PROVISIONS

Sample Language for Supplemental Needs Trusts

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October 1997

Community Supported Living Series

Wisconsin Council on Developmental Disabilities
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For additional information or assistance regarding options for home ownership, contact the Supported Housing Specialist, Wisconsin Department of Health and Family Services, Bureau of Developmental Disabilities Services, P. O. Box 7851, Madison, Wisconsin  53707-7851.

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Sample Language for Supplemental Needs Trusts
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CAUTIONS

This book does not take the place of getting professional advice and assistance from an attorney or tax advisor concerning your individual situation. Rules and policies affecting trusts change over time, and are subject to different interpretation. It is always advisable to consult an attorney and tax advisor before making a substantial commitment of property to a trust.

Because the rules on treatment of trusts are complex, agencies that determine eligibility for public programs often require review of a copy of the trust by agency legal counsel when an applicant is the beneficiary of a trust. This means that the beneficiary must be able to produce a copy of the trust document, and that the existence of a trust will somewhat slow the application process. In establishing a trust, it is important to assess the risk that it will not affect benefits as planned, or that a possibly lengthy appeal process will be needed. You may want to ask your Social Security or county Medical Assistance office ahead of time if your plan will be treated in the way you expect.
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INTRODUCTION

A supplemental needs trust is designed to provide for special needs and added opportunities for people with disabilities who rely on Supplemental Security Income (SSI), Medical Assistance (MA) and other long-term support programs that have resource or income limits or cost-sharing requirements. This paper provides sample provisions for consideration by people who are considering establishing a supplemental needs trust for a person with disabilities. It focuses on three issues:

- Will trust assets be counted as resources for purposes of eligibility for SSI, MA and other need-based public programs?
- Will distributions from the trust be counted as income or resources for those programs and, if so, does the benefit to the person outweigh any loss in benefits?
- Is the trust set up so that it will be as helpful to the person as possible and as flexible as possible to meet unforeseen needs?

No one set of trust provisions will be right for every situation. For example, the goals of large trusts are likely to be quite different from the goals of smaller trusts. Families will vary widely in the extent to which they want to simply rely on the trustee to do a good job, or provide specific guidance and controls on the trustee's actions. This paper does not provide a single set of "model" provisions. Instead, it tries to provide some possible alternatives, and the risks and benefits that go along with different choices. Choices are shown in two ways: by alternative paragraphs, and by language in brackets, which can be included or deleted from particular paragraphs depending on the grantor's intent. Sample trust language is shown in bold.

This paper is intended as a companion piece to One Step Ahead: Resource Planning for People with Disabilities who Rely on Supplemental Security Income and Medical Assistance (1997 ed.), referred to below as One Step Ahead. It will help the reader to get and read that publication first, as it provides the background on the public program requirements which affect many of the choices people must make in deciding on the terms of a supplemental needs trusts. If a trust is intended to assist in home ownership or some other housing arrangement, it will also be helpful to read Housekeeping: Issues in Owning or Renting a Home for People with Disabilities Who Rely on Supplemental Security Income and Medical Assistance. An order form for One Step Ahead, Housekeeping and other publications in WCDD=s Community Supported Living Series is included in the back.

This paper is primarily focused on the impact on public benefits received by the beneficiary of the trust. Establishing a trust may also have important consequences for the person who is putting property into the trust, in terms of future eligibility for public benefits, taxes, and costs (in time and money) of the probate process. This paper is not intended to cover these issues in detail, nor is it intended to provide all possible options on general issues of trust establishment and administration. An attorney should always
be consulted in drafting a trust for a particular family or individual.

The laws governing public benefit programs actually allow more flexibility than many people realize in what can be done with a supplemental needs trust. At this point in Wisconsin, there is only one provision that is essential to avoid a trust being counted as a resource for purposes of SSI and Medical Assistance: a statement that the beneficiary does not have a legal right to force the trustee to make cash payments or to provide basic support and maintenance. Even within this limitation, there is room to allow, or even require, use of funds for some cash payments or in-kind maintenance. (See xxx, below).

There are a number of other provisions that are frequently included in supplemental needs trusts, including:

- Provisions giving trustees total discretion to make or not make distributions.
- Prohibitions on any action that affects eligibility or reduces benefits.
- Prohibitions on cash payments.
- Provisions making the trust irrevocable.
- Limitations of distributions to "luxuries and entertainment."

These may or may not be advisable in a particular situation, but they are not mandatory for purposes of qualifying the beneficiary for SSI and Medical Assistance. An attorney can assist in determining

In making choices, it is important for everyone involved, including the person with a disability, other family members, and others who may want to contribute to the trust, to be included in planning. Try to identify what the person's situation is going to be, what his or her needs, desires and hopes are likely to be, and what a trust can reasonably expect to provide. Planning should not just look at the person's present situation, but also at potential future changes, some of which are quite predictable. (See One Step Ahead, Part II).

Except where specifically noted, the discussion in this paper assumes that the trust is being established by someone other than the person with a disability who is the primary beneficiary, and funded with property that does not already belong to the intended beneficiary. Trusts funded with property that the beneficiary owns or controls (or could own and control by asserting his or her legal rights) present special problems and require special drafting. (See One Step Ahead, Part VIII.f.) If you are considering putting property of the beneficiary into a trust, see an attorney familiar with current Medical Assistance restrictions on transfers of assets and use of trusts.

