary has no right to compel a distribution from the trust, and the trustee exercises his discretion by choosing *not* to make distributions for food and/or shelter, the trust assets should not be considered to be available. However, the answer to this question is different among the state Medicaid agencies around the country.

Oregon's Department of Human Services may[4] take the position that a DST is an available resource because the funds ***can*** be used to meet the beneficiary's basic monthly needs.[5] Accordingly, while DSTs have their place in the world of planning for disabled individuals, an attorney would be wise to implement the more restrictive terms of a special needs trust when the intended beneficiary is receiving, or is expected to receive, means-tested government benefits.

2. **Third Party Special Needs Trusts**. Special needs trusts created and funded by a third party for a disabled individual are distinguished from first-party special needs trusts by the source of the assets comprising the trust estate. In a third-party special needs trust, the source of the funding is someone *other than the disabled person*. For this reason, the funds remaining in a third-party special needs trust are not subject to recovery under payback rules at the disabled person's death.[6] (See discussion of first-party trusts, below). Instead, assets remaining in third-party SNTs may be distributed in whatever manner the settlor desires; *e.g.* onto other family members.

a. **Testamentary Special Needs Trusts.** A *testamentary* third-party special needs trust is a trust that is built into the settlor's (*e.g.* par-

[4] DHS itself has had different responses to this issue throughout the years. However, as recently as last year, DHS treated the assets of a discretionary support trust as an available resource. Given the current budget constraints, this position may be the beginning of a trend.

[5] The general rule in Oregon is that income and resources are "available" to a Medicaid applicant only if he or she has a legal right to compel distribution. (see 'A' below) This Oregon rule is mandated by federal law. (see 'B' below) In addition, Oregon regulations specifically provide that assets of an irrevocable or restricted trust are not available if they cannot be used to meet the basic monthly needs of the beneficiary's household (see 'C' below).

A. See ORS 414.025; 414.038-414.042; see ORS 413.005(3) and (4); OAR 461-140-0020(1) and (2); OAR 461-140-0040.
B. 42 USC § 1396a(a)(17)(B) (state may take into account only income and resources that are "available" according to standards prescribed by federal regulations); see 20 CFR § 416.1201(a)(1) (resource is unavailable for Social Security purposes if individual cannot liquidate it or convert it to cash); ORS 409.040 (federal Medicaid law supersedes contrary Oregon law).
C. OAR 461-140-0020(2)(3); OAR 461-145-540(2)(b).

[6] OAR 461-135-832(15); 20 CFR § 416.1212

ents) estate planning documents, such as a Will. These types of SNTs are funded upon the death of the testator or settlor.

b. **Inter vivos (Lifetime) Special Needs Trusts.** An *inter vivos* special needs trust is a separate "stand-alone" trust that is usually funded during the settlor's lifetime, but may also receive assets after the settlor's death. In some cases, clients may want to fund a special needs trust for a disabled child, relative, or friend immediately, rather than waiting to fund a SNT on their death. For example, it may be that a number of relatives and friends want to leave money to benefit a disabled child. In anticipation of this, a "stand-alone" special needs trust may be established to collect and receive the gifts from the friends and family and eliminate the need for each donee to establish (and pay for) a separate SNT in their estate planning documents. Or, it may be that a wealthy client would prefer to make lifetime gifts to a disabled person for estate planning purposes, or fund a SNT with a life insurance policy with the intention that the proceeds will provide enough funds to care for the disabled child in the event of their death.[7] In these situations, an inter vivos special needs trust may be established to accomplish these goals. Regardless of the variety (testamentary or inter-vivos), attorneys creating third-party SNTs should carefully consider how to draft the distribution standard for these instruments, taking into account the beneficiary's benefits situation.

c. **Distribution Standards for Third Party Special Needs Trusts.**

i. **Distribution Standards Generally.** What most distinguishes a special needs trust from other trusts is the distribution standard. The purpose of a special needs trust is to preserve the beneficiary's eligibility for means tested government benefits. However, while all SNTs have the same purpose, there is no single distribution standard that is appropriate for all SNTs. Rather, there is a continuum of options, and the drafting attorney should tailor the standard to best match the beneficiary's circumstances. A rule of thumb is to incorporate the distribution standard that is the most likely to preserve the client's eligibility now and in the future, without jeopardizing his or her quality of life. On the continuum, a discretionary distribution standard such as that described above in section III(A)(1) is the least safe. Although the Social Security Administration does not treat discretionary support trusts as countable assets if the beneficiary does not have the ability to compel distributions,[8] the standard used in DSTs is not recommended to maintain eligibility for means-tested government benefits. The strict distribution standard is the safest choice on the continuum. There are

[7] A complete discussion of the income and transfer tax consequences that may be triggered by making gifts to an inter vivos SNT is beyond the scope of these materials. Attorneys should consult with practitioners familiar with estate and gift tax issues prior to drafting and funding an inter vivos SNT. However, for a discussion of a few selected tax issues, see section IV below.

[8] POMS SI 01120.200

other choices in between these two, and there are numerous factors to be considered in choosing the most appropriate standard.

The most important consideration in determining the appropriate distribution standard is the type of public assistance the beneficiary is receiving (or is expected to receive). In some cases, the benefits require the use of a strict distribution standard, while other cases allow for a more flexible standard. The important thing to remember is that there is no "one size fits all" distribution standard in the SNT context, since each beneficiary receives a different mix of benefits.

Assuming the benefits received by the beneficiary allow for a range of distribution standards, a threshold consideration is whether the client feels distributions for food and shelter will be important. If so, and if the amount of the trust corpus will make such distributions practical, something other than the strict distribution standard should be considered. (See subsection iii below).

A last major consideration is whether the SNT is a third party or first party trust. A third party trust is a creature of common law, guided by the Oregon Uniform Trust Code, and is generally going to be interpreted in the courts by reference to the testator/settlor's intent. If the intention to preserve eligibility for means-tested government benefits is clearly stated and the beneficiary has no power to compel distributions, then generally a third party trust can utilize a more flexible standard, as described below. However, a first party trust is a creature of statute, further defined by administrative rules, and may be interpreted more narrowly. Caution: If drafting a first party trust, refer to both this section and section III(B) below regarding first party trusts.

ii. **Special Needs Only—Strict Distribution Standard.** A "special needs only" or "strict" distribution standard is the traditional standard for most SNTs (third-party and first-party). This standard restricts distributions to special needs and may expressly prohibit distributions for basic needs (*i.e.*, food and shelter). The term *special needs* suggests needs particular to the person and his or her disability, such as medical equipment or rehabilitative treatment, and indeed, many SNTs include specifically tailored distribution guidelines. However, a trust limiting distributions to special needs can be drafted to allow distributions for *anything* other than food and shelter.

This "strict" distribution standard, despite the name, actually encompasses many things that are not related to a disability or medical treatment, and which may not even be properly classified as a "need." For example, under a strict distribution standard, a trustee can make distributions for a cable television bill, internet services, or vacation expenses.[9] In fact, when advising trustees on this distribution standard, it is generally more useful to focus on what is *not* considered a special

[9] Further examples of special needs are as follows: clothing, telephone services and equipment, transportation (including automobile, auto maintenance and repair, gasoline, auto insurance, and/or bus pass), recreation, education, pet care, subscriptions, and computer equipment and services. For recent discussions of Special Needs Trust administration, see materials cited in footnote 1.

need (*i.e.*, what distributions are prohibited) than what is. In short, under the strict distribution standard, a special need is any distribution that is not cash, and is not shelter[10] or food.

A special needs trust with a strict distribution standard is the safest course of action to preserve public benefits now and in the future. The strict distribution standard provides clear guidelines that will not require significant analysis of public benefits law when distributions are made. Perhaps most importantly, since the strict distribution standard is a common standard, particularly in first party trusts, government agency workers reviewing the trust are more likely to recognize that the trust meets the criteria to qualify as a special needs trust. Thus, the strict distribution standard is the surest way to achieve the primary goal of a SNT—protecting means-tested public benefits.

iii. **Hybrid Distribution Standard.** In some situations, preserving the ability to make distributions for a beneficiary's shelter and/or food may be a priority to the client. In such cases, a flexible standard may be appropriate. The "hybrid" distribution standard falls in the middle of the continuum between the discretionary support standard of a DST and the strict distribution standard of a traditional SNT. The hybrid standard does not change the purpose of a SNT (namely, protection of eligibility for means-tested government benefits), but it does allow the trustee the flexibility to make distributions that will reduce benefits, if doing so is in the beneficiary's interest.

Depending on the benefits received, it may be possible in some cases to allow a trustee of a SNT to make distributions for a beneficiary's food and shelter without permanently terminating the beneficiary's eligibility for means-tested government benefits. This is due to a Social Security rule regarding "in-kind support and maintenance," which essentially provides that if any third party (*e.g.*, any friend, relative, or even a special needs trust) pays for the food and/or shelter of an SSI recipient, that individual's SSI benefit will be *reduced* up to a maximum amount of value.[11] If the only impact of such a distribution is a *reduction* in benefits, and not a permanent termination of benefits, it may be worthwhile to allow it in the SNT.

For example, suppose Sally is disabled and has lived with her parents all her life. When her parents pass away, she will lack the wherewithal to pay her shelter costs. If she receives the maximum SSI payment of $674 per month and, upon losing her parents, is faced with living independently for the first time, she is highly unlikely to have sufficient SSI income to pay for a security deposit, or for the first and last month's rent under the terms of a lease. Even if her parents have planned ahead and included a SNT in their estate plan, this individual may lack the

[10] Shelter includes rent, mortgage payments, property taxes, heating, gas and electric power, garbage, sewer, water, and hazard insurance (if required by the lender).

[11] The technical mechanics of the in-kind support maintenance rules are beyond the scope of this presentation; 42 USC § 1382a(a)(2)(A); 20 CFR § 416.1102; 20 CFR § 416.1130; 20 CFR § 416.1131; 20 CFR § 416.1140

means to pay for adequate housing if that SNT contains a strict distribution standard. In cases like this, something more flexible than the strict distribution standard might be appropriate.

In the example above, if Sally's SNT had contained a flexible or "hybrid" distribution standard, the trustee could have paid for a security deposit, the first and last month's rent, etc., and the only impact would have been a temporary reduction in the amount of Sally's SSI payment (if this had happened in 2011, Sally's SSI payment would have been reduced by $244.66). The temporary reduction would have been worth it, assuming the cost of the security deposit and rent payments exceed the reduction.

As another example, suppose Sally's rent is $900 per month and the trustee pays the rent each month by mailing a check directly to the landlord. Sally would be receiving "in-kind support" of $900 per month. However, the reduction in her SSI each month would be limited to $244.66 (in 2011),[12] and she would be receiving a value of $900 each month from the special needs trust.

Making distributions for shelter under a hybrid standard requires very careful planning, because it implicates multiple, highly technical public-benefits rules that are beyond the scope of these materials.[13] It is not always appropriate, and in fact, can be dangerous in certain situations. Depending on the amount of SSI a disabled person receives, making a distribution for shelter can put the beneficiary at risk of having his or her SSI benefits terminated. Because SSI and Medicaid benefits are often tied together, a loss of SSI can entail a loss of Medicaid as well. Accordingly, attorneys should carefully analyze a beneficiary's benefits situation before recommending distributions under a hybrid distribution standard. In the appropriate situation, however, such distributions can greatly enhance a beneficiary's quality of life, while causing only a reduction in means-tested public benefits.

B. First-Party Trusts (a.k.a. "Payback Trusts")

1. **Background and General Requirements.** As discussed above, SNTs were originally developed informally, by lawyers, based on principles of general trust law. In the Omnibus Reconciliation Act of 1993 ("OBRA '93"), however, Congress enacted new provisions specifically addressing the use of trusts designed to preserve (or establish) eligibility for certain means-tested public benefits (specifically, Medicaid). OBRA '93 restricted the use of many types of trusts created by (or on behalf of) a Medicaid recipient using the recipient's own funds—namely, first-party trusts.

However, in that same Act, Congress specifically created a new type of trust that *can* be funded with a Medicaid recipient's own funds, and in which the assets are ***not*** considered available for purposes of

[12] POMS SI Section 00835.00 *et seq.*

[13] See materials cited in footnote 1 for examples of how distributions for shelter from SNT can work to the beneficiary's advantage in appropriate situations.

Medicaid eligibility. Under the provisions of OBRA '93, in order for the assets in a first-party trust to be considered *unavailable*, the trust must:

- be created for the benefit of a disabled person as defined by the Social Security Administration;
- be created for the benefit of an individual under the age of 65;
- contain the disabled person's own assets;
- be established by a parent, grandparent, legal guardian (or Conservator in Oregon), or a court;
- provide that any State that has provided Medicaid assistance to the disabled person will receive all amounts remaining in the trust upon the disabled person's death, up to the total amount of Medicaid assistance provided.

These requirements are codified in the Medicaid Act at 42 USC Sec 1396p(d)(4)(a), and many people now refer to first-party trusts as "(d)(4)(a) trusts," referring to this provision.

In the Foster Care Independence Act of 1999 ("FCIA '99"), Congress enacted provisions similar to those of OBRA '93, this time applying them to trusts intended to qualify an individual for SSI. With certain limited exceptions, neither OBRA '93 nor FCIA '99 affected trusts created and funded by third parties. Today, as a result of OBRA '93 and FCIA '99, federal law specifically allows the creation of first-party trusts by (or on behalf of) individuals receiving means-tested benefits such as SSI and Medicaid, provided they meet the criteria cited above. These trusts have many names, but the most common of them are first-party special needs trusts, payback trusts, and (d)(4)(a) trusts.

