UTILIZING SCPA ARTICLE 17A AND MHL ARTICLE 81 GUARDIANSHIPS FOR DISABLED CHILDREN

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“SCPA 17-A is 'a simple guardianship devise, based upon principles of in loco parentis' by which a court can appoint a guardian for an individual based on a diagnosis of mental retardation, developmental disabilities, or traumatic head injury. In contrast, MHL 81 'the most modern form of guardianship . . .' is a more complex statute. Under MHL 81, the court appoints a guardian with authority tailored to the needs and functional limitations of the incapacitated person, rather than basing its decision on the individual’s particular diagnosis.” (Should we be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York, Rose Mary Bailey and Charis B. Nick-Torok, 75 Alb.L.Rev.807, 808.)

SCPA 17-A Background

The need for and appointment of a Guardian under SCPA 17-A is diagnosis driven. A person must be diagnosed as being mentally retarded or developmentally disabled, while MHL Article 81 requires a finding of functional incapacity due to diminished capacity. N.Y. Mental Hyg. Law §81.01 (McKinney 2014).

SCPA 17-A was enacted in 1969 as a means for parents of adult children diagnosed with Mental Retardation (SCPA 17-A defines a Mentally Retarded person as someone who is “incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature and likely to continue indefinitely.” SCPA 1750) to seek Guardianship in an inexpensive manner. SCPA 17-A is based on the principle of “in loco parentis.” Bailey, at 808. It was seen as a way for parents to continue as the legal care-givers and decision-makers of their mentally retarded children once the child reached the age of legal maturity, 18 years old. Bailey, at 818. In 1989, SCPA 17-A was amended and expanded to include Developmental Disability and Traumatic Brain Injury. See Generally, SCPA 1750. The term Developmental Disability also encompasses autism and autism spectrum disorders, and neurological impairments. SCPA 1750.

Procedure for filing a SCPA 17-A Proceeding

The diagnosis of mental retardation or developmental disability must be certified by a licensed physician and a licensed psychologist; or by two physicians. SCPA 1750 and SCPA 1750-a. The doctors and/or psychologist must complete an Affidavit (a standard SCPA form is used in all counties: SCPA 17-A forms can found on HotDocs or on line, at http://www.nycourts.gov/forms/surrogates/guardianship.shtml).
The Affidavits are then reviewed by the Surrogate’s Court in the county in which the individual needing a guardian resides. Upon the Court’s approval of the Affidavits, the Article 17-A petition is filed with the Court. (A $20 filing fee is charged by the Surrogate’s Court.)

The Petition for Guardianship may be filed by a parent, and interested person, the individual him or herself, or a not-for-profit or corporate entity. (SCPA 1751) The Petition must set forth who is the Petitioner and her relationship to the disabled individual; the identity of the disabled individual and his or her diagnosis.

The standard for appointment, for a person needing a SCPA 17-A Guardian is “best interest of the individual.” (SCPA 1750) The SCPA does not establish a burden of proof or standard of proof required for said appointment, rather, as the person has been diagnosed with mental retardation or developmental disability, she requires the appointment of a Guardian to manage his or her personal/medical and/or financial affairs.

Upon the filing of the SCPA 17-A Petition, the Court appoints a Guardian ad Litem, who can serve without a fee, to investigate the allegations set forth in the petition, met with the disabled individual and report its findings to the Court. (SCPA 1754) Unless requested, the Court will waive a hearing, subject to the GAL’s Report. The Court will then issue a Decree appointing the Guardian(s). The Guardianship is not tailored to the individual, and does not tailor the Guardian’s powers specific to her ward. The Guardianship is also of indefinite duration. (SCPA 1759).

Once appointed Guardian, the SCPA does not set forth criteria about standards that should govern the Guardian’s conduct. Nor does SCPA 17-A require the guardian to attend a guardianship training nor file an annual report with the Court (unless she is the Guardian of the Property); though, SCPA 17-A, as discussed above, is seen as a continuation of the parent’s legal authority over her child.

**Application for Approval of an SNT**

The Surrogate’s Court will not entertain an application for the approval of a Supplemental Needs Trust for the disabled individual until after a 17A Guardian has been appointed.

Attached to your materials is a sample SCPA Petition for the approval of an SNT, along with a sample SNT approved by the Westchester County Attorney’s office,
The Application for the approval of an SNT should be served upon the local social services district and their counsel (for example HRA and OLA in NYC; Westchester DSS and the Westchester County Attorney). It is imperative that the local social services district approve the SNT before same is funded.

While SCPA 17-A has been called a “simple approach to guardianship,” MHL Art. 81 has “emerged as a nuanced one.” Bailey, at 816.

**MHL Article 81 Background**

MHL Article 81 was enacted in 1992. ([N.Y. Mental Hygiene Law §81](https://www.law.nysenate.gov/legislation/bill/s5365)) Article 81 takes a broader approach to guardianships, and allows for greater flexibility relevant to the guardianship.

