

**THE SUPPLEMENTAL NEEDS TRUST
AS PART OF
YOUR ESTATE PLAN**

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When there is a member of the family with a disability, special provisions must be made to properly and effectively provide for them. In the preparation of an estate plan, the person who has a family member with a disability should include a supplemental needs trust as an important part of their estate plan.

1. What is a supplemental needs trust?

The supplemental needs trust is a fund established by parents or other family members to provide for the well being and needs of their family member with a disability.

2. What is the purpose of a supplemental needs trust?

The trust is intended and designed to pay for those "extra" items which are not provided by or paid for by publicly funded (government) programs. The goal is to provide resources for all of the things the government assistance does not provide so as to improve the quality of life for the person with a disability. Trust assets can be used to pay for clothing, furniture, books, video games, activities, entertainment like movies or going out with friends, tickets to concerts, plays or sporting events, or vacation and travel expenses. It can also be used to pay for things like dental work, eyeglasses or supportive medical equipment that is not covered by Medical Assistance or private insurance.

3. Does the law support the use of supplemental needs trusts?

For years, the legislation, court cases and Department of Human Services rules of many states have allowed the use of a supplemental needs trust. The following act as the foundation for legal support for the use of a supplemental needs trust: in Minnesota, statute M.S. 501C.1205 Subdivisions 2 & 3 (2016), the Minnesota Court of Appeals case known as Carlisle (498 N.W. 2d 260 (Minn. App. 1993)), and the DHS Health Care Services Manual; and nationally, the passage of the federal law known as OBRA 1993, 42 USC 1396p(d)(4)(A), and the Zebley case (US Supreme Court, 110 S. Ct. 885 (1990)).

4. Will the trust disqualify the beneficiary from publicly funded benefits?

If the trust is properly drafted, funded and administrated in accordance with the above noted laws, the trust will not disqualify the beneficiary with a disability from any publicly funded (government) programs.

5. Can the supplemental needs trust be incorporated into a Will?

A parent, grandparent, sibling or other interested person can include a provision in their Will which, upon their death, will establish and fund a supplemental needs trust. As an example, following the parent's death the trust will thereafter pay for the "extras" for the child with a disability which were previously being paid for by the parent.

6. Can the supplemental needs trust instead be established and used during the parents' lifetime?

Instead of establishing the trust upon death by means of the Will, the supplemental needs trust may also be created and established as a separate trust by a parent, grandparent, sibling or other interested person during their lifetime. In many cases, this type of trust is preferable because it allows for greater flexibility in the estate plan and will likely ensure that the trust is "grandfathered in" if there is a change in the law. Such a trust allows the parent to supervise and operate the trust to establish a history and ensure the foundation is laid for the on going administration of the trust. It also allows other persons to put funds into the trust, such as a grandparent placing funds into the trust established by the parent of the child with a disability.

7. How can the supplemental needs trust be funded?

The trust can be funded in many ways including designated gifts, life insurance proceeds and distributions from a Will. If your intention is to make the trust a beneficiary on a tax-deferred retirement account, however, you should take care to be fully informed of the potential tax implications. We generally recommend that you avoid this option and use your other assets to fund the trust.

8. What types of assets can the trust own?

The trust can own various types of assets including bank accounts, certificates of deposit, stocks, bonds, real estate, vehicles and personal property such as a computer or television that are used by the person with a disability for their benefit. Such assets can be bought and sold by the trustee, and the trustee may engage in loans or leases on behalf of the trust. But any assets or ownership interests will create fiduciary obligations of the trustee to maintain, repair and retain those assets for the maximum benefit of the beneficiary. This can include paying taxes or premiums for insurance coverage, or hiring professionals for their services depending on the requirements of maintaining the specific assets in question.

9. Who should be the trustee?

The trustee's duty is to invest, manage and distribute the trust assets in a manner which is in the best interest of the beneficiary with a disability and within the rules of the government assistance programs so as to not jeopardize the eligible status of the beneficiary. Therefore, the trustee must be qualified and motivated to do so. The trustee could then be parents, siblings, family members, friends or a professional fiduciary capable of acting as trustee.