The sample language in this paper is not generally relevant for people who get Social Security or Medicare benefits, unless they also need, or expect to need in future, SSI, Medical Assistance or support services from other need-based programs. It is also not relevant for people in need-based programs, such as Wisconsin Works, that are not based on disability.

**Sample Language for Supplemental Needs Trusts**
I. DEFINITIONS

The definitions here are intended first to help the reader of this paper understand the discussion below. Secondly, however, trust drafters may want to consider including some of the definitions in trust documents. Public benefit programs are complex, and their names and characteristics may change over time. Definitions may be helpful to future trustees, and others interpreting the trust, and are useful in avoiding long, repetitive "laundry lists" in the text of the trust. The definitions below are used in the sample trust provisions throughout this paper.

A. Trust-related definitions

As used in this Trust, words which refer to one gender apply to either gender whenever appropriate and words which refer to the singular or plural apply to either the plural or singular interchangeably whenever appropriate.

"Assets" means all property in the Trust, including real and personal property, principle, income and future gifts and transfers to the Trust.

"Beneficiary" used by itself means the Primary Beneficiary of the trust. (In this paper, the beneficiary is assumed to be a person with a disability who is likely to need income, medical care or support services from public programs.)

"Distribution" means a payment of money or property from the Trust to or for the benefit of the Beneficiary. A distribution can be directly to the person or indirectly for the person=s benefit, for example, by paying the person=s telephone bill.

"Grantor" means a person who creates the Trust by signing the Trust document. (Often, the grantor is also the person who puts property into the trust, but trusts can also be funded by transfers to the trust by other people.)

APersonal Adviser is a person designated by the Trust to stay informed of the Beneficiary=s needs and desires and to inform the Trustee of ways in which Trust assets can be used to meet those needs and desires. See Part IX, below.

ARevocable trust means a trust under which the grantor keeps the power to terminate the trust and regain full control over the property. A trust where the grantor does not keep this power is an irrevocable trust.
**Trust** means a title or power over property held by one person for the benefit of one or more other persons. Not all trusts have to be in writing. This paper assumes that the terms of the trust are contained in a trust document, which may be a provision in a will, a trust agreement between the grantor and the trustee, or a declaration of trust by the grantor.

**Trustee** means a person who holds title to property, or some power over property, in trust. A trustee’s powers over the property are limited to those provided by the terms of the trust. A successor trustee is a person who takes over the powers and duties of a trustee when a previous trustee dies, resigns or is unable to serve.

**Will** is a declaration of a person’s wishes concerning what will happen to his or her property after his or her death. A will has no effect on the person’s property prior to his or her death. To be valid, a will must meet certain formal requirements, including being in writing and being witnessed.

**B. Public-benefit-related definitions**

"Community programs" means programs and services provided under the state or county service system for individuals with developmental disabilities, mental illness or alcohol and other substance dependence under ch. 51, Wis. Stats., and successor programs providing similar services, and include but are not limited to habilitative and rehabilitative services, inpatient and outpatient treatment, community support, and residential and vocational support.

"Disabled adult child" is an adult who: (1) has had a disability since childhood that meets the Social Security definition of disability and (2) qualifies for a Social Security disability benefit based on the work record of a parent who is retired, disabled or deceased. See One Step Ahead, Parts II.a and VI.b for discussion of the effect of disabled adult child benefits on SSI and MA.

"In-kind support and maintenance" means distributions from the trust or other third-party sources that pay for or provide food, clothing or shelter, as defined for purposes of SSI and Medical Assistance or similar successor programs. See One Step Ahead, Part V.d for further discussion of the what things count as in-kind support, and how they affect SSI and MA.
"Long-term support services" include but are not limited to: services of the type provided under the Community Options Program and Community Integration Program; home health and personal care services; supportive home care; community support programs for people with mental illness; residential facility or nursing home care; and any similar successor programs.

"Medical Assistance" means the means-tested state and federal program to provide medical and rehabilitative services under \(49.45-.47\), Wis. Stats., and Title XIX of the Social Security Act, and similar successor programs.

"Presumed maximum value" means the maximum value of in-kind support and maintenance per month which is treated as countable income for purposes of Supplemental Security Income and Medical Assistance under 20 CFR \(416.1140\). (See One Step Ahead, Part V.d.)

"Public programs" refer to federal, state and local programs provided or funded by the government and providing financial assistance, social and support services, habilitation and rehabilitation services and medical goods and services, and include but are not limited to Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), the Wisconsin Medical Assistance program (MA), Medicare, vocational rehabilitation services, community programs, veterans benefits, and similar successor programs. See definition of community programs, \(\geq\) above.

"Supplemental security income" or "(SSI)" means the means-tested income support program for people who are disabled or over age 65 under Title XVI of the Social Security Act and state supplementary payments under \(49.77\), Wis. Stats., and similar successor programs.

II. CREATING A TRUST

Trusts can be created through separate trust documents or as part of a will. They sometimes take the form of a trust agreement, signed by the grantor and initial trustee. While a trust does not have to be signed by the trustee, the trustee's signature confirms that the trustee knows about the trust and agrees to serve. Trust documents may also take the form of a declaration of trust over certain property. A declaration can be used where the grantor is putting property in trust with himself or herself as trustee.

Trust agreement:

This agreement is made this [date] day of [month, year], between [name of grantor] of [name of county], Wisconsin, as Grantor, and [name of...
initial trustee], or his/her successor, as Trustee.

Declaration of trust:

This declaration of trust is made by [name of grantor] as grantor, as of [date].