2. **Applying the (d)(4)(A) Criteria.** First-party SNTs are best understood by separately examining each of the statutory criteria listed above.

a. **Disability Requirement.** First-party SNTs must be established for an individual who is disabled as defined in the Social Security Act. If the beneficiary is receiving either SSDI or SSI benefits, this requirement is met. Sometimes, however, disabled individuals receive (or want to apply for) only Medicaid. In these cases, the State Medicaid caseworker must make an independent determination of disability.

b. **Under Age 65.** The beneficiary of a first-party SNT must be under 65 when the trust is created and funded. Public benefits agencies have made clear that first-party SNTs remain "exempted" for individuals over the age of 65 (*i.e.*, a payback trust created for an individual at age 60 does not suddenly become *available* to that individual when he or she reaches the age of 65). However, in order to be treated as unavailable, a first-party SNT must be initially created and funded prior to the beneficiary's 65th birthday. Once the beneficiary reaches the age of 65, he or she can no longer transfer assets into the SNT without jeopardizing means-tested benefits.

c. **Beneficiary's Assets.** The purpose of a first-party SNT is to protect assets belonging initially to the beneficiary. Most recipients of means-tested assistance do not have significant assets, given the strict financial eligibility rules applicable to means-tested government pro-

grams. However, the need for first-party SNTs commonly arises when a recipient of means-tested benefits comes into a sum of money, perhaps through an inheritance or the receipt of a personal injury settlement or judgment.[14]

Receipt of inheritance or personal injury funds can result in termination of means-tested benefits if the disabled individual retains funds in excess of $2000. However, if a payback trust is created, the individual can retain his or her benefits and enjoy the benefit of the SNT funds (subject to the strictures of the trust). In many cases, funds received via inheritance or personal injury settlement by recipients of public benefits are not sufficient to replace the benefits, so simply retaining the funds is not a viable option. There are alternatives to creation of a first-party SNT, such as purchasing "exempt assets" (a home, for instance) or creation of a first-party pooled trust.[15] However, in many cases, a first-party SNT provides an ideal vehicle for holding a disabled individual's own assets, when those assets might otherwise cause a loss of benefits.

d. **Created by Parent, Grandparent, Guardian/Conservator, or Court.** Although the disabled individual is the party contributing the trust assets in first-party SNT cases, he or she is not permitted to act as the settlor or trustor. The trust must be created by a parent, grandparent, legal guardian or court. The term "legal guardian" is presumably intended to include a conservator in States like Oregon. ORS 125.440 specifically allows a conservator to create a trust, but only with prior court approval.

This aspect of the (d)(4)(a) criteria for first-party SNTs creates a number of planning issues. Since the disabled person cannot create the trust him or herself, attorneys need to determine the most appropriate, cost-effective way to create the trust. If the disabled individual has a living parent or grandparent who is willing and able to act as the settlor, this is often a first choice because it avoids the need to seek probate court approval for creation of the trust, thereby reducing attorney fees, court costs, and complications.

> **Practice Tip:** Even in cases where a parent or grandparent is available, court involvement is sometimes required. If the beneficiary is a minor, or lacks capacity and cannot consent to the transfer of his or her funds into the SNT, the probate court will have to authorize the transfer.

If there is no parent or grandparent available to create a first-party SNT, a petition or motion must be filed with the probate court to establish, or authorize the establishment of, the trust. Such petitions can take several forms, depending on a number of factors. In some cases, a disabled person will already have a guardian or conservator, and that fiduciary may be able to file a motion under ORS 125.440 for authority to create the trust. In cases where there is no existing guardian or conserva-

[14] See Section III (B)(4) of these materials for a discussion of special issues related to personal injury settlements/judgments.

[15] See Section III (B)(5) of these materials for a discussion of pooled trusts.

tor, a petition can be filed, seeking both the appointment of the fiduciary and the authority to create the SNT.

Under the (d)(4)(a) criteria, it is possible to ask a court to create a first-party SNT directly and to appoint a trustee, without the separate appointment of a guardian or conservator. Oregon law provides a mechanism for this in ORS 125.650, which authorizes the court to issue a protective order conferring any of the *powers* of a guardian and conservator, without actually appointing one. This practice is not commonly allowed by Oregon courts, however (under ORS 125.650, courts have *discretion* on whether to issue such protective orders).

In cases where court approval must be obtained for the creation of a payback SNT, local court rules and practices must be considered. In some Oregon counties, the probate courts will appoint a conservator on a temporary basis, for the limited purpose of establishing and funding a payback SNT. This *can* be very advantageous to a client, as it avoids the costs and complications of an ongoing conservatorship, such as annual court accountings, etc. Alternatively, if the disabled person is in need of a guardian, some counties will appoint the proposed guardian and authorize him or her to create the payback SNT, also avoiding the complications of ongoing conservatorship.

Of course, in some cases, ongoing conservatorship is desirable (for example, in cases involving larger sums of money, or involving a professional fiduciary who wants the protection of court-approved annual accountings). Even if an ongoing conservatorship is not desired, however, it may be required in some counties and in some situations. Several Oregon courts have long interpreted ORS 125.440 as requiring ongoing conservatorships in cases where approval of a payback SNT is sought, because of language in the statute barring court approval of a trust that "has the effect of terminating a conservatorship." Id.

The 2007 amendments to ORS 125.440(2) now specifically lay out circumstances under which a court *may* approve a trust that "has the effect of terminating a conservatorship" (or, as applied here, which has the effect of *avoiding* an ongoing conservatorship). The amended statute provides that a court may approve such a trust if:

> (a) The trust is created for the purpose of qualifying the protected person for needs-based government benefits or maintaining the eligibility of the protected person for needs-based government benefits;
>
> (b) The value of the conservatorship estate, including the amount to be transferred to the trust, does not exceed $50,000;
>
> (c) The purpose of establishing the conservatorship was to create the trust; **or**
>
> (d) The conservator shows other good cause to the court.

The amended statute authorizes approval of payback trusts without an ongoing conservatorship, but only in the court's discretion. Because of this discretion, the statute is not interpreted or applied the same way in every county. Attorneys should obtain a clear understanding of a given county's procedure before requesting the creation of a payback SNT. However, if local court rules and practices allow the above-mentioned alternatives to ongoing conservatorship, and if the alternatives represent a benefit to the disabled individual, they should be considered.

e. **Payback.** The most salient feature of a first-party SNT is the payback requirement. All first-party SNTs must provide that upon the death of the beneficiary, any remaining trust assets will be distributed to the State(s) that have provided Medicaid assistance to the disabled person, up to the total amount of Medicaid assistance provided. When the individual has received Medicaid benefits in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. FCIA '99 does not require payback of SSI, but does require the payback of Medicaid.

3. **Distribution Standards for First-Party Special Needs Trusts.** In general, distribution standards for first-party trusts are quite similar to those discussed above in the context of third-party trusts. A majority of first-party trusts contain the "strict" special needs standard, which prohibits distributions for food and shelter. However, as with some third-party trusts, there are occasions in which a flexible hybrid standard is appropriate for the disabled person.

Historically, hybrid distribution standards have been employed successfully in first-party trusts in Oregon, in those cases where the standard has made sense from a benefits standpoint. In recent years, however, Oregon DHS has occasionally objected to the use of the hybrid standard in first-party trusts.

From a legal standpoint, it seems clear that the hybrid distribution standard is acceptable in first-party trusts. Indeed, a recent (2009) Social Security POMS provision states as much. POMS SI 01120.203, "Exceptions to Counting Trusts Established on or after 1/1/00," outlines the exceptions to the general rule that trusts created with an individual's own funds are considered resources. Subsection (B)(1)(a), which deals specifically with special needs trusts, states: "Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust meeting [the (d)(4)(a) requirements] **and does not have to be a strict special needs trust**. (Emphasis added.).

The above-referenced POMS provision has been brought to the attention of Oregon DHS and its counsel.[16] Although no formal response to the letter was ever received, DHS personnel have recently indicated (verbally) that DHS will follow the Social Security Administration's ap-

[16] Attached as Appendix C is a 2010 letter sent to counsel for DHS, which lays out the case for the hybrid standard.

proach to treatment of trust assets. Presumably, this means that DHS will not object to the use of a hybrid distribution standard in first-party trusts. However, given the history of objections and the lack of written confirmation of a changed approach, attorneys using the hybrid distribution standard in first-party trusts should be prepared to defend it to Oregon DHS.

4. **First Party Trusts and Special Needs Settlement Planning.** When a first party trust is being established to receive a personal injury settlement, there are a number of related issues that may present themselves. These issues include: Medicare and Medicaid lien resolution, Medicare Set Aside arrangements (MSAs), court approval of proposed settlements, and structured settlement planning. The personal injury attorney is often relying on the special needs trust attorney for advice on **all** government benefits issues presented in a given case, sometimes without saying so and without knowing what the issues are. This specialized area of practice is sometimes called "special needs settlement planning." The issues that must be addressed are increasingly complex, and are beyond the scope of these materials. However, a brief checklist of some the issues is as follows:

a. **Medicaid Liens**. In personal injury cases involving Medicaid recipients, there is often a lien against the settlement proceeds for injury-related Medicaid assistance paid between the date of injury and the date of settlement. While personal injury lawyers typically handle payment of private liens, they often are unaware that there may be a Medicaid lien. The special needs trust attorney may handle lien resolution, or direct the personal injury attorney to contact the Personal Injury Liens Unit of the Department of Human Services.[17] There is a patchwork of law on this issue, including a U.S. Supreme Court case. With effective advocacy, there is the possibility of reducing the amount of the lien.[18]

b. **Medicare Conditional Payments**. Similarly, if Medicare pays for injury-related medical expenses prior to the date of settlement, it does so on the "condition" that it will be reimbursed from the settlement proceeds. This right to reimbursement derives from the Medicare Secondary Payer Act. Personal injury attorneys frequently initiate the process of determining Medicare's reimbursement rights by notifying the Medicare Coordinator of Benefits. However, if the beneficiary receives Medicare, the special needs trust attorney should confirm this.

c. **Medicare Set Aside Arrangements**. In addition to requiring reimbursement for conditional payments, the Medicare Secondary Payer Act has been interpreted by CMS as requiring that Medicare's interests be considered whenever a Medicare beneficiary (or an individual expected to become a Medicare beneficiary) receives a settlement involv-

[17] http://www.oregon.gov/DHS/admin/recovery/pilfaq.shtml

[18] Michael Edgel and Tim Nay, "Navigating Medicaid Issues in Personal Injury and Liability Cases: Liens & Subrogation," Oregon Trial Lawyers Association CLE, March 4, 2011.

ing payment for future medical expenses.[19] Although this interpretation of the MSP is not new, recent developments in the law have raised the importance of addressing future injury-related medical expenses during the process of settlement. Currently, there is an active debate among insurers, personal injury lawyers, special needs settlement planning lawyers, and structured settlement professionals regarding how to "consider Medicare's interests" in liability cases. Some believe that a formal "Medicare Set Aside Arrangement" ("MSA") is advisable in every case, while others believe that less formal approaches can be used. The MSP does not require the use of formal MSAs. However, most professionals involved in the field agree that Medicare's future interests in personal injury settlements cannot be ignored.

d. **Structured Settlement Planning.** Although most personal injury attorneys have experience working with structured settlement brokers and establishing structures, a special needs settlement planning lawyer can add a valuable perspective before a structure is agreed upon, ensuring an appropriate balance between structured and lump sum settlement proceeds. Additionally, a special needs planning lawyer can assist personal injury lawyers and structured settlement professional in coordinating a proposed structure with a Special Needs Trust, ensuring that the payee and beneficiary designations for a given structure comply with state and federal public benefits laws.

e. **Qualified Settlement Funds**. Section 468B of the Internal Revenue Code allows settlement funds to be placed into a Qualified Settlement Fund (QSF) while the details of a settlement (*i.e.* structure details, Special Needs Trusts, MSAs, etc.) are being worked out. While the funds are held in a QSF, liens can be resolved, trusts can be drafted, and a financial plan for the plaintiff can be developed. Funds held in a QSF are not considered to be available to a plaintiff, so constructive receipt issues are avoided. Defendants can make payment into a QSF and complete their involvement in the case. The plaintiff can then deliberate carefully on the details of the settlement. Special needs trust attorneys sometimes assist with creation of QSFs.

f. **Court Approval of Settlement.** If the beneficiary does not have capacity, court approval of the settlement will be required. The process for this varies by case and by county.

5. **Pooled Trusts.** One alternative to a special needs trust is a "pooled trust." Pooled trusts, like payback trusts, are creatures of statute. OBRA '93 created pooled trusts, and set out the criteria under which assets can be transferred into them without affecting means-tested government benefits. Pooled trusts, as their name implies, provide a vehicle for multiple disabled beneficiaries to pool their funds for purposes of investment and management, while offering the same primary benefits as standard SNTs (namely, preservation of means-tested government benefits). The statute defining pooled trusts requires that they:

- be established and managed by a non-profit association;

[19] 42 U.S.C. section 1395y(b)(2)(B)

- maintain separate accounts for each beneficiary of the trust;
- provide that each account in the trust be established for the sole benefit of a disabled person as defined by the SSI program;
- provide that each account in the trust be established by the disabled individual; a parent, grandparent, legal guardian (or conservator in Oregon), or a court; and
- provide that, to the extent amounts remaining in the beneficiary's account upon death are not retained by the trust, the State(s) will receive the remaining assets, up to the amount of Medicaid assistance provided to the beneficiary. 42 USC Sec 1396p(d)(4)(C).

There are several pooled trusts available to Oregon residents that meet all of these statutory criteria:

- The ARC of Oregon: *http://www.arcoregon.org/osnt.htm*
- The Good Shepherd Fund: *http://www.goodshepherdfund.org/index.html*
- Secured Futures: *http://www.securedfutures-snt.org/*

Pooled trusts can be a good option for public benefits recipients who receive modest amounts of assets from inheritances, personal injury settlements, and the like. Although pooled trusts charge management fees, those fees are often less than the cost of establishing an individual SNT, especially if the individual SNT would require ongoing conservatorship. Pooled trusts are also sometimes a good choice in situations where the disabled person does not have a suitable family member or trusted friend to serve as trustee of a SNT, and does not want to incur the expense of a professional trustee.

Although pooled trust sub-accounts are most often created by (or on behalf of) disabled individuals using first-party funds, pooled trusts routinely accept and manage third-party funds as well. If a family member of a disabled person wants to leave an inheritance without interrupting benefits, but cannot identify suitable trustee candidates and does not want to use a professional trustee, a pooled trust is a viable alternative.

