MICHIGAN REVOCABLE GRANTOR TRUSTS, SECOND EDITION

Chapter 12: Amenities Trusts for Individuals with Developmental Disabilities or Mental Illness

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I. Overview

A. Terminology

§12.1 This chapter describes and discusses amenities trusts for individuals with developmental disabilities or mental illness. The term amenities trust describes a trust that is designed to supplement benefits that an individual who is disabled or mentally ill may be entitled to and therefore differs from a basic support trust. An amenities trust is intended to coexist with means-tested benefits, specifically Supplemental Security Income (SSI) and Medicaid. An amenity is anything that is not food or shelter and does not involve a direct distribution of cash to a Medicaid recipient. This chapter describes when to use such trusts and how to create them. These trusts are an essential part of the estate planning process for parents who have a child with a developmental disability or mental illness.

For the practitioner who does not routinely work with families that include children with developmental disability or mental illness, the name amenities trust may be confusing as most authors and practitioners refer to the trusts described in this chapter as special needs trusts, or SNTs. Practitioners should be aware that the term special needs trust is viewed by parents of children with disability or mental illness as an exclusionary term that undermines the movement for inclusion led by advocates in this area over the last three decades. Beginning with the deinstitutionalization of people with developmental disabilities in the 1970s, advocates have struggled to ensure the inclusion of people with disabilities in community-based living, in mainstream education, in employment, in the self-determination of community-based supports, in the maintenance of legal rights, and in many other areas.

The term special needs highlights the perceived differences between those with disability and those without disability. The term amenities trust, on the other hand, accurately describes the purpose of the trust without unnecessarily evoking the condition that has resulted in the exclusion of those with disability or mental illness.

B. The Use of Trusts for People with Developmental Disabilities or Mental Illness

§12.2 A family that has a child with a developmental disability or mental illness faces planning challenges that are decidedly different from other families. Early in the child's life, parents realize that their child is not likely to attain economic self-sufficiency through sustained gainful employment. Depending on the severity of the disability, parents also understand that their child will likely require extensive personal support simply to engage in the ordinary activities of daily living.

As both children and parents age, parents understand that they will not be able to provide continuing personal support throughout their child's entire lifetime. Parents also realize that the cost of purchasing services required to support their child is well beyond the means of all but the wealthiest families. Inevitably, most parents conclude that their child will need to qualify for and receive public benefits to pay for basic yet essential personal services. These benefits include Social Security Disability Insurance, 42 USC 401 et seq.; Medicare, 42 USC 1395 et seq.; SSI, 42 USC 1381 et seq.; and Medicaid, 42 USC 1396 et seq.

Eligibility for these essential benefits requires the beneficiary to meet strict income and asset qualifications. Parents of children that receive these benefits are then faced with trying to maximize the quality of life for their impoverished child. Privately funded trusts are an important tool in this process. Trusts provide a resource from which to purchase amenities to enhance the quality of a person's life without interfering with his or her access to essential public benefits. Trusts can be useful in developing residential options for a child and in ensuring that his or her needs are monitored following the parents' deaths. Trusts are the private contribution to the financial challenges that accompany developmental disability or mental illness.

Amenities trusts not only enhance the quality of life for the child but provide the control, asset protection, and money management parents desire. For reasons similar to those that motivate parents to place their children's inheritance in trust until the child reaches a certain age and expected maturity, a child with a developmental disability or mental illness cannot be considered a good candidate to receive an outright inheritance. Parents understand that some person or entity will be needed to administer any inheritance that the parents expect to leave for their child. Regardless of which public benefits their child may qualify for, trusts should be used to receive the private funds that are transferred by parents for the benefit of the child.

C. Understanding the Need to Blend Public Programs with Private Resources

1. The Cost of Personal Assistance

§12.3 The use of amenities trusts for the benefit of people with developmental disabilities or mental illness is best understood in the context of the living arrangements provided for these individuals. Historically, if a family had a child with developmental disabilities, the options for long-term residential care were to (1) keep the child at home for as long as possible and then move the child in with relatives or (2) place the child in a state institution. Large state institutions warehoused people with developmental

disabilities. State psychiatric hospitals were used to provide treatment and residential services to people with mental illness.

People with developmental disabilities or mental illness no longer make their primary residence in state institutions, psychiatric hospitals, or nursing homes. Michigan began closing its institutions in the early 1970s, and since then thousands of people have moved from institutions into group homes or other supported living arrangements in communities throughout the state. In addition, many adult individuals with developmental disabilities still reside at home with their parents.

Families who keep their child at home undertake the burden of providing care and personal assistance for far longer periods of time than families whose children do not have disabilities. Some families deliberately keep their child at home because the parents do not want to face losing control over their child to the mental health system that contracts for group homes and supported independent living arrangements. Other families have placed their child on a waiting list for group homes or apartments and are awaiting suitable placement.

Regardless of why a child has remained at home, the reality is that a community-based placement is almost inevitable unless some other relative undertakes the obligation of providing care for the child. Parents naturally tend to become incapacitated or die before their children. For many families, the issue of long-term residential care, outside of the family home, remains to be addressed.

The private home, the group home, or the supported independent living arrangement share one common element. These are environments in which a person with a developmental disability or mental illness is provided with essential personal assistance by third parties. The amount of personal assistance that an individual requires can vary from minimal assistance to full-time care. Personal assistance needs are related to individual cognitive and psychological ability.

When personal assistance is provided by nonfamily third parties, the cost of staffing personal assistance needs becomes overwhelming at a very modest level of need. An adult with a high level of cognitive ability who requires only modest support, for example four or five hours per day, represents a substantial economic challenge to a family trying to fund his or her needs privately. In fact, many adults with developmental disabilities require far more personal assistance. Some require assistance 24 hours a day, 365 days a year. The cost of this assistance can exceed $100,000 or more annually if privately funded. Most parents understand that they are not expected to be the primary funding source for their child’s personal assistance needs throughout his or her lifetime. Personal assistance provided in a supported living arrangement outside of the family residence may be funded through Medicaid. Medicaid is a needs-based program funded over 50 percent with federal general fund dollars and state matching funds and administered by the states.

In addition to personal assistance needs, Medicaid is the primary funding source for a number of additional mental health services provided through community mental health agencies. These include case management, medical care, some transportation-related expenses, respite for families providing primary care, specialized equipment, hospitalization costs in facilities not operated by the State of Michigan Department of Community Health, and other benefits.

Medicaid has additional value to people with mental illness. Even for individuals who are capable of living on their own with minimal personal assistance needs, Medicaid is an invaluable resource because it pays for medication and psychiatric services. People with chronic mental illness are not likely to earn medical benefits by engaging in sustained gainful employment, thus Medicaid becomes an irreplaceable source of funds to pay for these medical necessities. All of the benefits described above are in addition to the resources required to provide for the food, clothing, and shelter of the individual.

2. Poverty as a Prerequisite for Access to Essential Services

§12.4 Medicaid has evolved into the primary funding source for the personal assistance and medical needs of people with developmental disabilities and mental illness. However, Medicaid eligibility is needs based. 42 USC 1396 et seq.; MCL 400.105 et seq. To be Medicaid eligible, a person can have only limited assets and income. If a person has resources from which he or she may provide for his or her basic support, eligibility for needs-based benefits is denied.

