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SUPPLEMENTAL NEEDS TRUSTS: THE MOVEMENT TOWARDS REFORMATION

MATTHEW M. SHATZKES

INTRODUCTION

Consider the following scenario:

The year is 1990 and you are an eighty-year-old grandparent with a significant amount of wealth. In apprehension of your declining health, you decide to set up trusts for your children and grandchildren. Unfortunately, one of your grandsons is disabled, and wanting to ensure that the grandson is cared for, you set up a trust solely for him. The trust instructs the trustee to pay out the net income of the trust for the disabled grandson's benefit during his lifetime. You pass away a year later and the trusts take effect. Before your death, the grandson was receiving government aid through Medicaid. Medicaid eligibility is based on a person's income and ability to pay for medical care.¹ Now, however, the proceeds of the trust are being counted as income for the grandson, thus making him ineligible for Medicaid. As a result, the burden of caring for this disabled grandson falls solely on the shoulders of the grandson's parents, your son and daughter-in-law. Following your death, the Legislature in 1993 adopts a new type of trust called a supplemental needs trust. The supplemental needs trust allows a person to care for a disabled person by giving them income, but instead of supplanting governmental benefits, as a traditional trust would, the supplemental needs trust would supplement them. As a result, the proceeds of the trust would not count as the income of the disabled, allowing the disabled person to continue to be eligible for government funded programs. In this case, it would allow the grandson to continue to receive the income from the trust by supplementing

¹ U.S. Dep't of Health & Human Services, Centers for Medicare & Medicaid Services (Jan. 5, 2010) available at <http://www.cms.hhs.gov/medicaideligibility> ("Medicaid is available only to people with limited income."); See 42 U.S.C.S. § 1396p(h)(1) (2010) ("The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive . . .").

the aid he was receiving from Medicaid. Would you, as the grandparent, want the trust to be modified by the courts to a supplemental needs trust?²

The hypothetical above illustrates an issue the Surrogate Courts in New York have struggled with. The scenario illustrates a situation where a decedent has already executed a trust before the legislature enacted Estate Powers & Trusts Law (EPTL) §7-1.12,³ which authorized supplemental needs trusts. Here the trustee would like the trusts to be modified into a supplemental needs trust. A similar situation exists where the decedent creates a trust after the enactment of EPTL §7-1.12, but due to error, a regular trust is created and not a supplemental needs trust.⁴ Here the trustee would like the error to be reformed by converting the trust into a supplemental needs trust. Though the remedies sought are labeled differently, the New York courts have treated these situations the same,⁵ and in both scenarios the underlying issue is whether the courts are allowed to change these trusts into supplemental needs trusts.

Historically, New York courts have held that the general rule is that there is no reformation of testamentary instruments.⁶ The underlying policies

² *In re Will of Kamp*, 790 N.Y.S.2d 852, 855-56 (2005) (arguing that government assistance supplemented by trust income is in the best interest of wards); *Estate of Rose Ciralo*, N.Y.L.J., Feb. 2, 2001, at 31 col. 4 (N.Y. Sur. Ct. Feb. 2, 2001) (granting reformation of a will to obtain a supplemental needs will where the decedent knew that the permanently disabled recipient relied on government benefits and would not have wanted to disturb those benefits); *See In re Estate of Newman*, 856 N.Y.S.2d 500, 500 (2008) (noting the importance of the testator's intent to supplement, rather than supplant, government benefits when creating a supplemental needs will); *See also In re Estate of Hyman*, 836 N.Y.S.2d 493, 493 (2007) (interpreting E.P.T. L. § 7-1.12 as authorizing the creation of non-self-settled supplemental needs trusts when (a) the person for whose benefit the trust is established suffers from a disability and (b) the trust evinces the intent that the assets be used to supplement, not supplant, government benefits).

³ N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(b)(1) (2010) (providing that when a trust is established for a disabled person, it shall be presumed that the creator of the trust intended that that neither the principal nor income be used to pay for any expense which would otherwise be covered by government benefits).

⁴ *In re Rappaport*, 866 N.Y.S.2d 483,485, 488 (2008) (allowing for the reformation of a will that post dates the enactment of EST. POWERS & TRUSTS LAW § 7-1.2); *See In re Estate of Longhine*, 836 N.Y.S.2d 500, 500 (2007) (holding that even a will that clearly and unambiguously establishes a non-supplemental needs trust may be reformed to create a supplemental needs will); *See also In re Estate of Hulett*, No. 28,611, at 325 (N.Y. Sur. Ct. Feb. 18, 1999) (finding that the decedent clearly intended that the trust supplement government benefits based on language in the will instructing the trustee to take into consideration other resources).

⁵ As the courts do not distinguish between these two scenarios, for the purposes of this article the terms modification and reformation shall be treated the same. In fact, in deciding whether to reform a testamentary trust to create a supplemental needs trust, “[C]ourts have not focused upon whether the decedent’s will was executed before or after . . . the enactment of EST. POWERS & TRUSTS LAW § 7-1.12.” *Rappaport*, 866 N.Y.S.2d at 487. Additionally, in making the decision to reform a will, courts will look to case law involving wills executed both before and after the enactment of EST. POWERS & TRUSTS LAW § 7-1.12. *Longhine*, 836 N.Y.S.2d at 500.

⁶ *Rappaport*, 866 N.Y.S.2d at 486. “Courts are generally loathe to reform testamentary instruments and, as a rule, will not, unless reformation effectuates the testator’s intent.”; *See In re Snide*, 52 N.Y.2d 193, 197 (1981) (rejecting the traditional unwillingness to reform wills and stating, “Nor can we share

behind the no-reformation rule stem from the fear that reformation of testamentary instruments would frustrate the intent of the testator's testamentary plan and lead to excessive litigation.⁷ Yet some New York courts have reformed trusts into supplemental needs trusts when the testator's intent is not frustrated, and the requirements of EPTL §7-1.12 for a valid supplemental needs trust are satisfied.⁸ The supplemental needs trust exception to the no reformation rule has been met with debate because some courts have refused to recognize it and have instead applied the traditional no-reformation rule.⁹

This article will argue that although the New York courts should continue to enforce the traditional no-reformation of testamentary instruments rule, they should also recognize the supplemental needs trust exception. The New York courts should recognize this exception for three reasons. First, reformation should be permitted because caring for the disabled is an important public policy.¹⁰ Government assistance has changed in three important respects over the years. It has evolved from a gift into a right, it is no longer associated with a stigma, and it is viewed as an insurance benefit rather than a charity.¹¹ These changes encourage

the fears . . . that our holding will be the first step in the exercise of judicial imagination relating to the reformation of wills.”)

⁷ *Snide*, 52 N.Y.2d at 196 (refuting the view that testator intent attaches irrevocably to the document prepared and instead focusing on the testamentary scheme reflected); *See Rappaport*, 866 N.Y.S.2d at 923. “It is of paramount importance that the testator’s actual purpose be determined and effectuated to the extent it comports with the law and public policy.”

⁸ *See, e.g., In re Estate of Hyman*, 836 N.Y.S.2d 493, 493 (2007) (finding that courts have shown a willingness to reform wills to obtain a supplementary needs trust where the testator’s intent to supplement government benefits is evident from the testamentary instrument); *In re Will of Kamp*, 790 N.Y.S.2d at 857-58 (2005) (noting that state public policy authorizes and encourages the use of supplementary needs trusts).

⁹ *In re Accounting of Tamargo* 115 N.E. 462, 463 (1917) (commenting on the traditional reluctance to reform trusts and stating, “When the purpose of a testator is reasonably clear by reading his words in their natural and common sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him.”); *In re Rubin*, 781 N.Y.S.2d 421, 426 (2004) (denying reformation of a testamentary trust into a supplemental needs trust).

¹⁰ *See In re Estate of Escher*, 94 Misc.2d 952, 959 (1978). “Charity bestowed by the State or any local political subdivision thereof to alleviate the suffering of the destitute is a grant or gift by an enlightened government that seeks to keep its less fortunate citizens from deprivation and want. It is in fact a gift by all the other citizens of the State and community who work, earn and pay taxes to the less fortunate who are unable to work and support themselves.” (quoting *In re Van Gaalen’s Estate*, 38 Misc.2d 853, 855 (1963)); *See generally In re Roger A. Wick v. Gozigian*, 85 A.D.2d 805 (holding that when is trustee is authorized only in the event of an emergency to invade the trust corpus for the benefit of the son, who was institutionalized at the time the will in question was executed, the trustee lacked the authority to invade the corpus to pay for the beneficiary’s institutionalization).