IV. SELECTED TAX ISSUES

In addition to the complexity of sorting through the beneficiary's public benefits issues, special needs trusts should be drafted to provide the best income, estate and gift tax results for the interested parties. While many of the fundamentals of the tax queries may be familiar to the estate planning attorney, analyzing them in context of a special needs trust may prove to be a unique exercise. The selected topics below are a few of the more common tax issues common to special needs trusts:

A. Grantor Trust vs. Non-Grantor Trust.

The grantor trust rules are found in Internal Revenue Code ("IRC") sections 671 through 679 and the accompanying Treasury Regulations. Those rules set forth the circumstances under which the income realized by a trust is taxable to the grantor of the trust. In the estate planning world, grantor trust status is generally considered advantageous

for the following reasons. First, the assets of the trust can grow tax-free thereby allowing more funds to be disbursed to the beneficiary(ies) of the trust and presumably satisfying the grantor's primary goal of shifting more wealth to his/her intended heirs. Secondly, grantor trust status usually results in less overall taxes paid on the income earned in the trust. A trust has a lower exemption amount than individual and no standard deduction. More importantly, a trust will pay the highest rate of tax on income exceeding $10,700 (2011) while an individual will only pay that same rate on income in excess of $357,000 (2011).

If the terms of a trust do not fit within the grantor trust rules, the trust is deemed to be a non-grantor trust for income tax purposes and the trust and/or the beneficiary (ies) will pay the income tax liability each year. In general terms, distributions from the trust will carry out the income out to the beneficiary to be taxed on the beneficiary's individual tax return. If the trust distributes less than the income that is earned each year, the tax liability will be shared by the trust and the beneficiary.[20] Because of the compressed income rates of trusts discussed above, it is generally advantageous for the trust to make enough distributions to carry out all the income so that it can be taxed at the individual beneficiary's lower rates.

1. **Testamentary Third-Party SNTs**. Because these trusts will only be funded upon the death of the grantor/settlor, a testamentary third-party SNT will always be taxed as a non-grantor trust. That is, depending on the amount of the distributions during the year, the trust and/or the disabled beneficiary will recognize the income tax liability each year.

2. **Inter Vivos (lifetime) Third-Party SNTs**. Like many irrevocable trusts, an inter vivos third-party SNT can be drafted to qualify as either a grantor or a non-grantor trust, depending on the goals and intentions of the grantor. If grantor trust status is desirable, the drafter must include provisions that give the grantor one or more of the powers described in IRC section 673-677. However, in many cases, drafting the special needs trust to be a non-grantor trust may provide a better income tax answer if the trust meets the standards of a "quality disability trust" under IRC section 642(b)(2)(C) (see below). Further, grantor trust status may not be a practical choice for a trust that is expected to receive transfer from multiple family members.

3. **First-Party SNTs**. Because in a first-party trust, the grantor of the trust is also the beneficiary of the trust, all first-party special needs trusts are grantor trusts.

B. Qualified Disability Trusts.

In the context of a special needs trust, non-grantor status may provide a unique income tax planning opportunity. IRC section 642(b)(2)(C) allows a "qualified disability trust" to take the same tax exemp-

[20] The details of the calculation of income taxes for a non-grantor trust are beyond the scope of this presentation. The statutory rules can be found in IRC sections 641 - 691.

tion as an individual taxpayer. In order to qualify, a trust must be: 1) irrevocable; 2) established for the sole benefit of a person under age 65 who is disabled according to the Social Security Administration; and 3) a non-grantor trust. This rule essentially allows income to be sheltered by both the trust exemption and the individual beneficiary's exemption/standard deduction upon distribution from the trust.

> **Case Example:** Dad establishes a lifetime non-grantor 3rd party special needs trust for his adult daughter. Daughter is disabled and receives SSI/Medicaid. Dad transfers $150,000 into the trust. Assume that the trust earns $7,500 in 2011 when the personal exemption amount is $3,700. Under these facts, the trust will qualify as a Qualified Disability Trust. As such, it is not necessary to distribute out all of the income to avoid taxation at the compressed trust tax rates. Up to $3,700 of income can remain in the trust and be re-invested into principal without triggering a tax liability. The balance of the income can be distributed for Daughter's benefit under the terms of the special needs trust. These distributions will carry out the excess income to be taxed on Daughter's personal return. Assuming that Daughter has no other taxable income (SSI would not be taxable under these facts), Daughter's exemption and standard deduction will shelter the balance of the income, resulting in $0 income tax liability. If, on the other hand, the trust was established as a grantor-trust, it is likely that all $7,500 would be subject to income tax if Dad had other income.

C. Crummey Powers.

When drafting a trust that will receive gifts/transfers from the grantor, estate planning attorneys will often include certain provisions to allow the expected transfers to qualify for the grantor's gift tax annual exclusion.[21] These so-called "Crummey power" provisions (named after the case, *Crummey v. Commissioner*,[22] that established this technique) allow the grantor to satisfy the otherwise missing "present interest" requirement of the gift tax annual exclusion statute (Section 2503(b)) by allowing the beneficiaries of the trust to demand their share of any transfer to the trust for a limited period of time. But while Crummey powers may provide a "good" gift tax result, that tax results comes with a fair amount of administrative complications, including the need to provide the Crummey power holders with actual notice of their right to withdraw the funds.[23]

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[21] The annual gift tax exclusion for 2011 is $13,000. IRC 2503(b).

[22] 397 F.2d 82, 88 (9th Cir. 1968).

[23] *See, e.g., Holland Est. v. Comr.*, T.C. Memo 1997-302. See also PLRs 9030005, 8121069, and 8008040.

In the public benefits world, Crummey powers can have **disastrous** consequences. If a person receiving means-tested public benefits is a Crummey power holder and is given a withdrawal notice allowing them to exercise that right, it could affect their eligibility for benefits (regardless of ether they actually do exercise their right).

This issue is highlighted when clients want to establish an inter vivos special needs trust for the benefit of a person receiving needs-based public benefits. For example, assume that parents want to fund the special needs trust with a life insurance policy. This is a common practice for parents of special needs children who want to ensure that their child receives a lump sum of money to pay for their needs after their parents pass away. The expected transfer of the life insurance policy to the special needs trust and the subsequent annual payments of premiums will result in taxable gifts to the special needs trust unless Crummey power provisions are employed. While the disabled beneficiary cannot be a Crummey power holder due to the risk of losing benefits discussed above, it may be that the disabled beneficiary's sibling(s), or other potential contingent remainder beneficiaries, could hold Crummey power interests to shelter all or a portion of any transfer from being treated as a taxable gift.[24] Given the recent increase in the federal estate/gift tax exemption to $5,000,000, some clients may reasonably choose to forgo the inclusion of the Crummey provisions (and their administrative complications) in the special needs trust and simply assume that all transfers will be taxable gifts.

D. 529 Plans.

A 529 plan is an education savings plan designed to allow individuals to set aside funds for higher education expenses. These plans are administered by states and educational institutions. Named after the code section (529) that allowed their creation, any contributions to a 529 plan automatically qualify for the Section 2503(b) annual gift tax exclusion.[25] As a further incentive to saving for education, section 529 allows a 5-year front loading of annual gift tax exclusions.[26] So, in 2011, a married couple could transfer $130,000 ($26,000 x 5) to a 529 plan without triggering a taxable gift. Once in the plan, the funds grow income tax-free and can be withdrawn tax-free if used for qualified higher education expenses[27] If the funds are withdrawn for other purposes, the earnings (from the time of contribution) are subject to income tax and a

[24] Whether such power holders would fit within the IRS' perspective of eligible Crummey power interest holders is beyond the scope of this presentation and the reader should refer to the landmark cases of *Cristofani v. Comr.*, 97 T.C. 74 (1991); and *Kohlsaat Est. v. Comr.*, T.C. Memo 1997-212, TAMs 9731004, 9628004, 9141008, 9045002, PLR 8727003 as well as the plethora of written analysis written in the wake of those decisions.

[25] IRC 529(c)(2).

[26] IRC 529(c)(2)(B).

[27] See Section 529 and the accompanying regulations for more details on what expenses qualify as higher education expenses.

additional 10% penalty.[28] However, in a little discussed caveat, the 10% penalty may be waived if the beneficiary of the plan is disabled.[29]

For this reason, some commentators have proposed a technique whereby a the trustee of a special needs trust would invest in a 529 college savings plan and name the disabled beneficiary as the beneficiary of the 529 plan. Parents (or other contributors) could transfer funds to the 529 plan and utilize their gift tax annual exclusions. While an eventual withdraw of the funds for the use of the disabled child may be subject to income tax (on the earnings of the plan), the 10% penalty may be avoided. In this way, parents can transfer funds to the special needs trust for the benefit of their disabled child AND utilize their gift tax annual exclusion without wrestling with the negative impact of giving the disabled person a Crummey withdrawal right.

E. Charitable Remainder Trusts.

Charitable Remainder Trusts ("CRT") are an estate planning technique in which a taxpayer transfers assets to a trust. The terms of the trust require that a fixed dollar amount (annuity interest) or a calculated percentage of the trust assets (unitrust interest) will be distributed each year to a non-charitable beneficiary (usually the taxpayer or another family member). At the expiration of the term of the CRT, the remaining trust assets must be paid to charity. If the non-charitable beneficiary is a trust, the general rule requires that the charitable remainder trust term be a fixed term of years not to exceed 20 years.[30] However, if the non-charitable beneficiary is a trust for the benefit of a "financially disabled" individual, the 20-year term limit does not apply and the CRT distributions to such a trust may be made for the life of the financially disabled individual.[31]

F. Retirement Plans.

Often, one the of the most valuable assets that a client owns is his/her interest in a retirement plan. Hopefully, the materials of this presentation have made it abundantly clear that naming a person who is receiving, or expected to receive, needs-based public benefits, as a direct beneficiary of a retirement plan will result in a termination of those benefits. For this reason, it is critical for the attorney to coordinate any assets that will pass by virtue of a beneficiary designation with the overall plan to incorporate a special needs trust for the disabled beneficiary.

When a trust inherits an interest in a retirement plan, the calculation of the minimum required distribution that must be paid out of the

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[28] IRC 529(c)(6).

[29] IRC 529(c)(6) refers to the rules of the Coverdell Education Savings Accounts (IRC 530(d)(4)) for imposition of the 10% penalty. IRC 530(d)(4) provides that the 10% penalty shall not apply to a distribution that is "attributable to the designated beneficiary's being disabled".

[30] Reg § 1.664-2(a)(5)(i) and Reg § 1.664-3(a)(5)(i).

[31] Rev Rul 2002-20, 2002-17 IRB 794.

plan each year is a complicated analysis.[32] Generally, if the trust qualifies as a "designated beneficiary", the minimum required distribution is calculated based on the oldest trust beneficiary's life expectancy. If the trust does not qualify as a "designated beneficiary", the retirement plan benefits must be paid out either: (1) within 5 years of the death of the plan owner; or (2) over the plan owner's remaining life expectancy.[33]

In order for a trust to qualify as a designated beneficiary and use the age of the oldest trust beneficiary to calculate the minimum required distributions, four requirements must be satisfied: (1) The trust is valid under state law; (2) The trust is irrevocable (or will, by its terms become irrevocable on the death of the plan owner); (3) All the trust beneficiaries are individuals and identifiable in the trust instrument; and (4) a copy of the trust instrument is provided to the plan administrator prior to October 31st of the year following the year of death.[34] The 3rd requirement, that all trust beneficiaries must be individuals and identifiable in the trust instrument, causes most trusts to fail as a designated beneficiary. This is because *all potential beneficiaries* of the trust must be considered in this analysis.[35] Consider the following examples to illustrate this issue:

> ***Example 1.*** Dad creates a testamentary special needs trust for the benefit of his disabled son, Thomas, and names this trust as the primary beneficiary of his IRA. The terms of the trust provide that, upon Thomas' death, the remaining trust assets are payable his descendants, if any, and otherwise to United Celebral Palsy Foundation. If Thomas does not have any descendants when Dad dies, the special needs trust will not qualify as designated beneficiary because a non-individual is a potential beneficiary.
>
> ***Example 2.*** Same facts as above except that the special needs trust provides that any funds payable to a descendant of Thomas are held in further trust until such descendant reaches age 25. If a descendant dies prior to reaching age 25, the remainder of that descendant's trust is distributed to his/her estate. When Dad dies, if Thomas has a

[32] The vast amount of highly technical rules regarding distributions of retirement plans to individuals and trusts are well beyond the scope of this presentation. It is the intent of the authors to simply highlight certain portions of those rules as they relate in the context of planning with a special needs trust.

[33] The determination of which of these terms applies depends on whether the plan owner died prior to his "required beginning date" ("RBD"). The RBD is April 1st of the year following the year in which the plan owner turns age 70 ½. Treas. Reg. 1.401(a)(9)-2, Q&A 2 (a). If the plan owner died before the RBD, the 5-year rule applies. If the plan owner died after the RBD, the life expectancy rule applies. Treas. Reg. § 1.401(a)(9)-2, Q&A 2 (a).

[34] Treas. Reg. § 1.401(a)(9)-4, A-5(b).

[35] A source for these examples and an excellent article that addresses this topic is Michelle Ward, "*Whose Life Expectancy Is It, Anyway? Determining Which Trust Beneficiaries are Countable for Required Minimum Distribution Purposes*", Journal of Retirement Planning (July-August, 2008).

child but the child is under age 25, the special needs trust fails because a non-individual (the child's estate) is a potential beneficiary. If Thomas' child was over the age of 25, the trust would qualify, and Thomas, as the oldest beneficiary, would be the measuring life to calculate the minimum required distributions.

Example 3. Same facts except the terms of the special needs trust provide that, upon Thomas' death, the remaining trust assets are distributed to his descendants, if any, and otherwise to Dad's intestate heirs. Assume Thomas' had no descendants at Dad's death, and Dad's oldest intestate heir was his sister, age 65. The measuring age for the trust would be Dad's sister.

In order to get around the complexity of these rules, some estate planning attorneys opt to include "conduit trust" provisions in any trust that will be named as a beneficiary of a retirement plan. Conduit trust provisions require the trustee to distribute any amounts received from an IRA distribution to the trust beneficiary. In this way, all IRA amounts will pass through the trust directly to an individual and not accumulate inside the trust for the benefit of a future beneficiary. This mirrors the income tax result that would occur if the individual were named directly on the IRA beneficiary designation form. Thus, conduit-type trusts will always qualify as a designated beneficiary and the measuring life will be the individual receiving the IRA distribution from the trust.

Conduit trust provisions are not appropriate in the special needs trust context, however. A requirement for the trustee to make distributions to the disabled beneficiary would defeat the purpose of the special needs trust by giving the disabled beneficiary assets that would disqualify him/her from qualifying from needs-based public benefits. If a stretch-out of the payment of retirement funds over a measuring individual life is a goal of the clients, attorneys drafting special needs trusts are stuck with navigating through the minefield of rules for trusts to qualify as a designated beneficiary.[36] In fact, for many clients, naming a charity as the remainder beneficiary or ensuring that assets are held in further trust for the benefit of grandchildren may outweigh the income tax implications of a trust that does not qualify. This seems particularly true in the case of parents with a special needs child where ensuring the child's eligibility for critical public benefits is always the primary focus, and tax savings becomes less important.