In 2007, a person with a developmental disability or mental illness who has nonexempt assets greater than $2,000 is not Medicaid eligible. PEM Item 400, at 4 (Michigan Program Eligibility Manual). The income test is substantially more intricate, but it is sufficient to point out that unearned income in an amount as little as $30 per quarter can begin to affect Medicaid eligibility. PEM Item 500, at 4. Medicaid requires that all income be counted whether or not the income is earned unless the income is specifically excluded. PEM Item 500, at 1. Until excess countable assets are spent down or converted to exempt assets, the flow of benefits is jeopardized and the mental health delivery system is potentially disrupted.

Accordingly, parents who have a child with a developmental disability should plan to ensure that their child does not have excess resources. At age 18, a person with a developmental disability or mental illness may qualify for SSI payments. SSI is used to provide an income stream for an individual who is disabled and does not have “excess” income or assets. When a person is SSI eligible, he or she is also Medicaid eligible in Michigan. Advocates advise parents to make certain that their child does not have excess assets when he or she attains majority, so that SSI and Medicaid can be obtained at the earliest time.

When mental illness first manifests itself, a process of divestment usually occurs. Expenditures are made for essential care, medical expenses, and other necessities of life. An uninsured hospitalization might result in impoverishment, or any other number of

factors or events can culminate in the spend down of life savings. Usually the capacity to earn sufficient income to sustain an unsubsidized standard of living is impaired by the mental illness. Once excess assets are exhausted, Medicaid eligibility is attained.

For people with developmental disabilities or mental illness, Medicaid is typically the sole, credible source of funds for the purchase of personal assistance and medical necessities. But Medicaid eligibility comes at a big price. The reality, of course, is that the system by which essential personal assistance, mental health services, and prescription medication is delivered to people with developmental disabilities or mental illness requires categorical personal impoverishment as a prerequisite to admission.

Amenities trusts exist in the context of a Medicaid-dependent mental health system and become a source of private funds to purchase goods and services that enhance the quality of the beneficiary's life. These trusts, when included in the parents' estate plan, allow parents to provide a meaningful inheritance to their child without disrupting the flow of benefits that is so critical to a child who requires substantial personal assistance and medical treatment.

II. Drafting the Amenities Trust

A. Understanding an Amenities Trust in the Context of the Grantor's Estate Plan

§12.5 The amenities trust is a disposition for the child of the grantor that belongs alongside the dispositions for other children. There is no need to create a separate, freestanding trust apart from other dispositions. Generally, the amenities trust is a part of the family or credit shelter trust in a standard two-trust estate plan. The funding of this trust will occur following the death of the surviving spouse of the grantor or following the death of the grantor if there is no surviving spouse.

B. Protection of Medicaid Eligibility

§12.6 First and foremost, amenities trusts protect Medicaid eligibility. Next, these trusts provide a source of funds to purchase amenities that enhance the quality of life of the beneficiary without impacting the flow of public benefits in any way. Drafting the amenities trust requires strict attention to the regulations and caselaw that define what are countable assets and that the Michigan Department of Human Services (DHS) uses to determine whether the trust assets or income affect or disqualify the beneficiary from Medicaid eligibility. The mere existence of a trust is not disqualifying, in and of itself. The issue in determining eligibility is whether the beneficiary has an ascertainable interest in trust assets that the beneficiary may direct toward the beneficiary's needs. PEM Item 401 states that a trust created with resources of others (e.g., parents in their estate plan) is an available asset "of the person who is legally able to … [d]irect use of the trust principal for his needs, or [d]irect that ownership of the principal revert to himself." PEM Item 401, at 13. In the absence of this control by the beneficiary, the trust

is not a countable asset. See also Miller v Department of Mental Health, 432 Mich 426, 442 NW2d 617 (1989).

Regarding the income that a trust generates and expends, PEM Item 401, at 13 states, “Count as a person’s unearned income any payment received from the trust.” It is obvious that this simple description of “unearned income” has significant implications regarding a trustee’s ability to make a direct distribution of cash to a beneficiary. What advocates do not necessarily agree on is whether any distribution from the trust except a direct payment to the beneficiary is not countable. PEM Item 500, at 1, defines income as “benefits or payments measured in money.” It then states, “Count all income that is NOT specifically excluded.”Id.

Third-party assistance is specifically excluded as income. “Payment of a person’s bills by a third party directly to the supplier using the third party’s money is NOT income to the person.” PEM Item 500, at 32–33. The example used in the PEM illustrates the point:

> Example: Sally’s father, Joe, pays Sally’s rent. Joe uses his own money. Joe does NOT owe Sally any money. The payment is NOT income to Sally.

PEM Item 500, at 33.

Likewise, in-kind benefits are also excluded. “Exclude as income any gain or benefit in a form other than money. This includes meals, clothing, home energy, garden produce and shelter.” PEM Item 500, at 20. PEM Item 500 therefore appears to authorize trusts to pay for essential needs (food and shelter) in the trustee’s discretion.

For the purposes of SSI, however, it is clear that the trust may not pay for any of the following basic support obligations of the beneficiary: rent, basic utilities (including gas, water, electricity, sewer, and garbage removal), mortgage payments, property taxes, and property insurance if required by the mortgage holder. 20 CFR 416.1120–.1141. Because the practitioner cannot know what benefits the trust beneficiary will be eligible for and cannot predict how Medicaid laws may be changed, a conservative approach restricts the trust from ever paying for basic support, i.e., food and shelter.

C. Defining Amenities

§12.7 Some attorneys attempt to compile a comprehensive list of amenities to include in the trust instrument. These lists are often accompanied by detailed instructions to the trustee concerning regular visitation of the beneficiary and similar matters. The language provided in form 12.1 represents a different approach to the definition and description of amenities.

An amenity is any good or service that provides a benefit to the beneficiary and is not prohibited by or disqualifying from Medicaid. Typically, the amenities provided by an amenities trust include entertainment, travel, clothing, and support services that are not

otherwise paid for. A well-drafted amenities trust provides as much latitude and flexibility to the trustee as possible, constrained only by the technical restrictions that accompany Medicaid eligibility. Exhibit 12.1 is a partial list of appropriate expenditures from an amenities trust.

In addition to purchasing amenities, an amenities trust may be used to purchase a residence to be occupied by the beneficiary. If the beneficiary pays rent to the trust and the rent payment constitutes a reasonable share of the expenses of maintaining the home, it will satisfy the provision that the trust not be used for the shelter of the beneficiary. The source of the rent payment will generally be either SSI, Social Security Disability Insurance, or both. Also, roommates (who are acceptable to the beneficiary) might be used to share the expenses associated with maintaining the house. The amenities trust may purchase a home in the beneficiary"s name if the beneficiary's income is sufficient to pay for the basic utilities, and property taxes. The use of amenities trusts to provide a residential alternative for the beneficiary is common and benefits both the beneficiary and the state. See Joel S. Welber, The Use of Trusts to Compliment Essential Governmental Benefits in Residential-Life Care Planning, 75 Mich BJ 402 (1996).