¹¹ *Escher*, 94 Misc.2d at 959–60 (explaining the emergence of the modern welfare state and the corresponding development of constitutional due process rights to safeguard these benefits). *See generally Goldberg v. Kelly*, 397 U.S. 254 (1970) (determining that failure to provide a fair hearing prior to the termination of welfare benefits violated the due process clause).

reformation, which give the court the ability to reform a trust to allow a disabled beneficiary to take advantage of his right to government benefits for which he would otherwise be ineligible. Second, reformation should be permitted because it would allow the trustee to fulfill his duty of acting in the best interest of his ward.¹² Acting in the best interest of the ward is essential to the role of the trustee, and reformation would allow the trustee to enable the disabled beneficiary to continue to receive government aid without exhausting the trust property. Third, reformation should be permitted because it is consistent with the doctrine of substituted judgment.¹³ The presumed intent of the disabled beneficiary would be to reform the trust so that he could be eligible for governmental benefits.¹⁴ Due to his disability, however, the beneficiary cannot request reformation. Under the substituted judgment doctrine, the court is able to “substitute its reasoned judgment for what the disabled individual would have decided if able, e.g., the presumed intent of the disabled person.”¹⁵ Thus, because the beneficiary would reform the trust if he were able to, the court should permit reformation. The court, however, should only apply the supplemental needs trust after considering the intent of the testator’s testamentary plan and determining that there was no fraud or unjust enrichment on the part of other beneficiaries.¹⁶ Additionally, the requirements of EPTL §7-1.12 must also be satisfied. These include: (1) the beneficiary of the trust suffers from a severe or chronic or persistent disability; (2) the trust evidences the intent that the assets be used to supplement, not supplant, government benefits; (3) the trust prohibits the

¹² See *In re Shah*, 95 N.Y.2d 148, 158–60 (2000) (explaining that when determining whether to approve an application for a transfer of assets, the courts should consider factors such as whether the proposed disposition will produce an estate, gift, income, or tax savings which would benefit the incapacitated person or his dependents). See also N.Y. MENTAL HYG. LAW § 81.21(d)(5) 2010 (discussing the factors that a court shall consider in order to approve a specific application for transfer of assets).

¹³ *Id.*, (citing N.Y. MENTAL HYG. LAW § 81.21).

¹⁴ *Id.* See generally Andrew D. Wone, *Don’t Want to Pay for Your Institutionalized Spouse? The Role of Spousal Refusal and Medicaid in Funding Long Term Care*, 14 ELDER L.J. 485 (discussing spousal refusal in New York).

¹⁵ *In Re Will of Kamp*, 7 Misc.3d 615, 621 (2005). See *Shah*, 95 N.Y.2d 148, 158–60 (2000) (defining the doctrine of substituted judgment and stating that a court may grant the application if satisfied by clear and convincing evidence that, among other things, a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances.” See, e.g. N.Y. MENTAL HYG. LAW § 81.21 (emphasizing the different factors needed in order to approve a transfer of assets).

¹⁶ *In re the Estate of Longhine*, 836 N.Y.S.2d 500 (N.Y. Sur. Ct., 2007). “Reformation may still be allowed upon consideration of the relevant factors, including: 1. The intention of the testator 2. Lack of fraud or unjust enrichment 3. Non-interference with or disruption of the dispositional plan under the instrument.” *Id.* See *In re the Estate of Herceg*, 747 N.Y.S.2d 901 (N.Y. Sur. Ct., 2002). “Of course, the paramount objective in interpreting a will is to determine the intention of the testator . . .” *Id.*

trustee from using assets in any way that may jeopardize the beneficiary's entitlement to government benefits or assistance; and, (4) the beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distribution of trust assets.¹⁷ These factors and requirements will act as safeguards, ensuring that the testator's intent is not frustrated and that excessive litigation does not arise. Thus, the policies of the no-reformation rule will not be ignored.

Part I of this article will give background information on trusts. This part will discuss the essential elements for a valid trust, and will then analyze the policies behind the no-reformation rule. This part will also discuss a key case in which the concept of supplemental needs trusts was first applied in New York and was eventually codified by EPTL §7-1.12, the section authorizing supplemental needs trusts. Part II of this article discusses key cases on the subject of supplemental needs trusts, the way courts have analyzed these situations, the courts trend in allowing the reformation of traditional trusts into supplemental needs trusts, and a case where the court denied reformation. Part III argues that the supplemental needs trust exception should be recognized by all New York courts, because of the important policy of caring for the disabled, the trustee's duty to act in the best interest of their ward, and the doctrine of substituted judgment.

I. BACKGROUND: TRUSTS, THE NO-REFORMATION RULE, AND SUPPLEMENTAL NEEDS TRUSTS

This part discusses trusts generally, focusing on the no-reformation rule, and supplemental needs trusts. Part I.A discusses the requirements for a valid trust. Two requirements, a beneficiary and property, will then be discussed in greater detail in order to give a better understanding of the different effect of a traditional trust from a supplemental needs trust. Part I.B explores the policies behind the no reformation rule. Part I.C discusses *In re Matter of Escher*,¹⁸ the case in which the concept of supplemental needs trusts originated, which was later codified in EPTL §7-1.12. This section will then discuss the requirements of EPTL §7-1.12.

¹⁷ N.Y. EST. POWERS & TRUSTS LAW § 7-1.12 (2010). See *In re the Estate of Newman*, 856 N.Y.S.2d 500, 500 (N.Y. Sur. Ct., 2008) (quoting *Kamp*, 790 N.Y.S.2d at 858).

¹⁸ *In re Estate of Escher*, 4047 N.Y.S.2d 106 (N.Y. Sur. Ct., 1978).

A. Trusts

The Restatement Third of Trusts defines a trust as “a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee.”¹⁹ As this definition suggests, the trust gives the trustee legal title and the beneficiaries equitable title to the property. Thus, the beneficiary has the benefit of ownership without the burden.

In New York, a trust may be created for any lawful reason,²⁰ so long as there is “(1) a designated beneficiary, (2) a designated trustee, (3) a fund or other property sufficiently designated or identified to enable title of the property to pass to the trustee, and (4) actual delivery of the fund or property, with the intention of vesting legal title in the trustee.”²¹ Additionally, “[t]o constitute a trust there must be either an explicit declaration of trust or facts and circumstances which show beyond reasonable doubt that a trust was intended to be created.”²² As there must be an explicit declaration or facts beyond a reasonable doubt to prove intent, many trusts are set up as provisions in the testator’s will. These types of trusts are known as testamentary trusts. By creating a testamentary trust, the testator ensures that his intent will be effectuated.

For the purpose of this article, the elements of a valid trust which need further analyzing are the requirements of a beneficiary and of property. The creator of the trust, also known as the settlor,²³ must designate at least one beneficiary.²⁴ A beneficiary is a person who “hold[s] a beneficial interest” in the property of the trust.²⁵ The settlor may name himself a beneficiary, but a merger would exist if the settlor were the sole beneficiary rendering the trust invalid.²⁶ To prevent a merger, there must be at least one

¹⁹ RESTATEMENT (THIRD) OF TRUSTS § 2 (2009).

²⁰ N.Y. EST. POWERS & TRUSTS LAW § 7-1.4 (2010). “An express trust may be created for any lawful purpose.” *Id.*

²¹ *In re Doman*, 890 N.Y.S.2d 632, 634 (2d Dep’t., 2009). “A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust.” *Id.*; *In re Estate of Fontanella*, 304 N.Y.S.2d 829, 831 (3d Dep’t. 1969). See *Brown v. Spohr*, 73 N.E. 14, 16-17 (1904).

²² *Fontanella*, 304 N.Y.S.2d at 831.

²³ RESTATEMENT (THIRD) OF TRUSTS § 3 (2009).

²⁴ N.Y. EST. POWERS & TRUSTS LAW, § 7-1.1 (2010).

²⁵ *Id.*; See also *Sasso v. Gallucci*, 447 N.Y.S.2d 618, 620 (N.Y. Sup. Ct. 1982) (citing *County Trust Co. v. Young*, 27 N.Y.S.2d 648, 652 (N.Y. App. Div. 2d Dep’t 1941)) (explaining that the phrase, “beneficial interest,” means the interest of the beneficiary of a trust); RESTATEMENT (THIRD) OF TRUSTS § 3(4) (2010) (stating that a beneficiary is a person for whose benefit property is held in trust).