[36] For an interesting take on this issue in the context of a 1st party SNT, see PLR 200620025 where the IRS examined the transfer of an inherited IRA to a 1st-party trust which provided that upon the disabled beneficiary's death, the trust assets would be subject to the payback provisions and then distributed to the disabled beneficiary's "heirs at law". Rather than using the using the oldest heir's age as the measuring age for required minimum distributions as would be expected under the discussion outlined above, the IRS ruled that the disabled beneficiary's life would be the measuring life.

V. DRAFTING TIPS

Attached as Appendix D is a sample form for a basic testamentary third party special needs trust with a strict distribution standard. Attached as Appendix E is a basic first-party special needs trust created by a parent for an adult child who has capacity. Attached as Appendix F is an inter vivos third party special needs trust with a hybrid distribution standard.

> **Practice Tip:** If a first party special needs trust will be established by a court or conservator, the sample trust should not be used. The drafting attorney will need to consider how the involvement of the court and/or conservator will impact certain provisions of the trust, including but not limited to: bond, payment of attorney fees, and annual accountings.

As with all trusts, certain provisions may be tailored to more closely meet the client's needs and desires; however, the following provisions are unique to special needs trusts and their inclusion may either be required or strongly suggested.

A. Drafting Third-Party Special Needs Trusts.

Third-party special needs trusts provide more flexibility to the drafter because there are no specific statutory requirements that must be incorporated as there are with first-party SNTs. The overriding goal of the drafter of a third-party special needs trust is to ensure that the assets of the trust are not considered an available resource to the disabled beneficiary. The availability of trust assets will be determined based on the trust distribution standard.

1. **Special Needs Only /Strict Distribution Standard**. As discussed in more detail above, the safest course of action is to draft a special needs trust that uses a "special needs only" or strict distribution standard which prohibits the trustee from making distributions for the disabled beneficiary's basic needs of food and/or shelter. The sample third-party SNT provided with these materials exemplifies a strict special needs standard.

2. **Hybrid Distribution Standard**. Courts typically interpret trusts in light of their express purpose. With the hybrid approach, the stated purpose is to preserve the beneficiary's ongoing eligibility for public benefits, but flexibility is incorporated. DHS currently accepts the hybrid distribution standard in a third-party SNT but has recently expressed their opposition to such a standard in payback special needs trusts. Here is a sample of a hybrid distribution standard:

> "**ADDITIONAL DISCRETIONARY DISTRIBUTIONS**. Notwithstanding any other limitations in this Trust Agreement on the trustee's discretion to make distribution to or for the beneficiary's benefit, the trustee shall have the discretion to make distributions to the beneficiary that will reduce or only temporarily terminate the beneficiary's

government assistance if the trustee, in the trustee's sole discretion, determines that it would be in the beneficiary's best interest to do so, as long as such disbursements will not compromise the intent that this Trust provide for the beneficiary's special needs for the beneficiary's lifetime. Specifically, the trustee may, in the trustee's sole discretion, provide for the beneficiary's food and shelter from the trust estate, with the understanding that such a distribution will reduce but not terminate any government benefits paid to the beneficiary. The trustee may also make one-time or short-term distributions to the beneficiary, even though such distributions will result in disqualifying the beneficiary from government assistance in the month or months of distribution, if the trustee determines, in the trustee's sole discretion, that the benefits of the temporary or one-time distribution outweigh the temporary loss of government assistance."

Practice Tip: When using this standard, it is advisable to include a provision allowing the trustee to amend the trust if necessary to accomplish the stated purpose of preserving the beneficiary's eligibility for means-tested government benefits.

3. **Fiduciary Chooses to Fund Discretionary Support Trust or Special Needs Trust.** Sometimes, it is just too difficult to predict what the disabled beneficiary's future holds or what types of government benefits he/she may be entitled to receive. Consider, for example, the case of young parents with a highly-functioning autistic child. Like many parents, they want the least restrictive distribution standard that will match the needs of their child *and* preserve their child's eligibility for government benefits, if necessary. For these "looking into the crystal ball" cases, clients may decide that they would like to defer the decision of whether to establish a discretionary support trust or a special needs trust until such time as a trust must be funded. The following is sample language that may be inserted into a client's operable estate planning document:

"**Distribution of Share for [disabled beneficiary].** A share established for [disabled beneficiary] shall be held in a separate trust for [his/her] benefit. At the time the separate share trust is to be established, the [personal representative/trustee] shall determine whether the trust shall be administered as a discretionary support trust as set forth in section __ below or as a special needs trust as set forth in section __ below. The determination about which type of separate share trust should be funded shall be made in the sole and absolute discretion of the [personal representative/trustee] and the beneficiary may not participate in such decision.

Criteria for Determining Trust to Be Funded: The [personal representative/trustee shall determine whether the trust shall be administered as a discretionary support trust or as a special needs trust based on the circumstances existing in the beneficiary's life at the time the separate share trust is to be established, taking into account the following criteria: (i) whether the beneficiary is then, or, will in the future, be receiving means-tested government benefits; (ii) the value of the benefits received, or expected to be received; (iii) the value of the beneficiary's separate share trust; and (iv) which type of trust is most likely to provide the beneficiary with the better quality of life."

4. **Purchase of Exempt Assets.** A common provision in special needs trusts allows distributions for purchase of exempt resources, such as a home or car. A provision allowing transfer of the exempt asset to the individual outright, free of trust, can be included with a trust funded with third-party assets.

> "**PURCHASE OF EXEMPT ASSETS.** The trustee may purchase items for the use of the beneficiary that would be considered "exempt" assets for purposes of public benefits law, such as personal household items, transportation devices, medical equipment, or a residence. Furthermore, the trustee may, in the trustee's sole discretion, distribute such items to the beneficiary to be held in the beneficiary's sole name, or, if the beneficiary has a court-appointed conservator, in the name of the conservator. Any distribution to the beneficiary of an exempt asset shall not be construed to be a breach of fiduciary duty to the remainder beneficiaries."

B. Drafting First-Party Special Needs Trusts.

Unlike third-party SNTs, first-party SNTs are a specific statutory exception to the Social Security Administration's clear prohibition against a disabled individual transferring their own assets into a trust in order to qualify for means-tested government benefits. [37] As such, the language of the statutes, as well as the interpretative administrative guidelines and rules[38], provide a "safe harbor" framework for drafting a first-party SNT. Because every first-party SNT must satisfy the elements stated below (and addressed in detail earlier in these materials), the goal of the drafter should be to make these elements readily identifiable to the caseworker that will be reviewing the trust document. The first three of these are straightforward and can be highlighted to the reader by simply stating them in the initial provisions of the trust document.

[37] 42 USC § 1396 p (d)(4)(A); 42 USC § 1382 (b)(e)(5)

[38] The Social Security Administration has issued detailed guidelines for first-party trusts in its Program Operations Manual System (POMS) handbooks. While the POMS is technically not "law", it is heavily relied upon by SSA benefits workers.

- Identify the settlor as the parent, grandparent, guardian or conservator,[39] or a court;
- State the age of the disabled beneficiary as being under 65 and provide his/her date of birth;
- Declare that the trust is for the "sole benefit" of the disabled beneficiary;
- Direct that, upon the death of the disabled beneficiary, any remaining trust property will be distributed to the applicable state Medicaid agency, up to the amount paid in Medicaid benefits on behalf of the individual. When the individual has received Medicaid benefits in more than one State, the trust "must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf."[40]

> **Practice Tip:** Note that only Medicaid assistance is subject to the payback provision. There is no required payback of SSI benefits.

C. Other Optional Drafting Provisions Applicable to Both Third-Party and First-Party SNTs.

1. **Power to Amend.** Because of the inherent complexity and changing interpretation of government benefits rules, it may be a good idea to include a provision that allows the trustee to amend the terms of the trust so that it continues to conform its primary purpose of preserving the disabled beneficiary's eligibility for government benefits.

> "**Power to Amend.** The trustee of this trust may amend this trust so that it conforms with any laws or interpretations of law by any governing body or agency relating to government assistance received by the beneficiary, and to better effectuate the purposes of the trust."
>
> **Practice Tip:** The power to amend should not be held by the disabled beneficiary.

2. **Early Termination.** If a trust contemplates early termination (prior to death) of a special needs trust, recently-drafted POMS mandate that certain provisions appear in the terms of the trust, including the following: (i) the beneficiary should not be able to compel this early termination; (ii) the remaining trust property must be used to satisfy the Medicaid payback provisions; and (iii) after satisfying the Medicaid payback provisions, the balance of the trust property must be paid to the beneficiary. [41]

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[39] The federal statute refers to a "guardian" but presumably this term is intended to include a conservator in states like Oregon.

[40] Health Care Financing Administration Transmittal 64 § 3259.7.

[41] POMS SI 01120.199

APPENDIX A—SOCIAL SECURITY ADMINISTRATION— CONSENT FOR RELEASE OF INFORMATION FORM

Social Security Administration
Consent for Release of Information

Form Approved
OMB No. 0960-0566

Instructions for Using this Form

Complete this form only if you want us to give information or records about you, a minor, or a legally incompetent adult, to an individual or group (for example, a doctor or an insurance company). If you are the natural or adoptive parent or legal guardian, acting on behalf of a minor, you may complete this form to release only the minor's non-medical records. If you are requesting information for a purpose not directly related to the administration of any program under the Social Security Act, a fee may be charged.

NOTE: Do not use this form to:

- Request us to release the medical records of a minor. Instead, contact your local office by calling 1-800-772-1213 (TTY-1-800-325-0778), or
- Request information about your earnings or employment history. Instead, complete form SSA-7050-F4 at any Social Security office or online at www.ssa.gov/online/ssa-7050.pdf.

How to Complete this Form

We will not honor this form unless all required fields are completed. An asterisk (*) indicates a required field. Also, we will not honor blanket requests for "all records" or the "entire file." You must specify the information you are requesting and you must sign and date this form.

- Fill in your name, date of birth, and social security number or the name, date of birth, and social security number of the person to whom the information applies.
- Fill in the name and address of the individual (or organization) to whom you want us to release your information.
- Indicate the reason you are requesting us to disclose the information.
- Check the box(es) next to the type(s) of information you want us to release including the date ranges, if applicable.
- You, the parent or legal guardian acting on behalf of a minor, or the legal guardian of a legally incompetent adult, must sign and date this form and provide a daytime phone number where you can be reached.
- If you are not the person whose information is requested, state your relationship to that person. We may require proof of relationship.

PRIVACY ACT STATEMENT

Section 205(a) of the Social Security Act, as amended, authorizes us to collect the information requested on this form. The information you provide will be used to respond to your request for SSA records information or process your request when we release your records to a third party. You do not have to provide the requested information. Your response is voluntary; however, we cannot honor your request to release information or records about you to another person or organization without your consent.

We rarely use the information provided on this form for any purpose other than to respond to requests for SSA records information. However, in accordance with 5 U.S.C. § 552a(b) of the Privacy Act, we may disclose the information provided on this form in accordance with approved routine uses, which include but are not limited to the following: 1. To enable an agency or third party to assist Social Security in establishing rights to Social Security benefits and/or coverage; 2. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; 3. To comply with Federal laws requiring the disclosure of the information from our records; and, 4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity of SSA programs.

We may also use the information you provide when we match records by computer. Computer matching programs compare our records with those of other Federal, State, or local government agencies. Information from these matching programs can be used to establish or verify a person's eligibility for Federally-funded or administered benefit programs and for repayment of payments or delinquent debts under these programs.

Additional information regarding this form, routine uses of information, and other Social Security programs are available from our Internet website at www.socialsecurity.gov or at your local Social Security office.

PAPERWORK REDUCTION ACT STATEMENT

This information collection meets the requirements of 44 U.S.C. § 3507, as amended by section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 3 minutes to read the instructions, gather the facts, and answer the questions. **SEND OR BRING THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE. You can find your local Social Security office through SSA's website at www.socialsecurity.gov. Offices are also listed under U.S. Government agencies in your telephone directory or you may call 1-800-772-1213 (TYY 1-800-325-0778).** *You may send comments on our time estimate above to: SSA, 6401 Security Blvd., Baltimore, MD 21235-6401.* ***Send only comments relating to our time estimate to this address, not the completed form.***

Form **SSA-3288** (07-2010) EF (07-2010) Destroy Prior Editions

Social Security Administration
Consent for Release of Information

Form Approved
OMB No. 0960-0566

*SSA will not honor this form unless all required fields have been completed (*signifies required field).*

TO: Social Security Administration

*Name _____ *Date of Birth _____ *Social Security Number _____

I authorize the Social Security Administration to release information or records about me to:

*NAME _____ *ADDRESS _____

_____ _____

_____ _____

*I want this information released because: _____
There may be a charge for releasing information.

_____

_____

*Please release the following information selected from the list below:
You must check at least one box. Also, SSA will not disclose records unless applicable date ranges are included.

- ☐ Social Security Number
- ☐ Current monthly Social Security benefit amount
- ☐ Current monthly Supplemental Security Income payment amount
- ☐ My benefit/payment amounts from _____ to _____
- ☐ My Medicare entitlement from _____ to _____
- ☐ Medical records from my claims folder(s) from _____ to _____
  If you want SSA to release a minor's medical records, do not use this form but instead contact your local SSA office.
- ☐ Complete medical records from my claims folder(s)
- ☐ Other record(s) from my file (e.g. applications, questionnaires, consultative examination reports, determinations, etc.) _____

_____

I am the individual to whom the requested information/record applies, or the parent or legal guardian of a minor, or the legal guardian of a legally incompetent adult. I declare under penalty of perjury in accordance with 28 C.F.R. § 16.41(d)(2004) that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly or willfully seeking or obtaining access to records about another person under false pretenses is punishable by a fine of up to $5,000. I also understand that any applicable fees must be paid by me.