10. What about the personal well being of the beneficiary?

It is the trustee's job to handle the financial assets of the trust, not to make decisions relative to the beneficiary's personal care such as medical care, residential programs, or educational and vocational programs. Such issues are the responsibility of the Guardian of the person with the disability or by the beneficiary themselves if they are capable. Although a probate court proceeding is necessary to actually establish a guardianship and appoint the Guardian, the supplemental needs trust may include nominations for the role expressing the family's wishes, thereby indicating to the court the person best suited to act as Guardian if one is required or if the appointed Guardian(s) is no longer capable of serving. The Guardian and the trustee may or may not be the same person(s).

11. What if the trustee can no longer perform their duties?

The supplemental needs trust is intended to last for the lifetime of the family member with the disability. Therefore it is likely that the person named as trustee may, at some point, be unable or no longer willing to act. The trust should nominate a series of successors to take over when such an event occurs.

12. How does the trustee determine what type of items should be paid for by the trust?

The trustee must work closely with the beneficiary, or their Guardian, to assess and provide for the needs of the beneficiary. However, the trustee should not pay for any items which would be provided for by any publicly funded (government) program. Further, the trustee should not make a distribution which would exceed the income or asset limitation imposed upon the beneficiary by various government programs. It is recommended that the parents provide their successor trustees with a letter of instructions which can provide guidance and knowledge to the trustee as to the personality and preferences of their child, what has been successful in the past, and their hopes and dreams for their child's future.

13. Can the person with a disability place their own assets into a supplemental needs trust?

Based upon the circumstances, two different types of supplemental needs trust are capable of being used:

(1) The first and more traditional type of **supplemental needs trust** (under Minnesota Statute 501C.1205 subdivision 2, originally passed in 1993) is one which is funded by assets which belong to someone other than the beneficiary with a disability (typically the parents, grandparents or siblings). This is the version that is appropriate for long term estate planning as a substitution for the family member with a disability. Because it is funded by individuals other than the person with a disability, this trust is not subject to any claim by the State for reimbursement of Medical Assistance upon the death of the beneficiary and any remaining assets may be distributed to whomever the creators (i.e. settlors) of the trust may designate.

(2) The second type of supplemental needs trust, sometimes referred to as a "**special needs trust**" (under Minnesota Statute 501C.1205 subdivision 3, originally passed in 1995, and under 42 USC 1396p(d)(4)(A), passed as apart of OBRA of 1993) is one which is funded by assets which are in the name of, and belong to, the person with a disability who is the beneficiary of the trust. This trust is used in reaction to the person with a disability receiving a windfall of assets that would cause them to be ineligible for government assistance and cannot easily be spent down. These funds may be from an inheritance, personal injury or medical malpractice settlement or award due to the

beneficiary. The key difference between these two types of supplemental needs trusts is what happens to the assets remaining in the trust after the death of the beneficiary—since the beneficiary himself or herself is the source of the funding, a Medical Assistance reimbursement claim will apply to the remaining assets. The MA claim for this reactionary trust is the main reason why it is so important to plan in advance to utilize the **supplemental needs trust** as part of the estate plan.

14. Upon the death of the trust beneficiary, what happens to the remaining assets of the trust?

The trust may first provide for the arrangement and payment of an appropriate funeral and any related expenses. Thereafter:

(1) **Supplemental Needs Trust.** If the trust was funded by assets belong to someone other than the beneficiary with a disability, then any remaining assets of the trust will then be disbursed in accordance with the directions set forth in the trust by the parents or the person who created the trust. This might include distributions to other children or grandchildren or non-profit organizations.

(2) **Special Needs Trust.** If, however, the trust has been funded by assets belonging to the beneficiary with a disability, then any assets remaining in the trust must first be used to repay Medical Assistance, or other governments funding sources, for the total amount they have paid out on behalf of the beneficiary during their lifetime. Thereafter, any remaining funds can be distributed to the person or organization designated by the one who created the trust.

15. Can the supplemental needs trust incorporate provisions for a non-profit organization?

Many times the family has a strong desire to distribute a portion of the remaining trust assets to a non-profit organization which has provided invaluable services and support to their family member with a disability. The supplemental needs trust can be prepared to accomplish this objective. In addition, the supplemental needs trust coordinates very well with other charitable giving techniques such as a charitable remainder trust.

16. How can I find out more about establishing a supplemental needs trust?

Consult with your attorney and certified financial planner on the specifics of the supplemental needs trust and how it can and should be a part of your estate plan.

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