III. NAMING THE TRUST

A name makes it possible for other people, insurance companies, etc., to name the trust as the beneficiary of gifts, bequests, insurance policies, etc. A name should be specific enough to avoid confusion with any other trust.

This trust shall be known as the "[name of beneficiary] Supplemental Trust, Dated [date of trust document]."

IV. REVOCABILITY

Where the grantor is not the beneficiary, and none of the funds in the trust originally belonged to or were controlled by the beneficiary, a trust is treated the same for public benefits purposes whether it is revocable or irrevocable. The important point is that the beneficiary, acting alone, must not have the power to revoke the trust, or control the terms of the trust to the point of requiring payments of cash or in-kind support and maintenance. The fact that the grantor can terminate the trust does not give the beneficiary any greater control over the funds; it actually reduces the beneficiary's ownership interest.

An advantage of a revocable trust is that the trustee (who is often also the grantor) can try things out and see how they work, and can retain the power to change the trust if circumstances change. Potential disadvantages may occur because the assets of the trust may still be treated as the grantor's assets for other purposes, such as income, gift and estate taxes or eventual Medical Assistance eligibility for the grantor.

Irrevocable trust:

This trust is irrevocable. [It may be changed only in regard to administrative or ministerial terms].

Revocable trust:

This trust may be revoked only by the grantor during his or her lifetime, in which case all rights and title to trust assets return to the grantor.
V. DESCRIBING THE PURPOSE OF THE TRUST

A. Introduction

A good description of the purpose of the trust helps the trustee and others understand what the grantor meant to achieve. It is a good place to provide guidance to the trustee, while not necessarily locking the trustee in with specific directives or prohibitions. The purpose section usually begins or ends with a directive that it be used in interpreting the trust.

To some extent the statement of purpose overlaps with the directives on how distributions are to be made (see next section). Generally, the intent section should be used to give guidance and background. If the grantor intends to require or prohibit particular distributions, this should be stated in the section on distributions.

The provisions of the trust should be interpreted in light of the following statement of concerns and intent.

B. Explain the circumstances

Supplemental trusts often include a short description of the beneficiary's circumstances. This is not strictly necessary, but can help people to understand why the trust looks the way it does, and also to show that the terms were not mistakes, but were thought through in light of circumstances. The description should be individualized to each person and family, and can include relevant information about the family's circumstances as well, if those entered into the thinking of the grantor.

This Trust is established for the primary benefit of the Beneficiary. The Beneficiary has a disability which substantially impairs his/her ability to provide for his/her own financial and support needs. As a result of disability, the Beneficiary will have a right to receive benefits from public programs. Continued full access to the benefits of these public programs is essential to meet the beneficiary's needs for basic maintenance, support services and medical care. At the same time, these programs may leave gaps in basic services, may not provide adequately for emergencies, and may not provide for needs, wants and opportunities beyond basic necessities.

The Grantor is concerned that if the Trust assets were to be used for basic maintenance and service needs, it is likely that the Trust assets would be rapidly depleted, particularly because the cost of medical and long-term support services is so high. This would defeat the intent of the Trust to supplement basic necessities, meet special needs, and provide opportunities beyond those available under public programs.
C. Statement of Supplemental Purpose

"Supplemental needs" trusts got their name because of the intent to supplement rather than replace benefits from public programs. This should be stated in the trust document to avoid confusion over the trust purpose.

A major decision is how strongly to state the supplemental purpose. An absolute prohibition on any action that would affect eligibility or reduce benefits could prevent the trustee from doing things that may benefit the person. For example, it may sometimes be appropriate to buy a service of higher quality that replaces one available from public benefits. It may also make sense to make a large gift in a particular month (e.g., to assist the person in becoming a homeowner, to pay some large lump-sum expense, such as real estate taxes, or simply to replenish cash reserves), even though that causes loss of some benefits in that month. If room is left open in the trust to provide cash or in-kind support or maintenance, then flexibility to supplant benefits may be important.

Flexible:

This Trust is primarily intended to supplement, and not to replace or make unnecessary, aid from public programs the Beneficiary qualifies to receive. This Trust is intended to provide needs, wants and opportunities for the Beneficiary for which adequate and appropriate aid from public programs is not available. The Grantor intends that the Trust assets be available as a resource to supplement public assistance for the Beneficiary, as the Grantor would provide if personally present.

Restrictive:

It is the Grantor's intent that Trust assets be used to supplement and never to supplant benefits of public programs, and that no distribution be made from the trust that would disqualify the Beneficiary from receiving the benefits of public programs or that would reduce the level of such benefits.

D. Describing a Distribution Pattern

An important issue is the balance between ensuring that the assets get used for the person's benefit, preserving assets for the person's future needs, and preserving assets for future beneficiaries. In some cases, the grantor may be more concerned with ensuring that the trust assets get used for the person's benefit than with ensuring that the trust will continue in existence until the beneficiary's death. Where the person is otherwise secure, or the trust assets are small, it may make more sense to use the assets up by providing items that are clearly of benefit than to stretch out the use of the trust in payments so small that they make no real difference to the person. In other cases, the grantor may be concerned with ensuring that payments are made evenly over the person's life span, with
ensuring that substantial assets remain in the trust for emergencies, or in preserving substantial assets for secondary beneficiaries. The options below are examples of possible approaches. An alternative to putting this language in the trust is for the grantor to write a separate AL letter of Intent that provides nonbinding guidance to the trustee.

It is the Grantor's intent: (choose any/all that apply)

That all or most of the principle and income be used for the Beneficiary during his/her lifetime, and that no or minimal assets remain in the Trust at the time of the Beneficiary’s death.

That the assets of the Trust be used as opportunities to provide substantial benefit to the Beneficiary arise, rather than held for future emergencies.

That the Trust be managed so that it continues in existence with sufficient assets to serve its purposes throughout the Beneficiary's life.

That the Trustee endeavor to maintain a reserve of $_____ for compelling needs that may arise for which adequate and appropriate governmental or private assistance is not available.

That distributions to or for the benefit of the Beneficiary be made primarily from income and that principle be used for distributions only in case of compelling need.

VI. DISTRIBUTION

A. Discretion of the Trustee

Supplemental needs trusts are frequently written to give the trustee absolute discretion over whether distributions will be made from the trust and as to the timing and amount of distributions. This is done to avoid any question as to whether the beneficiary has any legal right to the assets of the trust. In addition, it does not lock the trustee into distributions which, because of changes in public benefits laws and rules, may become useless or harmful to the beneficiary. It is a good approach, provided the trustee has a clear understanding of what is expected under the trust, and can be relied on to carry it out.

The downside of giving the trustee total discretion, is that he or she may not do what is expected. Some trustees see their primary duty as conserving the trust funds, and thus may be overly conservative in making distributions. Some trustees have a conflict of interest, in that they may be a beneficiary for any funds not spent when the trust terminates. Others may not be energetic in learning about the person’s needs. For these and other reasons, the grantor may want to use language that allows for express
provisions in the trust that direct that specific distributions be made.

The Trustee may apply [either principle, income, or both] to make distributions to or for the benefit of the Beneficiary. [Except as expressly provided by this trust document,] whether distributions are made to or for the benefit of the Beneficiary, and the manner, amount and times of any distributions, is entirely within the discretion of the Trustee.

B. Form of Distributions

Generally, payments from a trust should be made to providers of goods and services, rather than directly to the beneficiary. In that way, benefits to the person are either not income at all or are in-kind support and maintenance, which receives more favorable treatment than other forms of income. (See One Step Ahead, Part V)

[Except as provided in ___], payments from the Trust are limited to payments to a person who has provided or who has been authorized by the Trustee to provide or arrange provision of goods or services for the benefit of the Beneficiary.

C. Examples of Special Needs

There are many ways in which indirect distributions can be made to help a beneficiary without affecting public programs. It is important to make sure that the trustee is aware of those possibilities, whether in this section, in the statement of purpose, or through supplemental instructions in a separate document. Some grantors may want to provide the broadest possible list of choices. Others may want to specify particular needs that are most important to them. As discussed in subpart A., above, it is also possible to pick out payments for particular items and make them mandatory. See One Step Ahead, part V.c., for more detail on distributions trusts can make without affecting benefits.

Guidance on discretionary distributions:

Special needs, wants and opportunities for which the Trustee may make distributions under this Trust include [but are not limited to]:

1. Dental, medical, rehabilitative and supportive services and equipment of a type or quality not otherwise available under Medical Assistance or other public programs.

2. Educational opportunities and vocational training and support not available to the Beneficiary through vocational rehabilitation, state and county community service programs and other public programs.
3. Personal, household and other services not available under public programs, including but not limited to personal grooming, housekeeping, appliance and other household repair, chore services, advocacy and legal representation, vehicle maintenance and repair and travel, recreational or other companionship.

4. Transportation and other travel expenses, including but not limited to expenses for airline, bus, train, automobile or other forms of transportation, payment for lodging and meals during temporary absences from home, costs of travel companion and entry fees to public accommodations.

5. Payment of bills to the extent that such payment will not reduce SSI or MA payments, including but not limited to payment of telephone bills, cable television bills, and automobile insurance bills.

6. Purchase of items, other than food, clothing or shelter, that are excluded from the determination of available resources for purposes of SSI and MA, including household furnishings and equipment, personal care items (toothpaste, shampoo, etc.), a car or van used for transportation to medical services or work, property used in a trade or business, and a burial space, container, vault and marker.

7. Funding for a plan to achieve self support designed to help the Beneficiary attain an occupational goal, if the plan has been approved by the Social Security Administration.

8. Provision of funds to allow the Beneficiary to provide small gifts for [options: family members, specific friends, service providers, etc.].

Mandatory distributions:

The Trustee shall pay for the following items, and his or her duty to pay for these items shall be enforceable by [options: the Beneficiary, the Beneficiary’s guardian, and the Resource Person]:

1. The cost of basic telephone service and equipment, and of a reasonable level of long-distance charges, not to exceed $____ per month.
2. The cost of dental care recommended by a dentist but excluded from coverage under the Medical Assistance program.

3. The cost of at least one vacation each year for a period of two weeks, including the cost of airfare, ground transportation, passport and visa fees, lodging, meals and a travel companion. [Destinations shall be limited to ____.] [Destinations and activities shall be determined by the Trustee with advice of the Personal Advisor.]

4. The cost of purchasing, maintaining in working order, and replacing as needed a van appropriately equipped to meet the accessibility needs of the beneficiary.

This provision shall not apply if, due to changes in public program rules, payment for the above items would result in significant reduction in benefits under a public program.

D. Supplanting or reducing benefits from public programs

As discussed in Part V.c., above, on trust purpose, the grantor may want to limit the trust to purely supplemental purposes, or may want to allow some flexibility to the trustee to supplant or reduce benefits when that is in the beneficiary's best interests.

Restrictive

The Trustee may not use income or principal of the Trust to provide income, goods or services to the Beneficiary if the Beneficiary qualifies to receive the same or an equivalent benefit through public programs, as defined in [definition section of Trust].

Flexible:

The Trustee may not make cash payments or payments for goods or services, if those payments would have the affect of supplanting or reducing benefits otherwise available under public programs, unless the Trustee, in the Trustee's sole discretion, finds that the benefit to the Beneficiary substantially exceeds the loss from the reduction in public benefits.

OR

If the level or form of government assistance, including but not limited to assistance for basic needs, medical care, treatment, rehabilitation and vocational services, are at a level that is inadequate to appropriately meet the needs of the Beneficiary, the Trustee may, in the Trustee's sole discretion, use
principal and income of the Trust to meet the needs of the Beneficiary, even if this results in some supplanting or reduction of benefits from public programs.

OR

While the primary purpose of the Trust is to supplement public programs, the Trustee may, in the Trustee’s sole discretion, make distributions that have the effect of supplanting or reducing benefits from public programs if the Trustee finds that the distribution will substantially increase the health, safety, comfort or happiness of the Beneficiary.

E. Cash Payments and In-Kind Support and Maintenance

An important decision in drafting a trust is whether to leave the door open to some use of assets either to make cash payments or to provide in-kind support and maintenance. The conservative approach is to prohibit such distributions, or to limit them to irregular and infrequent gifts. In many cases, because of the size of the trust and the needs of the individual, a trust can be fully useful and effective with these restrictions. Distributions can be devoted entirely to special needs of the type described in Part VI.C., above.

In other cases, however, the beneficiary may have significant unmet needs or desires, and the trust may have sufficient funds to make a contribution without unduly affecting benefits. In still other cases, grantors may want to maximize the potential for cash payments, because of the control and autonomy this gives to the beneficiary. The following are examples of situations where a grantor may want to allow distributions of cash or in-kind support and maintenance:

- **Beneficiary is on SSI and has no other income.** SSI does not count the first $20 of unearned income that a person receives. If the person has no other source of income, a cash or in-kind gift of $20 per month will not affect his/her SSI or MA benefits.

- **"Irregular and infrequent income."** SSI does not count income that it considers "irregular and infrequent." The current rule excludes gifts of up to $20 that occur no more often than once per quarter of a calendar year.

- **The beneficiary is eligible for MA as a person who lost SSI due to Social Security Disabled Adult Child benefits.** In this situation, some additional income may have no impact on benefits. See One Step Ahead, Part VI.b.

- **The beneficiary is a former SSI recipient who is receiving MA because he or she**
would be eligible for SSI but for earnings from work. Again, in some circumstances additional income may have no impact on benefits. See One Step Ahead, Part VI.c.

- The beneficiary is receiving MA as a recipient of services under a home and community-based waiver program, such as the Community Integration or Community Options MA Waiver Program, provided the distribution will not cause his or her countable income to go over the special income limit applicable to those programs. See One Step Ahead, part VI.d.

- The trust can make distributions for in-kind support in amounts greater than the "presumed maximum value." In this situation, the beneficiary can end up better off, because he or she can receive substantial support and maintenance but lose only the "presumed maximum value" (PMV) or the Aone-third reduction for living in the household of another. (See discussion of in-kind support in Part V.d. of One Step Ahead and Part III of Housekeeping.) This may be problematic if the other countable income plus the PMV or one-third reduction results in ineligibility for SSI and/or MA.

- The trust may make payments for rent on behalf of a beneficiary who is paying the PMV or more out of his or her own funds for rent. In Wisconsin, in-kind payments of rent on behalf of a person who is already spending an amount equal to the PMV on rent is not considered countable income. See One Step Ahead, Part V.d. and Housekeeping, Part III.i.

- Down payment on a home, or support for home ownership. See One Step Ahead, Part IX, and Housekeeping, Part III.j., and VII.

Restrictive:

Except for small, irregular and infrequent gifts, the Trustee may not make any distribution in the form of a direct cash payment to the Beneficiary, or for the purpose of providing food, clothing or shelter for the Beneficiary.

Flexible:

[Except as expressly provided in this Trust,] any payment in cash and any use of income or principal to provide or pay for food, clothing or shelter rests in the sole discretion of the Trustee. No Beneficiary and no other person or governmental authority has authority to require a payment in cash or use of income or principal to provide or pay for food, clothing or shelter. This Trust is not subject to a court order under 701.13(2), Wis. Stats., to have income or principal of the Trust applied for the Beneficiary’s support or education.
[Choose any of the following that apply:]

If the Beneficiary is dependent on SSI or similar successor programs for basic maintenance, the Trustee may make cash distributions to the Beneficiary only to the extent that those payments will not result in reductions of SSI under federal rules governing the SSI program. At the time of the creation of the trust, this allows for payments of up to $20 per month if the beneficiary has no other unearned income. If the Beneficiary has other unearned income, the rules allow for payments that are infrequent or irregular, defined as no more than $20 in a calendar quarter.

If the Beneficiary ceases to be eligible for SSI, due to receipt of Social Security or due to earnings from work, but remains dependent on Medical Assistance for medical, rehabilitative and support services, the Trustee may make cash payments or provide in-kind maintenance to the extent that the payments or maintenance do not make the Beneficiary ineligible for Medical Assistance or similar successor programs.

If the Beneficiary remains eligible for SSI, the trustee may make distributions in the form of in-kind support and maintenance in a month distributions will not be counted as income for purposes of SSI or if the total value exceeds the applicable presumed maximum value, the distributions produce substantial benefit to the beneficiary and the distributions do not result in extended ineligibility for Medical Assistance and long-term support programs.

The Trustee may make distributions on behalf of the Beneficiary to pay for rent or may directly provide in-kind shelter, but only in months where the Beneficiary is applying an amount of his or her income or resources towards rent that equals or exceeds the presumed maximum value.

Note: An alternative, where the grantor wants to provide for the use of some funds for support and maintenance but is concerned about the risk of changes in the law that will make support trusts ineffective, is to segregate limited funds that can be used for support purposes, or to establish two separate trusts, one where support is permitted and one that is purely supplemental.

VII. HOME OWNERSHIP UNDER A TRUST

Information on the impact of home ownership on SSI and Medical Assistance and on ways that a trust can assist in home ownership is provided in Housekeeping (see back of this booklet for ordering information.) Part VI.f. of that booklet specifically discusses home ownership by a trust for the benefit of a person receiving SSI or MA.
If a trust owns a dwelling for the benefit of a beneficiary, Social Security considers that the beneficiary has an "ownership interest" for purposes of SSI. This means that the person can live in the house without paying rent to the trust, and not be considered to be receiving in-kind support that would count as income. However, payments by the trust for ongoing shelter costs, such as taxes, mortgage payments, and utility bills, may count as in-kind support. Ways in which a trust can help with ongoing housing costs are discussed in Housekeeping, Part VII.

It may be better for the trust simply to act as a landlord. If the beneficiary is not treated as having an ownership interest, the beneficiary can avoid having in-kind income by making a rental payment to the trust that is at least equivalent to the "presumed maximum value." See Housekeeping, Part VI.f.

The trust should include specific provisions on:

- Management and maintenance of the home. This can be a major task, especially if it involves finding other individuals to share costs by paying rent. If it is not desirable or appropriate for the trustee to do these tasks, they may be assigned to another person, such as a Resource Person, or they may be hired out to a property management company.

- Planning for disposition of the home if the beneficiary no longer lives there. For example, the trust can be authorized to sell the home and devote the proceeds to general trust purposes, including but not limited to purchasing another home. In other cases, the grantor may want ownership of the home to be transferred to some other beneficiary if the person with the disability no longer lives there and is not expected to return.

A trust that includes holding and maintaining a home may be quite different from a standard supplemental needs trust. First, managing real estate is a different task from managing investments. Second, the grantor may not intend to leave the trustee with the discretion that is typical in most supplemental trusts. Instead, the grantor may want to give the beneficiary an absolute right to live in the home, at least under certain conditions. For these reasons, it may make sense to have a separate trust, and trustee, for a home, with a provision for the proceeds of the sale of the home to be returned to the supplemental needs trust.

Purchase of home for the beneficiary:

The Trustee may, in the Trustee's discretion, use assets of the trust to purchase a suitable dwelling to be used as the primary residence of the Beneficiary and may transfer title to the dwelling to the Beneficiary.
 Provision of loans for down payment and other costs:

The Trustee may use assets of the Trust to provide loans, at no interest, to the Beneficiary for the purpose of down payment on a home and for the purpose of meeting major expenses, such as real estate taxes and maintenance costs.

Ownership of existing home by a trust:

The home located at _____ shall be held in trust subject to the Beneficiary’s right to live in the home during his/her lifetime. The Beneficiary’s right to live in the home is not transferable, and may not be sold or rented to any other person. The Beneficiary’s right to live in the home shall terminate at his/her death [and at any time that he/she moves from the home and the Personal Adviser certifies to the Trustee that the Beneficiary is not expected to return to live in the home [within 12 months]]. If the beneficiary is not occupying the home, the Trustee is authorized to rent it to someone else and to apply any proceeds to the purposes of this Trust.

Authority to sell the home and apply proceeds:

Upon termination of the Beneficiary’s right to live in the home, the Trustee has authority to sell the home, and [to apply any proceeds or income to the purposes of this Trust] [to pay the proceeds to the _____ Supplemental Needs Trust, dated ____].

Transfer of home to alternative beneficiary:

If the Beneficiary dies or the right of the Beneficiary to live in the home terminates, the Trustee shall transfer all rights and title of the home to [alternative beneficiary].

Ongoing shelter expenses paid by beneficiary:

Except as provided in par. ____, so long as the Beneficiary retains the right to live in the home, the Beneficiary has responsibility for payment of taxes, utility bills other than telephone and cable television, and mortgage payments.

Trust as landlord for beneficiary:

The Trustee [may][shall] hold the home located at _____ or an alternative dwelling designated by the Personal Adviser as part of the property of the trust, and [may][shall] make the home available to the Beneficiary for use as the Beneficiary’s primary residence at a monthly rental charge of no more
than the presumed maximum value, as determined under 20 CFR 416.1140. The Trustee shall pay all costs of mortgage payments, real estate taxes, utilities, repairs and maintenance related to the home from the assets of the Trust. If the Personal Adviser certifies that the individual will not be using the home as his or her principle residence, the Trustee may sell the home and apply any proceeds to the purposes of this Trust.

Rental by trustee to persons other than the beneficiary:

The Trustee has the authority to rent out living space in the home to up to [__] other persons, who may also use common areas of the home as determined by the rental agreement, provided that no rental agreement may limit the Beneficiary’s right to live in the home and to use common areas of the home unless the Personal Adviser certifies that the Beneficiary will not be using the home as a residence during the period covered by the rental agreement. Rental income shall accrue to the Trust, and not to the Beneficiary. The Trustee shall make payments from the Trust for taxes, utilities and mortgage interest, repairs and upkeep of the home that represent the pro rata share of these costs of the persons occupying the home as renters.

VIII. APPOINTMENT OF TRUSTEE(S)

It is possible to name more than one trustee for a trust, for example a trustee with expertise in financial investment and another with knowledge of the needs of the beneficiary. If this is done, the trust should indicate whether the trustees have differing authority and whether each is or is not authorized to act independently in making decisions about investments or distributions. Where the trustee is not someone who knows the needs of the person well, it is a good idea to appoint a personal advisor (see next section).

[Name(s)] shall serve as initial Trustee(s), until [his, her, their] death, resignation, or incompetence. The Trustee(s) shall always have the power to select any necessary additional Trustees.

[Names], shall serve as successor Trustee(s).

A Trustee shall be deemed incapacitated upon a signed, written finding of incapacity by two physicians or one physician and one licensed psychologist who have personally examined the Trustee.

The Trustee may resign only upon giving written notice to all competent beneficiaries or to the guardians of any incompetent beneficiaries together with a final account.
If for any reason none of the persons designated in this Trust as Trustee continues to serve, a majority of the following persons shall appoint a successor Trustee: [Option: Trust beneficiaries and the guardians].

IX. APPOINTMENT OF PERSONAL ADVISOR

It may be helpful, particularly where the trustee is primarily chosen for ability to manage property, to appoint a person or agency to act as personal adviser to advise the trustee on needs and desires that could be met through trust assets. This should be a person who knows the beneficiary well, or is in a position to learn the beneficiary’s needs, knows the support services the beneficiary receives, and is willing to keep in regular contact with the beneficiary to keep abreast of unmet needs and desires. This helps to avoid the situation where property sits in the trust because the trustee is unaware of needed distributions.

The Personal Advisor shall advise the Trustee as to the Beneficiary’s interests, needs and desires, and may: recommend to the Trustee that the Trustee make distributions of a particular type from the Trust; make recommendations as to the form of distributions; and assist the Trustee in arranging purchases of appropriate goods and services. The Personal Adviser shall investigate all potential public sources of support available to the Beneficiary and take whatever steps are necessary to enroll the Beneficiary for that support. The Personal Advisor is not a Trustee, and all distributions are made in the sole discretion of the Trustee.

The initial Personal Advisor shall be [__________]. The Grantor may remove or replace the Personal Advisor at any time during the Grantor’s lifetime. If the Personal Advisor is no longer able to serve, a subsequent Personal Advisor shall be appointed by [options: the Grantor, if living and able to do so; named family member(s); the Trustee (with advice from the Beneficiary or family members); a nonprofit organization; the Beneficiary].

[The trust may allow or require payment for reasonable expenses and/or a fee for the services of the personal advisor.]

The trustee is directed to consult with the Personal Adviser at least once every [60] days as to the needs of the Beneficiary.

X. FUNDING THE TRUST

A. Funding by grantor who is not the beneficiary.

A grantor can fund a trust with any type of property, including bank accounts, stocks, bonds, real estate, personal property and insurance proceeds (see next section).
The trust document will usually state that specific property has been transferred to and accepted by the trustee, to show that the trust is in effect, but property can be added to the trust at any time, and the trust can provide for addition of property by other persons.

The Grantor by this agreement transfers and delivers to the Trustee, in trust, the property set out in Schedule A, which is attached to this Trust Agreement. The Trustee by this agreement acknowledges receipt of that property.

Additional assets may be transferred at any time to the Trust by the Grantor or other persons, by will or otherwise, provided that the transfer is acceptable to the Trustee. Any assets transferred to the Trust and accepted by the Trustee shall become part of the Trust Estate and be subject to all terms and provisions of this Trust document.

B. Trusts funded from life insurance.

Life insurance is often used to fund supplemental needs trusts, particularly if the grantor has no property available to put into the trust. In this way, the grantor can be sure the trust will be funded if the grantor dies and is no longer around to provide assistance personally. Either term insurance or whole life insurance can be used to fund a trust. Term insurance will produce a larger payment for a lower premium, but will become more expensive, or unavailable, as the grantor gets older. If the trust is funded by life insurance, it is not enough to state this in the trust. The insurance company must be directed to designate the trust as the primary beneficiary to the policy.

The Grantor directs that the proceeds at Grantor’s death of Life Insurance Policy No. , issued by and owned by Grantor be paid into the Trust. [This provision does not limit Grantor’s rights to modify or terminate the policy prior to Grantor’s death.]

An alternative to the above provision is to transfer ownership of the policy itself to the trust, and to authorize or direct the trustee to pay premiums. If the life insurance has cash value, the trust should indicate whether the grantor intends the trustee to have authority to cash in the policy prior to the death of the insured person and use the proceeds to further the purposes of the trust.

C. Trusts funded from settlement agreements and judgements.

Federal Medical Assistance law will not count a supplemental trust "established" by a court as a resource, even if it contains funds from a judgement or settlement in a case which might have resulted in a direct payment to the beneficiary, provided the trust meets certain conditions. See One Step Ahead, Part VIII.f. To fit within this exception, it is important that any settlement be incorporated into a court order, and that the court
order itself establish the trust. The trust should be attached to and incorporated into the court order, and this should be reflected in the trust.

This Trust is established by Order of the Court in [name of case, court and case number] on [date]. A copy of the Court Order is attached as Exhibit A.

In addition, federal law requires that a trust funded by a court settlement provide that the state will receive all amounts remaining in the trust upon the death of the beneficiary up to an amount equal to the total Medical Assistance paid on behalf of the beneficiary. Hopefully, such a provision will inspire the trustee to use, rather than accumulate, trust assets.

XI. PROHIBITION OF ATTACHMENT

The Beneficiary's beneficial interest in this Trust fund is created for his/her personal enjoyment, protection and welfare and shall not be susceptible to assignment, anticipation or seizure through legal process by any creditor of the Beneficiary, including the Federal, State or local governments. It is the intent of the Grantor that at all times this Trust be interpreted to come within the provisions of Wisconsin Statute 701.06(5m) which exempts the Trust assets from the claims of the State of Wisconsin or its agencies.

This Trust is primarily for the supplemental benefit of the Beneficiary. However, it is the Grantor's specific intent that the interest of persons with a remainder interest shall take precedence over any public or private claimant.

The Beneficiary has no power to anticipate or assign benefits under this Trust.

XII. POWER OF TRUSTEE TO MODIFY TRUST

Some drafters give the trustee power to modify the trust terms to conform to changes in benefits law and the circumstances of the beneficiary. This adds flexibility, but also carries risks. First, the Trustee may use the power to circumvent the grantor's intent. Second, government programs might interpret this power to mean that any restrictions on the trustee's discretion (e.g., prohibiting cash payments) do not really exist because the trustee has power to modify them. Given the high level of discretion usually provided to trustees by supplemental needs trusts, adding a blanket power to modify the trust is probably not necessary to ensure that the trustee has the flexibility to respond to changing conditions. As with all trust terms, this should be discussed with the attorney creating the trust.
XIII. TERMINATION AND TRANSFER OF ASSETS ON TERMINATION

Disposition of the assets of the trust after termination is generally not an issue for public benefits eligibility, as long as the distribution is not to the recipient of benefits. Trust assets may be distributed to people chosen by the Grantor when the trust is created, to people named later by the Beneficiary, or to charitable or religious organizations. Trusts where the remainder goes to a charitable organization may have some tax advantages to the Grantor. If a trust is funded with the recipient's own funds, special restrictions on disposition of assets may apply. See One Step Ahead, Part VIII.f.

This Trust shall terminate upon the Beneficiary's death.

If it appears likely that a Court will order that any creditor, public or private, is entitled to receive any part of this Trust, this Trust may, in the absolute discretion of the Trustee, be terminated and the assets [distributed to the remainder beneficiaries.]

Upon Termination of the Trust, the Trustee shall distribute in equal shares, free of Trust, the remaining balance of the Trust assets to [the Beneficiary's surviving spouse, if any, or, if the beneficiary is not married at the time of his death, to his issue, if any][the brothers and sisters of the Beneficiary or their surviving issue, per stirpes], as remainder beneficiaries. If no identified remainder beneficiary survives, the Trust Assets shall be distributed to the heirs at law of [Options: Grantor, Beneficiary].

XIV. ANNUAL ACCOUNTING

The Trustee shall provide an annual written account of the administration of the Trust to [__].

XV. POWERS OF TRUSTEES TO MANAGE TRUST PROPERTY

The powers of trustees to manage and invest trust property do not affect the Beneficiary's eligibility for public benefits. The following provision is a broad grant of authority, and is provided simply to illustrate the kinds of issues that need to be addressed. In many cases, the grantor will want to be more restrictive, e.g., by limiting investments to mutual funds, or to insured bank accounts.

In addition to the powers otherwise vested in them by law, the Trustees are empowered to do all things necessary or convenient for the orderly and efficient administration of the Trust hereunder without the approval of any Court. Without limiting this general grant of power by the following enumeration, the Trustees shall possess the discretion and powers without application to or confirmation or order by any Court:
1. To retain any assets in the form received without regard to diversification or to suitability for purchase by fiduciaries.

2. To invest and reinvest in any assets; the Trustee shall not be restricted by any requirements regarding the substance of their investments or diversification.

3. To hold uninvested cash.

4. To lend or borrow money upon appropriate terms and to pledge or mortgage assets as security for loans obtained.

5. To purchase property, casualty, liability, title, health, life or other insurance.

6. To pay, compromise, contest or abandon claims.

7. To exercise directly or by proxy all voting subscription, conversion or other rights in securities held, and to participate in or oppose any plan or reorganization, dissolution, liquidation or merger.

8. To employ accountants, legal counsel or other agents, and to pay them reasonable compensation from the assets held.

9. To suspend all payments to any Trust beneficiary if the Trustees believe that the beneficiary's receipt of such payments is threatened or may be diverted by execution, attachment or other legal process, and to apply funds for the benefit of the beneficiary as it may determine will fulfill the purpose of the Trust.

10. To receive reasonable compensation.

The Trustees may exercise any of the foregoing powers without liability for any loss or damage resulting from actions taken or decisions made in good faith and with due care.

XVI. SEVERABILITY

If any article or provision of this Trust Agreement is found to be void or invalid, but the remainder of the Trust Agreement is upheld, that part of the Trust Agreement which was not adjudicated void or invalid shall be executed without reference to any void or invalid provisions.
XVII. GOVERNING LAW

This instrument and the dispositions hereunder shall be construed and regulated and their validity and effect shall be determined by the law of Wisconsin.