*Signature: _____ *Date: _____

Relationship *(if not the individual)*: _____ *Daytime Phone: _____

Form **SSA-3288** (07-2010) EF (07-2010)

APPENDIX B—

AUTHORIZATION TO RELEASE CONFIDENTIAL INFORMATION

To: _____

From: _____

Date of Birth: _____

Social Security No.: _____

I hereby authorize and direct you to release to the Attorneys and staff at LAW FIRM, any and all information that they may request relating to:

_____

_____

and to freely discuss the same with LAW FIRM. I request that you cooperate fully with LAW FIRM.

A photographic or facsimile copy of this authorization shall have the same force and effect as the original.

_____ _____

DATE CLIENT NAME

APPENDIX C—DISTRIBUTION STANDARDS IN SELF-SETTLED SPECIAL NEEDS TRUSTS FOR SSI RECIPIENTS

August 4, 2010

Karl Goodwin
Oregon Dept. of Justice
General Counsel Division, Human Services Section
1162 Court Street NE
Salem, OR 97301-4096

Re: Distribution Standards in Self-Settled Special Needs Trusts for SSI Recipients

Dear Karl:

Per our conversation earlier today, we are writing regarding distribution standards in self-settled Special Needs Trusts for SSI recipients. The purpose of this letter is to outline the legal basis for distribution standards which allow trustees of SNTs to make occasional distributions for food and shelter.

As we discussed, we have confirmed the acceptability of such distribution standards with Doug McSweyn at the Social Security Administration. However, our analysis actually begins with OAR 461-135-0010(6)(a), which provides that recipients of SSI are assumed eligible for OSIPM. Under this rule, if the Social Security Administration has determined that an SSI recipient's SNT is not a resource, this determination is binding on DHS.

Because the SSA's eligibility determinations are binding, we look to the POMS governing trusts to determine what types of trusts are considered to be resources. The new (2009) POMS provision, "Exceptions to Counting Trusts Established on or after 1/1/00," SI 01120.203, outlines several exceptions to the general rule that trusts created with an individual's own funds are considered resources. Subsection (B)(1)(a), which deals specifically with Special Needs Trusts, states: "Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust meeting [the (d)(4)(a) requirements] **and does not have to be a strict special needs trust**. (Emphasis added.).

As you know, both federal and state law define a (d)(4)(a) trust as one that: i) contains the assets of an individual under age 65 who is disabled; ii) is established by a parent, grandparent, guardian or court; and iii) provides that the State(s) will receive all amounts remaining in the trust upon the death of the individual, up to the total medical assistance provided. Neither 42 USC 1396p(d)(4)(a) nor OAR 461-145-540(9) impose any requirement that the distribution standards in such trusts prohibit distributions for food and shelter.

As the new POMS provision cited above points out, trusts meeting the (d)(4)(a) criteria are not automatically exempt. Rather, they must also be evaluated under the general trust rules found at SI 01120.200. Those provisions state, at subsection (D)(2):

> If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes. (Emphasis in original text).

Our discussion of distribution standards that allow payments for food and shelter has been in the context of irrevocable SNTs, which grant no discretion to the beneficiary to direct the use of the assets. On the contrary, these trusts generally give sole discretion to the trustee to make payments for food and shelter, and only after determining that the temporary loss of public assistance is outweighed by the benefit of the distribution. Thus, under both the SNT-specific POMS and the general trust POMS, SNTs can allow payments for food and shelter without being considered a resource.

Additional support for this position is found in SI 01120.201, regarding "Trusts Established with the Assets of an Individual after 1/1/00" (a.k.a. "first party" trusts). That provision states, in subsection (I)(1), that in cases where the trust principal is not a resource, "...disbursements from the trust may be income to the SSI recipient, depending on the nature of the disbursements." That rule goes on to state, in subsection (I)(1)(b): "Food or shelter received as a result of disbursements from a trust...is income in the form of in-kind support and maintenance and is valued under the presumed maximum value rule." The fact that the POMS details a mechanism for reducing a recipient's SSI benefit when he or she receives food or shelter distributions from an exempt trust further demonstrates that such distributions are allowable (albeit with consequences to the recipient).

As we indicated, we recently confirmed our understanding of the above-cited POMS provisions with Doug McSweyn at SSA. In light of this, we are hopeful that DHS will not object to the inclusion of "flexible" distribution standards in Special Needs Trusts, in cases involving SSI recipients. We currently have two cases ready to file with the Court, but we would like to resolve this matter before filing (thereby avoiding an objection). Taking the argument to the Court would result in lost time and efficiency for all of us.

Please let us know your thoughts on this . We will follow up with you late next week, but feel free to call or email us at any time with your input.

FITZWATER MEYER, LLP

Michael J. Edgel

Donna R. Meyer

APPENDIX D—

SAMPLE FORM

Basic 3rd Party Testamentary Special Needs Trust

[Strict Distribution Standard]

1. IF MY SPOUSE DOES NOT SURVIVE. If my spouse does not survive me, I give the residue in equal shares to my children, one share for any child who survives me and one share by right of representation for the then surviving descendants of each child who does not survive me; provided however, that any share for my son, WILLIAM SMITH, shall be held in trust for his benefit and administered and distributed as provided in section 2.

2. SPECIAL NEEDS TRUST FOR CHILD

2.1 NAME OF TRUST. This trust may be called The William Smith Special Needs Trust.

2.2 DISABILITY OF BENEFICIARY. William Smith is disabled. As a result of this disability, he requires financial assistance to meet his needs.

2.3 TRUST PURPOSE. My purposes for creating this trust for the benefit of the beneficiary is as follows:

2.3(1) SUPPLEMENT PUBLIC RESOURCES. To provide a fully discretionary spendthrift trust to supplement public resources and benefits when such resources are unavailable or insufficient to provide for the special and supplemental needs of the beneficiary. It is my purpose to create a fund for the benefit of the beneficiary which will not supplant any assistance which might otherwise be available from any public sources; and

2.3(2) ENHANCE QUALITY OF LIFE. To enhance the beneficiary's health, comfort, happiness and dignity during his lifetime, subject to the sole and absolute discretion of the trustee.

2.4 DISTRIBUTIONS.

2.4(1) SPECIAL NEEDS. During William's lifetime, my trustee shall distribute for the benefit of the beneficiary, in my trustee’s sole discretion, those amounts of income or principal that my trustee considers advisable to meet the beneficiary's special needs that are not met by government assistance programs. William shall have no authority to compel the trustee to make any distribution. .

ADAPT: "Special needs" shall include, but not be limited to, the following types of special needs, to the extent other funds from public sources are not available: clothing; personal attendant and personal care services, respite care, advocacy, rehabilitation, social development services, private case management; medication or therapies prescribed by a physician or other healing arts practitioner; health insurance premiums; dental care; psychological support services; durable medical equipment; goods and services necessary to modify living environment to accommodate special needs; guardian and conservator fees; education and training; transportation expenses; recreation, vacation, and outings; companion care to accompany the beneficiary on outings; entertainment and entertainment equipment; telephone equipment and services; housekeeping services and supplies.

2.4(2) PURCHASE OF EXEMPT ASSETS. The trustee may purchase items for the use of the beneficiary which would be considered “exempt” assets for purposes of public benefits law, such as personal household items, transportation devices, medical equipment, or a legal interest in a residence, and may, in the trustee=s sole discretion, distribute such items to the beneficiary to be held in the beneficiary=s name, or if the beneficiary lacks legal capacity, in the name of the beneficiary=s court-appointed conservator or guardian. Any distribution to the beneficiary of an exempt asset shall not be construed to be a breach of fiduciary to the remainder beneficiaries.

2.4(3) SUPPLEMENT PUBLIC ASSISTANCE. This trust shall be used to supplement public assistance benefits of any county, state, federal or other government entity which has a legal responsibility to serve the beneficiary and shall not be used to supplant such benefits. No part of the income or principal of the trust estate shall be considered available to the beneficiary.

2.4(4) DISTRIBUTIONS TO PAY TAX. The beneficiary may have income tax liability which results from income received by the trust but properly reported on the beneficiary's income tax return. During the term of this trust, the trustee shall pay directly to the Internal Revenue Service of the United States, or to the taxing authorities of any state, such amounts of income and/or principal of the trust as is needed to pay any such income tax liability of the beneficiary. In no event shall such a distribution be made directly to the beneficiary.

2.4(5) CONSIDERATION OF OTHER RESOURCES. Despite any other provision of this instrument, my trustee shall consider any income, support, or property available to the William from any source, including government assistance programs, before making any discretionary distributions under this trust. My trustee shall further consider the applicable resource and income limitations under any government assistance programs for which the beneficiary may be eligible.

2.4(6) ELIGIBILITY FOR GOVERNMENT ASSISTANCE. My trustee shall take any steps required to qualify the beneficiary for government assistance programs and to ensure that the beneficiary's support needs are met through such programs.

2.4(7) DEFENSE OF TRUST. For purposes of determining the beneficiary=s eligibility for such benefits, no part of the principal or income of the trust estate shall be considered available to the beneficiary. In the event the trustee is requested by any department or agency to release principal or income of the trust to or on behalf of the beneficiary to pay for equipment, medication, or services which other organizations or agencies are authorized to provide, or in the event the trustee is requested by any department or agency administering such benefits to petition the court or any other administrative agency for the release of trust principal or income for this purpose, the trustee shall deny such request and may defend, at the expense of the trust estate, any contest or other attack which defeats the purpose of this trust.

2.4(8) PREFERENTIAL RIGHTS OF BENEFICIARY. The rights and interests of the lifetime beneficiary are preferred over the rights of any remainder beneficiary who receives the trust property after the death of the life beneficiary. The trustee is authorized to exercise discretion to spend all income and/or principal of the trust in order to accomplish the trust purposes.

2.4(9) SPENDTHRIFT. No interest in the principal or income of this trust shall be anticipated, assigned or encumbered, or shall be subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary. Furthermore, I declare that it is my intent as expressed herein that, because this trust is to be conserved and maintained primarily for the special needs of William Smith, no part of the corpus thereof, nor principal nor undistributed income, shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential and institutional care, by any public entity, office, department or agency of the State of Oregon, or any other state, or of the United States, or any other governmental agency.

2.4(10) POWER TO AMEND. The trustee of this trust may amend this trust so that it conforms with any laws or interpretations of law by any governing body or agency relating to government assistance received by the beneficiary, and to better effectuate the purposes of the trust.

2.4(11) OBTAIN PROFESSIONAL ADVICE. I strongly encourage my trustee to consult with a knowledgeable attorney for professional advice regarding (1) the fiduciary duties of a trustee, (2) how to handle trust distributions in a manner that will not jeopardize the beneficiary's eligibility for government assistance programs. My trustee is to be reimbursed for the cost of this professional advice.

2.4(12) DEATH OF BENEFICIARY. Upon the death of the beneficiary, the trustee may pay the expenses of the beneficiary's funeral, and all administrative expenses relating to this trust, including reasonable attorney and accountant's fees, if, in the trustee's sole discretion, other satisfactory provisions have not been made for the payment of such expenses.

2.4(13) TERMINATION OF SPECIAL NEEDS TRUST. This trust shall cease and terminate on the death of the beneficiary and thereupon the trust shall be divided into equal shares, one share for any child of mine who is then living and one share by right of representation for the then surviving descendants of each child of mine who is then deceased. The trustee shall distribute each share outright and free of trust.

APPENDIX E—

SAMPLE FORM

First Party Special Needs Trust
Created by Parent for Adult Child who has capacity

THE SALLY SMITH SPECIAL NEEDS TRUST

THIS TRUST AGREEMENT is made by MRS. SMITH, individually and in her capacity as parent of the beneficiary, hereinafter referred to as "settlor," and ROBERT JONES, as trustee, hereinafter referred to as "trustee." This is an Irrevocable Special Needs Trust for the benefit of SALLY SMITH, hereinafter referred to as "beneficiary".

ARTICLE 1

1. TRUST

1.1 NATURE OF TRUST. The Trust established under this Agreement is an Irrevocable Living Trust made in accordance with the laws of the State of Oregon, whereby the property placed in trust shall be managed for the benefit of beneficiary for her lifetime. The effective date of this Trust Agreement shall be the date it is executed by the settlor and accepted by the trustee. All property which is made subject to this Trust shall be held, administered, and distributed in accordance with this Agreement.

1.2 NAME OF TRUST. For convenience, this Trust may be called the SALLY SMITH SPECIAL NEEDS TRUST.

1.3 INITIAL FUNDING. The beneficiary is disabled. The sum of $10.00 of the initial funding of this Trust shall be contributed by settlor. The remainder of the initial funding of this Trust will be contributed by the beneficiary, with assets beneficiary will receive as an inheritance. Such property, together with any additions thereto, shall constitute the trust estate.

1.4 ADDITIONS TO TRUST. The trustee may accept property from any source and upon any terms. Upon acceptance by the trustee, the property shall become subject to this agreement.

1.5 TRUST IS IRREVOCABLE. This Trust is irrevocable and may not be changed, altered, or amended by the beneficiary.

ARTICLE 2

2. PURPOSES OF TRUST

2.1 PAYBACK TRUST. The beneficiary was born on [birthdate] and is disabled as defined in Section 1614(a)(3) of the Social Security Act. The settlor establishes this Trust to conform to the provision of the Omnibus Reconciliation Act of 1993 pertaining to disabled individuals under the age of 65, which is found at 42 U.S.C. Section 1396p(d)(4)(A), and the provisions of the Foster Care Independence Act of 1999 also pertaining to trusts for disabled individuals under the age of 65, which is found at 42 U.S.C. Section 1382b.

2.2 PURPOSES OF TRUST. The beneficiary's disability prevents her from engaging in substantial gainful activity. The funds described in section 1.3 are insufficient to provide for her needs. The beneficiary currently receives Supplemental Security Income, which provides a small monthly cash benefit, and Medicaid Assistance, which provides certain health care services. The intent of the settlor is as follows:

2.2(1) To provide a fully discretionary spendthrift trust to supplement public resources and benefits when such resources are unavailable or insufficient to provide for the special and supplemental needs of the beneficiary. It is the purpose of the Trust to create a fund for the benefit of the beneficiary which will not supplant any assistance which might otherwise be available from any public sources; and

2.2(2) To enhance the beneficiary's health, comfort, happiness and dignity during her lifetime, subject to the absolute discretion of the trustee.

ARTICLE 3

3. DISTRIBUTIONS

3.1 DISTRIBUTIONS FOR SPECIAL NEEDS. The trustee shall pay to or apply for the benefit of the beneficiary, for her lifetime, such amounts from the principal or income, up to the whole thereof, as the trustee may from time to time

determine necessary or advisable for the satisfaction of the beneficiary's special needs.

