

(ii) Traditional fiduciary income tax rules apply. Please see IRC §§ 641 – 668.

i. It is important to remember that trust fiduciary income tax brackets are significantly compressed when compared to individual income tax brackets. In 2019, the top income tax rate of 37% starts at only \$12,750 for trusts and at \$518,388 for a single individual and at \$ for married couples.

ii. The Qualified Disability Trust, which provides an increased personal exemption and is discussed more thoroughly later in this outline, should be considered if the third-party supplemental needs trust will have non-grantor trust status.

c. Complete Gift – Does the settlor want the gift to the third-party supplemental needs trust to be a completed gift for gift tax purposes? See IRC § 2511 and Treas. Regs. §§ 25.2511-2(b) and (c). Is missing out on “stepped up” basis and being stuck with “carryover” basis the right decision? See IRC §§ 1014 and 1015.

d. Incomplete Gift - Does the settlor want the trust property included in her gross estate for estate tax purposes to realize “stepped up” basis? See generally §§ 2033 and 1014.

2. Testamentary – Traditional rules governing fiduciary income taxation of trusts will apply. See I.C.1.b above and II.C.1.a.(ii) below.

3. Non-Tax Considerations – Generally, non-tax considerations are more important than tax issues when planning for and drafting the third-party supplemental needs trust, including the decision whether the trust should be created during the settlor’s lifetime or upon the settlor’s death. Non-tax considerations include funding by others, being able to revoke or amend the trust due to changing circumstances and/or laws (i.e., the decision to use an inter vivos revocable trust versus an inter vivos irrevocable trust), compliance with Medicaid and other public assistance laws, being better able to handle non-probate distributions (such as life insurance and retirement benefits), the settlor’s overall asset protection and estate planning goals and objectives, and to witness the relationship between the trust and the primary beneficiary and the impact the trust has on the primary beneficiary’s quality of life. Finally, trust provisions to provide flexibility to deal with unforeseen tax and non-tax issues should be considered and, if appropriate, drafted into the third-party supplement needs trust. Trust provisions that provide flexibility to deal with changing circumstances include trust protectors, trust advisors, committees to remove and replace trustees, allowance for changes of trust situs and governing law, and allowance for decanting.