MHL 81 is not “diagnosis” driven, and a determination for the need for a guardian is not made based on a person’s medical condition and/or diagnosis. Article 81 provides for a functional assessment of the actual abilities of the alleged incapacitated person (“AIP”) for both property and personal management. ([MHL §81.15](https://www.law.nysenate.gov/legislation/bill/s5365))

**Procedures for filing MHL Article 81 Proceeding**

An Article 81 petition can be brought by a family member or other interested party, such as the nursing home where the AIP resides. ([MHL §81.06.](https://www.law.nysenate.gov/legislation/bill/s5365)) The Petition must set forth the AIP’s functional limitations and demonstrate why the appointment of a guardian is necessary. The proceeding is commenced by filing (a $305 filing fee) an Order to Show Cause and Petition in the Supreme Court in the county where the AIP resides, though if the AIP is in a nursing home, the petition is brought in the county where the nursing home is located. ([MHL §81.05](https://www.law.nysenate.gov/legislation/bill/s5365))

Upon the Court’s signing the Order to Show Cause and setting a date for the Hearing, the Court may appoint an attorney ([MHL §81.10](https://www.law.nysenate.gov/legislation/bill/s5365)) to represent the AIP and/or a Court Evaluator, to investigate the allegations set forth in the Petition and prepare a report ([MHL §81.09](https://www.law.nysenate.gov/legislation/bill/s5365)) for the Court regarding same.

At the Guardianship Hearing, which is usually held within twenty-eight days ([MHL §81.07](https://www.law.nysenate.gov/legislation/bill/s5365)) from the Court’s signing of the Order to Show Cause, the Petitioner must prove by clear and convincing evidence that the AIP has functional limitations necessitating the need for a guardian. ([MHL §81.12](https://www.law.nysenate.gov/legislation/bill/s5365)) If said burden is met by the Petitioner, the Court will grant the Petition and appoint a Guardian for the AIP.
The Guardianship Judgment must specifically define the authority of the Guardian, (MHL §§81.21 and 22) and said Judgment can be tailored to the specific needs of the AIP. For example, if the AIP has a health care proxy, the Court may not necessarily appoint a guardian of the person. If the AIP has a Power of Attorney (POA), but said POA limits or does not permit gifting, the Court may authorize the gifting of the AIP’s assets for Medicaid or estate planning purposes. (See generally MHL §81.21, Powers of the Guardian, property management). Also, the Judgment must set forth the duration of the Guardianship.

Once appointed Guardian, the Guardian is required to take a Guardianship class. (See generally MHL §81.20, Duties of the Guardian) The Guardian is also required to file an Initial Report (MHL §81.30) within ninety days of appointment, setting forth what she has done on behalf of her ward since appointed. Each calendar year, she is also required to file an Annual Report (MHL §81.31) with the Court.

MHL Article 81 can allow for the Incapacitated Person (IP) to retain some autonomy even with the appointment of a guardian. The statute provides for flexibility and independence. In planning for a disabled child, the key is flexibility and MHL Article 81 can allow for more flexibility and a more tailored guardianship meeting the exact needs of the individual. However, some individuals are constrained by the type of proceeding that can be brought based on the disabled individual’s diagnosis and functional capacity.

Application for Approval of an SNT

An Application for the approval of an SNT for the AIP can be made with the filing of the Guardianship Petition. In the request for the powers of the Guardian, a request for the approval of an SNT can be made, as follows.

First, in the paragraph entitled “Plan for Property Management,” it should be stated “To create and fund a Self Settled/First Party Supplemental Needs Trust for the benefit of JAKE, with MOM and DAD as Co-Trustees, to be funded with the BANK ACCOUNT. (A copy of the proposed JAKE Supplemental Needs Trust is attached hereto and made a part hereof as Exhibit X.)”

In the section entitled “Specific Property Management Powers Sought” in power OTHER: “To create and fund a Supplemental Needs Trust for the benefit of JAKE, with MOM and DAD as Co-Trustees, to be funded with the BANK ACCOUNT.”

The Guardianship Petition (with the SNT) should be served
upon the local social services district and their counsel (for example HRA and OLA in NYC; Westchester DSS and the Westchester County Attorney). It is imperative that the local social services district approve the SNT before same is funded.

**SUMMARY**

SCPA Article 17A

1. **Standard for the Appointment of a Guardian**
   - Incapable of managing himself/herself or his/her affairs by reason of:
     - Mental Retardation
     - Developmentally Disabled -- cerebral palsy, epilepsy, neurological impairment, autism, traumatic head injury
   - Appointment is in the best interest of respondent (SCPA 1750)

2. **Proving Incapacity**
   - Certification by 2 physicians or Certification by 1 physician and 1 psychologist (SCPA 1750 & SCPA 1750-a)

3. **Appointment of Counsel**
   - Does not provide for the appointment of counsel for AIP
   - Limited requirements for appointment of Guardian ad litem or appointment of MHLS (SCPA 1754)

4. **Guardian’s Powers**
   - Plenary powers over financial and/or personal care of disabled person
   - Does not provide for “tailoring” the guardian’s power to the needs of the individual
   - Guardian precluded from exercising substituted judgment on behalf of ward

5. **Training of Guardians**
   - Does not provide for training of the Guardian
   - Appointment of guardian is continuation of parent’s legal authority over their child

6. **Reporting Requirements of Guardian**
   - Reporting for guardian of property only
   - Some courts require reporting for guardian of the person

7. **Health Care Decision Making**
   - 14 NYCRR Section 633.11
   - PHL Section 2504 (per SCPA 1750-b)
   - Hospital setting - need guardian
8. Considerations – functioning level of person with disability
   Low functioning, severely disabled and cannot meaningfully participate in decision making

9. Supplemental Needs Trust
   Need Court approval of SNT
   possible Bond
   Second application to the Court once Guardian appointed

10. Costs
    Less expensive
    Standardized forms
    $20 filing fee
    Most are application of person not property
    GAL can serve without a fee

11. Role & Authority of Guardian
    Health care decision making
    No training for guardian
    Guidance for annual reporting for guardian of property
    Some courts require reporting of guardian of person
    Duration of guardianship – indefinite (SCPA 1759)