D. Funding the Trust

1. Finding the Correct Funding Level

a. Developmental Disability

§12.8 In an estate plan for a family that has no child with a disability or mental illness, parents will commonly split their estate equally among their children. Occasionally one child is favored or disfavored, but fundamentally most parents want to treat their children equally.

When a family has a child with a developmental disability, the issue of a funding level for his or her trust becomes important. Some parents are inclined to leave all of their assets in trust for the child with a developmental disability, even to the exclusion of other children. Other parents have been advised to disinherit the child with the disability to avoid interference with needs-based programs, particularly Medicaid. Neither of these extreme approaches is required to accomplish the goals discussed in this chapter. In fact, disinheritance in favor of other children may create adverse consequences for the child with a developmental disability.

An alternative approach is to work backward from the perceived financial need and to calculate a principal amount required to fund that need. Parents tend to be the best source for determining the funding level for the amenities trust. Parents are most familiar with the needs and desires of their children and typically have been spending their own money to provide amenities to their child. The planner and parents can then calculate the cost of these amenities and additional needs, such as monitoring services, financial management, advocacy, and other services that the parents presently provide. This calculation need not be exact but rather is used as a ballpark figure to be used in funding

the trust. In general, there is no correct or incorrect funding level for amenities trusts. A child with a developmental disability or mental illness may usually receive an equal share of the grantor's estate without creating undue problems because the funding range for these trusts is quite broad. A trust funded between $100,000 and $500,000 will typically generate sufficient income to provide adequate amenities to the beneficiary while keeping the principal intact.

Individuals with developmental disabilities tend to be very modest consumers. Therefore, the trust should provide that the trustee may accumulate income if there are no appropriate distributions. At higher funding levels, amenities trusts for people with developmental disabilities can reach a point of diminishing financial returns. Parents may be justified in funding this trust at a lower level and diverting the excess assets to other children. For example, if a family has three children and a net distributable estate of $1.5 million, the child with a developmental disability might not need to have $500,000 funding his or her amenities trust. As a result, parents can favor the other two children by giving each of them a greater share of the estate without doing any harm whatsoever to the child with a developmental disability.

Parents whose only child is developmentally disabled or mentally ill face a different funding question. If the parents wish to leave their total estate for the benefit of their child, putting all assets into an amenities trust may not make sense. Instead, these parents may wish to leave the majority of their estate in an unrestricted trust for the benefit of their child with the remaining assets in an amenities trust that protects the child's eligibility for means-tested benefits once the unrestricted trust has been exhausted. For example, if parents with total assets of $1 million wanted to leave all their assets to their only child, who has a developmental disability, the parents may choose to fund an unrestricted trust in the amount of $700,000 and an amenities trust in the amount of $300,000. The unrestricted trust would be used for the child's basic support and would disqualify the child from means-tested benefits but give the trustee greater flexibility to provide the highest quality support and care for the child. Once the unrestricted trust is exhausted, the child will again qualify for means-tested benefits and will also benefit from the $300,000 amenities trust.

b. Mental Illness

§12.9 The funding level that is appropriate for a child with mental illness will reflect the capabilities of the child. Many children with mental illness drive cars, attend college or community college, travel, live independently, and manifest needs that are more intricate than those of people with developmental disabilities. Because the consumption needs of the child with mental illness can be somewhat similar to those of their siblings, an equal division of the estate among the grantor's children is often appropriate. However, the planner should not be lulled into thinking that the cognitive ability of the child with mental illness affects the need for an amenities trust. Unless a child is capable of sustaining long-term gainful employment without reliance on public benefits, the disposition should always be in trust.

2. Avoiding Double Funding

§12.10 One small problem for the drafter who is not accustomed to funding a trust in a specific pecuniary amount is that it is possible to double fund an amenities trust. This is not desirable. The amenities trust is usually a subtrust of the family or credit shelter trust to be fully funded on the death of the survivor of the grantor and the grantor's spouse. Usually the husband's and wife's grantor trusts contain mirror-image language concerning the division of the family or credit shelter trust into shares and the allocation of the share for the child with a developmental disability or mental illness to his or her amenities trust.

If a grantor has decided to fund an amenities trust with a specific dollar amount of assets, for example, $150,000, the problem of double funding arises. At the time of the first death, a credit shelter trust will receive assets of up to $2 million, which will be more than enough to fund the pecuniary amount of the amenities trust on the subsequent death of the grantor's spouse. However, if the survivor's trust is not changed, the possibility exists that a second trust, funded in the amount of $150,000 will be created on the death of the surviving spouse from the assets in his or her family or credit shelter trust.

Language can be inserted into the trust to avoid this double funding problem. A sample of that language is contained in form 12.2.

3. Funding at the Death of the Grantor

§12.11 One misconception that is common among parents of a child with a developmental disability or mental illness is that money has to be allocated to the trust for this child during the parents' lifetimes. In reality, there generally is no reason to fund a trust for this child before funding a disposition to any other child—in other words, at the time of the parents' deaths. Obviously, an amenities trust contained in the parents' grantor trusts cannot receive annual exclusion gifts or other transfers. The creation of a freestanding amenities trust for the sole purpose of receiving $12,000 or $24,000 gifts is possible but not common. The main problem with doing this is that the parents cannot act as trustee, and the size of the trust is too small to justify professional management. Most parents realize that during their lifetimes their natural inclination is to purchase amenities for their child and no trust is required for them to do so. Usually parents are relieved to know that the trust can be funded on their deaths.

E. Trust Instructions—Recognizing the Irrevocable Life Insurance Trust Trap and Learning to Avoid It

§12.12 There is an almost unacceptable conflict between amenities trusts and documents that cannot be modified during the lifetime of the grantor. During the past 25 years, substantial changes have occurred in the public's perception of and approach toward people with developmental disabilities and mental illness. For example, advocates have made substantial gains in the development of supported independent living arrangements for people with considerable cognitive and physical disabilities.

Often, the impetus for change comes from outside of the family and sometimes in spite of parents' efforts to find a "secure" placement for a child with an agency or in a group home. Trust instruments that are inflexible may present an obstacle to lifestyle changes that are inevitable for people with developmental disabilities and mental illness. Also, a lack of flexibility might prevent a trust from compliance with a change in eligibility requirements for needs-based benefits to the detriment of the beneficiary, even though there have been very few substantive changes in eligibility regulations over the past two decades.

The irrevocable life insurance trust (ILIT) trap arises in one of two circumstances. First, a family with wealth decides to create an ILIT to create additional wealth, which is not subject to federal estate tax. In this context, the estate planner drafts an amenities trust into the ILIT to be funded on the death of the insured and perhaps his or her spouse. Unfortunately, this trust is irrevocable. If the trust contains disqualifying language, it cannot be changed. Even if the trust is a perfectly drafted amenities trust, it might contain provisions that a subsequent grantor trust would not contain.

One easy solution to this ILIT trap is to give the trustee the right to amend the trust or name a trust protector for this purpose. Another easy solution is to include the amenities trust in the grantor's grantor trust even if the beneficiary with a developmental disability or mental illness is disinherited from the proceeds of the ILIT. The funding of the amenities trust can be given priority in the grantor trust if the fear is that there might not be enough assets to create shares that are equal or fair among all of the children. Often, families that have the resources to create an ILIT will have sufficient assets to fully fund an amenities trust from noninsurance sources.

The second potential ILIT trap is less obvious. In recent years, financial planners have discovered that parents of children with developmental disabilities or mental illness constitute a fertile market in which to sell planning services and products. These parents desperately seek assurance that their child will be safe and fully provided for following their deaths.

Some financial planners espouse the view that a freestanding trust for a child with a disability should be created separately from the grantor trust used in the estate plan. They argue that if the grantor requires long-term nursing care, the depletion of the grantor's estate could adversely affect the grantor's ability to provide an inheritance to the child with a developmental disability or mental illness.

Often, a parent's concern for his or her child is so great that the parent is induced to purchase a separate life insurance policy or some other financial product to assure funding for this freestanding trust. When life insurance is added to an estate, whether it truly adds value or not, there is a tendency to lock the insurance into an irrevocable trust to cement the assurance that the death benefit will be available for the beneficiary. The estate planner is brought into this plan to draft the documents and in essence, to ratify the plan.

The mere fact that a child has a developmental disability or mental illness does not justify a purchase of life insurance or the use of an irrevocable trust. Attorneys should be objective and analyze the estate plan to determine whether the estate will benefit from the purchase of life insurance or whether parents are being sold a product from which marginal benefit will be derived.

Sometimes life insurance is an appropriate product to add to an estate to provide additional funds with which to fund an amenities trust. For example, a young couple with small children and little savings might benefit from life insurance that can be used to provide for income replacement or even to fund an amenities trust on the second death. An older couple who can afford a second-to-die policy might want to add additional coverage to fund an amenities trust.

In other cases, a family may have more than adequate funds to provide security to the parents and to fund an amenities trust on the parents' deaths. If this is true, a child's security does not depend on the parents' willingness to buy a financial product from the planner. Freestanding trusts funded by life insurance should only be used when the planner can articulate a clear and credible rationale for such a plan. Moreover, if the proposal is to use an irrevocable trust, whether funded with life insurance or otherwise, this option should almost always be avoided, absent some extraordinary circumstance that justifies this loss of flexibility.

III. Selection of a Trustee

A. The Case for the Corporate Trustee

§12.13 Choosing a trustee is a very important part of the planning process when a beneficiary has a developmental disability or mental illness. A fiduciary will be required to manage assets throughout the lifetime of the beneficiary. There will be no sprinkling of principal and the trust will remain intact as long as assets remain and the beneficiary is living. The choice of fiduciary may determine the success or failure of the funded trust. See Joel S. Welber et al., But What Will Happen To My Child? What Is the Role of the Trustee in the Administration of a Trust for a Beneficiary with Developmental Disabilities? Trusts & Estates (June 1992).

When the beneficiary is a person with a developmental disability, many parents lean toward using a sibling or other relative as a trustee. They correctly presume that the beneficiary's sibling will be in the best position to know the needs of the beneficiary. There is also a tendency for parents to want to save fiduciary fees; they perceive, albeit often without much investigation, that trust company fees will be large and will diminish the ability of the trust to provide adequate amenities for their child.

Banks are commonly criticized for being too conservative in their investment philosophy. Based largely on anecdotal evidence, parents will argue that banks are not

good at investing for growth and are slow to distribute income once earned. Some older parents continue to question the safety of deposits in banking institutions. Among other things, these parents do not understand that trusts do not constitute general deposits. All of these factors and others predispose many parents toward a noncorporate fiduciary, usually a sibling. In spite of these objections, when drafting an amenities trust, a planner can and should make a case in favor of a corporate fiduciary. The reasons and arguments that support this case are as follows:

1. A corporate fiduciary provides certainty and stability to the administration of the trust and will definitely outlive the beneficiary. In many cases, parents simply assume that the sibling that they want to act as fiduciary will outlive the beneficiary or that the sibling will remain in the area, never be transferred in his or her job, or never lose interest. Of course, once these possibilities are raised, parents begin to understand the benefit of naming a corporate fiduciary.

2. A corporate fiduciary is accountable and insured. Ultimately, a sibling may not be accountable, as a practical matter. Most beneficiaries with developmental disabilities are incapable of understanding the nature of the trust arrangement; many have no comprehension of money. They are certainly not in a position to protect themselves against trust mismanagement. If trust assets are squandered, mismanaged, lost to the sibling's creditors when commingled, or converted by the sibling, a planner must assume that there will be no recourse. In fact, a beneficiary with a developmental disability will probably not know that he or she has been injured.

On the other hand, a corporate trustee is accountable and collectible. A sibling or guardian can exercise oversight and provide protection for the beneficiary when a corporate fiduciary is used. This issue needs to be discussed with parents in the planning process.

3. A corporate fiduciary provides professional money management. Generally, most people may do an adequate job of investing their own money, but investing someone else's money, in trust, requires skills and understanding that many, if not most, people do not have.

4. The cost of professional management is not a significant consideration when the beneficiary is a person with a developmental disability. Most corporate fees are set between 1 and 2 percent of the trust principal, per annum. This fee is reasonable considering that the assets are professionally invested and that there is full accountability. Most beneficiaries with developmental disabilities are not consumers of big-ticket items. Generally, they do not require funds for expensive houses, cars, vacations, computers, tuition, or other items that trustees are commonly called on to fund. A conservative investment strategy designed to produce sufficient income to meet the modest needs of the beneficiary and grow at the rate of inflation, or better, is well suited for most amenities trusts.

The combination of professional management, accountability, perpetual existence, and a conservative approach to money management works well for amenities trusts for people with developmental disabilities. The challenge is to find a corporate trustee who is willing to manage a fund that may be less than $250,000. One approach to this problem is to use the same trustee for a substantial number of trusts. Another approach is to use the trustee as successor for the entire estate plan and to give the trustee the right to settle the estate. The ability to offer this incentive to the trustee is another reason for folding the amenities trust into the family or credit shelter portion of the parents' grantor trust rather than creating a freestanding document. If large banking institutions continue to combine and form yet larger, less personal entities, the use of a bank as corporate fiduciary may diminish. Parents and planners most certainly will balance the positives recited above with the negatives associated with the large, impersonal organizations that banks are seemingly becoming.

When the beneficiary is a person with mental illness, parents are far less likely to hesitate in naming a corporate fiduciary. Many parents do not want to name a sibling as trustee when the beneficiary has a mental illness because the parents perceive that the sibling is put in a difficult if not untenable position. Mental illness presents very different challenges than mental retardation, autism, or other developmental disabilities. People with mental illness are often quite aware of financial matters; they understand what money can do for them and they are also acutely aware of their own poverty. A sibling, charged with the responsibility of a fiduciary, is placed in the unenviable position of withholding access to trust assets or income from his or her own sibling. The beneficiary's reaction to the acts of the sibling trustee can be very damaging to the relationship between the siblings.

B. The Role of Siblings as Advisors

§12.14 Siblings play a very important role in the operation of the amenities trust. One very important part of the estate planning process is to make sure that the primary beneficiary's needs are closely monitored after the parents' deaths. Communication between a corporate fiduciary and a beneficiary with a developmental disability can be highly problematic. In many cases, an intermediary or advisor is the best answer to the problem of identification of needs facing the trustee. As previously noted, most parents assume that a beneficiary's siblings will be in the best position to know the needs of the beneficiary.

Even though siblings might not make the best trustees, they are invaluable as advisors to the corporate fiduciary. Language is provided in form 12.1 that can be used as a part of the amenities trust to name a sibling or siblings as advisor. Corporate trustees are very comfortable when interacting with family members. Trustees welcome input concerning the beneficiary's needs when there is a developmental disability or mental illness.

However, a sibling should usually be named as an advisor rather than as a cotrustee. Naming a sibling as a cotrustee introduces an unnecessary element of

complexity into the relationship between corporate fiduciary and sibling. Siblings do not need to be consulted about every investment decision that the corporate fiduciary makes. Usually, a trustee's expression of a willingness to consult with a sibling as an advisor is sufficient to address the parents' concerns about monitoring the beneficiary's needs.

If the beneficiary has no siblings, language should be inserted into the trust to permit, if not require, the trustee to hire a person or an agency to regularly monitor the beneficiary's needs. The estate planner drafting the amenities trust has to understand that the communication between the trustee and the beneficiary will be very different in an amenities trust from other trusts for children. Accordingly, naming advisors or giving instructions to monitor should be a part of each amenities trust.

C. Testamentary Bequests from Family and Friends

§12.15 Often aunts, uncles, grandparents, cousins, or friends wish to make testamentary gifts to individuals with developmental disabilities or mental illness. Any outright inheritance or distribution received by an individual with developmental disability or mental illness can interfere with that individual's flow of important means-tested benefits such as SSI and Medicaid. Parents of the child with developmental disability or mental illness need to advise family and friends that an outright gift or bequest to their child might cause more problems than benefits. If family and friends want to provide for the child they should either create their own amenities trust or make the gift or bequest directly to the child's parents. However, if a client is aware that a family member or friend wants to make a present gift to their child with a disability, yet does not wish to create their own amenities trust, and does not wish to make the gift to the child's parents, then a free-standing amenities trust should be considered as a vehicle to hold such gifts.

IV. Disposition of the Trust on the Death of the Beneficiary

A. The Misconception Concerning the Obligation to Repay

§12.16 Amenities trusts are designed to last throughout the lifetime of the beneficiary. On the death of the beneficiary, an amenities trust can provide for the payment of reasonable funeral and burial expenses of the beneficiary. Often, this trust is the primary source of funds for these purposes. The trust should contain provisions for the disposition of the remaining assets and accumulated income following the payment of these expenses.

There is no present case law or regulation that precludes giving the beneficiary of an amenities trust a power of appointment over the disposition of the remaining trust assets. However, as a practical matter, this is rarely done. The power to dispose of the remaining trust assets would make a very attractive target for states that engage in estate recovery. Also, because the beneficiaries are people with developmental disabilities or

mental illness, they may not have the practical ability to exercise such a power and when they attempt to do so, their capacity is subject to challenge.

Rather than bring the issues of capacity or estate recovery into play, a grantor can direct the disposition of the trust assets that will remain following the death of the primary beneficiary. In many cases the primary beneficiary will not have issue surviving, although this is not always the case. There is a possibility of a generation skip making its way into this trust, and the drafter should be careful to plan accordingly. Generally, however, the grantor is likely to dispose of the trust to siblings of the primary beneficiary (or their descendants).

Contrary to a widely held misbelief, there is no obligation to use the remaining trust assets to reimburse the State of Michigan for Medicaid benefits received by the beneficiary during the existence of the trust. The repayment requirement applies only to OBRA 93 trusts, discussed in §§12.19–12.25. A trust that is not an OBRA 93 trust but that is drafted to require repayment to the state arguably breaches the applicable standard of care for drafting amenities trusts. The amenities trusts described above are funded with the parent's assets, not the assets of the individual with a developmental disability or mental illness. Accordingly, the parents may choose how to dispose of their assets on their death without subjecting them to automatic repayment for Medicaid expenditures.

B. Charitable Opportunities

§12.17 The disposition of the amenities trust provides an opportunity for a charitable disposition of assets by the grantor. The beneficiary is not given a power of appointment; generally, there are no surviving issue, and siblings have already received their shares of the grantor's estate. The grantor's most compelling interest, the well-being of the child with a disability or mental illness, has been addressed. As a result, it is common for a grantor to use this opportunity to make a charitable disposition to the entities that have provided care, advocacy, research, or other services that benefit the person with a development disability or mental illness during his or her lifetime.

V. Powers of Attorney and Guardianships

§12.18 Practitioners engaged in drafting amenities trusts should take the opportunity to discuss guardianship with their clients. While the amenities trust is the primary vehicle parents use to plan for the financial well-being of their child with a developmental disability or mental illness after the parents are gone, the trustee does not have any legal authority to make decisions regarding living arrangements or care on behalf of the benefit.

Some parents are able to advocate for and assist their child without any need for a guardianship and without a power of attorney. In these instances, parents may not consider the practical consequences of who will have legal standing to act on behalf of their child when the parents are no longer able to act. Typically, however, when a child

with a developmental disability or mental illness reaches the age of majority (or later with the onset of mental illness) parents face the prospect of no longer having legal authority to act on behalf of their children. If the child is in need of assistance in making financial and care decisions, the parents may initiate some action to obtain the legal authority to assist in those decisions. The movement for independence and self-determination has lead many parents of children with developmental disabilities or mental illness to be vehemently opposed to anyone ever being appointed guardian for their child and to favor the use of patient advocate designations and durable powers of attorney. Likewise, Michigan law essentially provides that guardianship over individuals with developmental disabilities should be considered a last resort. MCL 330.1602. Other parents of children with developmental disabilities may feel very strongly that they need to be their child's guardian.

Regardless, at some point parents will no longer be available to or able to act on behalf of their child. If no plan is put in place for who should have the authority to act on behalf of the child with a disability when the parents are unable to act, there is a high likelihood that authority will be obtained by an individual the parent does not consider appropriate or in a manner the parent does not agree with. For example, if a parent has been able to advocate on behalf of his or her child without guardianship and without power of attorney but has not implemented a succession plan for when the parent dies, on the death of the parent a relative may think that he or she needs to be named guardian to act for the individual with a disability.

To avoid such an occurrence, it is important that parents consider a succession plan. If the child has executed a patient advocate designation and/or a power of attorney, those documents should include successors in the event of the parent's death or disability. If the client is strongly opposed to a guardianship, the practitioner may want to include a statement to that effect in the will. Such a written statement has no legal authority in a guardianship proceeding but may be useful to surviving family members when determining whether to pursue guardianship or to a court in determining whether guardianship is necessary. On the other hand, if the parent is the child's guardian, the practitioner should discuss the naming of a standby guardian or the appointment of a testamentary guardian in the parent's will. MCL 330.1642.

VI. OBRA 93 Trusts

A. In General

§12.19 As stated in §12.16, amenities trusts are typically part of a parent's total estate plan and are funded with the parent's assets on the parent's death. Another important tool when dealing with families of the developmentally disabled or mentally ill is the Omnibus Budget Reconciliation Act of 1993 (OBRA 93) trust. In contrast with the amenities trust funded with the parents assets, OBRA trusts are used to shelter the assets of the individual with a developmental disability or mental illness while protecting the individual's Medicaid eligibility. 42 USC 1396p. These assets are typically in the form of

accounts created for the individual before they reach the age of majority or unexpected distributions such as inheritances, personal injury settlements, or even lump-sum payments from the federal government. It is not uncommon for the parents of children with developmental disabilities to fund accounts in the name of their child while their child is a minor. Unfortunately, on reaching the age of majority any assets in the name of the child can interfere with the child's eligibility for essential benefits. Likewise, any distribution, inheritance, settlement, or payment that passes directly to the child would interrupt the flow of public benefits and would add marginal value to the child's life. The creation of an appropriate trust to administer and preserve these assets creates additional potential for the enhancement of the child's quality of life.

B. Statutory Background

§12.20 In 1993, Congress adopted important provisions concerning Medicaid trusts as a part of OBRA 93. 42 USC 1396p. A Medicaid trust is a trust created by a grantor, or by someone acting on behalf of the grantor, using assets countable to the grantor. PEM Item 401, at 3–7. Usually a transfer into a trust is made in an attempt to shelter assets and subsequently to qualify for Medicaid benefits. Assets found in Medicaid trusts are countable, and income generated by the assets is also countable using Medicaid eligibility criteria.

Congress has created two important exceptions to the Medicaid trust provisions. These are known as Exception A trusts, 42 USC 1396p(d)(4)(A), and Exception C trusts, 42 USC 1396p(d)(4)(C), and are intended to benefit people who are disabled as defined under the Social Security Act, 42 USC 1381 et seq. In Michigan's PEM, Exception C trusts are referred to as Exception B trusts. However, outside of this one awkward reference, they are known throughout the estate planning world as Exception C trusts.

Under both Exception A and Exception C, assets may be transferred to a trust for a person with a disability to create or protect Medicaid eligibility as of the time of the transfer. This protection permits the uninterrupted flow of benefits if countable assets are received that would otherwise place an individual over the eligibility limit. However, OBRA 93 does provide that on the death of the beneficiary of the trust, the trust assets will be paid either to the state or states that have provided Medicaid benefits (Exception A) or to a nonprofit that has acted as trustee during the lifetime of the beneficiary (Exception C). 42 USC 1396p(d)(4)(A), (C).

C. When to Use an OBRA 93 Trust

§12.21 OBRA 93 trusts are used to shelter unexpected lump-sum distributions received by the person with a developmental disability or mental illness. They are not a typical part of a parent's estate plan for a child. OBRA 93 trusts are specifically used to protect settlements from personal injury cases, receipt of retroactive Social Security benefits in excess of spendable amounts, matured Uniform Gifts to Minor Act (now Uniform Transfers to Minors Act) accounts that interfere with Medicaid eligibility and

unexpected inheritances or gifts from relatives that are not put into otherwise properly funded amenities trusts.

OBRA 93 protects Medicaid eligibility when disqualifying assets are received by a person with a disability. The substantive provisions of the trust must require that neither the income nor the principal be available for the support of the beneficiary, otherwise there will be an impact on ongoing eligibility. In other words, the OBRA 93 trust is an amenities trust with OBRA qualifying provisions.

D. Technical Requirements

§12.22 Exception A provides that a trust created by the transfer of (otherwise countable) assets by or on behalf of a person with a disability is not a Medicaid trust if the following criteria are met:

· The trust must contain the assets of an individual under the age of 65 who is disabled (as defined in 42 USC 1382c(a)(3)(A))
· the trust must be established by a parent, grandparent, legal guardian, or court
· the trust must specifically authorize that the State will receive all amounts remaining in the trust on the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual. 42 USC 1396p(d)(4)(A).

See form 12.3 for sample language.

An Exception C trust contains similar provisions concerning the transfer of countable assets to a trust. However, under Exception C, the trustee must be a nonprofit organization, and the exception contemplates a pooling of assets by people with disabilities, with separate subaccounts for each subscriber. On the death of the primary beneficiary, who is the person with a disability, assets that are retained by the trust may be used for the benefit of others with disabilities. The nonprofit organization that is the trustee is not required to pay the state unless it relinquishes the assets that remain in the beneficiaries account.

E. Judicial Approval

§12.23 Technically, OBRA 93 does not require judicial approval for the establishment of either an Exception A or an Exception C trust. As noted, an Exception A OBRA 93 trust may be created by the person's parent, grandparent, guardian/conservator, or by a court. Under Exception C, the trust may be created by the person himself or herself, in addition to the persons mentioned above.

As a practical matter, an attorney who participates in the creation of an Exception A trust may want to obtain probate court approval. There is no requirement under OBRA for how that court authority is obtained. All that is required is an order by which the court creates the trust. It is not sufficient to have the court approve the creation of the trust. Instead, the court must order its creation. Often, this is done by obtaining a single

protective order creating the OBRA 93 trust, pursuant to MCL 700.5401. Alternatively, seeking an order of the probate court creating the OBRA trust through an ongoing guardianship or conservatorship matter achieves the same result and may require fewer court filing fees. If the funds to be placed in the trust are from a personal injury or other settlement that also requires probate court approval, the practitioner may seek an order that both approves the settlement and creates the trust.

There are several reasons why court approval should be obtained:

· Although OBRA permits the creation of the trust without court approval, neither Estates and Protected Individuals Code (EPIC) nor the Mental Health Code clearly empowers the fiduciary to divert assets of the ward to such a trust without court approval. Under EPIC, a hearing and determination that a basis for a protective order exists appears to be mandatory if a trust is being created for a protected person. See MCL 700.5407(2)(c)(v). Further, under EPIC, a conservator does not have the express power to create a trust without court approval. MCL 700.5423.

· A parent may create an OBRA 93 trust for a child who is disabled. However, a parent who is not a guardian or conservator generally may not exercise legal control over assets belonging to an adult child to create an irrevocable trust and commit the child's assets to it. There is no reason for a parent to use his or her own assets to create an OBRA trust under most circumstances, for reasons discussed in §12.16. Perhaps there are circumstances under which a parent would want to create an OBRA 93 trust for a child, but absent assets that are jointly owned by parent and child, there are few circumstances in which a parent would properly transfer a child's assets into an OBRA 93 trust. With court approval, this problem disappears.

· An OBRA 93 trust requires that trust assets remaining on the death of the beneficiary be paid to the State of Michigan or any other state that provides Medicaid benefits during the existence of the trust. This specific disposition of trust assets may have an adverse impact on the intestate or other rights of heirs and creditors of the beneficiary. For this simple reason, court protection of the conservator is obtained by seeking approval of the trust.

F. Disposition on the Death of the Beneficiary

§12.24 Under Exception A, trust assets must first be paid to the state or states that have provided Medicaid benefits to the beneficiary. The repayment provision is mandatory and must allow for the repayment of all Medicaid benefits made to or on behalf of the beneficiary during the beneficiary's lifetime, even benefits received before the creation of the trust. The trust instrument must require repayment regardless of whether a state files a claim or lien against trust assets. The state's claim must have priority over all other debts and expenses except those given higher priority by law. See

PEM Item 401, at 5–7. However, once the state is fully repaid, there is no impediment to distributing any remaining assets to family members or to some other named beneficiary.

During 2000, the Social Security Administration (SSA) adopted the position that an OBRA 93 Exception A trust that did not name a specific beneficiary after the required repayment provision to the state constituted a revocable grantor trust under Michigan law. As such, the trust was available for the support of the beneficiary and adversely affected the beneficiary's eligibility for SSI. This administrative opinion ignored the clear language of the trust that prohibited modification with respect to those provisions that qualified the trust as an Exception A trust. The opinion also ignored the fact that Michigan law permits the creation of Exception A trusts and excludes them as countable for Medicaid purposes. In late 2001, the SSA changed its position on this legal issue with regard to trusts created in Michigan. Under present SSA policy resulting from federal litigation, OBRA 93 trusts are permitted to name the beneficiary's estate or intestate heirs as remaindermen following the death of the beneficiary.

Nevertheless, the Exception A beneficiary should not be given a power of appointment regardless of where the remainder interest will pass. The trust may name a specific person or entity to take upon the death of the primary beneficiary and following the repayment of the Medicaid super-priority lien. Exception C trusts do not encounter the issue of remainder beneficiaries because the nonprofit agency share constitutes the remainder interest.

The planner considering the use of an Exception A trust should also bear in mind that the repayment provisions apply only to assets remaining in the trust at the time of the death of the beneficiary; there is no requirement that assets actually remain. The trust may be exhausted for the benefit of the person with the disability during his or her lifetime, and OBRA 93 will be satisfied.

Under Exception C, the trust assets are paid to the nonprofit organization in conformance with a pooled account agreement. Exception C is attractive when there is little likelihood that trust assets would remain after the payment of the Medicaid super-priority debt. Under Exception C, the trust assets remain "in circulation" to assist other persons being served by the nonprofit organization. However, it should be noted that the nonprofit organization is the trustee and is also a remainder beneficiary. Care should be taken to assure that this conflict of interest is understood before the irrevocable transfer of assets to the trust. Finally, although an Exception C trust might seem attractive because a nonprofit organization and the people that it serves benefit, some parents will balk at relinquishing control over the assets to an organization, whether or not it is nonprofit. Parents can be trustee under an Exception A trust but not under an Exception C trust.

G. Relationship Between OBRA Exception A Trusts and Amenities Trusts

§12.25 Exception A trusts require that any assets left in the trust at the time of the death of the beneficiary first go to the state to repay any Medicaid expenditures made during the beneficiary's lifetime. Amenities trusts do not have the same requirement. For

this reason, if an individual is the beneficiary of both an Exception A trust and an amenities trust, the Exception A trust should be the first source of funds used to provide amenities to the beneficiary.

VII. "Solely for the Benefit of" Trust

A. In General

§12.26 Another trust arrangement that practitioners need to be familiar with is the "solely for the benefit of" trust. This type of trust is created "solely for the benefit of" a person who is disabled under federal law (and Medicaid regulations, specifically PEM Item 260) and is in the amenities trust format. A distinguishing feature of the "sole benefit" trust is that the transfer of assets to it, generally by a parent, is used to qualify the parent for Medicaid without disqualifying the person with a disability or mental illness from also receiving Medicaid.

> Transfers to the client's blind or disabled (see [PEM Item 260]) child, regardless of the child's age or marital status, are not divestment. This includes transfers to a trust established 'SOLELY FOR THE BENEFIT OF' the child.
>
> … .
>
> Transfers to a trust established 'SOLELY FOR THE BENEFIT OF' a disabled ([PEM Item 260]) person under age 65 are not divestment.

PEM Item 405, at 7. In other words, a parent who is heading into long-term care and who may need to qualify for Medicaid may create a trust that is solely for the benefit of his or her child with disabilities or mental illness and may fund the trust during the parent's lifetime. The transfer of the parent's assets to the trust is not a divestment subject to a look-back period with respect to the parent's Medicaid application. The assets are transferred to the trust and are removed from the parent's countable assets.

As a result, the parent becomes immediately eligible for medical assistance, assuming there are no other disqualifying assets and all other criteria are met. The beneficiary of the trust need not count the trust assets and, assuming that the trust is properly drafted and expenditures are handled correctly by the trustee, the income that the trust generates is also not countable.

B. Requirements

§12.27 The conditions for a trust solely for the benefit of a person with a disability are stated in PEM Item 405, at 8:

> · The arrangement must be in writing and legally binding on the parties.

· The arrangement must ensure that none of the resources can be used for someone else during the person's lifetime, except for "Trustee Fees."

· The arrangement must require that the resources be spent for the person on an actuarially sound basis. This means that spending must be at a rate that will use up all the resources during the person's lifetime.

Sole benefit trusts are commonly used in Medicaid planning in addition to planning for the well-being of persons with disabilities or mental illness. The use of such trusts in the elder law–planning context is generally beyond the scope of this chapter. However, the sole benefit trust can be a very effective tool to fund a trust for a child with disabilities or mental illness during the lifetime of the parent when the parent's estate is at risk of depletion due to the parent's medical and long-term care needs.

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Form 12.1
Qualifying Language for an Amenities Trust

1.1 Amenities Trust For Person with Disability. The following provisions will control the administration of the amenities trust for **[person with disability]**.

1.1.1 Specific Instructions, Limitations. [Trustee] shall use and expend the trust property for the benefit of **[person with disability]**, at the sole discretion of the **[trustee]**. The **[trustee]** is specifically empowered to, but is not required to, make expenditures on behalf of **[person with disability]** for goods and services provided to **[him/her]** by third party providers. Expenditures may include, but are not strictly limited to, the payment of expenses for entertainment, travel/vacations (including the costs for a companion, if necessary), periodic evaluation of the living conditions of the beneficiary by the **[trustee]** or consultants hired by the **[trustee],** including monitoring services that may be available on a contract basis from entities or individuals, direct services, small items of tangible personal property for personal use and such other items that are commonly considered "amenities" in the administration of third party trusts for persons who are or who may become eligible for Medicaid and are not available to Sarah Klenczar from any other source.

Under no circumstances shall **[person with disability]** have the power or authority to demand any distribution from the **[trustee],** who is under no obligation, implied or otherwise, to make any distributions to **[him/her]**. Further, the **[trustee]** may withhold distributions to **[him/her]**, if in its sole discretion, they would not be consistent with the intentions as expressed in this trust agreement. The **[trustee]** shall not make distributions that cause the beneficiary to be disqualified from Supplemental Security Income or Medicaid. The **[trustee]** shall not make distributions which cause the beneficiary to enter a Medicaid spend down of excess unearned income. The **[trustee]** shall attempt to maximize the benefits that the beneficiary receives from outside sources, including State and Federal government, without limitation.

If the **[trustee]** has any questions or concerns regarding issues such as the effect of unearned income accruing to **[person with disability]** or the effect of any disbursement on **[his/her]** eligibility for a particular governmental or other entitlement benefit, the **[trustee]** shall request the advice of knowledgeable counsel, or an advocacy association to help resolve any difficulties.

It is the **[grantor]**'s express intention and instruction that the income and principal of this trust shall be made for the supplemental needs of the beneficiary and not for **[his/her]** primary support. This is not a support trust, this is a trust for amenities only.

1.1.2 Power to Accumulate Income. No payments of income or principal, other than small amounts of income advanced for incidentals (not to exceed $20.00/month), are to be made directly to **[person with disability]**. Any income not expended by **[trustee]** for the purchase of amenities will be added to principal from time to time and reinvested by **[trustee]**. **[Trustee]** is expressly authorized to accumulate income.

1.1.3 Advisor. To the extent that it is practical, **[sibling or other person designated by the Grantor]** is requested to serve as the advisor to the successor trustee. The advisor is requested to monitor the beneficiary's needs at such time or times as it is practical to do so and to advise **[trustee]** directly if the need for expenditure of funds arises. **[Trustee]** is not required to consult with the advisor on every decision concerning the expenditure of funds, however, **[trustee]** is required to provide the Advisor with an annual accounting of the trust. In the event that an Advisor incurs expense in monitoring the needs of **[person with disability]** , the **[trustee]** is expressly authorized to reimburse the advisor for any expense reasonably incurred. In the event of a disagreement between **[trustee]** and the Advisor, the decision of **[trustee]** will be final.

1.2 Death of Person with Disability. At the death of the beneficiary, **[person with disability]**, this trust will terminate. **[Trustee]** may pay the reasonable burial and funeral expenses of **[person with disability]**, in **[trustee]**'s discretion. The remaining trust assets will be divided into shares, and distributed among **[those individuals and/or charities as designated by the Grantor]**.

Form 12.2
Language to Avoid Double Funding

1.3 Limitation on Funding Amenities Trust. Notwithstanding the preceding provisions of this article (concerning funding this amenities trust, ("Trust A"), in a specific pecuniary amount, e.g., $150,000), if an amenities trust has been created and funded (or will be fully funded on **[grantor]'**s death) through a trust created by **[grantor's spouse]**, ("Trust B"), and if Trust B will be administered at the time of or following the death of **[grantor]**, and if Trust B has or will have assets having a value equivalent to the value of the allocation to Trust A (the trust created for the benefit of **[person with disability]**), the distribution of assets to Trust A will not occur. If Trust B will be administered following **[grantor]'**s death but if the principal and accumulated income of Trust B is less than the value of the allocation to Trust A, as described in this article, **[Trust A trustee]** will allocate assets sufficient to increase the value of Trust B to the value of the allocation described in this article. The share created will be transferred to **[Trust B trustee]** to be administered in conformance with its terms and conditions.

Alternatively, **[Trust A trustee]** is authorized to receive assets from **[Trust B trustee]** and to administer those assets in conformance with the provisions of Trust A. For purposes of clarification, the **[grantor]** intends that one amenities trust be created and funded either as a part of the grantor's credit shelter trust as Trust A or as a part of the grantor's spouse's credit shelter trust as Trust B.

Form 12.3
Language for an OBRA 93 Exception A Trust (Partial)

1. DECLARATION OF TRUST

This trust is made and approved by an order entered by the **[court]** on **[date]** in the matter of **[person with disability]**, who currently resides at **[street address]**, **[city]**, **[county]**, **[state]**, through **[his / her]** mother, designated by the court, as “grantor” and initial trustee named in this trust agreement.

A TRUST IS DECLARED AND CREATED AS FOLLOWS

ARTICLE 1: PROVISIONS DURING THE LIFETIME OF **[PERSON WITH DISABILITY]**

2.1 General Authority. See exhibit 12.1 (Amenities Trust for Person with Disability).

2.2 Trust Is Unmodifiable with Respect to Certain Provisions. The trust created pursuant to this agreement cannot be modified with respect to those provisions that qualify the trust as an Exception A Trust under OBRA 1993. 42 USC 1396p(d)(4)(A).

2.3 Specific Instructions, Limitations. See exhibit 12.1.

2.5 Power to Accumulate Income. See exhibit 12.1.

2.6 Death of Person with Disability. At the death of **[person with disability]**, this trust will terminate. **[Trustee]** will pay so much of the principal and accumulated income of the trust to the State of Michigan (or any other state) as may then be required to reimburse the State of Michigan (or any other state) for any and all Medicaid benefits paid to or on behalf of the beneficiary to and including the last date that the State of Michigan has then expended Medicaid funds to or for the benefit of **[person with disability]**. **[Trustee]** will determine the extent of Medicaid payments made to or on behalf of the beneficiary in conjunction with the appropriate agency of the State of Michigan. The State of Michigan will be entitled to reimbursement for Medicaid payments regardless of whether it has filed a lien against this trust. If **[person with disability]** receives Medicaid payments or benefits in any other state in which **[he / she]** may reside during **[his / her]** lifetime, the obligation to repay benefits in this agreement will apply to those benefits received in any other state or states. The remaining trust assets will be divided into shares and distributed among **[those individuals and/or charities as designated by the Grantor]**.

Exhibit 12.1
A List of Amenities

- acupuncture/acupressure
- advocacy
- appliances (TV, VCR, stereo, microwave, stove, refrigerator, washer/dryer)
- bottled water
- bus pass/public transportation fees
- clothing
- clubs and club dues (record clubs, book clubs, health clubs, service clubs)
- computer (hardware, software, programs, Internet service)
- courses or classes (academic or recreational)
- cell phone bill
- curtains, blinds, drapes
- dry cleaning and laundry services
- elective surgery
- fitness equipment
- furniture, home furnishings
- gasoline for automobile
- haircuts/salon services
- house cleaning/maid services
- insurance (automobile and/or possessions)
- linens and towels
- massage
- musical instruments (including lessons)
- nonfood grocery items (laundry soap, bleach, fabric softener, deodorant, dish soap, hand and body soap, personal hygiene products, paper towels, napkins, Kleenex, toilet paper, any household cleaning products)
- over-the-counter medications (including vitamins or herbs, first aid supplies)
- personal assistance
- pet, pet supplies
- physician specialists
- private counseling
- repair services (appliance, automobile, bicycle, household)
- retail store charge accounts (gift stores, craft stores, hardware stores, pet stores)
- sporting goods/equipment
- taxi cab scrip, or transportation costs
- telephone, internet, cable or satellite television
- tickets to concerts or events (for beneficiary and accompanying companion)
- transportation (automobile, motorcycle, bicycle, moped)
- vacation (including paying for a companion to accompany the beneficiary)

This list was adapted from a list compiled by Marsha Rose Katz and with the assistance of the Washtenaw Association for Community Advocacy.