

and, if applicable, state forms and schedules). It is important to note that if an irrevocable inter vivos third-party supplemental needs trust is created by the primary beneficiary's parents, the parents want to be co-trustees of the trust, and Qualified Disability Trust status is desired, the trust must be carefully drafted so that the parents do not possess any powers that would create grantor trust status.

(iii) Sole Benefit – The trust must be for the sole benefit of an individual who is under age 65. See IRC § 642(b)(2)(C)(ii)(I) with a cross reference to 42 U.S.C. § 1396p(c)(2)(B)(iv). The Social Security Administration defines “sole benefit” to mean “if no other person or entity can benefit from the transferred resources at the time of the transfer or for the remainder of that persons’ life.” See POMS SI 01150.120.B.8. It is unknown at this time whether the IRS would take this narrow of a view in interpreting the term “sole benefit.”

(iv) Disability – The primary beneficiary of the third-party supplemental needs trust must be disabled as that term is defined at 42 U.S.C. § 1382c(a)(3). See § IRC 642(b)(2)(C)(ii)(II). Generally, an individual will be considered to be disabled if the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which as lasted or can be expected to last for a continuous period of not less than twelve months. See 42 U.S.C. § 1382c(a)(3)(A). See also 42 U.S.C. § 1382c(a)(3)(B).

c. Testamentary – Traditional fiduciary income tax rules for trusts apply. See II.C.1.a.(ii) above.

2. Gift and Estate Tax – Not applicable to the general administration of third-party supplemental needs trusts.

D. Distributions From Third-Party Supplemental Needs Trusts

1. Income Tax

a. Inter Vivos

(i) Grantor Trust – See I.C.1.a. above

(ii) Non-Grantor Trust – See II.C.1.a.(ii) above

b. Testamentary – See II.C.1.a.(ii) above.

2. Gift Tax – A completed gift for gift tax purposes occurs if a distribution is made to a beneficiary and there was no completed gift for gift tax purposes when the assets were contributed (e.g., settlor retains a limited/special power of appointment over trust assets). See IRC § 2511.