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ELDER LAW MEMORANDUM

TO: CPAs, Clients & Associates

FROM: David L. Silverman, Esq.
Shirlee Aminoff, Esq.

DATE: April 2, 2010

RE: Supplemental Needs Trusts

Elderly and disabled persons are peculiarly prone to significant and continuing costs for long-term care. Since many governmental benefits are need-based, ownership of substantial assets may preclude qualification under these programs. A Special Needs Trust (SNT) established for a person with severe and chronic disabilities may enable a parent or family member to supplement Medicare or Supplemental Security Income (SSI), without adversely affecting eligibility under these programs, both of which impose restrictions on the amount of "income" or "resources" which the beneficiary may possess. 42 U.S.C. § 1382a.

SSI is intended to provide income to persons who are over 65 years of age or who are blind or disabled. To qualify, the value of an otherwise eligible person's resources (i.e., cash, liquid assets, real or personal property) may not exceed \$2,000 (personal residence, automobile and clothing are excluded). The beneficiary's income (which includes gifts, inheritances and additions to trusts) will

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reduce available SSI benefits. However, assets owned by the SNT will not be deemed owned by the beneficiary. Medicaid is a federal program jointly funded and administered by the states which also provides benefits in the form of long-term care for elderly and disabled persons whose income and resources are otherwise inadequate to pay for such care. As with SSI, Medicaid benefits are conditioned on the person's meeting income and resource rules.

For Medicaid eligibility purposes, Congress has imposed a look-back period of thirty-six months applicable to the outright transfer of nonexempt assets. This period increases to sixty months for transfers to certain trusts. However, federal law authorizes the creation of SNTs that will not be considered "resources" for purposes of determining SSI or Medicaid eligibility where the disabled beneficiary is under age 65, provided the trust is established by a parent, grandparent, legal guardian, or a court. Thus, personal injury recoveries may be set aside to supplement state assistance.

[Note: While SSI and Medicaid are need-based, Social Security and Medicare are not. Social Security provides retirement and disability benefits. Medicare provides hospital insurance. Social Security and Medicare are available to wage earners who have made payroll tax contributions. Medicare B (Supplemental Medical Insurance), which is voluntary, provides health insurance for physician's services and certain outpatient services. A Special Needs Trust may or may not be necessary for a person who qualifies for Medicare and Social Security benefits.]

The SNT may be created by either an inter vivos or a testamentary instrument. If an inter vivos trust is used to create the SNT, the trust may, but is not required to be, irrevocable. Provided the beneficiary may not revoke the trust, trust assets will not constitute income or resources for SSI or Medicaid purposes. A revocable inter vivos trust also permits the parent or grandparent, for example, to modify the trust to meet changing circumstances. Of course, if the trust is revocable the trust assets will be included in the trustor's estate under IRC §2038.

A testamentary SNT may be established on the death of a surviving parent for a disabled adult child. A testamentary trust may be established either by will or by revocable inter vivos trust. In *Matter of Ciruolo*, NYLJ Feb. 9, 2001 (Sur. Ct. Kings Cty), the court allowed reformation of a will to create

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an SNT out of an outright residuary bequest for a chronically disabled beneficiary. Neither the beneficiary nor the beneficiary's spouse should be named as trustee, as this might result in a failure to qualify under the SSI and Medicare resource and income rules. A family member or a professional trustee would be preferable choices as trustee. NY EPTL § 7-1.12 expressly provides for the SNT and helpfully includes suggested trust language. Sec. 7-1.12 imposes certain requirements for the trust. The trust must (i) evidence the creator's intent to supplement, rather than impair, government benefits; (ii) prohibit the trustee from expending trust assets in any way that might impair government benefits; (iii) contain a spendthrift provision; and (iv) not be self-settled (except in narrowly defined circumstances).

Notwithstanding the general prohibition imposed on the trustee from making distributions that might impair qualification under federal programs, the trust may grant the trustee discretionary power to make distributions in the best interests of the beneficiary, despite possible disqualification from thereafter receiving government benefits. A "third party" SNT, which is a trust created by a person other than the beneficiary (e.g., a parent for a developmentally disabled child) does not require a "payback" provision. Such a provision mandates that on trust termination the trustee must reimburse Medicaid for benefits paid to the beneficiary. Only a "first-party" SNT, which is an SNT funded by the beneficiary (self-settled), requires a payback provision. Including a payback provision where not required would result in a windfall to Medicare at the expense of remainder beneficiaries.

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