²⁶ N.Y. EST. POWERS & TRUSTS LAW § 7-1.1 (2010).

or more other persons, other than the settlor, who holds a beneficial interest in the trust.²⁷

The trust must also designate property to which the beneficiaries have title, resulting in the property being a financial resource of the beneficiary. EPTL §7-1.14 states that a trust may dispose of “real and personal property.”²⁸ EPTL §7-1.15 elaborates by stating that “[e]very estate in property may be disposed of” in a trust.²⁹ Thus, the settlor is allowed to dispose of any form of property within the trust. Additionally, the settlor may designate the interest in the property that the beneficiaries are entitled to in the trust. These interests include the income and the principal of the property.³⁰ If there is only one beneficiary, she is entitled to both the income and principal. However, if there are multiple beneficiaries, the trust instrument may designate some beneficiaries to the income and others to the principal.³¹

Following the death of the settlor, the income and principle interests in the property are considered financial assets of the beneficiaries, and may render the beneficiaries ineligible for government funded programs such as Medicaid.³² The beneficiary may be ineligible for Medicaid because, “for purposes of eligibility for Medicaid, the government considers the amount of an individual’s “assets,” defined as “all income and resources of the individual”³³ However, “the Medicaid statutes . . . provide an exemption . . . whereby an individual may transfer his or her own income and assets to fund an supplemental needs trust without having the funds

²⁷ *Id.*

²⁸ N.Y. EST. POWERS & TRUSTS LAW § 7-1.14 (2010).

²⁹ N.Y. EST. POWERS & TRUSTS LAW § 7-1.15 (2010).

³⁰ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.5 (2010) (describing the interests of the beneficiary); N.Y. SOC. SERV. LAW § 369(3) (2010) (explaining that the beneficial interest can include the income and principal of the trust).

³¹ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.5 (2010); N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (2010) (stating that a beneficiary may be entitled to either the income or the principal, or both, under the terms of the trust). See *Richardson v. Richardson*, 81 N.E.2d 54, 55 (N.Y. 1948) (referencing a trust which assigned the income and principal of the trust to different parties); see also *In re Arnold's Trust*, 190 N.Y.S.2d 815, 816-7 (N.Y. Sup. Ct. 1959) (identifying a trust which designated the principal and income from the trust to different parties).

³² See *In re Will of Kamp*, 790 N.Y.S.2d 852, 853 (N.Y. Sup. Ct. 2005) (“Because the trust is not considered an exempt resource, [the disabled] is ineligible for Medicaid funding . . . program.”). *In re Estate of Longhine*, 2007 N.Y. Misc. LEXIS 937, at *1 (N.Y. Sur. Ct. Feb. 27, 2007) (explaining that the allegedly disabled beneficiary sought reformation of his trust in order to avoid losing Medicare and other benefits).

³³ See N.Y. SOC. SERV. LAW § 366(5)(d)(1)(i) (2010) (stating that the term “assets” is defined as “all income and resources of an individual and of the individual’s spouse”); see also *Jennings v. Comm’r, N.Y.S. Dep’t of Soc. Serv.*, 893 N.Y.S.2d 103, 108 (N.Y. App. Div. 2d Dep’t 2010) (quoting 42 U.S.C.S. § 1396p(h)(1) (2010)).

counted as available resources for Medicaid eligibility purposes.”³⁴ The exception to the Medicaid statute was codified in New York with the enactment of EPTL §7-1.12.³⁵

B. No-Reformation Rule

Traditionally, New York courts have held that there is no reformation of testamentary instruments, due to the concern that reformation of testamentary instruments would frustrate the intent of the testator’s testamentary plan and lead to excessive- litigation.³⁶ As stated in the Restatement 3rd of Property: Wills & Other Donative Transfers, “[t]he denial of a reformation remedy . . . was predicated on observance of the Statute of Wills, which requires that wills be executed in accordance with certain formalities.”³⁷ These formalities, which ensure that the testator intended this testamentary scheme, have been extended to trusts.³⁸ Accordingly, “[c]ourts . . . generally loathe to reform testamentary instruments and, as a rule, will not, unless reformation effectuates the testator’s intent.”³⁹

As the courts have stated, “[t]he prime consideration . . . in all construction proceedings is the intention of the testator All rules of interpretation are subordinated to the requirement that the actual purpose of the testator be sought and effectuated as far as is consonant with principles of law and public policy.”⁴⁰ When determining the testator’s intent courts

³⁴ See 42 U.S.C.S. § 1396p(c) (2010). See also, *Jennings*, 893 N.Y.S.2d at 108.

³⁵ *Jennings*, 893 N.Y.S.2d at 109.

³⁶ See *In re Rappaport*, 866 N.Y.S.2d 483, 486 (2008) (stating that courts generally loathe to reform testamentary instruments); *In re Estate of Longhine*, 836 N.Y.S.2d 500 (2007) (explaining that of all the courts that considered the issue, only three have allowed the reformation of a testamentary trust). See also *Matter of Snide*, 52 N.Y.2d 193, 197–98 (1981) (Jones, J., dissenting) (“To protect testators generally from fraudulent alterations of their wills.”).

³⁷ RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE INSTRUMENTS § 12.1 cmt. c (2009).

³⁸ N.Y. EST. POWERS & TRUSTS LAW § 7-1.17 (2010).

Every lifetime trust shall be in writing and shall be executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument. *Id.*

Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 578 (2007). Requirements for proper will execution improve reliability.

³⁹ *In re Rappaport*, 21 Misc.3d 919, 923 (2008). See *In re of Snide*, 52 N.Y.2d 193, 196–97 (1981). “Nor can we share the fears of the dissent that our holding will be the first step in the exercise of judicial imagination relating to the reformation of wills.” *Id.*

⁴⁰ *In re Fabbri’s Will*, 2 N.Y.2d 236, 239–40 (1957). See *Matter of Rappaport*, 866 N.Y.S.2d 483, 486 (2008) (noting the paramount importance of the testator’s intent). *Snide*, 52 N.Y.2d at 196 (“Of

have held that the “intent . . . must be gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the [testamentary instrument] were framed.”⁴¹ Therefore, New York courts have stated that “reformation [is] only allowed to correct mistakes in the written instrument,”⁴² but “not . . . to change the terms of a trust to effectuate what the settlor would have done had the settlor foreseen a change in circumstances that has occurred.”⁴³ This, ensures that the testator’s intent is effectuated, and not varied due to changed circumstances. Additionally, not permitting reformation ensures that no person is unjustly enriched. The possibility of an “unintended taker” would unjustly enrich that person and disturb the testator’s dispositive scheme.⁴⁴ Furthermore, the unjust enrichment of this unintended taker would be “at the expense of an intended beneficiary.”⁴⁵ Accordingly, courts were hesitant to reform testamentary instruments and adhered to the no-reformation rule.

Finally, the no-reformation rule is in place to prevent excessive and frivolous litigation.⁴⁶ If reformation of testamentary instruments were allowed, there would be many more challenges to testamentary instruments. These challenges would be brought by both beneficiaries who feel they are entitled to more than they received, and from individuals who were left nothing. If these challenges are successful, it would disturb the testator’s testamentary intent, and at the same time tie down the Surrogate Courts with excessive litigation.⁴⁷ For these reasons the New York Courts generally adhered to the no-reformation rule and did not reform testamentary instruments.

course it is essential to the validity of a will that the testator was possessed of testamentary intent.”). *Id.*

⁴¹ *Fabbi*, 2 N.Y.2d at 240.

⁴² *In re Rubin*, 4 Misc.3d 634, 637–38 (2004).

⁴³ *Id.*

⁴⁴ *Rubin*, 4 Misc.3d at 638. “Equity rests the rationale for reformation on two related grounds: giving effect to the donor’s intention and preventing unjust enrichment.” RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE INSTRUMENTS § 12.1 cmt. b (2009) “The claim of an unintended taker is an unjust claim”.

⁴⁵ *Rubin*, 4 Misc.3d at 638.

⁴⁶ See *In re of Snide*, 52 N.Y.2d 193, 197–98 (1981) (Jones, J., dissenting) (“To protect testators generally from fraudulent alterations of their wills.”); *In re Estate of Snyder*, 154 Misc. 156 (1935) (“Often while it may happen that a will truly expressing the intention of the testator is denied probate for failure of proper execution, it is better this should happen under a proper construction of the statute.”).