3.2 SPECIAL NEEDS DESCRIBED. As used in this Trust, "special needs" refers to the requisites for maintaining beneficiary's good health, safety, and welfare when, in the discretion of the trustee, such requisites are not being provided by any public agency, office, or department of the State of Oregon, or of any other state, or of the United States, or any insurance carrier with insurance policies covering the beneficiary.

"Special needs" shall include, but not be limited to, the following types of special needs, to the extent other funds from public sources are not available: clothing, education and training; transportation expenses; computer equipment and services; entertainment and entertainment equipment; telephone equipment and services; housekeeping services and supplies; private case management; medication or therapies prescribed by a physician or other healing arts practitioner; health insurance premiums; dental care; psychological support services; personal care services; and durable medical equipment.

Expenditures for these and similar benefits shall be made only if public benefit programs do not cover these benefits, and only if the trustee chooses, in the exercise of his sole discretion to choose among special needs, to allow them. This list is intended to be illustrative and not inclusive of all kinds of non-support disbursements which would be appropriate for the trustee to make. Any income not distributed shall be accumulated and added to principal. Distributions may be made from the trust estate without court approval.

3.3 PURCHASE OF EXEMPT ASSETS. The trustee may purchase items for the use of the beneficiary which would be considered "exempt" assets for purposes of public benefits law, such as personal household items, transportation devices, medical equipment, or a legal interest in a residence.

3.4 DISTRIBUTIONS TO PAY TAX. The beneficiary may have income tax liability which results from income received by the Trust but properly reported on the beneficiary's income tax return. During the term of this Trust, the trustee shall pay directly to the Internal Revenue Service of the United States, or to the taxing authorities of any State, such amounts of income and/or principal of the Trust as is needed to pay any such income tax liability of the beneficiary. In no event shall such a distribution be made directly to the beneficiary.

3.5 CONSIDERATION OF OTHER RESOURCES. Despite any other provisions of this instrument, the trustee shall consider any income, support, or

property available to the beneficiary from any source, including government assistance programs, before making any discretionary distributions under this Trust. The trustee shall further consider the applicable resource and income limitations under any government assistance programs for which the beneficiary may be eligible.

3.6 DEFENSE OF TRUST. For purposes of determining the beneficiary's eligibility for such benefits, no part of the principal or income of the trust estate shall be considered available to the beneficiary. In the event the trustee is requested by any department or agency to release principal or income of the Trust to or on behalf of the beneficiary to pay for equipment, medication, or services which other organizations or agencies are authorized to provide, or in the event the trustee is requested by any department or agency administering such benefits to petition the Court or any other administrative agency for the release of trust principal or income for this purpose, the trustee shall deny such request and may defend, at the expense of the trust estate, any contest or other attack which defeats the purpose of this Trust.

3.7 MANNER OF DISTRIBUTIONS. The trustee shall refer to the following provisions as guidance when making distributions, and is encouraged to seek the advice of an attorney or advisor experienced in making distributions for persons with disabilities similar to that of the beneficiary. During such time as the beneficiary is receiving Supplemental Security Income, Medicaid or benefits through another similar program that has income and/or resource limitations:

3.7(1) The trustee shall not distribute cash directly to the beneficiary;

3.7(2) The trustee shall not reimburse the beneficiary directly for purchases the beneficiary makes;

3.7(3) The trustee may pay directly for services, provided that the beneficiary does not receive any assets as a result of such expenditure that can be converted to cash.

3.8 PREFERENTIAL RIGHTS OF BENEFICIARY. The rights and interests of the lifetime beneficiary are preferred over the rights of any remainder beneficiary who receives the trust property after the death of the life beneficiary. The trustee is authorized to exercise discretion to spend all income and/or principal of the Trust in order to accomplish the trust purposes.

ARTICLE 4

4. TERMINATION

4.1 TERMINATION OF TRUST. This Trust shall cease and terminate at the death of the beneficiary.

4.2 WINDING UP TRUST AT TERMINATION. At the termination of the Trust, the trustee shall conclude all of the affairs of the Trust, paying for all administrative costs, including trustee fees, attorney fees, and accounting fees.

4.3 REMAINDER. Upon termination of the Trust, the remaining trust property, after payment of expenses as set forth above, shall be paid and distributed as follows:

4.3(1) PAYMENT TO STATE FOR MEDICAID ASSISTANCE PROVIDED. The trustee shall pay the remaining trust property to any State that may have provided the beneficiary with medical assistance, up to an amount equal to the total medical assistance paid on behalf of the beneficiary under the Medicaid program to the extent such medical assistance has not already been reimbursed from any other source. This provision is intended to meet the requirements of 42 U.S.C. 1396(p)(d)(4)(A) and 42 U.S.C. 1382b.

4.3(2) TRUST PROPERTY THEN REMAINING. If there is any trust property then remaining, the trustee shall distribute the remaining trust property, including principal and undistributed income of this Trust, to such individuals, corporations, or other appointees, including the whole thereof, as the beneficiary shall appoint by a validly executed Will, provided that her will contains a reference to this specific power of appointment. To the extent that the beneficiary fails effectively to exercise this power of appointment, due to minority or any other reason, the remaining trust corpus shall be distributed to in equal shares to the beneficiary's children, Susan Smith and Steven Smith, one share to each of them who survive the beneficiary, and one share by right of representation for the then surviving descendants of any of them who does not survive the beneficiary. If none of the above named individuals survive the beneficiary, then the trustee shall distribute the then remaining trust property to those people who survive the beneficiary who are entitled to her intestate property on the date of her death.

4.4 EARLY TERMINATION OF TRUST. The Trustee may terminate the Trust prior to the death of the beneficiary, if the Trustee determines it is in the best

interest of the beneficiary, or if the beneficiary's disability ended. In such event, the Trustee shall make distribution as provided for in sections 4.3(a) and (b), and the remaining trust property, after payment of allowable expenses, shall be distributed to the beneficiary. In no event may the beneficiary compel termination of this Trust.

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ARTICLE 5

5. TRUST ADMINISTRATION

5.1 LIMITATION ON LENGTH OF TRUST. Unless sooner terminated or vested in accordance with other provisions of this instrument, all interests not otherwise vested, including, but not limited to, all trusts and powers of appointment created hereunder shall terminate twenty-one (21) years after the death of the last survivor of the beneficiary living on the date of this agreement, at the end of which time distribution of all principal and all accrued, accumulated and undistributed income shall be made to the persons then entitled to distributions of income and in the manner and proportions herein stated (or, if not stated, equally), irrespective of their then-attained ages.

5.2 UNDISTRIBUTED INCOME. Income accrued or undistributed at the termination of a beneficiary's interest in a trust shall be added to and become part of the principal of that trust, and any rights of that beneficiary to that income shall terminate.

5.3 TRUSTEE PROTECTION SO LONG AS TRUSTEE ACTS IN GOOD FAITH. Settlor recognizes that the trustee is not licensed nor skilled in all possibly relevant fields including medicine, social services, investment management, and public benefits law. The trustee may seek the counsel and assistance of experts, at trust cost, and of the beneficiary's guardian or conservator, if any, and any State and local agencies that have been established to assist the disabled in similar circumstances as the beneficiary. The trustee may use these resources to aid the beneficiary, or the beneficiary's guardian or conservator, as appropriate, in identifying programs which may be of social, financial, or developmental assistance to the beneficiary. However, the trustee shall not in any event be liable to the beneficiary, the remainder beneficiaries of the Trust, or any other party for his or her acts as trustee hereunder so long as the trustee acts in good faith. For

example, the trustee, the beneficiary, and the beneficiary's guardian or conservator, if any, shall not be liable for the failure to identify each program or resource that might be available to the beneficiary because of disabilities.

5.4 NO COMMINGLING OF ASSETS. Any public assistance benefits of any beneficiary of this Trust shall not be commingled with trust assets but shall be separately held by the trustee, should the trustee be payee or the recipient of those benefits. Nothing in this provision shall be construed to require the addition to the trust estate of public assistance benefits received by, or on behalf of, the beneficiary.

5.5 NOTICE, INFORMATION AND REPORTS. To the extent allowed by law, the provisions of this instrument shall govern the trustee's duty to furnish notice, information and reports.

5.5(1) INITIAL NOTICE. The Trustee shall provide initial notice of the trust's existence, of the identity of the settlor, of the right to receive a copy of the trust instrument and of the right to a trustee's report to the lifetime beneficiary, the permissible distributees, the qualified beneficiaries, and, if the beneficiary has a court-appointed conservator, to the conservator.

5.5(2) ANNUAL REPORT. The trustee shall report, at least annually, to the lifetime beneficiary, to the permissible distributees and qualified beneficiaries who request a report, and, if the beneficiary has a court-appointed conservator, to the conservator.

5.5(3) CONTENTS OF ANNUAL REPORT. The trustee's report shall show assets on hand, and show in detail all receipts, disbursements, investment transactions, and distributions of both principal and income since the report. The report shall be deemed to have been furnished to the person entitled to it when it has been personally delivered or placed in the United States mail addressed to that person at the person's last known address. Copies of documents evidencing ownership of assets in the name of the Trust shall be attached to the report.

5.5(4) BENEFICIARY PROTECTOR. The beneficiary's sister, JENNIFER JONES, shall serve as beneficiary protector. If JENNIFER JONES fails to qualify or ceases to act as beneficiary protector, or is then acting as trustee, any interested person may file a petition requesting the court to name a beneficiary protector, who shall be a person who has a high degree of familiarity with the beneficiary's personal and health needs. The beneficiary protector shall have all rights a beneficiary has at law or in equity

to protect the beneficiary's interest in a trust, and is designated to receive notices and reports delivered by the trustee as provided for in this trust and required by law on behalf of and in addition to the beneficiary, if she becomes financially incapable, and, further on behalf of any qualified beneficiaries entitled to notice and reports who are minors or financially incapable.

5.5(5) PROTECTION IF BENEFICIARY PROTECTOR ACTS IN GOOD FAITH. The beneficiary protector shall not in any event be liable to the beneficiary, the remainder beneficiaries of the Trust, or any other party for acts performed as the beneficiary protector under this Agreement as long as the beneficiary protector acts in good faith.

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ARTICLE 6

6. TRUSTEE POWERS

6.1 IN GENERAL. The trustee shall have all powers conferred on a trustee by Oregon law as now existing or later amended, except as specifically restricted in this instrument. In addition, the trustee shall have the powers described in this Article 6.

6.2 MANAGE AND DISPOSE OF ASSETS. To manage, maintain, improve, lease, grant options on, encumber, sell, exchange, or otherwise dispose of part or all of the trust estate in any manner and on any terms the trustee considers beneficial to the trust estate.

6.3 RETAIN ASSETS. To retain any property, including nonproductive property, for so long as the trustee considers retention of probable benefit to the trust estate and the trust beneficiaries.

6.4 MAKE INVESTMENTS. To invest and reinvest the trust estate in common or preferred stocks, bonds, mutual funds, annuities, common trust funds, secured and unsecured obligations, mortgages, and other property, real or personal, which the trustee considers advisable and in the best interest of the trust estate.

6.5 RECEIVE COMPENSATION. To receive reasonable compensation for the trustee's own services and reimbursement for expenses incurred in administering the trust estate.

6.6 PAY ADMINISTRATIVE COSTS. To pay administrative costs such as bank service charges, trustee fees, attorney fees, fees for preparation of yearly tax returns, and charges for photocopying, fax and postage.

6.7 TRUSTEE RELIEVED OF DUTY TO DIVERSIFY. Trustee is relieved of the obligation to diversify assets.

6.8 LIMITED AMENDMENT RIGHT. The trustee of this Trust may amend this agreement so that it conforms with any laws or interpretations of law by any governing body or agency relating to 42 U.S.C. Section 1396p, 42 U.S.C. Section 1382b, or related statutes or rules, including State statutes or rules that are consistent with the provisions and purposes of these laws, and to better effect the purposes of this Trust.

This agreement may not be revoked by the Beneficiary nor may the rights of the State Medicaid agencies to repayment under Section 4.3 be modified unless specifically allowed under 42 USC §1396p, 42 USC §1382b, or related statutes or rules.

6.9 DO OTHER ACTS. Except as otherwise provided in this instrument, to do all acts that might legally be done by an individual in absolute ownership and control of property and which, in the trustee's judgment, are necessary or desirable for the proper and advantageous management of the trust estate.

ARTICLE 7

7. BENEFICIARY'S INTERESTS AND POWERS

7.1 TAX NATURE OF TRUST. This Trust is funded with $10 contributed by settlor, with the remainder of the funding contributed solely with assets initially owned by the beneficiary. It is the intent of the Settlor that this Trust be construed as a “grantor trust” under the Internal Revenue Code. All income received, distributed, held, or accumulated by this Trust shall be taxable to the beneficiary, individually.

7.2 RENUNCIATION. In addition to any power to renounce conferred by law, the beneficiary (including the beneficiary's personal representative or

conservator), may renounce in whole or in part any power granted to the beneficiary under this Trust Agreement.

7.3 NONASSIGNMENT/SPENDTHRIFT. No interest in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or be subject to any creditor's claim or to legal process. Furthermore, because this Trust is to be conserved and maintained entirely for the special needs of the beneficiary, no income or principal shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care, by any private or public entity, office, department, or agency of any state, or of the United States or any other governmental agency. No beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner anticipate or dispose of his or her interest in the Trust or the income produced thereby, prior to its actual distribution by the trustee for the benefit of the beneficiary in the manner authorized by this agreement. No beneficiary shall have any assignable interest in any trust created under this agreement or in the income therefrom. Neither the principal nor the income shall be liable for any debts of the beneficiary. The limitations herein shall not restrict the exercise of any power of appointment or disclaimer.

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ARTICLE 8

8. TRUSTEE

8.1 RESIGNATION OF TRUSTEE. Any trustee may resign the trusteeship at any time. Any resignation shall be in writing and delivered to any remaining acting trustee. If upon resignation no existing trustee remains, the resignation shall become effective only upon written acceptance of the Trust by a successor trustee.

8.2 DESIGNATION OF SUCCESSOR TRUSTEE. If ROBERT JONES ceases to act due to resignation, removal, incapacity, or death, then the settlor appoints JENNIFER JONES to serve in his place as trustee. If JENNIFER JONES is unable to or ceases to act due to resignation, removal, financial incapability, or death, the currently acting trustee may nominate a successor

trustee, in writing, and the nominated successor trustee shall become the acting successor trustee upon written acceptance of the Trust by the successor trustee.