MHL Article 81

1. Standard for the Appointment of a Guardian
   Finding that AIP is unable to provide for personal needs and/or property management, and cannot understand and appreciate the nature and consequences of such inability
   OR
   AIP consents to appt of guardian (MHL 81.02)

2. Proving Incapacity
   Functional assessment of actual abilities of the person to perform activities of daily living (MHL 81.15)
   Clear and convincing evidence (MHL 81.12)

3. Appointment of Counsel
   Provides for the appointment of counsel (MHL 81.10)
   Payment of counsel – from IP funds or 18b panel
   Provides for appointment of court evaluator(MHL 81.09)

4. Guardian’s Powers
   Must specifically define the authority of the guardian
   Exercise substituted judgment on behalf of ward
   Orders specifically list guardian’s authority (MHL 81.15)

   Powers of Guardian of the Property (MHL 81.21)
Powers of Guardian of the Property – Health care decision making (MHL 81.22)

5. Duration of guardianship
   varies on the needs of the IP (MHL 81.15)

6. Training of Guardians
   Training for court evaluators, court examiners and guardians
   (MHL 81.39, 81.40 and 81.41)

7. Reporting Requirements of Guardian
   Accountability – annual reports for both person and property
   Initial Report (MHL 81.30)
   Annual Report (MHL81.31)

8. Supplemental Needs Trust
   Need Court approval of SNT
   possible Bond
   Application for approval of SNT with initial guardianship petition

9. Cost
   Use of IP’s funds to pay petitioner’s counsel, court
   evaluator, court examiner, and guardian (MHL 81.09, 81.10, 81.27-28 and 81.32(f))
   More expensive
   Forms vary from county to county
   Filing fee - $305

10. Considerations
    Procedural and substantive rights of the individual are more fully provided
    High functioning and capable of making some decisions
    Provides flexibility and independence
    More flexibility in management of property of infant and SNT

Good overview Article 17A vs. MHL 81 cases:

Matter of Chaim A.K., 26 Misc. 3d 837; 855 NYS 2d 582 (Surr. Ct., NY Cty., 2009) – Surrogate Glenn
   The Court denied an application by parents for 17A guardianship of their son without prejudice to file an Article 81 guardian, finding that the AIP, although mildly mentally retarded, also has along history of psychological problems that may change over time and that he was in need of the more tailored and more carefully monitored supervision of an Article 81 Guardian.

Matter of John J.H., 27 Misc.3d 705; 896 NYS2d 662 (Surr. Ct., NY
Cty., 2010) – Surrogate Glenn

Parents of a 22 year old autistic man with artistic talent filed a SCPA 17-A petition to become his guardians with the specific power to sell his artwork and to make charitable gifts on his behalf from the proceeds. The court indicated that it was constrained by the language of 17A, to order a plenary guardianship over the property and that it could neither tailor the guardianship to the AIP’s particular needs nor issue gift giving powers to the proposed guardians. The court explained that there was a presumption against applying “substituted judgement” in a 17A where the assumption is that the ward never had capacity to formulate a judgment of his own. In the end, the petitioners withdrew their 17A petition and re-filed under Article 81.

Matter of Yvette A., 27 Misc.3d 945; 898 NYS2d 420 (Surr. Ct., NY Cty., 2010) – Surrogate Webber

A father who had not had any contact with his severely mentally retarded Willowbrook class daughter for over 16 years sought to be appointed as her 17A guardian. MHLS, NYLPI, NYCLU and the GAL opposed his appointment and NYLPI and NYCLU requested that the matter be referred to Supreme Court for an Article 81 proceeding. The father was unclear about his daughter’s condition and prognosis and had no plan in mind for her continued care. The objectants raised concerns about his motives and commitment to his daughter in light of his past history and were concerned about his suggestion that he would want to remove her from the only group home she had been in for the past 33 years and possibly sue them in relation to their past care of his daughter.. The Surrogate declined to transfer the case to Supreme Court reasoning that Article 81 and SCPA are not alternatives for one another and stating: “although Article 17- A does not specifically provide for the tailoring of a guardian’s powers or for the reporting requirements similar to Article 81, the court’s authority to impose terms and restrictions that best meet the need of the ward is implicit in the provisions of §1758 of the SCPA.” The Court concluded that it had the authority, both at the inception of a 17A decree and upon modification of an original decree, to tailor the order to meet the needs of the ward. The court thus decreed that the father could be appointed, but included very detailed reporting requirement similar to those in Article 81 and further decreed that the independent agency overseeing the Willbrook cases should continue its oversight of the ward.


The Court held that there is no express provision Art. 17A empowering a 17A guardian to make gifts, as contrasted with such
In the Matter of Application of Geoffrey M. and Jordana M., as Parents and Guardians for the Personal Needs and Property Management of Sigal M.
42 Misc. 3d 379; 975 N.Y.S.2d 634
November 12, 2013 (County Court of New York, Nassau County)

The application by Geoffrey and Jordana M., the Article 81 co-guardians of the personal needs and property of their daughter, Sigal for an order: (1) permitting the guardians to reimburse to themselves, in their capacity as parents, the sum of $33,348.64 from the guardianship account for all of the costs associated with a bat mitzvah party for Sigal, and (2) authorizing the expenditure of approximately $65,000.00 from the guardianship account to cover the vacation cost for the entire family and an aide.

The Court denied the written application by the guardians for reimbursement from the guardianship account for the costs associated with the bat mitzvah party for Sigal.

