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**MARION COUNTY CIRCUIT COURT POLICY
SPECIAL NEEDS TRUSTS**
(aka "payback trusts", "Medicaid trusts", "income cap trusts", etc)

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This policy is to inform practitioners as to how the Marion County Circuit Court will treat petitions to create special needs and income cap trusts as a general rule. Judges, of course, maintain discretion to make appropriate determinations based on the circumstances of individual cases. The court cannot provide any advice as to the requirements of any government benefit program.

1. Pursuant to ORS 125, the court may authorize either a conservator, or a special limited conservator, to create a trust, including a special needs trust (SNT). ORS 125.440(2), 125.650(4), (5). In addition, the court may create the trust without the appointment of a conservator pursuant to ORS 125.650 (1) and (5). If a protective proceeding already exists, the fiduciary (or other interested person) may petition for creation of the trust within the protective proceeding and a new file is not required. If there is no protective proceeding, a new file is required; IE, the court will not authorize creation of an SNT as a distribution vehicle in a decedent's estate or personal injury case.
2. A new petition to create a SNT is a Chapter 125 proceeding and Chapter 125 filing fees apply. (If you believe there is authority other than Chapter 125 for the court to create a special needs trust, you will need to clearly cite the authority in your petition.)
3. All notice provisions of Chapter 125 must be complied with. Pursuant to ORS 125.060(2)(m), the court will require notice to any relevant benefit-paying agency; typically DHS and/or Social Security.
4. Unless it is a small amount of money, the court will require an ongoing conservatorship with normal conservatorship protections, ie fiduciary and fiduciary's attorney can't be paid without court approval, annual accountings in UTCR 9.160 form, and bond. Here is the court's reasoning: generally these are funds that normally would be in a conservatorship (EG, developmentally disabled person receives personal injury accident settlement). The only reason the funds are going to a trust rather than conservatorship is to achieve eligibility for some program. We know from experience that fiduciary misappropriation of funds is a common problem. The court is not prepared to strip a protected

person from the protection they would otherwise have against misuse of their funds in order to qualify them for public benefits. In addition, the SNT takes funds that otherwise would replace public funds or be taken by a public benefit agency to fund services. If the court allows those funds to be diverted improperly by a fiduciary then the public is adversely affected.

5. The court will require a complete copy of the trust approving attached to the order as Exhibit A. The order should specify that the trust is approved in the form set forth in Exhibit A.