8.2(1) POWER OF BENEFICIARY TO REMOVE AND APPOINT TRUSTEES. Notwithstanding any other provision of this agreement, the beneficiary may at any time and from time to time: (i) remove a trustee or co-trustee without cause; and/or (ii) appoint a sole trustee or co-trustees. In no event may the beneficiary name herself or her spouse, if any, to be the trustee of this Trust. Any action to appoint a successor trustee under this subsection shall be in writing, and shall become effective only upon written acceptance by the successor trustee.

8.2(2) COURT TO APPOINT OR REMOVE TRUSTEE. If the Trust has no trustee and no successor is named in this instrument or appointed by the acting trustee or the beneficiary as provided for in this section, any court having jurisdiction may do so at the request of any person interested in the trust. Furthermore, any court having jurisdiction may remove a trustee for good cause shown at the request of any person interested in the trust.

8.3 TRANSFER TO SUCCESSOR TRUSTEE. Upon acceptance, a successor trustee shall succeed to all rights, powers, and duties of the trustee. All right, title, and interest in the trust property shall vest in the successor trustee. The prior trustee shall, without warranty, transfer the existing trust property to the successor trustee. A successor trustee shall not have any duty to examine the records or actions of any former trustee and shall not be liable for the consequences of any act or failure to act of any former trustee.

8.4 NO BOND REQUIRED. No bond or other undertaking shall be required of any individual trustee of any trust. However, should a Court of proper jurisdiction determine, upon the application of any interested person, that it is contrary to the best interests of the beneficiary for the trustee not to be bonded, then the trustee shall, as a trust expense, be bonded in such amount as the Court shall determine.

ARTICLE 9

9. GENERAL ADMINISTRATIVE PROVISIONS

9.1 DEFINITIONS. The definitions in this section shall apply for purposes of this Trust.

9.1(1) DESCENDANTS. "Descendants" means all naturally born or legally adopted descendants of the person indicated.

9.1(2) FINANCIALLY INCAPABLE. “Financially incapable,” means a condition in which a person is unable to manage financial resources effectively because the person cannot take the actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, claims and income.

9.1(3) PERMISSIBLE DISTRIBUTEE. “Permissible distributee” means a beneficiary who is currently eligible to receive distributions of Trust income or principal, whether the distribution is mandatory or discretionary.

9.1(4) QUALIFIED BENEFICIARY. “Qualified beneficiary” means a beneficiary who is a permissible distributee, who would be a permissible distributee if the interests of all permissible distributees terminated, or who would be a permissible distributee if the trust terminated. “Qualified beneficiary” also includes the other persons described in ORS 130.040.

9.1(5) BENEFICIARY PROTECTOR. “Beneficiary protector” means the person designated to act in good faith to protect the interests of a person who is a minor or financially incapable, and to receive notices and reports delivered by the trustee as provided for in this Trust and otherwise only as further required by ORS 130.020(3)(b). The beneficiary protector shall have all the rights a beneficiary has at law or in equity to protect the beneficiary’s interest in a trust.

9.2 TRUSTEE. The word “trustee” shall be deemed a reference to whomever is serving as trustee, whether original, alternate, or successor, and shall include a trustee acting alone or as a co-trustee.

9.3 GOVERNING LAW. The validity and construction of this Trust Agreement shall be determined under Oregon law in effect on the date this Agreement is signed, and the initial situs of this Trust is Oregon.

9.4 CAPTIONS. The captions are inserted for convenience only. They are not a part of this Trust Agreement and do not limit the scope of the section to which each refers.

EXECUTED by MRS. SMITH this _____ day of _____, 2010 individually and in her capacity as parent of SALLY SMITH.

MRS. SMITH, Settlor and parent of beneficiary

STATE OF OREGON
County of _____

On this _____ day of _____, 2010, personally appeared before me the above named settlor, MRS. SMITH, in her capacity as parent of SALLY SMITH, and acknowledged the foregoing instrument to be her voluntary act and deed.

Notary Public for Oregon

EXECUTED AND ACCEPTED by trustee ROBERT JONES this _____ day of _____, 2010.

_____
ROBERT JONES, Trustee

STATE OF OREGON
County of _____

On this _____ day of _____, 2010, personally appeared before me the above named trustee, ROBERT JONES, and acknowledged the foregoing instrument to be his voluntary act and deed.

_____
Notary Public for Oregon

SCHEDULE A

DATE: PROPERTY:

$10 contributed by settlor

APPENDIX F—

SAMPLE FORM

Third Party Inter Vivos (Living) Special Needs Trust.

[non-grantor, no Crummey powers, hybrid distribution standard]

THE JOHN SMITH
SPECIAL NEEDS TRUST AGREEMENT

Date: _____, 2011

Settlors: MRS. SMITH and MR. SMITH

Trustee: TRUSTEE

ARTICLE 1

1. DECLARATION OF TRUST

1.1 DECLARATION OF TRUST. MRS. SMITH and MR. SMITH (referred to herein as "settlors"), transfer and deliver to TRUSTEE, as initial trustee, the sum of $10.00 and such other property as may constitute a portion of the trust estate. The trustee acknowledges that the initial trust estate has been or will be transferred to the trustee, as a gift irrevocably in trust, solely for the uses and purposes provided in this document.

1.2 LIMITATIONS ON SETTLOR. The settlor may not (a) become a trustee of any trust hereunder, (b) exert any control over the Trust or the assets thereof, or (c) in any way affect the beneficial enjoyment of the trust estate.

1.3 QUALIFIED DISABILITY TRUST. To the maximum extent possible, the settlor intends to create a qualified disability trust under 42 U.S.C. c1396p(c)(2)(B)(iv) and 26 U.S.C. c642(b)(C).

1.4 IRREVOCABILITY. This document is irrevocable and may not be altered or amended by the settlor.

1.5 SETTLORS' FAMILY. The settlors are married to each other. The settlors' children are MICHAEL SMITH and JOHN SMITH. JOHN SMITH is referred to herein as "John" or the "beneficiary."

1.6 TRUST BENEFICIARY. This Trust is created for the sole benefit of John during his lifetime.

1.7 NAME OF DOCUMENT. This document shall be known as the JOHN SMITH SPECIAL NEEDS TRUST.

ARTICLE 2

2. SPECIAL PURPOSES. John was born on February 19, 1982 and is under the age of 65. He is disabled as defined in 42 U.S.C. section 1382c(a)(3), and is financially disabled as defined in section 6511(h)(2)(A) of the Internal Revenue Code. John may now or in the future be eligible for government assistance, including but not limited to Supplemental Security Income (SSI) and Medicaid Assistance. It is the settlors' intention that distributions from the Trust will be used for John's sole benefit during his lifetime, to enhance his quality of life to the maximum extent possible, but will not supplant his government assistance. The settlors anticipate that the trustee shall consider the effect of any distribution on John's government assistance, if any, and will not make distributions which will jeopardize his ongoing eligibility for such government assistance.

ARTICLE 3

3. DISTRIBUTIONS AND TERMINATION.

3.1 DISTRIBUTIONS. The Trust shall be administered and distributed by the trustee as follows:

3.1(1) SPECIAL NEEDS. During John's lifetime, the trustee shall distribute for his benefit those amounts of income or principal that the trustee considers necessary or advisable, in the trustee's sole discretion, to meet his special needs that are not met by government assistance programs.

"Special needs" shall include, but not be limited to, the following types of special needs, to the extent other funds from public sources are not available: clothing; personal attendant and personal care services, respite care, advocacy, habilitation, social development services, private case management; medication or therapies prescribed by a physician or other healing arts practitioner; health insurance premiums; dental care; psychological support services; durable medical equipment; goods and services necessary to modify living environment to accommodate special needs; massage; guardian and conservator fees; education and training; automobile, truck, or other vehicle, automobile insurance, automobile fuel and repair; bus pass; computer equipment and services; recreation, vacation, and outings; companion care to accompany the beneficiary on outings; entertainment and entertainment equipment; telephone equipment and services; housekeeping services and supplies.

3.1(2) PURCHASE OF EXEMPT ASSETS. The trustee may purchase items John's use which would be considered "exempt" assets for purposes of public benefits law, such as personal household items, transportation devices, medical equipment, or a legal interest in a residence, and may, in the trustee's sole discretion, distribute such items to John to be held in John's name, or if John lacks legal capacity, in the name of John's court-appointed guardian or conservator. Any distribution to John of an exempt asset shall not be construed to be a breach of fiduciary duty to the remainder beneficiaries.

3.1(3) [Hybrid Distribution Standard] ADDITIONAL DISCRETIONARY DISTRIBUTIONS. Notwithstanding any other limitations herein on the trustee's discretion to make distribution to or for John's benefit, the trustee shall have the discretion to make distributions to John which will reduce or temporarily terminate John's government assistance if the trustee, in the trustee's sole discretion, determines that it would be in John's best interest to do so, and provided that such disbursements will not compromise the intent that this share provide for John's special needs for John's lifetime. Specifically, the trustee may, in the trustee's sole discretion, provide for John's food and/or shelter from this share, with the understanding that such a distribution will reduce any government benefits paid to John. The trustee may also make one-time or short-term distributions to John even though it will result in disqualifying John from government assistance in the month or months of distribution if the trustee determines, in the trustee's sole discretion, that the benefits of the temporary or one-time distribution outweigh the temporary loss of government assistance.

3.1(4) PROHIBITED DISTRIBUTIONS. Except as otherwise provided in section 3.1(c), the trustee shall not make any distributions which would adversely affect John's eligibility for government assistance. John shall have no authority to compel the trustee to make any distribution.

3.1(5) CONSIDERATION OF OTHER RESOURCES. Despite any other provision of this instrument, the trustee shall consider any income, support, or property available to John from any source, including government assistance programs, before making any discretionary distributions under this share. The trustee shall further consider the applicable resource and income limitations under any government assistance programs for which John may be eligible.

3.2 DEFENSE OF TRUST. For purposes of determining John's eligibility for such benefits, no part of the principal or income of this share shall be considered available to John. In the event the trustee is requested by any department or agency to release principal or income of this Trust to or on behalf of John to pay for equipment, medication, or services which other organizations or agencies are authorized to provide, or in the event the trustee is requested by any department or agency administering such benefits to petition the court or any other administrative agency for the release of this Trust's principal or income for this purpose, the trustee shall deny such request and may defend, at the expense of this Trust, any contest or other attack which defeats the purpose of this Trust.

3.3 OBTAIN PROFESSIONAL ADVICE. The settlor strongly encourages the trustee to consult with a knowledgeable attorney for professional advice regarding how to handle share distributions in a manner that will not jeopardize John's eligibility for government assistance programs. The trustee is to be reimbursed for the cost of this professional advice.

3.4 DISTRIBUTIONS TO PAY TAX. John may be taxed as a result of being a beneficiary of this Trust. During the term of this Trust, the trustee shall pay directly to the Internal Revenue Service of the United States, or to the taxing authorities of any state, such amounts of income and/or principal of the Trust as is needed to pay any such income tax liability of John. In no event shall such a distribution be made directly to John.

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3.5 PREFERENTIAL RIGHTS OF BENEFICIARY. The rights and interests of John as the lifetime beneficiary are preferred over the rights of any remainder beneficiary who receives the share property after his death. The trustee is authorized to exercise

discretion to spend all income and/or principal of this Trust in order to accomplish the Trust's purposes.

3.6 TERMINATION OF TRUST. This Trust shall cease and terminate on John's death. The trustee shall pay the expenses of John's funeral, and all administrative expenses relating to each share, including reasonable attorney and accounting fees, if, in the trustee's sole discretion, other satisfactory provisions have not been made for the payment of such expenses. The trustee shall then distribute the remaining trust property John's brother. If John's brother is not then living John, the trustee shall distribute remaining trust property to the Smith Family Donor Advised Fund, or, if the Smith Family Donor Advised Fund is not then in existence, to non-profit organizations selected by the trustee, which support the causes that the settlors supported during their lifetime.

ARTICLE 4

4. TRUSTEESHIP AND BENEFICIARY PROTECTOR

4.1 POWERS TO ACT. The settlors may, during their lifetimes, pursuant to a written instrument and served upon the then acting trustee hereunder:

4.1(1) REMOVAL AND APPOINTMENT OF TRUSTEE. Removing any then acting trustee and appoint a trustee or trustees to serve as successor to such removed trustee, provided, however, that no appointed successor may be a related or subordinate party within the meaning of Section 672(c) of the Code;

4.1(2) DESIGNATION OF CO-TRUSTEES. Designate one or more individuals and/or any corporation qualified to act as a trustee (and may fix the order in which such individuals and/or corporation shall serve) as co-trustee or co-trustees to serve with any then acting trustee hereunder and/or as successor trustee or trustees, to succeed any trustee, in the event such trustee shall cease to act as trustee hereunder for any reason whatsoever, provided, however, that no appointed co-trustee may be a related or subordinate party within the meaning of Section 672(c) of the Code;

4.1(3) CHANGE ORDER OF SUCCESSOR TRUSTEES. Eliminate or change the order of succession of any successor trustee or co-trustee designated in this Article and/or hereafter designated pursuant to this subarticle;

4.1(4) WAIVER. Waive all or any part of the rights described in this section 4.1.

4.2 RESIGNATION OF TRUSTEE. The trustee may resign the trusteeship at any time. Any resignation shall be in writing and shall become effective only upon written acceptance of the trust by a successor trustee.

4.3 SUCCESSOR TRUSTEESHIP. If the initial trustee resigns or otherwise ceases to act, then PROFESSIONAL TRUST COMPANY shall serve as successor trustee. Furthermore, the currently acting trustee may nominate a successor trustee, in writing, and the nominated successor trustee shall become the acting successor trustee upon written acceptance of the Trust by the successor trustee. If the successor trustees nominated herein all fail to qualify or cease to act, and no new successor trustee is appointed within a reasonable time, any interested person may petition a court with jurisdiction to appoint a successor trustee. Under no circumstance may settlor or any other donor be appointed as successor trustee.

4.4 BENEFICIARY PROTECTOR AND TRUST ADVISOR. John's brother shall serve as the beneficiary protector and trust advisor, as further described in section 7.2. If no beneficiary protector is then serving, the person nominated as the next successor trustee, but not currently serving as trustee, shall serve as the beneficiary protector.