⁴⁷ *Snide*, 52 N.Y.2d at 197–98 (Jones, J., dissenting) (discussing the overarching policy of protecting testators from fraudulent alterations of their wills.”); 38 ROMUALDO P. ECLEVEA AND WILLIAM H. DANNE, JR., NEW YORK JURISPRUDENCE DECEDENTS’ ESTATES §403 (2d ed. 2010) (“The Legislature intended to prevent fraud and uncertainty in the testamentary disposition of property.”).

C. Supplemental Needs Trusts

The concept of supplemental needs trusts originated in the Medicaid statute. The primary purpose of the Medicaid program is to enable each state, jointly with the Federal government, to furnish “medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services.”⁴⁸ For purposes of eligibility for Medicaid, the government considers the amount of an individual’s “assets,” defined as “all income and resources of the individual and of the individual’s spouse, including any income or resources which the individual or such individual’s spouse is entitled to but does not receive because of action . . . by the individual or such individual’s spouse.”⁴⁹ If the individual’s financial assets fall below a certain income level, he or she becomes eligible for Medicaid benefits.

“The Medicaid statutes, however, provide an exemption to this income rule, whereby an individual may transfer his or her own income and assets to fund an S[upplemental] N[eed] T[rust] without having the funds counted as available resources for Medicaid eligibility purposes.”⁵⁰ Congress permitted these supplemental needs trusts to be created with the individual’s income and/or assets, either as a self-settled supplemental needs trust to benefit the individual himself or herself, or as a third-party supplemental needs trust benefitting a disabled child or some other third party.⁵¹ A supplemental needs trust is similar to a traditional trust in that there is a transfer of property into the trust, managed by a trustee, for the benefit of the beneficiary. However, a supplemental needs trust differs from a traditional trust, because in a supplemental needs trust the beneficiary must be disabled, and the disabled beneficiary has no control over any disbursements made from the trust, or the ability to revoke the trust.⁵²

⁴⁸ 42 U.S.C.S. § 1396-1 (2010).

⁴⁹ 42 U.S.C.S. § 1396p(h)(1) (2010); *see Jennings v. Comm’r, N.Y.S. Dep’t of Soc. Serv.*, 893 N.Y.S.2d 103, 108 (2010) (“For purposes of eligibility for Medicaid, the government considers the amount of an individual’s “assets,” defined as “all income and resources of the individual and of the individual’s spouse, including any income or resources which the individual or such individual’s spouse is entitled to but does not receive because of action . . . by the individual or such individual’s spouse.”); *see also* N.Y. SOC. SERV. LAW § 366(5)(d)(1) (2010).

⁵⁰ *See Jennings*, 893 N.Y.S.2d at 105; 42 U.S.C.S. § 1396p(c) (2010).

⁵¹ *See* 42 U.S.C.S. § 1396p(c)(B)(iii), (iv) (2010). *See also* N.Y. SOC. SERV. LAW § 366(5)(d)(3)(ii)(C), (D) (2010) (pointing out needs in individuals who have children who are blind or disabled, and those who establish trusts solely for the benefit of such a child).

⁵² *Jennings*, 893 N.Y.S.2d at 108 (stating that in a supplemental needs trust the beneficiary must have no control over any disbursements made from the trust and no ability to revoke the trust); *see Sai*

In New York, the supplemental needs trust exception was first applied by the courts in 1978 in *In re Estate of Escher*.⁵³ In *Escher*, Surrogate Gelfand stated that a supplemental needs trust “establish[ed] a vehicle for parents and guardians of . . . children with severe and chronic disabilities to provide for their children’s future by transferring their funds to a trust, created to pay for items that will enhance their children’s quality of life without jeopardizing their children’s eligibility for government benefits, such as . . . Medicaid.”⁵⁴ In *Escher*, the Surrogate Court, later affirmed by the Court of Appeals, held that a testamentary trust established by the parents of a disabled daughter, which provided that the principal was to be used only “for the payment of expenses necessary for the maintenance and support of . . . daughter,”⁵⁵ was protected from the State’s claim for reimbursement of the amount that it had paid on behalf of the daughter.⁵⁶ The court further held that “a trustee could properly exercise discretionary powers by declining to make funds available if doing so would interfere with the beneficiary’s eligibility for government benefits.”⁵⁷ The Surrogate Court in its decision explained that public assistance has become the right of the physically and mentally disabled, particularly in light of the extremely high cost of such care in the modern day.⁵⁸

The New York Legislature codified the holding of *Escher* and the concept of supplemental needs trust in 1993, in EPTL §7-1.12, defining it as a “discretionary trust established for the benefit of a person with a severe and chronic or persistent disability by his or her parent, grandparent, legal guardian, or a court.”⁵⁹ A supplemental needs trust “shelter[s] a disabled person’s assets for the dual purpose of securing and maintaining eligibility

Kwan Wong v. Daines, 582 F. Supp. 2d 475, 479 (S.D.N.Y. 2008) (explaining that beneficiaries are not given control over trust distributions because such an act would be considered a resources thereby eliminating the eligibility for government benefits); See 42 U.S.C.S. § 1382b(e)(3)(A) (2010).

⁵³ See generally *In re Estate of Escher*, 94 Misc.2d 952 (1978) (permitting a parent to create a trust for a disabled adult child, without jeopardizing the child’s eligibility for government benefits).

⁵⁴ *Jennings*, 893 N.Y.S.2d at 104-05; *Escher*, 94 Misc.2d at 957. “The provisions made for the life beneficiary indicate a conclusion that she would never be self-supporting or fully capable of handling her own affairs. This conclusion leads to an apparent primary purpose on the part of the testator to provide for her basic needs on an ongoing basis.” *Id.*

⁵⁵ *Escher*, 94 Misc.2d at 955.

⁵⁶ *Id.* At 955-56; See also *In re Will of Kamp*, 7 Misc.3d 615, 617 (2005) (quoting SOC. SERV. LAW §104(3)) (providing that “no action may be brought against either the trust or the trustee to recover the cost of assistance or care provided to such person.”).

⁵⁷ Hulett, *supra* note 4 at 324-25; See *Escher*, 94 Misc.2d at 961.

⁵⁸ *Kamp*, 7 Misc.3d at 617; See *Escher*, 94 Misc.2d at 959 (stating that, because of the high costs involved, programs to pay for the care of the physically and mentally disabled are now seen as benefits).

⁵⁹ *In re Jennings v. Comm’r, N.Y.S. Dep’t of Soc. Serv.*, 893 N.Y.S.2d 103, 109 (2010); See Est. POWERS & TRUSTS LAW, § 7-1.12 (2010) (codifying the definition of a supplemental needs trust).

for state-funded services, and enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets."⁶⁰ The supplemental care paid for by the assets of the trust are used "to provide additional health care services and equipment, specialized or unique therapy, private health insurance, educational and vocational training, computers and software, case management services, and recreational activities for the disabled child"⁶¹ If the trust is a third party supplemental needs trust, a trust which is "created and funded by someone other than the disabled beneficiary," the assets of the trust are protected from the State's claim for reimbursement.⁶² Protection from state reimbursement is consistent with the policy of the State of New York, which is to encourage the creation of supplemental needs trusts for people who are mentally or physically disabled.⁶³

According to EPTL §7-1.12 a testamentary supplemental needs trust is created when the following requirements are satisfied:

the person for whose benefit the trust is established suffers from a severe or chronic or persistent disability; (2) the trust evidences the intent that the assets be used to supplement, not supplant, government benefits; (3) the trust prohibits the trustee from using assets in any way that may jeopardize the beneficiary's entitlement to government benefits or assistance; and (4) the beneficiary does not have the power to assign, encumber, direct, distribute or authorize distribution of trust assets.⁶⁴

If the requirements of §7-1.12 are met "[i]t shall be presumed that the creator of the trust intended that neither principal nor income be used to pay for any expense which would otherwise be paid by government benefits or assistance."⁶⁵ As a result the trust "prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be

⁶⁰ *Jennings*, 893 N.Y.S.2d at 109 (quoting *In re Abraham XX*, 871 N.Y.S.2d 599 (2008)).

⁶¹ *Id.*

⁶² Anthony J. Enea, *The ABC's of SNTS (Special Needs Trusts)*, 35 WESTCHESTER B.J., 25, 26-27 (2008) (noting that a third party supplemental needs trust is generally created by a parent, grandparent, or sibling).

⁶³ *Kamp*, 7 Misc.3d at 616 (discussing the legislative's intent to provide a legislative framework, regarding the trusts, that meet the basic needs of disabled persons through government benefits or assistance programs).

⁶⁴ EST. POWERS & TRUSTS LAW, § 7-1.12[a][5][i]-[iv] (2010); *In re Estate of Hyman*, 14 Misc.3d 1232(A) (2007); *See generally In re of the Estate of Longhine*, 836 N.Y.S.2d 500 (2007)(holding that a testamentary trust should not be reformed into a supplemental needs trust).

⁶⁵ EST. POWERS & TRUSTS LAW, § 7-1.12(b)(1) (2010).

receiving.”⁶⁶ Additionally, “the Medicaid statutes . . . provide an exemption . . . whereby an individual may transfer his or her own income and assets to fund an S[upplemental] N[eed]s T[rust] without having the funds counted as available resources for Medicaid eligibility purposes.”⁶⁷ This exemption is consistent with EPTL §7-1.12.

II. REFORMATION OF SUPPLEMENTAL NEEDS TRUSTS: THE CONFLICT

This part discusses key cases on the subject of reformation of trusts into supplemental needs trusts. Part II.A will focus on cases in which New York courts have allowed the reformation of traditional trusts into supplemental needs trusts. This part will discuss two lines of cases, in which the courts have treated the same. The first line of cases are trusts that were created before the enactment of EPTL §7-1.12. The second line of cases are trusts that were created after the enactment of EPTL §7-1.12. Regardless of whether the trust was created before or after the enactment of EPTL §7-1.12, courts have treated these cases the same. Part II.B will discuss one recent case in which the court denied reformation of a trust into a supplemental needs trust. This case follows the traditional rule in New York of no reformation of testamentary instruments.

A. Two Lines of Cases in which the New York Court's Allowed Reformation

The first line of cases in which the court has allowed reformation are in situations in which the trust was created prior to the enactment of EPTL §7-1.12. There are four cases that fit within this scenario. In the first case, *Estate of Ciraolo*,⁶⁸ a will was executed by the decedent prior to the enactment of EPTL §7-1.12.⁶⁹ The will contained a provision that created a testamentary trust leaving one-third of the decedent's residuary estate to a disabled infant.⁷⁰ The infant's mother wanted the court to reform the provision and create a supplemental needs trust.⁷¹ The Surrogate Court reformed the provision, holding that courts should reform to obtain supplemental needs trusts when “such would be the intent of the testator [And] the proposed reformation would not alter the dispositive

⁶⁶ EST. POWERS & TRUSTS LAW, § 7-1.12(a)(5)(ii) (2010).

⁶⁷ *Jennings v. Comm'r, N.Y.S. Dep't of Soc. Serv.*, 893 N.Y.S.2d 103, 108 (2010). See 42 U.S.C.S. § 1396p(c) (2010).

⁶⁸ *Ciraolo*, *supra* note 2, at 31.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

scheme of the will or trust at issue.”⁷² Additionally, the Surrogate Court quoted *Matter of Escher*, by saying “it is divorced from the realities of life to presume that if the testator were aware of the facts as they now exist, he would desire to pay the immense cost for his child’s care in preference to having society share is burden.”⁷³

The second case where the court allowed reformation is *In re Will of Kamp*.⁷⁴ In *Kamp*, a testamentary trust created in 1977 had been paying annual income to the testator’s mentally retarded son, the trust beneficiary, since the testator’s death in 1982, thereby rendering the beneficiary ineligible for Medicaid benefits.⁷⁵ As a result, the trustee petitioned the court to reform the trust into a supplemental needs trust.⁷⁶ The court granted reformation holding that the reformation was consistent with the intent of the testator and would be in the best interest of the beneficiary.⁷⁷ The court stated,

Clearly, [the beneficiary] will be better off if he has the benefit of governmental assistance for the costs of his care and treatment through Medicaid. Equally clearly it is in his best interests if the trust income and assets can be retained to supplement government benefits and provide [the beneficiary] with clothing, uncovered medical care and recreation not otherwise provided by government programs for retarded citizens.⁷⁸

The third case where reformation was granted for a trust that was established before the enactment of EPTL §7-1.12 was *In the Matter of the Estate of Hyman*.⁷⁹ In *Hyman*, a will provision which took effect in 1984 established a testamentary trust for the decedent’s disabled son.⁸⁰ The trustee, fearing that the trust funds would be insufficient to cover the cost of the son’s medical bills not covered by insurance, sought reformation of the trust into a supplemental needs trust.⁸¹ The court reformed the trust, holding that the “testator’s intent [was] to supplement, rather than supplant, government benefits [as] is evident from the language of the testamentary instrument . . . and such reformation would not change the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *In re Will of Kamp*, 7 Misc. 3d 615 (2005).

⁷⁵ *Id.* at 616.

⁷⁶ *Id.*

⁷⁷ *Id.* at 619.

⁷⁸ *Id.*

⁷⁹ *In re Estate of Hyman*, 14 Misc.3d 1232(A) (2007).

⁸⁰ *Id.* at *1.

⁸¹ *Id.*

testator's dispositive plan."⁸² The court stated that the "will evidences decedent's intention to provide for [the son] to the extent that his needs are not met by government assistance and that the trust's assets be used to supplement, not supplant, government benefits."⁸³

The fourth and final case where reformation of a trust, created prior to the enactment of EPTL §7-1.12, was permitted, is *In the Matter of the Estate of Newman*.⁸⁴ In *Newman*, the decedent died in 1988 leaving a will that created a testamentary trust for the decedent's disabled daughter.⁸⁵ At the time of the execution of the will "the decedent was aware that his daughter had developmental, cognitive and physical disabilities which prevented her from being educated past the third grade."⁸⁶ At the time, however EPTL §7-1.12 was not yet enacted.⁸⁷ The trustee petitioned the court to reform the trust into a supplemental needs trust.⁸⁸ The court reformed the trust, holding that all of the requirements for a valid supplemental needs trust established by EPTL §7-1.12 were fulfilled.⁸⁹ Furthermore, the court held that "this case falls within the line of cases where courts reformed a testamentary trust into a supplemental needs trust, based upon the presumption that the testator would have utilized that device had the testator known that it would be possible to prevent exhaustion of the trust on expenses covered by governmental benefits."⁹⁰ Accordingly, the court held that reforming the trust was valid as the supplemental needs trust did effectuate the testator's intent and was in the best interest of the disabled beneficiary.⁹¹

The second line of cases in which the court granted reformation are cases where the trusts were created after the enactment of EPTL §7-1.12. There are three cases that fit within this scenario. The first case is *In the Matter of the Estate of Hulett*.⁹² In *Hulett*, the decedent's 1995 will created a testamentary trust for her daughter who suffered from serious mental

⁸² *Id.* at *3.

⁸³ *Id.* at *4.

⁸⁴ *In re Estate of Newman*, 18 Misc.3d 1118(A) (2008)

⁸⁵ *Id.* at *1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (holding that the testamentary trust created can be reformed into a supplemental needs trust because reformation comports with E.P.T.L. §7-1.12).

⁹⁰ *Id.*

⁹¹ *Id.* (holding that reformation does not disrupt the dispositional plan under the will and absent a supplemental needs trust the daughter is in danger of losing governmental benefits).

⁹² *Hulett*, *supra* note 4.

disability.⁹³ Although the trust provision indicated that the trustee should consider other resources of the daughter in deciding how much of the trust income to apply for the benefit of the daughter, it did not comply with the requirements for the creation of a supplemental needs trust under EPTL §7-1.12.⁹⁴ The executor of the will sought to reform the trust so that it would comply with the statutory requirements, thereby shielding the corpus of the trust from claims of reimbursement, and permitting the daughter to continue receiving public assistance.⁹⁵ The court concluded that the testator's knowledge of her daughter's condition and the fact that she was receiving public assistance, coupled with the admonition in the instrument to consider other assets of the daughter, demonstrated a clear intent on the part of the decedent not to have payments from the trust supplant public benefits, but rather, to have the payments supplement those benefits.⁹⁶ The court noted that the courts have long honored such intentions and have construed the trust language as creating a supplemental needs trust.⁹⁷

The second case where reformation was granted was in *In the Matter of the Estate of Longhine*.⁹⁸ In *Longhine*, the decedent's 2005 will created a testamentary trust for a disabled adult child, but the trust did not comply with the requirements of EPTL §7-1.12 to qualify as a supplemental needs trust.⁹⁹ The guardian for the disabled child petitioned the court to reform the instrument so that it would qualify, and the child would not lose his eligibility for Supplemental Security Income and Medicare, which he was receiving.¹⁰⁰ The court held that although there was no clearly expressed intention to qualify the trust as a supplemental needs trust, the court could presume that the decedent would not have wanted his son to lose the government benefits he was currently receiving and would likely receive in the future.¹⁰¹

The third and final case where reformation of a trust created after the

⁹³ *Id.* at 323.

⁹⁴ *Id.* at 323–24.

⁹⁵ *Id.*

⁹⁶ *Id.* at 325. “It is clear that decedent intended that the trust assets be used to supplement, not supplant, impair or diminish any benefits or assistance for which the beneficiary might otherwise be eligible.” *Id.*

⁹⁷ *Id.* at 323–24 (citing to *In re Escher* 94 Misc.2d 952 (N.Y. Sur. Ct. 1978)) (holding that the settlor's clear intent to supplement rather than supplant public benefits for a third party should be honored).

⁹⁸ *In re Estate of Longhine*, 15 Misc.3d 1106(A) (2007).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

enactment of EPTL §7-1.12 was granted, was in *Matter of Rappaport*.¹⁰² In *Rappaport*, the decedent's 2006 will created a testamentary trust naming the decedent's disabled daughter as income beneficiary.¹⁰³ The disabled child's guardian petitioned the court to reform the trust into a supplemental needs trust.¹⁰⁴ The court reformed the trust holding that the reformation met the criteria set out by EPTL §7-1.12, the decedent's intent was for the "trust's assets be used to supplement, not supplant, government benefits,"¹⁰⁵ the proposed reformation "[did] not alter decedent's testamentary plan,"¹⁰⁶ and the requested reformation was in the best interests of the disabled daughter.¹⁰⁷

Though these two lines of cases have factual differences, "the courts have not focused upon whether the decedent's will was executed before or after . . . the enactment of EPTL 7-1.12."¹⁰⁸ Similarly, the courts have permitted testamentary trusts to be reformed to "create . . . supplemental needs trust notwithstanding the fact that the trusts have been operative for many years prior to the reformation application."¹⁰⁹ As the cases above show, the courts focus on the intent of the testamentary plan of the testator, the requirements of EPTL §7-1.12, and the best interest of the disabled beneficiary.

B. Reformation Prohibited

A recent case in which the court prohibited the reformation of a testamentary trust into a supplemental needs trust was *In re Rubin*.¹¹⁰ *Rubin* is a consolidation of "two independent applications, decided together, concerning inter vivos trusts for beneficiaries with long-term disabilities."¹¹¹ The first case in *Rubin* concerned a lifetime trust created in 1972 for the benefit of a disabled grandchild.¹¹² The trust "was created

¹⁰² *In re Rappaport*, 21 Misc.3d 919 (2008).

¹⁰³ *Id.* at 920–21.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 924–25.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* *In re Estate of Newman*, 2008 N.Y. Misc. LEXIS 149, at *1, *3 (N.Y. Sur. Ct. Jan. 22, 2008) (acknowledging the trust was created in 1973 and reformed in 2008); see *In re Estate of Hyman*, 2007 N.Y. Misc. LEXIS 402, at *1, *4 (N.Y. Sur. Ct. Feb. 16, 2007) (noting that the respective testamentary trust was in existence for more than 20 years prior to its reformation); see also *In re Estate of Kamp*, 790 N.Y.S.2d 852, 856, 858 (2005) (stating that the trust took effect in 1982 and was reformed in 2005).

¹¹⁰ *In re Rubin*, 781 N.Y.S.2d 421 (2004).

¹¹¹ *Id.* at 422.

¹¹² *Id.* (referring to the trust created by Sylvia Rubin).

before supplemental needs trusts were authorized by either case law or statute.”¹¹³ The income from the trust disqualified the disabled grandchild from receiving certain needs-based benefits from the federal government as well as from the State of California where she resided.¹¹⁴ Furthermore, the trust income was no longer sufficient to provide her with appropriate medical care and supervision, the cost of which had increased substantially in the preceding years.¹¹⁵ A petition was brought to reform the trust to qualify as a supplemental needs trust.¹¹⁶

The second case in *Rubin* involved three trusts,¹¹⁷ all created before supplemental needs trusts were authorized by either case law or by statute, for the benefit of the decedent’s five grandchildren.¹¹⁸ One grandchild was developmentally disabled, who at the time was receiving government benefits that paid for all of his needs, including the cost of the assisted living facility where he resided.¹¹⁹ As a beneficiary of the trusts, this disabled grandchild would no longer qualify for the Medicaid benefits on which he was depending.¹²⁰ The trustee requested, first, that the trusts be divided to sever the disabled grandchild’s interest from those of his siblings and, second, to reform the disabled grandchild’s trusts to provide that his shares be held in continuing supplemental needs trusts instead of distributed to him outright.¹²¹

In both proceedings, petitioners contended that the settlors’ intent to provide for their disabled grandchildren could not be carried out under the terms of the trusts they created.¹²² Additionally, petitioners noted that when the various trusts were created it was not clear that supplemental needs

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (referring to the trusts created by Katherine Morimer. One for the disabled beneficiary Alston Shields).

¹¹⁸ *Id.* at 636 (stating that the three trusts were created in 1945, 1959, and 1964 respectively).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 637.

In the case of Ms. Rubin, her trustees show that the full extent of the disability and the cost of her future care were not known or anticipated in 1972 when the trust was established. In the case of Mr. Shields, the first trust was created before he was born. The other trusts were created when he was 8 and 13 years old, respectively. It was apparent shortly after his birth that he was not an entirely healthy child, and he was placed in a residential treatment center at the age of 2 1/2 years. His care was largely paid for by Mrs. Mortimer, who petitioners believe made no special arrangement for him in the various trusts she created for the family because she hoped her grandson would grow out of his problems. *Id.*

trusts were lawful.¹²³ Due to these circumstances, petitioners argued that the court should permit reformation of the interests of the disabled beneficiaries “to place the inherited assets they would otherwise receive outright into supplemental needs trusts deemed settled by their respective grandmothers.”¹²⁴

In both cases, the court denied reformation. Following the traditional no reformation rule the court held that “reformation may not be used to change the terms of a trust to effectuate what the settlor would have done had the settlor foreseen a change of circumstances that has occurred.”¹²⁵ The court cited to the Restatement Third of Property which states that “reformation is unavailable to modify a document in order to compensate for changes in circumstances.”¹²⁶ The court continued by noting that a donor may establish a trust for another to avoid the claims for reimbursement by state and federal agencies,¹²⁷ and just as certainly an ambiguous trust may be construed to effectuate an intent to avoid such claims.¹²⁸ However, the court held that nothing requires or suggests that courts ought to “alter an unambiguous instrument to achieve outcomes never expressed by the creator of the instrument. Imputing intent in this way would substitute the judiciary’s value system for that of the donor, which sometimes may accord with the creator’s wishes, but just as frequently may defy them.”¹²⁹

Finally, the court held that reformation is prohibited because the trust as written is able to effectuate the testator’s presumed intent, and reformation would alter the testator’s dispositive scheme.¹³⁰ The court stated that “petitioners have not shown that the settlors’ presumed intent is incapable of fulfillment under the trusts as drafted.”¹³¹ As the trusts were drafted, the disabled beneficiaries would be able to continue receiving government aid subject to state and federal claims for reimbursement.¹³² As the disabled

¹²³ *Id.* “In both proceedings, petitioners observe that when the various trusts were created it was not clear that supplemental needs trusts were lawful. It was not until 1978, when Surrogate Gelfand issued his decision in *Matter of Escher* . . . that the validity of such trusts was expressly recognized. . . . Furthermore, it was not until 1993 that EPTL 7-1.12 was enacted, providing statutory authority for the creation of supplemental needs trusts.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 638.

¹²⁶ *Id.*; RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE INSTRUMENTS § 12.1 cmt. h (2003).

¹²⁷ *Rubin*, 4 Misc.3d at 638 (“Certainly a donor may establish a trust for another to avoid the claims of these agencies[.]”); *See* EST. POWERS & TRUSTS LAW, § 7-1.12 (2010).

¹²⁸ *Rubin*, 4 Misc.3d at 638 (“[A]nd just as certainly an ambiguous trust may be construed to effectuate an intent to avoid such claims[.]”).

¹²⁹ *Id.*

¹³⁰ *Id.* at 639.

¹³¹ *Id.*

¹³² *Id.* “The inheritance of each beneficiary may be placed in a ‘self-settled’ supplemental needs

beneficiaries can still receive government aid, and there is no language in the trusts preventing reimbursement, there is no reason to reform the trust. Additionally, the court noted that reformation would interfere with the testator's dispositive scheme. Interference with the testator's dispositive scheme would occur because reformation "would increase the shares of the siblings of the disabled beneficiaries at the expense of creditors, particularly the state and federal governments that supply the medical benefits petitioners want to preserve."¹³³

III. REFORMATION OF TRUSTS INTO SUPPLEMENTAL NEEDS TRUSTS SHOULD BE A RECOGNIZED EXCEPTION TO THE TRADITIONAL NO REFORMATION RULE

This part will argue that although the New York courts should continue to enforce the traditional no-reformation of testamentary instruments rule, they should also recognize the supplemental needs trust exception. The New York courts should recognize this exception for three reasons. First, reformation should be permitted because caring for the disabled is an important public policy.¹³⁴ Government assistance has changed in three important respects over the years. It has evolved from a gift into a right, it is no longer associated with a stigma, and it is viewed as an insurance benefit rather than a charity.¹³⁵ Second, reformation should be permitted because it would allow the trustee to fulfill his duty of acting in the best interest of his ward.¹³⁶ Third, reformation should be permitted because it is

trust, made possible by the enactment in 1993 of the federal Omnibus Budget Reconciliation Act This act permits the transfer of assets of a disabled person under the age of 65 to a trust that supplements but does not supplant Medicaid benefits New York thereafter amended EPTL 7-1.12 . . . to conform to the federal law."

¹³³ *Id.*

¹³⁴ See *In re Estate of Escher*, 94 Misc.2d 952, 959 (N.Y. Sur. Ct. 1978). "Charity bestowed by the State or any local political subdivision thereof to alleviate the suffering of the destitute is a grant or gift by an enlightened government that seeks to keep its less fortunate citizens from deprivation and want. It is in fact a gift by all the other citizens of the State and community who work, earn and pay taxes to the less fortunate who are unable to work and support themselves." (quoting *In re Estate of Van Gaalen*, 38 Misc.2d 853, 855 (N.Y. Sur. Ct. 1963)).

¹³⁵ *Escher*, 94 Misc.2d at 959-60 (demonstrating the shift in society's perception of government assistance). See e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them."

¹³⁶ See *In re Shah*, 95 N.Y.2d 148, 159 (N.Y. 2000) "A court may authorize a guardian: 'to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act.'" (quoting N.Y. MENTAL HYG. LAW § 81.21(a) (2010)); N.Y. EST. POWERS & TRUSTS LAW § 7-1.12 (2010). "EPTL 10-6.6(b)(1) authorizes a trustee who has the absolute discretion to invade trust principal for the benefit of a beneficiary to exercise that power by

consistent with the doctrine of substituted judgment.¹³⁷ The court, however, should only apply the supplemental needs trust after considering the intent of the testator's testamentary plan and determining that there was no fraud or unjust enrichment on the part of other beneficiaries.¹³⁸ Additionally, the requirements of EPTL §7-1.12 must also be satisfied.¹³⁹ These requirements act as safeguards, ensuring that the testator's intent is not frustrated and that excessive litigation does not arise.¹⁴⁰

The Legislature's intent in enacting EPTL §7-1.12 conforms with the policy of the State of New York to authorize and encourage supplemental needs trusts for disabled persons. The Legislature declared its intent in the following words:

This act is intended to provide a legislative framework for the use of trusts to meet the supplemental needs of persons with disabilities whose basic needs are expected to be met, in large part, through government benefits or assistance programs. The purpose of the legislation is to encourage future care planning by instilling greater confidence in families and friends of persons with disabilities that the trusts they establish for recipients of government assistance will be used for the purposes they intend. This act is intended to benefit individuals with a wide variety of disabilities including, but not limited to, mental illness and

appointing all or part of the principal of the trust to the trustee of another trust, created under a separate instrument, provided certain requirements are met. This section permits the trustee of a trust for the benefit of a disabled person which does not qualify as a supplemental needs trust to appoint the principal of the trust to the trustee of a supplemental needs trust, even if the supplemental needs trust is established only to accept the appointment from the existing trust."

¹³⁷ MENTAL HYG. LAW, § 81.01 (2010) (explaining that the guardianship system takes into account the personal preferences, wishes and desires of the incapacitated individual); *Shah*, 95 N.Y.2d at 159 (noting the only limitation on a guardian is the doctrine of substituted judgment).

¹³⁸ *In re Estate of Longhine*, 15 Misc. 3d 1106A, 1106A (2007) "Reformation may still be allowed upon consideration of the relevant factors, including: 1. The intention of the testator 2. Lack of fraud or unjust enrichment 3. Non-interference with or disruption of the dispositional plan under the instrument."

¹³⁹ See EST. POWERS & TRUSTS LAW, § 7-1.12(a)(5) (2010). See also *In re Estate of Newman*, 18 Misc. 3d 1118A, 1118A (2008):

Pursuant to EPTL 7-1.12(a)(5), enacted in 1993, a testamentary [supplemental needs trust] may be created where: (1) the beneficiary of the trust suffers from a severe or chronic or persistent disability; (2) the trust evidences the intent that the assets be used to supplement, not supplant, government benefits; (3) the trust prohibits the trustee from using assets in any way that may jeopardize the beneficiary's entitlement to government benefits or assistance; and, (4) the beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distribution of trust assets.

¹⁴⁰ *In re Estate of Hyman*, 14 Misc. 3d 1232A, 1232A (2007) (explaining that courts have shown a willingness to reform when such reformation would not change the testator's dispositive plan). *Newman*, 18 Misc. 3d at 1118A (noting that reformation would not disrupt the dispositional plan under the will and, instead the creation of the supplemental needs trust is necessary to preserve the plan).

developmental disabilities.¹⁴¹

The Legislature's goal was to create a mechanism to allow for the future care of the disabled. There are three reasons why allowing reformation is consistent with this goal.

The first reason why reformation should be permitted is because caring for the disabled is an important public policy.¹⁴² Government assistance has changed in three important respects over the years. It has evolved from a gift into a right, it is no longer associated with a stigma, and it is viewed as an insurance benefit rather than a charity.¹⁴³ Surrogate Gelfand, in his decision in *Matter of Escher*,¹⁴⁴ explained that public assistance has become the right of the physically and mentally disabled, particularly in light of the extremely high cost of such care in the modern day.¹⁴⁵ The Surrogate stated that preceding cases presumed that a person would prefer paying for the needs of a disabled relative in lieu of welfare contributing thereto.¹⁴⁶ However, this philosophy has changed and now public assistance has "evolved from being a gift into a right which must be provided by State and local governments to all who show need, without even regard to the capacity of their respective taxpayers to generate the required revenue to pay the mounting cost of this right."¹⁴⁷ Additionally, public assistance programs have expanded to meet the peculiar needs of the ill, the aged, the disabled, and the handicapped.¹⁴⁸ Accordingly, reformation should be permitted as everyone is entitled to government funded programs, and not permitting reformation, when the testator's dispositive scheme is not disturbed and the requirements of EPTL §7-1.12 are satisfied, takes away this right.

The second change in the view of government assistance is that there is

¹⁴¹ *In re Kamp*, 7 Misc. 3d 615, 616 (2005).

¹⁴² See *In re Estate of Escher*, 94 Misc. 2d 952, 959 (1978) "Charity bestowed by the State or any local political subdivision thereof to alleviate the suffering of the destitute is a grant or gift by an enlightened government that seeks to keep its less fortunate citizens from deprivation and want. It is in fact a gift by all the other citizens of the State and community who work, earn and pay taxes to the less fortunate who are unable to work and support themselves." (quoting *In re Van Gaalen's Estate*, 38 Misc. 2d 853, 855 (1963)); *In re Gruber's Will*, 122 N.Y.S.2d 654, 657 (1953) "State and local political subdivisions thereof will not sit by and permit a destitute person to starve and die from want of lack of care."

¹⁴³ N.Y. CONST. art. XVII, § 1 "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."; *Escher*, 94 Misc. 2d at 959-60 (stating that public assistance is a right which must be provided by the State and local governments to all who show need).

¹⁴⁴ *In re Estate of Escher*, 94 Misc.2d 952 (1978).

¹⁴⁵ *Id.* at 959.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* See *Goldberg v. Kelly*, 397 U.S. 254, 262 (U.S. 1970).