The oral application by the guardians for the release of funds from the guardianship account for a vacation to Israel for Sigal, her entire family and an aide, was granted to the extent that the court allowed the guardians to withdraw, for the calendar year 2013, the amount of the costs of the handicap suite required for Sigal; the airline tickets for Sigal, her aide and her mother; and the wheelchair accessible van, all extraordinary expenditures predicated by Sigal's physical condition and personal needs; for a total cost of $27,723.61. (The Court’s order of December 18, 2006 (Asarch, J.) permitted the disbursement of up to $20,000.00 a year for a family vacation). The court declined to permit the additional withdrawal from Sigal’s guardianship account to pay for the cost of the vacation for Sigal’s siblings and father, as well as her parents’ hotel room. The court admonished the family that Sigal’s funds are not for family use.

The Court directed that the co-guardians must in the future seek prior approval from the Court before incurring any extraordinary expense on behalf of Sigal M.
In the Matter of the Application for  
the Approval of a Supplemental Needs  
Trust by C  

Petitioner,  

For: D  

TO THE SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  

The Petition of C, domiciled and residing at , New York, respectfully shows:  
1) Petitioner is the SCPA Article 17A Guardian of the Person and Property of D, her son, pursuant to the Surrogate’s Court Decree appointing Guardian and Standby Guardian for a Mentally Retarded Person, dated 2014, with Letters of Guardianship (Person & Property) 17A issued on 2014. A copy of said Decree, Decision and Letters of Guardianship 17A are attached hereto and made part hereof as Exhibit “A.”  
2) D who suffers from Mental Retardation and whose date of birth is , resides with his mother, C the Court Appointed Guardian of the Person and Property, at , New York.  
3) D is a recipient of Medicaid and Social Security Survivor benefits in the monthly amount of $1,577.00. His mother and Court Appointed Guardian, C, is the representative payee for said Social Security Survivor benefits.  
4) On , 2012, SR., the father of D, died. D has inherited death benefits in the total amount of $ from the New York State (NYS) Employees Retirement System (Group Term Life) in which his father participated and for which D is the named beneficiary. In my capacity as the Court Appointed Guardian for D, I received two checks, in the amount of $ and $ , representing full payment for said death benefits. Copies of said checks are attached hereto and made a part hereof as Exhibit “B”.  
5) Due to D’s Mental Retardation, he cannot make any significant financial or personal decisions and is unable to manage his financial affairs.  
6) I have been advised by my attorneys that the above referenced death benefits in the total amount of $ would cause D to be ineligible for Medicaid, as said funds exceed the Medicaid limit of $14,850 for the year 2015, unless said benefits were deposited into a Supplemental Needs Trust for the benefit of D.  
7) I am seeking Court permission to approve and authorize the creation and funding of the D Supplemental Needs Trust (SNT)
for the deposit of the $ in life insurance death benefits in order to protect D’S Medicaid benefits and to utilize said monies for his sole benefit, with the date of the trust deemed to be the date said SNT was approved by the Westchester County of Law on behalf of the Westchester County Department of Social Service, being 2014. A copy of the proposed D Supplemental Needs Trust (SNT), which contains Medicaid payback provisions, is attached hereto and made a part hereof as Exhibit “C”.

8) The SNT was approved by the Westchester County Law Department pursuant to a letter dated 2014 from , Esq., Assistant County Attorney, on behalf of the Westchester County Department of Social Services, a copy of which letter is attached hereto and made a part hereof as Exhibit “D”.

9) Attached hereto and made a part hereof as Exhibit “E” is an original Waiver of Citation and Consent, signed by , Esq., on 2014, as the Legal Representative for the Department of Social Services, Westchester County.

10) The names and addresses of the persons interested in this proceeding who are required to be cited upon application or concerning whom this Court is required to have information are:

Westchester County DSS
112 East Post Road, 5th Floor
White Plains, NY 10601-4201

Mental Hygiene Legal Service
200 White Plains Road, 2nd Floor
Tarrytown, New York 10591
Attn: Daniel Pelligrin, Esq.

11) There are no other persons than those mentioned interested in the application or proceeding.

12) I believe that this Petition complies with SCPA §402 as follows:

a) I am qualified to protect the rights of D as his Court appointed Article 17A Guardian;

b) I am not connected in business with any party to the proceeding or the attorney for any party;

c) I am not entitled to share in the estate in which D is interested; and

d) I do not have any interest adverse to or in conflict with that of my ward, D

Therefore, I respectfully request that the Court authorize me to appear on behalf of my ward, D, as his Court Appointed SCPA Article 17A Guardian.

13) No previous application has ever been made to this Court or any other court of competent jurisdiction for the relief sought herein.

WHEREFORE, petitioner requests that
A decree be granted to:
(a) approve and authorize the creation and funding of the D Supplemental Needs Trust (SNT) for the sole benefit of D, with the date of the trust deemed to be the date said SNT was approved by the Westchester County of Law on behalf of the Westchester County Department of Social Service, being 2014;

(b) approve and authorize the transfer of the $ in death benefits issued to D, as the named beneficiary of his late father for the NYS Employees’ Retirement System Group Life Term Policy, and be deposited to said D Supplemental Needs Trust; and

(c) appoint C the Trustee of the D Supplemental Needs Trust; and

that Mental Hygiene Legal Service may be cited to show cause why a decree should not be made accordingly as he has not provided a “Waiver and Consent” to the D Supplemental Needs Trust.

DATED: ____________________, 2014

C

________________________________________

VERIFICATION

STATE OF NEW YORK)

COUNTY OF WESTCHESTER)

C, being duly sworn, deposes and says:

That she is the Petitioner and that the contents of said Petition are true to her own knowledge, except as to matters alleged upon information and belief, and that as to those matters, she believes the same to be true.