4.5 TRANSFER TO SUCCESSOR TRUSTEE. Upon acceptance, a successor trustee shall succeed to all rights, powers, and duties of the trustee. All right, title, and interest in the trust property shall vest in the successor. The prior trustee shall, without warranty, transfer the existing trust property to the successor trustee. A successor trustee shall not have any duty to examine the records or actions of any former trustee and shall not be liable for the consequences of any act or failure to act of any former trustee.

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ARTICLE 5

5. POWERS AND RESPONSIBILITIES OF TRUSTEE

Subject to any limitations contained elsewhere in this document, the trustee is granted all powers necessary to carry out the terms of this document, including the following powers:

5.1 EMPLOY AGENTS. To employ, compensate and grant discretionary authority to agents, managers, attorneys, accountants, brokers, investment counselors and others, even if they are associated with a trustee. The trustee shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared by such persons as to matters which the trustee reasonably believes to be within such person's professional or expert competence and shall not be liable for losses resulting therefrom.

5.2 PAYMENT OF EXPENSES. To pay all expenses and taxes incurred in the administration of all trusts established hereunder, including payment of premiums for such insurance as the trustee deems advisable to protect the trust estate from damage or loss and to protect the trustee from liability.

5.3 TO RECEIVE PROPERTY. To receive and retain any property at any time subject to this document, regardless of whether receipt or retention thereof violates sound diversification principles, or such property is under productive.

5.4 TO HOLD PROPERTY. To hold property in the name of the trustee, a nominee, or in bearer form.

5.5 TO MANAGE AND CONTROL PROPERTY. To manage, control, lease for terms within or beyond the duration of a trust created hereunder, grant options with respect to, partition, divide, improve, insure and repair any kind of property, real or personal.

5.6 TO PURCHASE AND SELL. To purchase, exchange or sell for cash or upon terms at public or private sale any kind of property, real or personal, including trust funds administered by the trustee, stocks, bonds, and other securities, general and limited partnership interests and interests in other business ventures, whether or not an interest in any such property is already included in the trust estate. The trustee may maintain brokerage accounts.

5.7 TO CREATE RESTRICTIONS. To create restrictions, easements, and servitudes; to litigate, arbitrate and compromise claims and actions; and to effect transactions among trusts established hereunder for value, including sales, exchanges and loans.

5.8 TO BORROW AND LEND. To borrow and lend money and to encumber trust property by mortgage, deed of trust, pledge, or otherwise for the debts of the Trust or the joint debts of the Trust and any co-owner of the property in which the Trust has an interest. Any loan, guarantee, pledge or encumbrance may be for a period within or beyond the duration of the Trust.

5.9 TO CONDUCT BANKING. To deposit trust funds in accounts of any kind, with any bank, savings and loan association, or similar institution, including a trustee; to withdraw such funds; to designate in writing the trustees who may conduct such activities; and such institutions may rely, without liability, on such designation.

5.10 TO BE COMPENSATED FOR SERVICES. To pay himself or herself reasonable compensation for his or her services rendered the trust estate as trustee, and to reimburse himself or herself for any expenses of the trust estate that such trustee has paid. The trustee may waive the right to compensation for services to be rendered the trust estate, such waiver to be in writing and executed by the trustee in advance of rendering the services for which such compensation is being waived. A waiver may be limited in duration or to specific services.

5.11 TO DISTRIBUTE ASSETS. To allocate or distribute trust assets, in cash or in kind or partly in each, including undivided interests, pro rata or non-pro rata, and for this purpose to sell trust assets. In making such allocation or distribution, the trustee is not required to consider the income tax bases of such assets or the potential income tax consequences to the distributees.

5.12 TAX ELECTIONS; NO NEED TO MAKE ADJUSTMENTS. The trustee may make such tax decisions and elections as shall be permitted under the Code. The trustee shall not be required to make adjustments in the rights of any beneficiaries, or among the principal and income accounts, to compensate for the consequences of any tax decision or election, that has had the effect, directly or indirectly, of preferring one beneficiary or a group of beneficiaries over others.

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5.13 CONSOLIDATION OF TRUSTS. The trustee may consolidate this Trust with another trust for the same uses and purposes as provided herein insofar as it is practicable and not in conflict with the provisions of this Trust. Variation in minor details relating to management and distribution shall not be considered as constituting a conflict within the meaning of the preceding sentence.

5.14 ALLOCATION OF INCOME OR PRINCIPAL. To the broadest extent permitted under Oregon law and consistent with the Code and applicable treasury regulations, the trustee may, in the trustee's discretion, allocate receipts and expenses to either income or principal.

5.15 TRUSTEE AMENDMENT POWER. The trustee of this Trust may amend this Trust so that it conforms with any laws or interpretations of law by any governing body or agency relating to government assistance received by the beneficiary, or to better effectuate the purposes of the Trust, the settlors' intent or the intent of any other person making a Contribution to the Trust. However, the trustee is prohibited from amending this Trust in a manner that would: (a) cause inclusion in the donor's estate, the donor's spouse's estate, or the settlor's estate to a greater extent than prior to the amendment; or (b) defeat an outstanding withdrawal right.

5.16 DISTRIBUTION TO BENEFICIARY UNDER AGE TWENTY-FIVE OR LACKING LEGAL CAPACITY. Except as otherwise provided in this instrument, the trustee may make any distribution in any of the following ways to a beneficiary who is under the age of twenty-five (25), incompetent, under legal disability, or considered by the trustee to be unable to handle property if paid to him or her directly, without liability to the trustee:

5.16(1) DIRECT. Directly to the beneficiary.

5.16(2) TO FIDUCIARIES. To the beneficiary's guardian or conservator, to a custodian under the Oregon Uniform Transfers to Minors Act (or a substantially similar Act of another state) to serve for the maximum period of time under applicable law as allowed, or to any other fiduciary.

5.16(3) OTHERS. To any person or organization furnishing health care, education, support, or maintenance.

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5.17 POWER TO APPOINT AGENT. A trustee shall have the power to appoint a general or special agent to act on trustee's behalf for a temporary period of time. Any power of attorney trustee creates pursuant to this power shall cease when the appointing trustee ceases to act as trustee.

5.18 NOTICE, INFORMATION AND REPORTS. Under Oregon law, the trustee may be required to furnish notice of the trust, information and financial reports to

certain beneficiaries. [Any such notice, information and reports required to be furnished to John shall be furnished to the beneficiary protector in addition to John/in lieu of John]. Any such notice, information and reports required to be furnished to any person who is a minor or is financially incapable, shall be given to his or her court-appointed conservator or guardian of the estate. If no such fiduciary has been appointed, or, if the court-appointed conservator or guardian of the estate is serving as trustee, notices and reports shall be given to the beneficiary protector.

ARTICLE 6

6. SPECIAL LIMITATIONS

6.1 LIMITATIONS AND SPECIAL POWERS. Notwithstanding anything contained herein to the contrary, the following limitations and special powers shall apply to the Trust:

6.1(1) LIMIT ON POWERS REGARDING INVESTMENT. During the lifetime of the settlor, no person, other than the trustee acting in a fiduciary capacity, shall have or exercise the power to vote or direct the voting of any stock or other securities of the Trust, to control the investment of the Trust either by directing investments or reinvestment, or by vetoing proposed investments or reinvestment, or to reacquire or exchange any property of the Trust by substituting other property.

6.1(2) NO DISTRIBUTIONS FOR LEGAL OBLIGATIONS. No distributions of principal or income shall be made to or for a beneficiary in lieu of or in discharge of the settlors' legal obligations, including the obligations of support and maintenance.

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6.1(3) DECISIONS. No trustee shall participate in a decision that would cause any portion of the Trust to be includable in the estate of the trustee for federal estate tax purposes. Any such decision, if any, shall be made by an independent Trustee as provided for in this agreement.

ARTICLE 7

7. DEFINITIONS.

7.1 DESCENDANTS. "Descendants" means all naturally born or legally adopted descendants of the person indicated. Notwithstanding any other provision hereof or of state law, the person's "descendant" shall not include an individual who is such person's "descendant" by adoption if such individual is older than the permissible distributees of this trust determined as of the date of the death of the settlor.

7.2 BENEFICIARY PROTECTOR. "Beneficiary protector" means the person designated to act in good faith to protect the interests of a person who is a minor or financially incapable, with all of the rights a beneficiary has at law or in equity to protect the beneficiary's interest in a trust. The authority of the beneficiary protector includes the following:

7.2(1) NOTICES. To receive notices and reports required under Oregon law on behalf of a financially incapable beneficiary as provided for in ORS 130.020(3)(b);

7.2(2) ADVISE TRUSTEE. To advise the trustee regarding appropriate trust distributions. The trustee shall have the discretion to make the final decision regarding trust distributions, but shall give any advice from the beneficiary protector significant weight in making the decision.

ARTICLE 8

8. MISCELLANEOUS PROVISIONS

8.1 SPENDTHRIFT. No interest in the principal or income of this share shall be anticipated, assigned or encumbered, or shall be subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary. Furthermore, the settlors declare that it is the settlors' intent as expressed herein, that because this share is to be conserved and maintained primarily for John's needs, that no part of the principal or undistributed income shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential and institutional care, by any public entity, office, department or agency of the State of Oregon, or any other state, or of the United States, or any other governmental agency.

8.2 GST EXEMPTION. The following provisions apply in considering the federal generation-skipping transfer tax ("GST") consequences, if any, of this Trust.

8.2(1) CREATE TWO TRUSTS. If a trust created under this instrument (the "original trust") would otherwise be partially exempt from federal generation-skipping transfer tax ("GST") after the intended allocation of a GST exemption to it, then, before such intended allocation and as of the relevant valuation date under Section 2642 of the Code with respect to such allocation, the trustee may (but need not) create instead two separate trusts of equal or unequal value which shall be funded fractionally out of the available property, and which shall be identical in all other respects to the original trust, so that the allocation of GST exemption can be made to one trust which will be entirely exempt from federal generation-skipping transfer tax. The two trusts created under this subsection: (1) shall have the same name as the original trust except that the trust to which the GST exemption is allocated shall have the phrase "GST exempt" added to its name, and (2) are sometimes referred to herein as "related". As used in this instrument, the "GST exemption" means the exemption from federal generation-skipping transfer tax allowed under Section 2631 of the Code.

8.2(2) HOLD PROPERTY IN SEPARATE TRUST. If property which is held in, or is to be added or allocated to, a trust pursuant to this instrument is subject to different treatment for any reason for purposes of the federal generation-skipping transfer tax than other property being added or allocated to, or also held in, that trust, then the trustee may (but need not) hold such property instead as a separate trust that is appropriately designated to distinguish it from the trust to which the property otherwise would have been allocated, but that is identical in all other respects to that trust. The identical trusts resulting from application of this subsection are also sometimes referred to herein as "related". It is the settlors' intent that the trustee shall not be required to create or administer a trust hereunder that is only partially exempt from federal generation-skipping transfer tax, or to commingle property subject to different treatment for federal generation-skipping transfer tax purposes whether because the transferors with respect to the property are assigned to different generations or otherwise. The provisions of this section are intended to enable the trustee to avoid such situations by empowering the trustee to segregate trust property (1) that is entirely exempt from federal generation-skipping transfer tax from trust property that is not exempt, or (2) that is otherwise treated differently from other trust property for purposes of the federal generation-skipping transfer tax, and the provisions of this section should be applied in a manner consistent with this intention.

8.2(3) DISCRETION. To the extent it is consistent with the trustee's fiduciary obligations, the trustee, in making discretionary distributions of net income and principal from the related trusts referred to earlier in this Article, shall

take advantage of the opportunities provided by the creation of such related trusts to avoid or delay federal generation-skipping transfer tax when making discretionary distributions, to pursue different investment strategies for those trusts, if appropriate, and to maximize the amount of trust property that eventually may be distributed to the settlors' grandchildren or more remote descendants without transfer tax of any kind at the termination of all trusts created under this instrument.

8.3 CONSTRUCTION. The section headings used are for convenience only and shall not be resorted to for interpretation of this Trust. Wherever the context so requires, the masculine shall include the feminine and neuter and the singular shall include the plural. All references to Code Sections shall be construed as reference to a section of the Internal Revenue Code of l986, as amended, and corresponding provisions of subsequent federal tax laws. If any portion of this Trust is held to be void or unenforceable, the balance of this Trust shall nevertheless be carried into effect.

8.4 BOND. No bond shall be required of the original trustee hereunder, but may be required in the case of a successor corporate trustee, unless otherwise waived by the settlors' children.

8.5 PERSONS DEALING WITH TRUSTEES. No one dealing with the trustee hereunder need inquire concerning the validity of anything the trustee purports to do, or need to see to the application of any money paid or any property transferred to or upon the order of the trustee.

8.6 LIMITATION ON LENGTH OF TRUST. Despite any other provision of this instrument, each trust created by this instrument shall terminate and be distributed as if it had then terminated in accordance with its terms not later than twenty-one (21) years after the death of the last survivor of the individual beneficiaries herein living at the date of death of the settlor.

8.7 GOVERNING LAW. This Trust is to be governed and construed and administered in accordance with the laws of the State of Oregon and shall continue to be so governed and construed and administered, even though administered elsewhere within the United States or abroad.

8.8 CERTIFIED COPIES OF THIS AGREEMENT. To the same effect as if it were the original, anyone may rely upon a copy certified by a Notary Public to be a true copy of this Agreement (and of the writings, if any, endorsed thereon or attached thereto).

PAGE 13 - THE JOHN SMITH SPECIAL NEEDS TRUST

Anyone may rely upon any statement of facts certified by anyone who appears from the original document or a certified copy thereof to be a trustee hereunder.

IN WITNESS WHEREOF, the settlors have hereunto set their hands this _____ day of _____, 2011.

SETTLORS:

MRS. SMITH

MR. SMITH

TRUSTEE:

TRUSTEE

ACKNOWLEDGMENT:

On this _____ day of _____, 2011, before me personally appeared MRS. SMITH and MR. SMITH, settlors, and acknowledged the foregoing instrument to be their voluntary act and deed.

_____

Notary Public

PAGE 14 - THE JOHN SMITH SPECIAL NEEDS TRUST

THE JOHN SMITH

SPECIAL NEEDS TRUST AGREEMENT

SCHEDULE A

Date: Asset: