Supplemental and Special Needs Trusts – Establishing, Administering, Amending, and Defending
Minnesota CLE’s Copyright Policy

Minnesota Continuing Legal Education wants practitioners to make the best use of these written materials but must also protect its copyright. If you wish to copy and use our CLE materials, you must first obtain permission from Minnesota CLE. Call us at 800-759-8840 or 651-227-8266 for more information. If you have any questions about our policy or want permission to make copies, do not hesitate to contact Minnesota CLE.

All authorized copies must reflect Minnesota CLE’s notice of copyright.

MINNESOTA CLE is Self-Supporting

A not for profit 501(c)3 corporation, Minnesota CLE is entirely self-supporting. It receives no subsidy from State Bar dues or from any other source. The only source of support is revenue from enrollment fees that registrants pay to attend Minnesota CLE programs and from amounts paid for Minnesota CLE books, supplements and digital products.

© Copyright 2018

MINNESOTA CONTINUING LEGAL EDUCATION, INC.

ALL RIGHTS RESERVED

Minnesota Continuing Legal Education's publications and programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that Minnesota CLE does not render any legal, accounting or other professional advice. Attorneys using Minnesota CLE publications or orally conveyed information in dealing with a specific client's or other legal matter should also research original and fully quoted sources of authority.
The Minnesota CLE Board consists of practicing attorneys and Judges from throughout Minnesota as well as one representative from each Minnesota law school. This provides representation of the interest and efforts of the bench, practicing bar and academic community.

Minnesota Continuing Legal Education is a non-profit 501(c)(3) organization. Minnesota CLE receives no subsidy from Bar dues or any other source. The only source of support is revenue from program tuition and publication sales. The basic ingredient in Minnesota CLE’s success is the involvement of the very best Minnesota lawyers from the practicing bar, bench and academic community. These dedicated individuals have given generously of their time and talent to make Minnesota CLE courses and its publications what they are today.
the communities at
my.mnbar.org

Improving the way you connect, learn and collaborate with your colleagues at the MSBA.

Sample new features include ability to: search discussion posts and document libraries, schedule delivery of emails, and share files in a central location. For more information, send a note to feedback@mnbar.org or see, my.mnbar.org/tutorial

GET STARTED!
Use your existing MSBA credentials to login today.

MSBA

the communities at
my.mnbar.org
Faculty

Lori L. Guzmán
Guzmán Law Firm PA
Apple Valley

Eric Jonsgaard
First Fiduciary Corp
Eagan
Table of Contents

1 Supplemental and Special Needs Trusts - Establishing, Administering, Amending, and Defending
   - Lori L. Guzmán & Eric Jonsgaard

Additional resources may be found at: https://www.minncle.org/eAccess/2025411901/index.htm
Supplemental and Special Needs Trusts - Establishing, Administering, Amending, and Defending

Presented by:

Lori L. Guzmán
Guzmán Law Firm PA
Apple Valley

Eric Jonsgaard
First Fiduciary Corp
Eagan

Prepared by:

Lori L. Guzmán
Guzmán Law Firm PA
Apple Valley
I. INTRODUCTION

Supplemental Needs Trusts and Special Needs Trusts benefit people with disabilities by supplementing and managing their resources while maintaining their eligibility for public assistance benefits. If these trusts are properly drafted, funded, and administered, the assets within the trust will not be deemed available to the beneficiary and will not disqualify the beneficiary from receiving public benefits such as Medical Assistance and Supplemental Security Income. The trust funds are supplementary or secondary to public or government benefits.

The primary difference between the Supplemental and Special Needs Trust is in whose assets fund the trust. If the person with the disability is funding the trust with their own assets, such as through an inheritance they received, it is a Special Needs Trust. If the trust is funded with assets belonging to someone other than the person with the disability or their spouse, such as by a parent or grandparent, then it is a Supplemental Needs Trust. The following charts illustrate a few of the similarities and differences between the Supplemental and Special Needs Trusts:

<table>
<thead>
<tr>
<th>Supplemental Needs Trusts</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Use/Purpose</td>
<td>Generally used for estate planning to provide supplemental resources for a person with a disability that allows for the individual to maintain eligibility for public assistance programs.</td>
</tr>
<tr>
<td>For</td>
<td>A person with a disability of any age, except those persons over age 64 who reside in a long-term care facility</td>
</tr>
<tr>
<td>Established by</td>
<td>Third parties. Cannot be established by the beneficiary, beneficiary’s spouse, or anyone obligated to the beneficiary per terms of a settlement or judgment.</td>
</tr>
<tr>
<td>Funded by</td>
<td>Assets belonging to third parties. Cannot be funded by the beneficiary or the beneficiary’s spouse or anyone obligated to the beneficiary per terms of a settlement or judgment.</td>
</tr>
<tr>
<td>Distribution on Death</td>
<td>To person(s) or non-profit designated by the Settlor.</td>
</tr>
<tr>
<td>Legal Authority</td>
<td>Minn. Stat. § 501C.1205 subd. 2, and Minn. Stat. § 256B.056, subd. 3b(a) and (b)</td>
</tr>
<tr>
<td>Verification/Reporting Requirements</td>
<td>MDHS requires reporting/verification of trust when funded and in existence. Copy of trust supplied at application or recertification. One time disclosure.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Special Needs Trusts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use/Purpose</td>
</tr>
<tr>
<td>For</td>
</tr>
<tr>
<td>Established by</td>
</tr>
</tbody>
</table>
**Special Needs Trusts**

<table>
<thead>
<tr>
<th>Funded by</th>
<th>Assets of the Beneficiary = resources of Beneficiary or spouse (can be assets entitled to but not yet received)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distribution on Death</td>
<td>Governmental Agency to reimburse for all Medical Assistance benefits paid to Beneficiary; excess to person or non-profit designated by Settlor</td>
</tr>
<tr>
<td>Legal Authority</td>
<td>42 U.S.C. § 1396p(c) and (d): Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), and Minn. Stat. § 501C.1205 subd. 3</td>
</tr>
<tr>
<td>Verification/Reporting Requirements</td>
<td>MDHS requires reporting, verification and accounting. Must supply a copy of the trust and initial trust inventory upon application for MA, or upon creation of trust if already MA recipient. Annual trust accountings must be filed with MDHS for duration of trust existence.</td>
</tr>
</tbody>
</table>

II. **SUPPLEMENTAL NEEDS TRUST**

A. **Trust Purpose**

A Supplemental Needs Trust serves to benefit a person with a disability by supplementing the government benefits he or she receives. The trust is used to protect financial resources for a person with a disability who is receiving or will be receiving publicly funded benefits. Both the income and principal of the trust may be used by the trustee to augment the government benefits received by the person with a disability. However, the trustee must first rely upon government benefits before making distributions. Only when the benefits from these programs are insufficient to meet the needs of the beneficiary, is the trustee authorized to make distributions.

Publicly funded benefits such as Social Security and Medical Assistance provide a basic level of income support for food, clothing, shelter, and medical care. By supplementing this basic support, the Supplemental Needs Trust enhances the quality of life of the person with a disability by providing for those supplemental needs, such as more sophisticated medical, rehabilitative, recreational or educational aid, not provided by governmental assistance.