________________________________________

C

Sworn to before me this ___ day of __________, 2014

________________________________________

Notary Public
D SUPPLEMENTAL NEEDS TRUST

The D SUPPLEMENTAL NEEDS TRUST is created by C , residing at New York , as Grantor (hereinafter referred to as “Grantor” or “Grantors”), and C , residing at New York , as Trustee (hereinafter referred to as “Trustee” or “Trustees”). Reference in this Trust to the “Trustee” or “Trustees” shall be deemed a reference to whomever is serving as Trustee, whether original, alternate, or successor.

The sole beneficiary of this Trust Estate shall be D , (hereinafter referred to as the “Beneficiary”) a person with a chronic and persistent disability.

This is an irrevocable trust for the benefit of D, residing at New York , a person suffering from a chronic and persistent disability during said beneficiary's lifetime. The effective date of this Trust shall be the _____ day of ____________, 2014.

W I T N E S S E T H:

WHEREAS, Grantor is the mother and the Court appointed Surrogate’s Court, Westchester County Article 17A Guardian, of D; and

WHEREAS, Beneficiary suffers from Severe Mental Retardation, and exhibits mental disabilities, which has resulted in a persistent and chronic disability by reason thereof; and

WHEREAS, Beneficiary whose date of birth is , is approximately 28 years of age; and

WHEREAS, Grantor desires to establish a supplemental needs trust for a substantial portion of the Beneficiary's assets, which trust shall qualify as an exempt trust pursuant to 42 USC §1396p [d][4][A], as codified by NYS Soc. Serv. Law §366[2][b][2][iii][A] and 18 NYCRR §360-4.5[b][5][i][a]; and

WHEREAS, Grantor anticipates that the Beneficiary will continue to have extensive needs as well as other services not provided by private insurance; and

WHEREAS, Grantor anticipates that the creation, funding, assignment of income to this trust, and use of this trust shall not create any period of ineligibility for Medical Assistance, under 42 USC §1396p[c][2][B][iv], as codified in NYS Soc. Serv. Law §366 [5][d][3][ii][D] and 18 NYCRR §360-4.4[c][2][iii][c][iv].

NOW, THEREFORE, in consideration of the promises and of the covenants herein contained, the Grantor has herewith delivered (or acknowledge the delivery thereof) and do hereby grant, convey, assign and set over to the Trustee, the property and/or interests in income described in Schedule “A” annexed hereto (sometimes herein referred to as the “trust fund”) IN TRUST, NEVERTHELESS, for the benefit of the Beneficiary on the following terms and conditions:
FIRST: The Trustee shall hold, invest and reinvest the said trust fund, including any other cash, securities or other property, real, personal or mixed, at any time forming a part of this trust, shall collect and receive the income thereof, and shall apply and distribute such income and principal as hereinafter provided, subject to the provisions and restrictions of the Order and Judgment appointing said Trustee as S.C.P.A. Article 17A Guardian and approval by the Surrogate’s Court.

A. The Trust fund shall be held, IN TRUST, for the sole benefit of the Beneficiary and shall be held, managed, invested and reinvested by the Trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, pay to (except as hereinafter provided) or apply for the benefit of the Beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustees shall deem advisable, in their sole and absolute discretion, subject to the limitations set forth below. The Trustee shall add to the principal of such Trust not less than annually the balance of net income not so paid or applied.

B. This Trust is intended to conform with 42 U.S.C. §1396p [d][4][A], NY EPTL §7-1.12 and NYS Soc. Serv. Law §366 which presently govern trusts referred to as “Supplemental Needs Trusts.” The Grantor intends that the assets constituting the Trust fund be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be or become eligible or which the Beneficiary may be receiving or may receive at some point in time. Consistent with that intent, it is the Grantor’s desire that, before expending any amounts from the net income and/or principal of this Trust, the Trustee considers the availability of all benefits from government or private assistance programs for which the Beneficiary may be or may become eligible and that, where appropriate and to the extent possible, the Trustee endeavors to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the Beneficiary.

C. None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be or become eligible or which the Beneficiary may be receiving or receive at some point in time. Without limiting the foregoing, none of the income or principal of this Trust shall be paid directly to the Beneficiary.

D. Notwithstanding the provisions of paragraphs B. and C. above, the Trustee may make distributions to meet the
Beneficiary’s needs for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the Beneficiary’s receipt or eligibility for government benefits or assistance but only if the Trustee determines (i) that the Beneficiary’s basic needs will be better met if such distribution is made, and (ii) that it is in the Beneficiary’s best interests to suffer the consequent effect, if any, on the Beneficiary’s eligibility for or receipt of government benefits or assistance. Notwithstanding the foregoing, if the mere existence of the Trustee’s authority to make distributions pursuant to this subparagraph shall result in the Beneficiary’s loss of government benefits or assistance, regardless of whether such authority is actually exercised, this subparagraph shall be null and void and the Trustee’s authority to make such distributions shall cease and shall be limited as provided in paragraphs B. and C. above, without exception.

E. The Beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this Trust.

F. To the extent permitted by law, no interest of any beneficiary in the income or principal of any trust shall be subject to pledge, assignment, sale, or transfer in any manner, nor shall any beneficiary have the power in any manner to anticipate, charge, or encumber his or her interest, nor shall the interest of any beneficiary be liable while in possession of the Trustee for debts, contracts, liabilities, engagements, or torts of the Beneficiary; provided however, that this exemption shall not apply in any respect to payments made on behalf of the Beneficiary for medical assistance provided by the New York State Department of Health, Westchester County Department of Social Services, and/or any other appropriate Medicaid entity within New York State or any other state(s). Trust principal shall not be subject to any court directed invasion pursuant to the provisions of the New York Estates, Powers and Trusts Law Sec. 7-1.6, or any other statute of New York or any other state of the United States of America except for purposes of Medicaid reimbursement.

G. Upon early termination of the Trust, the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or other appropriate Medicaid entity within New York State, or any other state(s) shall receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the Beneficiary during his lifetime, as consistent with Federal and State law. If such Beneficiary received Medicaid in more than one state, then the amount distributed to each state shall be based on each state’s proportionate share of the total amount of Medicaid benefits paid by all states on behalf of the
Beneficiary. After Medicaid reimbursement, the Trustee shall distribute any income and principal that then remain in the Trust to the Beneficiary. No entity other than the Trust Beneficiary may benefit from the early termination of the Trust.

H. Unless sooner terminated by application to the Westchester County Surrogate’s Court and upon thirty (30) days written notice served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 and a Court Order approving said termination is issued, the Trust shall terminate upon the death of the Beneficiary, except that the Trust shall continue to pay reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, payment of any state or federal taxes due from the trust because of the death of D, or other required actions associated with the termination and wrapping up of the trust and collect additional or remaining funds due to the trust, and the Trustee shall distribute any principal and accumulated interest that then remains in accordance with subparagraph (C) of this paragraph.

(A) The Trustee(s) shall serve written notice within 30 days upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or the appropriate social services district, of the Beneficiary’s death;

(B) Within thirty (30) days of the Beneficiary’s death, the Trustee(s) shall serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or the appropriate social services district by certified mail, return receipt requested and by regular mail to the Surrogate’s Court of Westchester County, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, a certified copy of the Beneficiary’s death certificate exhibiting a “raised seal”;

(C) On written consent of the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, the Trustee(s) may withhold a sum in reserve to cover any estate, trust or income taxes which are or may be due upon or by reason of the Beneficiary’s death. The decision as to the amount to be held in reserve shall be binding on the remainders;

(D) The Trustee shall promptly obtain a certified Statement of Benefits from the New York Department of Health, the Westchester County Department of Social Services,
and/or any other appropriate Medicaid entity within New York State, or any other state(s), of Medicaid payments, if any, made on behalf of the beneficiary during his lifetime. Upon receipt of such Statement of Benefits, the Trustee shall pay the State(s), or designated Social Services district(s), the lesser of (i) the total Medical Assistance provided to the beneficiary during his lifetime, as consistent with Federal and State law; or (ii) the entire balance of the Trust estate. If the beneficiary received Medicaid in more than one State, then the amount distributed to each State shall be based on each State's proportionate share of the total amount of Medicaid benefits paid by all States on behalf of the beneficiary;

(E) All remaining principal and accumulated income shall be paid to the estate of the Beneficiary and distributed in accordance with the laws of the State of New York;

(F) No Trustee shall be discharged and released from office and bond except upon the filing of a final accounting, on notice to the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, in the form and manner required by the Surrogate's Court of Westchester County and by obtaining judicial approval therefor.

SECOND: The Trustee shall have the following powers and discretions, in addition to any conferred by law:

(A) All powers conveyed to the Trustee by law, including those set forth in EPTL §11-1.1. A Trustee who has executed and filed a bond shall have the authority to invest the Trust fund in accordance with EPTL §11-2.2 and §11-2.3. In the event that the Trustee wishes to exercise powers beyond the express and implied powers of EPTL Article 11, the Trustee shall seek and must obtain Court Order.

(B) Only upon Court Order and upon thirty (30) days prior written notice to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other entity providing medical assistance in the State of New York or in any other state, shall the Trustee purchase and/or sell real estate, a condominium, or cooperative apartment or retain any such property coming into their possession for the purpose of providing a residence for the Beneficiary. Any housing purchased shall be an asset of the Trust and the instrument conveying any such house, or real
estate shall identify the Trust as the owner of the housing, and the respective percentages of ownership of the Trust and any other party contributing to the purchase of the housing, if any; and to pay a percentage of operating costs based upon the number of residents in the housing or percentage of ownership of the housing. Upon termination of the Trust, the Trust is to be reimbursed for the Trust’s share of ownership of the real property and the Trust is to be reimbursed with the proceeds of the sale.

(C) To employ agents, depositaries, accountants, investment advisors, and attorneys, and to compensate them for their services, subject only to prior Court Order approving all professional services based upon an Affirmation of Legal Services submitted to the court for review and upon thirty (30) days written notice served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601; to employ health care providers, including Social Workers, for the care and support of the Beneficiary, and to compensate them for their services, but only to the extent that such services are not paid for by government programs.

(D) The Trustee may invest in and hold property which is used as the principal residence, furniture, automobile and other items meeting the “special needs” of the Beneficiary despite the fact that such property is non-productive of income. Other non-productive property may also be held by the Trustees, and they shall have the discretion to sell such property if they deem it to be in the Beneficiary’s best interest, and add proceeds to the Trust. The Trustee shall serve the Westchester County Department of Social Services written notice at least thirty (30) days prior to the purchase, sale, exchange and or disposal of any real property. Said purchase, sale, exchange and or disposal of any real property shall be subject to the Order of the Westchester County Surrogate’s Court and the approval of the Westchester County Department of Social Services. Court Order is required prior to the purchase of a car with prior notice serviced on the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601. If applicable to meet the needs of the Beneficiary and upon Court Order, the Trustee is authorized to purchase or lease a vehicle suitable for
the transportation of the Beneficiary, on thirty (30) days notice served upon Westchester County. If a vehicle is purchased in the name of the Trustee, the purchase should be conditioned on reimbursing this Trust in the event said vehicle is sold or traded in for another vehicle. In addition, upon the death of the beneficiary and/or termination of this Trust the vehicle is to be sold and this Trust is to be reimbursed with the proceeds of the sale.

(E) The Trustee shall have the power to allocate items to income or principal. The Trustee shall determine whether capital gains will be included in trust accounting income, provided that allocations are consistent from year to year. The Trustees are authorized to deem distributions of principal to be made first from realized capital gains.

(F) To purchase annuities or life insurance policies with Trust principal or income on the condition that the applicable instrument names the Trust as the annuitant of the annuities and names the Trust as the beneficiary of any such annuity and life insurance policy. Any annuity purchased shall provide that the Trust shall be the sole beneficiary thereof and the annuity must commute at the termination of the Trust and be paid to the Trustee, in his/her fiduciary capacity of this Trust.

THIRD: A. In the event that the Beneficiary receives Medical Assistance, the Trustee shall:

(i) At the time of the filing of a Medicaid application, notify the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or any other state, of this Trust;

(ii) On thirty (30) days written notice, notify the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 of the death of the Beneficiary and provide a certified copy with a raised seal of the Beneficiary’s death certificate, and the termination of the within Trust;

(iii) On thirty (30) days written notice, serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, with notice in advance of any transactions tending to substantially deplete the principal of the Trust in the case of a Trust valued at more than $100,000; for the purposes of this clause, the Trustee must notify the Department of Social Services of Westchester County, c/o Department of Law,
148 Martine Avenue, Sixth Floor, White Plains, New York 10601 of proposed disbursements from this Trust in excess of the following percentage of Trust principal and accumulated income: five percent (5%) for trusts over $100,000 up to $500,000; ten percent (10%) for trusts valued over $500,000 up to $1,000,000; and fifteen percent (15%) for trusts over $1,000,000. A Court order is required in advance of any transactions tending to substantially deplete the principal of the Trust on notice to the Westchester County Department of Social Services or any other entity providing medical assistance in the State of New York or in any other state.

(iv) On thirty (30) days written notice, serve the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 in advance of any transactions involving transfers from the Trust principal for less than fair market value;

(v) Provide the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state with proof of bonding in the amount of the fair market value of all liquid assets held in this Trust and comply with all applicable laws. A Trustee who has executed and filed a bond shall be authorized to invest in accordance with EPTL §§11-2.2 and 11-2.3.

Furthermore, the Trustee(s) shall obtain said bond from a bonding company that is authorized and licensed to do business within the State of New York. Proof of such bonding shall be filed with the Westchester County Department of Social Services and the Clerk of the County of Westchester at the time that the Trust is funded or signed, whichever is later, and upon each annual renewal with proof of payment of the bond premium demonstrating that such bond is in full force and effect.

(vi) The Trustee shall annually account to the Surrogate’s Court for all Trust activity in the same manner as a 17A Guardian of the Property. Original accountings must be filed with the Surrogate’s Court, County of Westchester, Guardianship Department, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, and a copy of the accounting must be served on the Westchester County Department of Social Services c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state with the accountings thirty (30) days prior to filing said accountings with the Court. Each annual accounting shall be judicially approved by the Surrogate’s Court of Westchester County.

No fees or commissions shall be paid without prior Court
approval. Failure to timely file accountings may result in removal of a Trustee by the Court and/or surcharge on Trustee commissions.

B. The Trustee shall administer this Trust pursuant thereto and consistent with the Guardianship Decree.

FOURTH: A. The Trustee, acting from time to time, is authorized at any time to designate one or more persons or a bank or trust company or a not for profit entity to act in the order named as successor Trustee to fill any vacancy that may occur if no person named herein or previously designated pursuant to this paragraph as a successor Trustee shall be available to act, and only upon prior application to the Court and thirty (30) days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state.

B. Designations of successors or additional Trustee may be made upon the occurrence of a vacancy or prior thereto and shall be embodied in a written, signed and acknowledged instrument delivered to the successor, successors, or additional Trustee so designated. Any such designation may be revoked at any time prior to its delivery to the person designated. If the designating Trustee or Trustees shall die prior to the delivery of such instrument to the person designated, the executors or administrators of the deceased designating Trustee or Trustees may deliver such instrument.

C. A successor or additional Trustee shall qualify by giving notice of acceptance of the Trust. Such notice shall be embodied in a written, signed and acknowledged instrument delivered to any then acting Trustee, or if none, to (1) the Grantors, if living, and (2) the Beneficiary (or if the Beneficiary is disabled, notice shall also be given to his parent, guardian (if a guardian be appointed) or to the person with whom he resides), and (3) the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state.

As a Guardian has been appointed for the Beneficiary pursuant to Article 17A of the SCPA the State of New York, or similar statute of another jurisdiction, no resignation and designation of a successor Trustee shall be effective unless approved by the court having jurisdiction thereof.

D. Except as provided in subsection “C.”, above, the resignation of a Trustee is subject to Court approval, and upon filing a final account with the court on notice to the Department of Social Services of Westchester County, c/o
Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601 or any other entity providing medical assistance in the State of New York or in any other state. If a Trustee should die or become disabled or incompetent and unable to perform his or her responsibilities as fiduciary, then such Trustee’s estate representative or guardian undertakes that responsibility.

Notwithstanding the foregoing, as a Guardian has been appointed pursuant to Article 17A of the S.C.P.A., no Trustee shall be discharged from office and bond, except upon the filing of a final accounting in the manner required by the Surrogate’s Court, Westchester County, and obtaining judicial approval of same.

The appointment of a Successor Trustee shall be upon application to the court on notice to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

FIFTH: A. The Trustee, whether individual or a corporation, hereunder shall be paid as compensation for their services the commissions provided by law under S.C.P.A. section 2309, unless payment of such commissions shall be waived.

B. The Trustees are subject to the provisions of the Prudent Investor Act and any amendments thereto.

C. The terms “Trustee” and “Trustees” shall include survivors, successors, or persons appointed as additional Trustees.

D. The masculine gender shall include the feminine, and vice versa. The singular shall include the plural, and vice versa.

SIXTH: A. The preambles set forth above are incorporated by reference, as though more fully set forth at length herein.

B. Neither the Grantor nor any other person shall have the right to make additions to the Trust hereunder by Will or otherwise by transferring to the Trustees additional real or personal property without the consent of the Trustees.

SEVENTH: A. The Trust hereby created shall be irrevocable and may not be altered, amended, revoked, assigned or terminated by the Grantors either in whole or in part. No amendments to this SNT shall increase the class of beneficiaries. Notwithstanding the foregoing,

(i) The Trustee may revise this agreement, subject to the prior written consent of the Westchester County Department of Social Services and Court Order, at the time of the Beneficiary’s application for Medical Assistance or at such other time as necessary, in order to insure that the within Trust is not an available resource and that the transfers to this Trust do
not create any period of ineligibility for the care of the Beneficiary. The Westchester County Department of Social Services or any other entity providing medical assistance in the State of New York or in any other state shall be served with thirty (30) days written notice of any application made to the Court for any matter relating to the Trust. Such notice shall be made at least thirty days before the return date of any such action, to the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

(ii) Upon an Order of a court of competent jurisdiction and on thirty days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, the Trustee may amend this instrument at any time, and from time to time, to the extent necessary to establish or maintain the Beneficiary’s eligibility for Medical Assistance as articulated in this instrument.

The Trustee shall not have the authority to amend this Trust so as to limit or extinguish the right of New York Department of Health, the Westchester County Department of Social Services, and/or any other appropriate Medicaid entity within New York State, or any other state(s).

Anything in this instrument to the contrary notwithstanding, the Trustee shall not have the authority to amend this Trust so as to limit or extinguish the right of the State of New York, or other jurisdiction, to receive an amount equal to the total Medical Assistance paid on behalf of the Beneficiary during his lifetime under the State’s plan, pursuant to Title XIX of the Social Security Act (to the extent of Trust funds remaining upon termination, as provided above).

B. In the event that it is determined that any provision of this Trust shall in any way violate applicable law, such determination shall not impair the government’s right to its claim, if any, to the Trust funds remaining following the demise of the Beneficiary or termination of the Trust.

EIGHTH: A. C , residing at, New York , shall serve as the original Trustee.

B. In the event of the death of C or if for any reason whatsoever she ceases to serve as Trustee hereunder, A , residing at New York, shall serve as Trustee hereunder without the approval of any Court.

NINTH: This Agreement and the Trust hereby created shall be construed and regulated by the laws of the State of New York. The Surrogate’s Court of the State of New York, Westchester County shall have continuing jurisdiction over the performance of the duties of the Trustee, the interpretation, administration and operation of this Trust, and the appointment
of a Successor Trustee and all other related matters. The appointment of a Successor Trustee not named in this Trust shall be upon application to the Court and upon thirty (30) days written notice served upon the Department of Social Services of Westchester County, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601.

The Trustee may transfer the situs of the Trust to another jurisdiction upon the consent of the Court retaining jurisdiction and the Court obtaining jurisdiction of the Trust, in the event such action is taken, to elect to have the Trust construed and regulated by the applicable laws of such jurisdiction. The Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state, shall be served with notice of any proposed situs transfer and/or change in choice of law. Notwithstanding any provision to the contrary, in the event that the jurisdiction of the Trust is removed from New York State and Westchester County or any other entity in New York State provides Medicaid services to the Beneficiary, this Trust shall be construed in accordance with the laws of the State of New York.

Any change of jurisdiction shall only occur after notice to each Interested Party, and served upon the Westchester County Department of Social Services, c/o Department of Law, 148 Martine Avenue, Sixth Floor, White Plains, New York 10601, or any other appropriate local social services district or any other entity providing medical assistance in the State of New York or in any other state, shall be served with notice of any proposed situs transfer and/or change in choice of law. Notwithstanding any provision to the contrary, in the event that the jurisdiction of the Trust is removed from New York State and Westchester County or any other entity in New York State provides Medicaid services to the Beneficiary, this Trust shall be construed in accordance with the laws of the State of New York.

This Trust shall be binding upon the estate, executors, administrators and assigns of the grantor any individual Trustee and upon any successor Trustee.

This Trust agreement may be executed in separate counterparts which, together, shall be deemed to be one agreement.
IN WITNESS WHEREOF, the undersigned has executed this agreement as of the day and year first above written.

____________________________
C
Grantor and Trustee

STATE OF NEW YORK )
 ) ss.:
COUNTY OF WESTCHESTER )

On the _____ day of __________, 2014, before me, the undersigned, a Notary Public in and for said state, personally appeared C, known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

____________________________
Notary Public