B. **Legal Authority**

Minnesota Statute § 501C.1205, subd. 1 prohibits the establishment of trusts that provide for the suspension, termination, limitation, or diversion of the principal or income of the trust if the beneficiary applies for or is determined eligible for public assistance benefits. The Supplemental Needs Trust is an exception to this rule and its authority is found in Subdivision 2.

Minnesota Statute § 501C.1205, subd. 2. states that it is the public policy of the State to enforce a “supplemental needs trust.” This subdivision applies to a third-party Supplemental Needs Trust. The Supplemental Needs Trust is defined as a trust which is created for the benefit of a person with a disability and is funded by someone other than the trust beneficiary, the beneficiary’s spouse, or anyone with a legal obligation to pay...
any sum for damages or any other purpose for the benefit of the trust beneficiary under the terms of a settlement agreement.

**501C.1205 Trust provisions linked to public assistance eligibility; supplemental needs trusts.**

Subdivision 1. **Trusts containing limitations linked to eligibility for public assistance.**
(a) Except as allowed by subdivision 2 or 3, a provision in a trust that provides for the suspension, termination, limitation, or diversion of the principal, income, or beneficial interest of a beneficiary if the beneficiary applies for, is determined eligible for, or receives public assistance or benefits under a public health care program is unenforceable as against the public policy of this state, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(b) This subdivision applies to trust provisions created after July 1, 1992. For purposes of this section, a trust provision is created on the date of execution of the first instrument that contains the provision, even though the trust provision is later amended or reformed or the trust is not funded until a later date.

Subdivision 2. **Supplemental trusts for persons with disabilities.**
(a) It is the public policy of this state to enforce supplemental needs trusts as provided in this subdivision.

(b) For purposes of this subdivision, a "supplemental needs trust" is a trust created for the benefit of a person with a disability and funded by someone other than the trust beneficiary, the beneficiary's spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the benefit of the trust beneficiary under the terms of a settlement agreement or judgment.

(c) For purposes of this subdivision, a "person with a disability" means a person who, prior to creation of a trust which otherwise qualifies as a supplemental needs trust for the person's benefit:

(1) is considered to be a person with a disability under the disability criteria specified in Title II or Title XVI of the Social Security Act; or

(2) has a physical or mental illness or condition which, in the expected natural course of the illness or condition, either prior to or following creation of the trust, to a reasonable degree of medical certainty, is expected to:

(i) last for a continuous period of 12 months or more; and

(ii) substantially impair the person's ability to provide for the person's care or custody.
Disability may be established conclusively for purposes of this subdivision by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, confirmed by the written opinion of a second licensed professional who is qualified to diagnose the illness or condition.

(d) The general purpose of a supplemental needs trust must be to provide for the reasonable living expenses and other basic needs of a person with a disability when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs. Subject to the restrictions contained in this paragraph, a supplemental needs trust may authorize distributions to provide for all or any portion of the reasonable living expenses of the beneficiary. A supplemental needs trust may allow or require distributions only in ways and for purposes that supplement or complement the benefits available under medical assistance, Minnesota supplemental aid, and other publicly funded benefit programs for disabled persons. A supplemental needs trust must contain provisions that prohibit disbursements that would have the effect of replacing, reducing, or substituting for publicly funded benefits otherwise available to the beneficiary or rendering the beneficiary ineligible for publicly funded benefits.

(e) A supplemental needs trust is not enforceable if the trust beneficiary becomes a patient or resident after age 64 in a state institution or nursing facility for six months or more and, due to the beneficiary's medical need for care in an institutional setting, there is no reasonable expectation that the beneficiary will ever be discharged from the institution or facility. For purposes of this paragraph "reasonable expectation" means that the beneficiary's attending physician has certified that the expectation is reasonable. For purposes of this paragraph, a beneficiary participating in a group residential program is not deemed to be a patient or resident in a state institution or nursing facility.

(f) The trust income and assets of a supplemental needs trust are considered available to the beneficiary for medical assistance purposes to the extent they are considered available to the beneficiary under medical assistance, supplemental security income, or Minnesota family investment program methodology, whichever is used to determine the beneficiary's eligibility for medical assistance. For other public assistance programs established or administered under state law, assets and income will be considered available to the beneficiary in accordance with the methodology applicable to the program.

(g) Nothing in this subdivision requires submission of a supplemental needs trust to a court for interpretation or enforcement.

(h) Paragraphs (a) to (g) apply to supplemental needs trusts whenever created, but the limitations and restrictions in paragraphs (e) to (g) apply only to trusts created after June 30, 1993.
C. Trust Design

1. Grantor/Settlor Limitations

The Supplemental Needs Trust may be established and funded by anyone other than the trust beneficiary, his or her spouse, or anyone with a legal obligation of support or reimbursement to the beneficiary. Minn. Stat. § 501C.1205, subd. 2(b). A person with a disability cannot establish the Supplemental Needs Trust for himself or herself. Persons with a legal obligation of support or reimbursement to the beneficiary include anyone obligated to pay any sum for damages or for any other purpose under the terms of a settlement agreement or judgment.

2. Inter Vivos or Testamentary

The trust agreement can be drafted as an inter vivos trust or a testamentary Supplemental Needs Trust. The inter vivos trust is recommended for several reasons. First, it is good practice to create a separate trust during one’s lifetime because there is a greater likelihood of being ensured that the trust will be “grandfathered in” if there any changes in the law. The trust can initially be minimally funded and can later be fully funded by testamentary provisions elsewhere. Second, other family members who want to provide for the disabled individual can do so through the existing trust. Lastly, the inter vivos Supplemental Needs Trust allows for supervision of the trust that can establish a history and help insure the foundation is laid for future ongoing administration of the trust.

3. Court Approval Not Required

The statute specifically states the Supplemental Needs Trust does not need court approval in order to be enforced.

4. Beneficiary

a. Sole Benefit

The Supplemental Needs Trust must be for the beneficiary’s sole benefit. This means that all goods and services purchased from the trust must be purchased for the sole benefit of the beneficiary and no other individual or entity can benefit in any way from the assets or income at the time of a transfer or at any time in the future.

b. Person with a Disability

Subparagraph (c) of Minn. Stat. § 501C.1205, subd. 2 defines the beneficiary of a supplemental needs trust as a person who, prior to the creation of the trust, is a “person with a disability.” The trust must be set up to benefit a person who was certified as disabled before the trust was created. Minn. Stat. § 501C.1205, subd.
2(c). EPM 2.3.3.2.7.9.7. There are two alternative tests to determine whether the beneficiary is a “person with a disability.”

First, if the person is considered disabled under Title II of the Social Security Act (regarding MA) or Title XVI of the Social Security Act, the person is then considered a person with a disability for purpose of the Statute. Second, the beneficiary is considered a person with a disability if he or she has a physical or mental illness or condition which, either prior to or following creation of the trust, is expected to last for a continuous period of 12 months or more, and substantially impairs the person’s ability to provide for his or her care.

Subparagraph (c) also states that a disability may be established conclusively by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, and the diagnosis is confirmed by a second written opinion of a licensed professional. This is not a requirement, but it would be advisable in the situation where the disability may be difficult to determine (such as a survivor of a traumatic brain injury).

c. No age limit – except persons over age 64 in long term care facilities

Subparagraph (e) of Minn. Stat. § 501C.1205, subd. 2 limits the use of a Supplemental Needs Trust for the benefit of a person who is over age 64 and a resident of a state institution or nursing home. Specifically, the statute states that a Supplemental Needs Trust is no longer enforceable if the trust beneficiary becomes a patient or resident, after age 64, in a state institution or nursing care facility for six months or more and there is no reasonable expectation that the beneficiary will ever be discharged.

If these conditions exist, the assets in the trust will be deemed available to pay for the beneficiary’s long-term care needs. However, it is possible to have a Supplemental Needs Trust beneficiary over age 65 and in a nursing home. In this case, the attending physician must determine that there is a reasonable expectation that the individual will return to the community. For purposes of Subparagraph (e) an assisted living facility, adult foster care home, or group home, are not considered a state institution or nursing facility.

5. Trustee

The trustee of the Supplemental Needs Trust may not be the beneficiary. If the beneficiary served as trustee, the funds would be deemed available for purposes of public benefits. The trustee can be the parents, siblings, family members or friends of the beneficiary, a professional trustee, or a trust officer from a financial institution. Frequently, if parents/grandparents serve as Grantors, and establish the Supplemental Needs Trust for their child/grandchild, they also act as trustees.
The Trustee of a Supplemental Needs Trust has the responsibility and discretion to distribute or accumulate income and to determine the timing, amount, and use of the Trust funds. Before making distributions from the trust, the trustee must first rely upon public benefits or government benefits and only if such benefits are insufficient, may the trustee make distributions. Therefore, it is preferable that the selected trustee be familiar with the public benefits that the beneficiary is receiving.

6. Funding the Trust

a. Source of Funds.

The Supplemental Needs Trust can only consist of funds and assets belonging to anyone other than the beneficiary. Resources or income belonging to the beneficiary cannot be added to the trust. The Supplemental Needs Trust can be funded during the life of the settlor. The trust can also be funded at death out of a decedent’s estate or at death through beneficiary designations on an IRA, Annuity, Multi-Party Accounts, or other investments.

b. Minimum Funding.

Even if the inter vivos Supplemental Needs Trust will not be fully funded until the death of the settlor, it is recommended that the settlor fund the trust in a minimal fashion.

7. Remaindermen

Upon the death of the beneficiary, the remaining assets of the Supplemental Needs Trust are distributed according to the provisions set forth in the trust as determined by the Grantor. This might include distributions to other children or grandchildren or non-profit organizations.

8. Supplemental Purpose

The purpose of the Supplemental Needs Trust is to benefit persons with a disability by supplementing the government benefits they receive. The trust may cover reasonable living expenses and other basic needs of a person with a disability when public assistance does not provide enough for those needs. EPM § 2.3.3.2.7.9.7. This section goes on to state that the trust may allow or require distributions only to supplement or complement benefits from public assistance programs. Further, the section indicates disbursements should be prohibited if they would have the effect of replacing or reducing public assistance that is otherwise available.
D. Trust Administration

The trustee of a Supplemental Needs Trust must closely observe the statutory requirements and guidelines as he or she administers the trust. Failure to make disbursements according to the statutory requirements can result in a determination that the funds are available to the beneficiary. If funds are deemed available, continuance of some, if not all, of the beneficiary’s public benefits may be denied due to an excess of available funds.

1. Manner of Distribution

Under NO circumstances, can the assets of a Special Needs Trust be directly disbursed to the beneficiary. All payments from the trust should be made to the person or persons supplying goods or services to the beneficiary.

   a. Medical Assistance

   Payments made directly to the providers of goods and services for the benefit of the beneficiary are not considered an available resource by Medical Assistance. EPM 2.3.3.2.7.9.7. Payments made directly to the beneficiary could be treated as available income and may result in the loss of Medical Assistance benefits.

   b. Supplemental Security Income

   Payments made directly to the providers of goods and services for the benefit of the beneficiary are not considered available income for the Supplemental Security Income Program.

2. Distribution Standards

The Supplemental Needs Trust may grant the trustee the powers and authorities under the Minnesota Trustee’s Powers Act. The trust should also clearly set forth the limitations on the trustee’s powers that are consistent with the statutory requirements provided in Minn. Stat. § 501C.1205, subd. 2 and the requirements provided in EPM 2.3.3.2.7.9.7. The following include sample provisions:

   • The trustee shall not make any disbursements of the income and principal of this Trust that would have the effect of replacing, reducing or substituting publicly-funded benefits otherwise available to the Beneficiary or rendering him or her ineligible for publicly funded benefits.

   • The trustee shall expend such sums of the income and principal of the Trust to or for the benefit of the Beneficiary only for purposes which supplement benefits from publicly-funded programs.
- The beneficiary shall not make any distributions for the Beneficiary’s food, shelter, clothing, medical care, or other basic necessities as provided or to be provided by any governmental unit.

- The trustee is under no obligation to make any expenditure, but if the trustee decides to make any expenditure, the trustee shall under no circumstances pay to or reimburse any sums to any governmental unit or governmental agency for any purpose including the care, support, maintenance, and education of the beneficiary.

As seen in the preceding provisions, the trustee is directed to first rely upon public or governmental benefits, such as Supplemental Security Income or Medical Assistance. The trust funds cannot be used to pay for items or services for the beneficiary that are already provided or could be provided by any governmental unit. Generally, the items and services provided by the governmental units or agencies cover basic needs such as food, shelter, clothing, and medical care. The trust can provide for the beneficiary’s reasonable expenses for the following needs only when the benefits from publicly funded benefit programs are not sufficient to provide adequately for them or they are not available from public sources:

- Special medical care, equipment, dental care, personal supervision, companion services, private room charges, counseling and treatment not covered by publicly funded benefit programs, and legal, accounting and other professional fees.

- The purchase, maintenance, repair or modification of a home suitable for a person having the Beneficiary’s disability. If any real estate is used for homestead residential purposes for the Beneficiary, the beneficiary shall have the unqualified right to reside in and occupy such property so long as the Trustee (or the guardian or conservator of the Beneficiary) deems such residence to be desirable, practicable and safe.

- Transportation or a suitable vehicle, and for comfort, convenience and reasonable luxuries which may include, but are not necessarily limited to, entertainment, education, vacations and travel, as the Trustee, in the Trustee’s sole discretion, deems advisable.

3. Reporting/Verification Requirements.

Medical Assistance applicants/ recipients must report the existence of the trust to Minnesota Department of Human Services upon application or recertification. This is part of the verification process for the application of benefits or the recertification of the continuation of benefits. A copy of the trust instrument must also be supplied. Verification of the supplemental needs trust is required only one time per supplemental needs trust.
E. Termination

The Supplemental Needs Trust can terminate for several reasons. The death of the sole beneficiary of the trust will terminate the trust. The trust usually contains a provision for the trust to terminate upon the death of the beneficiary and that the trustee can then distribute the remaining trust assets to the listed remainder beneficiaries.

The trust may also terminate if the trust assets have been exhausted so that continuance of trust administration is unduly burdensome or expensive to the Beneficiary. In addition, the Supplemental Needs Trust should include a termination clause that would effectively terminate the trust if the existence of the trust renders the beneficiary ineligible for benefits from any governmental unit or governmental agency.

F. Tax Consequences

1. Estate and Gift Tax

If the client’s goal is to ensure that the assets of the Supplemental Needs Trust are not included in the taxable estate, steps should be taken to avoid the Supplemental Needs Trust being deemed as a grantor trust for estate tax purposes. Under IRC § 2036, the grantor should not serve as trustee. If the grantor is the trustee, the Supplemental Needs Trust will be included in the grantor’s taxable estate. This is because the grantor/trustee of a Supplemental Needs Trust has the right to control trust distributions and the ability to designate the persons who shall receive and enjoy the assets.

An outright gift made to a person with a disability would have a detrimental effect on public assistance. Gifts should always be made to the Supplemental Needs Trust. However, gifts to a Supplemental Needs Trust in most circumstances do not qualify for the annual gift tax exclusion. This is because most Supplemental Needs Trusts make the distribution of the income and principal subject to the trustee’s sole discretion and therefore the gift would not be a present interest and would not qualify under IRC § 2503.

2. Federal Income Tax

In most cases, a Supplemental Needs Trust is a “complex trust” for income tax purposes and the income earned is taxable and payable by the trust. If the Supplemental Needs Trust is a grantor trust, the income tax will be taxed to the grantor rather than the trust. Various factors cause a trust to be a grantor trust for income tax purposes. IRC § 673-677.
III. SPECIAL NEEDS TRUST

A. Trust Purpose

Similar to a Supplemental Needs Trust, a Special Needs Trust serves to benefit a person with a disability by supplementing the government benefits he or she receives. The trust is used to shelter financial resources for a person with a disability who is receiving or will be receiving publicly funded benefits. Both the income and principal of the trust may be used by the trustee to augment the government benefits received by the person with a disability.

In contrast to the Supplemental Needs trust, the Special Needs Trust must contain a “payback clause.” The public policy behind the Special Needs Trust was and remains one of “quid pro quo.” A person with a disability is able to retain their assets by placing them into a Special Needs Trust and is able to use the assets to supplement their government benefits during their lifetime. At the individual’s death, however, any assets remaining in the trust must be repaid to the state for medical assistance benefits paid on behalf of the person during their lifetime.

B. Legal Authority

On October 1, 1993, Congress passed 42 United States Code 1369p(d) (dealing with “liens, adjustments and recoveries and transfers of assets.”). Under 42 USC §1369p(d)(1)-(3) first party trusts, trusts created with assets of the Medical Assistance recipient, are generally considered available. Special Needs Trusts were created as an exception to the general rule that assets of a first party trust are available. §1369p(d)(4)(A) reads: “A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Plan under this subchapter.”

In 1995, Minnesota added Subdivision 3 to Minn. Stat. §501C.1205. This subdivision states that a trust created under 42 USC 1362p(c)(2)(B)(iv) or 1396p(d) is enforceable and the courts of Minnesota may authorize creation and funding of a trust which so qualifies. In other words, Subd. 3 via §1369p(d)(4)(A) permits a disabled person to fund a self-settled special needs trust with his or her own assets.

C. Trust Design

1. Grantor/Settlor Limitations

Under §1369p(d)(4)(A), the only persons who may establish a Special Needs Trust for the benefit of a person with a disability are a parent, grandparent, legal guardian or conservator, or a court. This federal provision was amended in
December 2016 to allow persons with disabilities to establish and fund their own special needs trusts. This change was a result of the passage of the Special Needs Trust Unfairness Act that was included in the 21st Century Cures Act signed into law by President Obama on December 20, 2016.

2. Court Approval and Supervision

If a beneficiary has parents or grandparents who are willing to act as settlors and the beneficiary is not a ward or conservatee, court involvement is generally not required. If the beneficiary is under guardianship or conservatorship, court involvement is required. Direct court approval to establish the Special Needs Trust will most likely come in the context of the court’s approval of a petition in the probate division under Chapter 524 for guardianships, conservatorships, and protective arrangements. For example, if a beneficiary’s assets are already under the Probate Court’s supervision as part of a conservatorship, it will be necessary for the conservator to seek court approval to transfer assets to fund the Special Needs Trust. It is necessary for the court to direct the establishment of the special needs trust. A court cannot simply approve of the trust, it must direct its establishment.

In cases where there is no parent, grandparent, conservator, or guardian available to establish the Special Needs Trust, seeking court authorization/direction will be necessary to establish the trust. In these situations, the court itself may act as the settlor of the Special Needs Trust, ordering that the trust be established. Also, direct court establishment may also come in the context of a court’s approval of a tort settlement or dissolution judgment or decree.

Once the establishment of a Special Needs Trust is directed by the court, the trust generally remains under the Court’s continuing supervision. The court may allow the trustee to be confirmed in the initial petition to establish the trust or may require an ex parte petition to confirm the trustee. The trustee is required to prepare an initial trust inventory of the property to be held in the Special Needs Trust and must make annual accountings of all financial activity conducted by the trust.

The various district courts have their own requirements relative to court establishment of a Special Needs Trust. An attorney should consult with the specific county district court prior to bringing a petition to establish a trust.

3. Provision for Payback to Medical Assistance

The Special Needs Trust must specify that upon termination of the trust, the Department of Human Services will receive all amounts remaining in the trust up to an amount equal to the total medical expenses paid through Medical Assistance on the client’s behalf. EPM 2.3.3.2.7.9.4.

Payments for expenses for last illness and funeral and the beneficiary’s outstanding debts or expenses Payments are not permitted to be paid after the
beneficiary’s death and before the Department of Human Services. Administrative expenses or attorney’s and trustee’s fees related to the termination of the trust are permissible to be collected before disbursement to the Department of Human Services in limited circumstances. In these cases, the trust must clearly state that it will allow reasonable and necessary administrative expenses approved by the Department of Human Services or approved by the Probate Court with advance notice to the Department of Human Services.

4. Beneficiary

   a. Sole Benefit

   The Special Needs Trust must be for the beneficiary’s sole benefit. This means that all goods and services purchased from the trust must be purchased for the sole benefit of the beneficiary. The trust should only allow distributions from the trust that are for the sole benefit of the client at the time the trust is created and any time in the future. The sole benefit requirement is not met if the trust allows for payments to the spouse or dependents, even if the client has no spouse or dependents. EPM 2.3.3.2.7.9.4.

   b. Person with a Disability

   The applicable definition of disability is set forth in 42 USC 1382c(a)(3)(A). The section states that an individual shall be considered to be disabled for the purposes of this subchapter if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity.)

   Disability may also be established by a State Medical Review Team (SMRT) that uses similar criteria to the Social Security Administration. Also, a licensed professional qualified to diagnose the illness or condition can also certify a person as disabled. This must be confirmed by a second licensed professional of the same qualification. EPM 2.3.3.2.7.9.4.

   c. Under Age 65

   The beneficiary must be under 65 when the trust is established. If the Special Needs Trust is established while the beneficiary is under age 65, the trust funds will remain protected when the beneficiary reaches the age of 65. EPM 2.3.3.2.7.9.4. However, any additions to the trust assets after the beneficiary reaches the age 65 will be considered an asset transfer and will not receive protection under the Special Needs Trust provisions.
5. Funding the Trust

The Special Needs Trust can only be funded with assets of the individual who is disabled. The term “assets of the individual” is defined in 42 USC 1396p(d)(6)(e)(1) as follows:

(1) The term “assets” with respect to an individual, includes all income and resources of the individual and of the individual’s spouse, including any income or resources which the individual or such individual’s spouse is entitled to but does not receive because of action—

(A) by the individual or such individual’s spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual’s spouse; or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual’s spouse.

In summary, the Special Needs Trust can consist of funds and assets belonging to the beneficiary or given to the beneficiary or awarded to him or her prior to reaching age 65. The trust may include any assets and income which belong to any person other than the trust Beneficiary, provided, however, that any such assets or income shall be held for the sole benefit of the trust Beneficiary and be subject to administration and distribution set forth in the trust agreement. Any person, other than the trust Beneficiary, who contributes assets or income to this instrument shall be deemed to know and acknowledge that said assets and income so contributed shall be for the sole benefit of the trust Beneficiary and be subject to the terms and conditions of the trust instrument.

6. Trustee

The trustee of the Special Needs Trust may not be the beneficiary. If the beneficiary served as trustee, the funds would be deemed available for purposes of public benefits.

Similar to the Supplemental Needs Trust, selecting an appropriate trustee for a Special Needs Trust is a critical decision. If possible, the trustee should have knowledge of public benefit programs and their regulations. The trustee should be familiar with the beneficiary’s particular needs and circumstances. Family members are a good choice for trustee because they are often most familiar with the beneficiary’s needs.

If a beneficiary has no family or close relatives available or the duties and responsibilities would be overwhelming and unmanageable for the family members, professional fiduciaries are available to serve as trustees. The range of fees as well as
experience in handling Special Needs Trust varies greatly among professional trustees.

Regardless of who is selected to serve as trustee, and whether or not the trust is court-supervised, the trustees should be provided with general guidelines to follow in administering a Special Needs Trust.

7. **Supplemental Purpose**

The Special Needs Trust may only allow the trustee to make distributions that supplement or complement governmental benefits. The trust funds cannot be used to pay for items or services for the beneficiary that are already provided or could be provided by any governmental unit.

D. **Trust Administration**

The administrative concerns for the Special Needs Trust are similar to the Supplemental Needs Trust with the exception of the additional accounting requirements required by Minnesota Department of Human Services for Medical Assistance applicants and recipients. The trustee must closely observe the statutory requirements and guidelines when administering these trusts. Failure to make distributions according to these requirements could result in a determination that the trust funds are available to the beneficiary and that beneficiary is ineligible for governmental benefits.

1. **Manner of Distribution**

The Special Needs Trust prohibits any distribution directly to the beneficiary. The trustee must make distributions directly to the persons providing services or goods to the beneficiary. If distributions are made directly to the beneficiary, the payments will be considered available to the beneficiary for purposes of qualifying for public benefits.

2. **Distribution Standards**

The trustee shall not distribute income or principal to the beneficiary that would replace, reduce, or substitute any public assistance benefits received by the beneficiary. The trustee should be familiar with the benefits the beneficiary receives from governmental units. The trustee should periodically review the benefits to which the Beneficiary is entitled from any governmental unit or governmental agency, including, but not limited to Social Security Administration benefits, Medicare benefits, Medical Assistance benefits, and Supplemental Security Income benefits. The trustee’s distributions must be made for the beneficiary’s extra and supplemental care, maintenance, support and education over and above the benefits these programs provide.
Generally, the items and services provided by the governmental units or agencies cover basic needs such as food, shelter, clothing, and medical care. The trustee may pay for special medical care, equipment, dental care, personal supervision, companion services, private room charges, counseling and treatment not covered by the publicly funded benefit programs.

The trustee may also use the trust funds for the purchase, maintenance, repair and modification of a home suitable for a person with the Beneficiary’s disability. If any real estate is used for homestead residential purposes for the Beneficiary, the beneficiary shall have the unqualified right to reside in and occupy such property so long as the Trustee (or the guardian or conservator of the Beneficiary) deems such residence to be desirable, practicable and safe.

The trustee may also expend funds for transportation for a suitable vehicle. For more permissible expenditures, a list of permissible distributions has been provided as an attachment.

3. Reporting Requirements

Minnesota Statutes Section 501C.1205, subd. 4 requires the trustee of a special needs trust “at the time of the beneficiary’s request of medical assistance” submit to the Commissioner of Human Services the following:

a. a copy of the trust instrument; and,

b. an inventory of the beneficiary’s trust account assets and the value of those assets.

The trustee of a special needs trust must also submit an accounting of the beneficiary’s trust account to the Commissioner of Human Services at least annually until the trust or the beneficiary’s interest in the trust, terminated.

Accountings are due on the anniversary date of the trust unless another annual date is established by the terms of the trust. The accountings must include the following information for the accounting period:

a. inventory of trust assets and value of the assets at beginning of accounting period;

b. additions to trust during accounting period and source of those additions;

c. itemized distributions from the trust during the accounting period, including the purpose of the distribution and to whom the distributions were made;
d. an inventory of trust assets and the value of those assets at the end of the accounting period; and

e. changes to the trust instrument during the accounting period.

E. Termination

The Special Needs Trust will terminate upon the death of the sole beneficiary. The trust may also terminate if the trust assets have been exhausted so that continuance of trust administration is unduly burdensome or expensive to the Beneficiary. In addition, the Special Needs Trust should include a termination clause that would effectively terminate the trust if the existence of the trust renders the beneficiary ineligible for benefits from any governmental unit or governmental agency.

F. Tax Consequences

For income tax purposes, the Special Need Trust can be a grantor trust or a complex trust. The income generated by a grantor trust is taxed to the grantor and not to the trust. In contrast, the income generated by a nongrantor trust is taxed to the trust to the extent it is not distributed to the grantor.
# APPENDIX

## SIDE BY SIDE COMPARISON OF SUPPLEMENTAL AND SPECIAL NEEDS TRUSTS

<table>
<thead>
<tr>
<th>Use</th>
<th>Supplemental Needs Trust</th>
<th>Special Needs Trusts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use</td>
<td>Generally used for estate planning to provide supplemental resources for a person with a disability that allows for the individual to maintain eligibility for public assistance programs.</td>
<td>An asset protection vehicle that allows a person with a disability to maintain eligibility for public assistance programs and provides for supplemental resources for goods and services beyond those available through public assistance.</td>
</tr>
<tr>
<td>For</td>
<td>Person with a disability of any age, except those persons over age 64 or who reside in a long-term care facility.</td>
<td>Person with a certified disability under age 65 at the time of establishment.</td>
</tr>
<tr>
<td>Established by</td>
<td>Third parties only. Cannot be established by the beneficiary, the beneficiary’s spouse or anyone obligated to the beneficiary per the terms of a settlement or judgment.</td>
<td>Person with a disability, parent, grandparent, court appointed guardian/conservator, or court.</td>
</tr>
<tr>
<td>Funded by</td>
<td>Assets belonging to third parties only. Cannot be funded by the beneficiary, the beneficiary’s spouse or anyone obligated to the beneficiary per the terms of a settlement or judgment.</td>
<td>Assets belonging to the beneficiary, or anyone else.</td>
</tr>
<tr>
<td>Distribution on Death</td>
<td>To persons, charities, etc. as designated by the Settlor. No payback to the State is required.</td>
<td>Payback to the State is required. Distribution to state agency to reimburse for all medical assistance and Medicaid benefits paid during lifetime. Any excess is then distributed to person, charities, etc. as designated by the Settlor.</td>
</tr>
<tr>
<td>Verification/Reporting Requirements</td>
<td>Report the existence of trust. Provide a copy of trust instrument to MDHS.</td>
<td>Provide copy of trust and initial trust inventory to MDHS. Submit annual accountings including additions, distributions and changes to trust instrument to MDHS.</td>
</tr>
<tr>
<td>Legal Authority</td>
<td>Minn. Stat. § 501C.1205 subd 2, and Minn. Stat. § 256B.056, subd. 3b(a) and (b)</td>
<td>42 U.S.C. § 1396p(c ) and (d): Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), and Minn. Stat. § 501C.1205 subd 3</td>
</tr>
</tbody>
</table>
A sample listing of permissible distributions/expenses from a Minnesota Supplemental Needs Trust or Special Needs Trust

A trustee may use trust funds for any of the many different types of expenditures. This list of permissible purchases of items is provided for purposes of description and is not meant to limit the trustee in making other distributions for other items of amenities that the trustee believes are in the best interest of the beneficiary.

Permissible items of expenses that can be paid for by trust income or assets may include, but are not limited to the following:

1. Automobile/Van
2. Accounting services
3. Acupuncture
4. Appliances (TV, VCR, stereo, microwave, stove, refrigerator, washer/dryer)
5. Bottled water or water service
6. Bus pass/public transportation costs
7. Cable television services
8. Camera, film, recorder and tapes, development of film
9. Cellphones
10. Clubs and club dues (record clubs, book clubs, health clubs, service clubs, zoo, advocacy groups, and museums)
11. PCs, tablets, hardware, software, and Internet service
12. Conferences
13. Courses or classes (academic or recreational) including supplies
14. Curtains, blinds, drapes, and the like
15. Dental work not covered by Medicaid, including anesthesia
16. Down payment on home or security deposit on apartment
17. Dry cleaning and/or laundry services
18. Elective surgery
19. Fitness equipment
20. Funeral expenses
21. Furniture, home furnishings
22. Gasoline and/or maintenance for automobile
23. Haircuts/salon services
24. Holiday decorations, parties, dinner dances, holiday cards
25. Home alarm and/or monitoring/response system
26. Home improvements, repairs, and maintenance (not covered by Medicaid), including tools to perform home improvements, repairs and maintenance by homeowners
27. Home purchase
28. House cleaning/maid services
29. Insurance (automobile, home, and/or possessions)
30. Legal fees/advocacy
31. Linens and towels
32. Massage
33. Musical instruments (including lessons and music)
34. Non-food grocery items (laundry soap, bleach, fabric softener, deodorant, dish soap, hand and body soap, personal hygiene products, paper towels, napkins, Kleenex, toilet paper, and household cleaning products)
35. Over-the-counter medications (including vitamins and herbs, etc)
36. Personal assistance services not covered by Medicaid
37. Pet and pet’s supplies, veterinary services
38. Physician specialists if not covered by Medicaid
39. Private counseling if not covered by Medicaid
40. Repair services (appliance, automobile, bicycle, household, fitness equipment)
41. Streaming services such as Netflix, Hulu, Spotify, etc
42. Snow removal/landscaping/lawn service
43. Sporting goods/equipment/uniforms/team pictures
44. Stationary, stamps, cards, etc.
45. Storage units
46. Taxicab fees
47. Telephone service and equipment, including cell phone, paper, etc.
48. Therapy (physical, occupational, speech) not covered by Medicaid
49. Tickets to concerts or sporting events (for beneficiary and an accompanying companion)
50. Transportation (automobile, motorcycle, bicycle, moped, gas, bus passes)
51. Utility bills (direct TV, cable TV, electric, heating)
52. Video game consoles and video games
53. Vacations (including paying for personal care attendant to accompany the beneficiary)

**Trust Distributions that will Reduce SSI Benefits**

1. Basic shelter-related expenses
2. Food
3. Cash for any purpose

**These types of Trust Distributions are Impermissible:**

1. Paying for a service already paid for by another source
2. Distribution not in the best interest of the beneficiary (made primarily for the benefit of another person)
TRUSTEE INSTRUCTIONS
for the Minnesota Supplemental Needs Trust
(Minn. Stat. § 501C.1205, Subd. 2)

The [NAME OF TRUST], a Minnesota Irrevocable Supplemental Needs Trust, has been established. It is now important to review the general guidelines and instructions that you, as Trustee, must follow when administering this Trust.

It is imperative that you closely observe the statutory requirements and guidelines as you administer the Trust. Failure to make disbursements according to the statutory requirements can result in a determination that the funds are available to [Beneficiary’s Name], as beneficiary. If the Trust funds are deemed available, continuance of some, if not all, of [Beneficiary’s Name]’s public benefit funds may be denied due to an excess of available funds.

Keeping this in mind, please review the following:

1. Under NO CIRCUMSTANCES can the Trust assets be directly disbursed to [Beneficiary’s Name], as the Beneficiary of the Trust. In other words, you cannot write checks or make payments directly to him/her. All payments from the Trust should be made to the person or persons supplying goods or services to [Beneficiary’s Name] or on his/her behalf.

2. Under NO CIRCUMSTANCES can you place any assets received from any government unit or agency into [Beneficiary’s Name]’s supplemental needs trust, including Social Security payments, VA payments, etc.

3. Trust funds cannot be used to pay for items or services for [Beneficiary’s Name] that are already provided or could be provided by any governmental unit. Generally, the items and services provided by governmental units or agencies cover basic needs such as food, shelter, and medical care. The Trust can provide for [Beneficiary’s Name]’s reasonable expenses for the following needs only when benefits from publicly funded benefit programs are not sufficient to provide adequately for them or they are not available from public sources:
   
   • Special medical care, equipment, dental care, personal supervision, companion services, private room charges, counseling and treatment not covered by publicly funded benefit programs, and legal, accounting and other professional fees.

   • The purchase, maintenance, repair or modification of a home suitable for a person having [Beneficiary’s Name]’s disability. If any real estate is used for homestead residential purposes for [Beneficiary’s Name], she/he shall have the unqualified right to reside in and occupy such property as long as the Trustee (or the guardian or conservator of [Beneficiary’s Name]) deems such
residence to be desirable, practicable and safe.

- Transportation or a suitable vehicle, and for comfort, convenience and reasonable luxuries which may include, but are not necessarily limited to, entertainment, education, vacations and travel, as the Trustee, in the Trustee’s sole discretion, deems advisable.

4. The Trust can consist of funds and assets belonging to anyone other than [Beneficiary’s Name]. Resources or income belonging to [Beneficiary’s Name or Beneficiary’s Spouse] cannot be added to the Trust at any time.

5. This supplemental needs trust is for the sole benefit of [Beneficiary’s Name] during her lifetime.

6. The residual beneficiaries identified in the trust will receive any funds remaining in the Trust when the beneficiary dies, less any of the beneficiary’s final expenses and the final costs of administering and terminating the Trust.

7. The Trustee must keep accurate records of money and/or property received into the Trust as well as payments made out of the Trust.

8. The Trustee has a fiduciary responsibility to make certain all necessary tax filings on behalf of the Trust are made on time. The Trustee should check with a qualified tax professional to determine whether an income tax return must be filed on behalf of the Trust.

9. The Trustee must report the existence of the Supplemental Needs Trust on the application for Medical Assistance, the application for recertification of Medical Assistance or to the County in which the [Beneficiary’s Name] receives medical assistance benefits.
Court Supervised
Irrevocable Special Needs Trust
(Minn. Stat. § 501C.1205, subds. 3 & 4)
Trustee Instructions

The [Beneficiary’s Name] Irrevocable Special Needs Trust has been established, and your appointment as Trustee has been confirmed by the court. It is now important to review the general guidelines and instructions that you, as Trustee, must follow when administering this Trust.

It is imperative that you closely observe the statutory requirements and guidelines as you administer the Trust. Failure to make disbursements according to the statutory requirements can result in a determination that the funds are available to [Beneficiary’s Name], the sole beneficiary. Needless to say, if the Trust funds are deemed available, continuance of some, if not all, of [Beneficiary’s Name]’s public benefit funds may be denied due to an excess of available funds.

Keeping this in mind, please review the following:

1. Under NO CIRCUMSTANCES can the Trust assets be directly disbursed to the beneficiary. In other words, you cannot write checks or make payments directly to [Beneficiary’s Name]. All payments from the Trust should be made to the person or persons supplying goods or services to beneficiary.

2. Under NO CIRCUMSTANCES can you place any assets received from any government unit or agency “directly” into the Special Needs Trust, including Social Security payments, Veteran's Administration (VA) payments, etc.

3. Trust funds cannot be used to pay for items or services for [Beneficiary’s Name] that are already provided or could be provided by any governmental unit. Generally, the items and services provided by governmental units or agencies cover basic need such as food, shelter, clothing and medical care. The Trust can provide for [Beneficiary’s Name]’s reasonable expenses for the following needs only when benefits from publicly funded benefit programs are not sufficient to provide adequately for them or they are not available from public sources:

- Special medical care, equipment, dental care, personal supervision, companion services, private room charges, counseling and treatment not covered by publicly funded benefit programs, and legal, accounting and other professional fees.

- The purchase, maintenance, repair or modification of a home suitable for a person having the beneficiary’s disability. If any real estate is used for homestead residential purposes for the beneficiary, she shall have the unqualified right to reside in and occupy such property as long as the Trustee (or the guardians or conservators of [Beneficiary] deem such
residence to be desirable, practicable and safe.

- Transportation or a suitable vehicle, and for comfort, convenience and reasonable luxuries which may include, but are not necessarily limited to, entertainment, education, vacations and travel, as the Trustee, in the Trustee’s sole discretion, deems advisable.

4. Deposits to the Trust should generally consist of funds and assets belonging to [Beneficiary’s Name] or given to or awarded to her prior to her reaching age 65. Resources or income belonging to anyone other than the beneficiary generally should not be added to the Trust without further consideration.

5. This Special Needs Trust is for the sole benefit of [Beneficiary’s Name], the beneficiary.

6. The State of Minnesota will receive amounts remaining in the Trust when the beneficiary dies, up to an amount equal to the total medical assistance paid on the beneficiary’s behalf.

7. The Trustee must keep accurate records of money and/or property received into the Trust as well as payments made out of the Trust. The Trustee should also keep all financial statements and copies of canceled checks relating to any trust account. The county social services agency from which [Beneficiary’s name] receives services, the Social Security Administration, and the State of Minnesota all have the right to examine the Trust Instrument and the Trustee’s records relating to the administration of the trust.

8. The Trustee must report the existence of the Special Needs Trust to the Commissioner of the Minnesota Department of Human Services and to the county providing social services to [Beneficiary’s Name]. The Trustee shall also provide a copy of the Trust and the initial trust inventory to the Commissioner.

9. The Trustee of a court supervised Special Needs Trust must file an initial trust inventory with the supervising court. Thereafter, the Trustee must file annual accountings with the Court within thirty (30) days of the anniversary date of the Trustee’s confirmation by the court. The date of your confirmation is [insert confirmation date]

10. The Trustee must submit an accounting of the beneficiary’s trust account(s) to the Commissioner of Minnesota Department of Human Services at least annually or until the trust terminates in conjunction with the Beneficiary’s application or renewal of medical assistance. The accounting must include: 1) an inventory of trust assets and value of assets at beginning of accounting period; 2) additions to the trust during the accounting period and source of the additions; 3) itemized distributions from the trust during the accounting periods, including the purpose of the distribution and to whom the distribution(s) were made; 4) an inventory of the trust assets at the end of the accounting period; and, 5) any changes made to
the trust instrument during the accounting period.

11. The Trustee must obtain court approval prior to selling any real property belonging to the Trust and prior to making any large expenditures from the trust. The purchase of a pre-paid burial plan, however, does not require Court approval.

12. The Trustee has a fiduciary responsibility to make certain all necessary tax filings on behalf of the trust are made on time. The Trustee should check with a qualified tax professional to determine whether an income tax return must be filed on behalf of the Trust.
The [Insert Full Name of Trust] has been created. It is now important to review the general guidelines and instructions that you, as Trustee, must follow when administering this Trust.

It is imperative that you closely observe the statutory requirements and guidelines as you administer the Trust. Failure to make disbursements according to the statutory requirements can result in a determination that the funds are available to [Beneficiary’s Name], the sole beneficiary. Should Trust funds be deemed available, continuance of some, if not all, of [Beneficiary’s Name]’s public benefit funds may be denied due to an excess of available funds.

Keeping this in mind, please review the following:

1. Under NO CIRCUMSTANCES can the Trust assets be directly disbursed to the beneficiary. In other words, you cannot write checks or make payments directly to [Beneficiary’s Name]. All payments from the Trust should be made to the person or persons supplying goods or services to beneficiary.

2. Under NO CIRCUMSTANCES can you place any assets received from any government unit or agency “directly” into the Special Needs Trust, including Social Security payments, Veteran’s Administration (VA) payments, etc.

3. Trust funds cannot be used to pay for items or services for [Beneficiary’s Name] that are already provided or could be provided by any governmental unit. Generally, the items and services provided by governmental units or agencies cover basic need such as food, shelter, clothing and medical care. The Trust can provide for [Beneficiary’s Name]’s reasonable expenses for the following needs only when benefits from publicly funded benefit programs are not sufficient to provide adequately for them or they are not available from public sources:

   - Special medical care, equipment, dental care, personal supervision, companion services, private room charges, counseling and treatment not covered by publicly funded benefit programs, and legal, accounting and other professional fees.

   - The purchase, maintenance, repair or modification of a home suitable for a person having the beneficiary’s disability. If any real estate is used for homestead residential purposes for the beneficiary, she shall have the unqualified right to reside in and occupy such property as long as the Trustee (or the guardians or conservators of [Beneficiary] deem such residence to be desirable, practicable and safe.

   - Transportation or a suitable vehicle, and for comfort, convenience and reasonable luxuries which may include, but are not necessarily limited to, entertainment, education, vacations and travel, as the Trustee, in the Trustee’s sole discretion, deems advisable.
4. Deposits to the Trust should generally consist of funds and assets belonging to [Beneficiary’s Name] or given to or awarded to her prior to her reaching age 65. Resources or income belonging to anyone other than the beneficiary generally should not be added to the Trust without further consideration.

5. This Special Needs Trust is for the sole benefit of [Beneficiary’s Name], the beneficiary.

6. The State of Minnesota will receive amounts remaining in the Trust when the beneficiary dies, up to an amount equal to the total medical assistance paid on the beneficiary’s behalf.

7. The Trustee must keep accurate records of money and/or property received into the Trust as well as payments made out from the Trust. The Trustee should also keep all financial statements and copies of canceled checks relating to any trust account. The county social services agency from which [Beneficiary’s name] receives services, the Social Security Administration, and the State of Minnesota all have the right to examine the Trust Instrument and the Trustee’s records relating to the administration of the trust.

8. The Trustee must report the existence of the Special Needs Trust to the Commissioner of the Minnesota Department of Human Services and to the county providing social services to [Beneficiary’s Name]. The Trustee shall also provide a copy of the Trust and the initial trust inventory to the Commissioner.

9. The Trustee must submit an accounting of the beneficiary’s trust account(s) to the Commissioner of Minnesota Department of Human Services at least annually or until the trust terminates in conjunction with the Beneficiary’s application or renewal of medical assistance. The accounting must include: 1) an inventory of trust assets and value of assets at beginning of accounting period; 2) additions to the trust during the accounting period and source of the additions; 3) itemized distributions from the trust during the accounting periods, including the purpose of the distribution and to whom the distribution(s) were made; 4) an inventory of the trust assets at the end of the accounting period; and, 5) any changes made to the trust instrument during the accounting period.

10. This Trust is not court supervised; however, a trust that is not supervised may be placed under court supervision by petition of an interested party.

11. The Trustee has a fiduciary responsibility to make certain all necessary tax filings on behalf of the trust are made on time. The Trustee should check with a qualified tax professional to determine whether an income tax return must be filed on behalf of the Trust.
# COMPARISON OF THE SUPPLEMENTAL, SPECIAL, POOLED TRUSTS, AND 529 ABLE ACCOUNT

<table>
<thead>
<tr>
<th>Use/ Purpose</th>
<th>Supplemental</th>
<th>Special</th>
<th>Pooled</th>
<th>529 ABLE Account</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Use/ Purpose</strong></td>
<td>Generally used for estate planning to provide supplemental resources for a person with a disability that allows for the individual to maintain eligibility for public assistance programs.</td>
<td>An asset protection vehicle that allows a person with a disability to maintain eligibility for public assistance programs and provides for supplemental resources for goods and services beyond those available through public assistance programs.</td>
<td>An asset protection vehicle that allows a person with a disability to maintain eligibility for public assistance programs and provides for supplemental resources for goods and services beyond those available through public assistance programs.</td>
<td>Tax free savings vehicle offering persons with disabilities and their families a savings plan with tax-free growth while maintaining eligible for public assistance programs. <strong>Tax free gains provided funds used for “qualified expenses”.</strong></td>
</tr>
<tr>
<td><strong>Beneficiary Requirements</strong></td>
<td>A person with a disability of any age, except those persons over age 84 who reside in a long term care facility.</td>
<td>A person with a certified disability under the age of 65 at time of establishment.</td>
<td>A person of any age with a certified disability.</td>
<td>Beneficiary must be blind or disabled prior to age 26 and be SSI benefit eligible or have MD statement of certification of blindness or disability.</td>
</tr>
<tr>
<td><strong>Established by</strong></td>
<td>Third parties only. Cannot be established by the beneficiary, the beneficiary’s spouse or anyone obligated to the beneficiary per the terms of a settlement or judgment.</td>
<td>Person with disability (with cognitive capacity), Parent, grandparent, court appointed guardian, conservator, or court.</td>
<td>Generally by parent, grandparent, court appointed guardian/conservator, or court, but not limited to these.</td>
<td>Must use state established plan</td>
</tr>
<tr>
<td><strong>Funded By</strong></td>
<td>Assets belonging to third parties only. Cannot be funded by the beneficiary, the beneficiary’s spouse or anyone obligated to the beneficiary per the terms of a settlement or judgment.</td>
<td>Assets belonging to the beneficiary, or anyone else.</td>
<td>Subaccount can be funded by assets belonging to the beneficiary, or anyone else. Master Pooled Trust Agreement held by non-profit organization acting as Trustee</td>
<td>Funded by person with disability, friends, relatives, etc. Deposits limited to $15,000 per year (2018) Deposits made are irrevocable (same with the trusts).</td>
</tr>
<tr>
<td><strong>Limited Funding?</strong></td>
<td>No limit to amount held by Trust</td>
<td>No limit to amount held by Trust</td>
<td>No limit to amount held by Trust</td>
<td>Account is capped in MN at $350,000 (2016) for MA eligibility and $100,000 for SSI eligibility. Amounts over the caps will result in suspension of MA/SSI eligibility and benefits.</td>
</tr>
<tr>
<td><strong>Distribution upon death of Beneficiary</strong></td>
<td>To a persons, charities etc. as designated by the Settlor. <strong>No payback to the State is required.</strong></td>
<td>Payback to the State is required. Distribution to state agency to reimburse for all medical assistance (Medicaid) benefits paid during lifetime. Any excess is then distributed to person, charities, etc. as designated by the Settlor.</td>
<td>Payback to the State is required. Distribution to state agency to reimburse for all medical assistance (Medicaid) benefits paid during lifetime.</td>
<td>Payback to the State is required but is limited to amount of MA paid for the beneficiary beginning at time of funding the individual’s ABLE Account.</td>
</tr>
</tbody>
</table>