¹⁴⁸ *Id.* (recognizing the expansion of public assistance programs).

no longer a stigma attached to receiving government benefits.¹⁴⁹ In *Matter of Escher*, Surrogate Gelfand stated that, “[i]n the context of modern society, the stigma attached to receiving the benefits of these programs has largely disappeared, particularly with reference to those programs designed to meet the astronomical cost of illness or institutional care of any sort.”¹⁵⁰ This change in policy is important when determining the testator’s intent. Since a stigma is no longer associated with collecting government assistance, it would be inconsistent to believe that the testator would not have wanted the government funded programs to provide for the disabled beneficiary.¹⁵¹ Accordingly, reformation should be permitted to allow the disabled beneficiary to maintain his government benefits.

Finally, government assistance is now viewed more as an insurance benefit than charity.¹⁵² In view of the vast costs involved in caring for the disabled, logic suggests that receiving government assistance is a benefit most citizens would seek for their loved ones, rather than rapidly expending their total assets.¹⁵³ Furthermore, “it is divorced from the realities of life to presume that if a testator were aware of the facts as they now exist, he would desire to pay the immense cost”¹⁵⁴ of care in preference to having society share this burden. In *Escher*, Surrogate Gelfand stated that, “to apply to these facts a conclusion that the testator would find accepting benefits to be a repugnant humiliation at becoming the object of charity is an anachronism.”¹⁵⁵ As access to government funded programs is viewed as insurance benefit available to everyone, it would be unjust to remove this benefit from the disabled. Additionally, it would be unfair to prevent a disabled person from receiving these government benefits simply due to the fact supplemental needs trusts had not yet been authorized or due to mistake. As the government benefits are

¹⁴⁹ *Id.* See 89 Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, CAL. L. REV. 569, 604 (citing the landmark case of *Goldberg v. Kelly* which established that welfare benefits were a form of property and thus could not be terminated without the due process protections of prior notice and a hearing. Significantly, the *Goldberg* Court rejected the argument that welfare benefits were a “privilege,” rather than a “right.”).

¹⁵⁰ *Id.*

¹⁵¹ See *Id.* See also *In re Will of Kamp*, 7 Misc.3d 615, 618 (2005) (quoting *In re Estate of Escher*, 94 Misc.2d 952, 959-60 (1978)) (declaring a stigma is no longer associated with receiving benefits from government).

¹⁵² *Id.* See *Kamp*, 7 Misc.3d at 618 (quoting *Escher*, 94 Misc.2d at 959-60) (stating government programs that pay medical and institutional care are viewed more as an insurance benefit as opposed to charity).

¹⁵³ *Id.* See *Kamp*, 7 Misc.3d at 618 (quoting *Escher*, 94 Misc.2d at 959-60) (rationalizing most decedents would prefer their descendants receive government assistance for medical and institutional care rather than paying for those benefits from the decedent’s estate).

¹⁵⁴ *Id.* See *Kamp*, 7 Misc.3d at 618 (quoting *Escher*, 94 Misc.2d at 959-60).

¹⁵⁵ *Id.* at 959

a right of the disabled and not a charity, and there is no longer a stigma attached to receiving government benefits, not permitting reformation would be inconsistent with the policy of caring for the disabled.

A second reason why reformation should be permitted is because it would allow the trustee to fulfill his duty of acting in the best interest of his ward.¹⁵⁶ The New York Court of Appeals in *Matter of Shah*,¹⁵⁷ held that a guardian for a disabled individual has the right and power to engage in Medicaid planning for the ward.¹⁵⁸ In *Shah*, the Court of Appeals authorized the wife and guardian of a man in a permanent coma to transfer all of his assets to her to allow him to qualify for Medicaid and also so she could provide for herself and their children.¹⁵⁹ In reaching its holding the Court of Appeals explained, “[t]here can be no quarreling with the Supreme Court’s determination that any person in Mr. Shah’s condition would prefer that the costs of his care be paid by the State, as opposed to his family.”¹⁶⁰ The request to reform a trust into a supplemental needs trust is for the purpose of allowing the disabled to qualify for Medicaid, which is in effect Medicaid planning. Thus, the policy of the State, as established by the Court of Appeals, favors planning to permit disabled individuals to secure the financial benefits of Medicaid, while retaining supplemental income and assets.

A third reason why reformation should be permitted is because it is consistent with the doctrine of substituted judgment.¹⁶¹ Article 81 of the Mental Hygiene Law,¹⁶² “adopts the doctrine of substituted judgment whereby a court can substitute its reasoned judgment for what the disabled individual would have decided if able, e.g., the presumed intent of the disabled person.”¹⁶³ In most cases the provision preventing the trust from

¹⁵⁶ See *In re Shah*, 95 N.Y.2d 148, 158–60 (2000). See also MENTAL HYG. LAW § 81.01 (2010) (stating generally that there is a fiduciary duty from a guardian for personal needs and management to a person with incapacities).

¹⁵⁷ *In re Shah*, 95 N.Y.2d 148 (2000).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 160.

¹⁶¹ *Id.* N.Y. MENTAL HYG. LAW § 81.21 (2010).

¹⁶² N.Y. MENTAL HYG. LAW § 81.21 (2010).

¹⁶³ See *In re Will of Kamp*, 7 Misc.3d 615, 621 (2005). See also *Shah*, 95 N.Y.2d at 158–60; MENTAL HYG. LAW § 81.21 (e) (2010).

(e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings: 1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition; 2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and 3. the

being a supplemental needs trust is the required distribution of income to the disabled beneficiary.¹⁶⁴ In these cases, it can be safe to presume that if the disabled were able to, they would choose to have a supplemental needs trust for their benefit rather than have the trust income utilized to reduce or eliminate their Medicaid benefits.¹⁶⁵ If able, the disabled could renounce his right to income thereby qualifying the trust as a supplemental needs trust.¹⁶⁶ The court could likewise renounce the income for him by application of substituted judgment to achieve what would be in the disabled's best interests.¹⁶⁷ Accordingly, the policy of substituted judgment encourages permitting reformation.

The opposition to the supplemental needs trust exception argues that allowing supplemental needs trusts places the burden of caring for the disabled on society. As government programs such as Medicaid are funded through tax dollars, tax payers would help bear the cost of paying for the disabled person's medical care. However this argument is without merit. Governor Mario Cuomo in his memorandum on the bill, pointed out that encouraging supplemental needs trusts is a benefit to everyone, including the State, despite the potential loss of reimbursement to the Medicaid program.¹⁶⁸ The Governor stated that,

incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition. *Id.*

¹⁶⁴ See *Kamp*, 7 Misc.3d at 621 (stating that in *Kamp* the provision preventing the trust from being a supplemental needs trust is the required distribution of income to Henry the disabled beneficiary). See also MENTAL HYG. LAW § 81.21 (d) (2010) (enumerating factors courts can consider in approving applications for petitions for appointment of trustees [guardians] for personal needs or property management, including the distribution of income provision).

¹⁶⁵ See *In re Estate of Kamp*, 790 N.Y.S.2d 852, 857 (Sur. Ct. 2005) (holding that if the beneficiary of the trust was able to choose he "would choose to have a supplemental needs trust for his benefit rather than have the trust income utilized to reduce or eliminate his Medicaid benefits"); *Cf. In re Estate of Longhine*, 836 N.Y.S.2d 500, 500 (Sur. Ct. 2007) (noting that courts have created a presumptive intent on behalf of the donor or testator to take advantage of public benefits as the primary means of providing for the disabled donee).

¹⁶⁶ See *Kamp* 790 N.Y.S.2d at 857 (explaining that the beneficiary of the trust could renounce his right to income thereby qualifying the trust as a supplemental needs trust); See also *In re Estate of Kalt*, 108 P.2d 401, 404 (Cal. 1940) (holding that a "legatee is free to renounce even a beneficial bequest, so long as the rights of third parties are not involved").

¹⁶⁷ See N.Y. MENTAL HYG. LAW § 81.21(e) (2010) (adopting the substituted judgment doctrine when the incapacitated person lacks the mental capacity to perform the act for which court approval has been sought and where a competent, reasonable person would be likely to perform the act under the same circumstances); See *Kamp* 790 N.Y.S.2d at 857 (holding that the court could apply substituted judgment to achieve what would be in the disabled beneficiary's best interest).

¹⁶⁸ Governors of New York, available at <http://www.state.ny.us/governor/nygovs/index.html> (stating that Cuomo was elected New York State's 52nd Governor in 1982. He served as governor for 12 years until 1994).

Arguably, everyone, including the State, can only benefit . . . [F]amilies play a multitude of roles in their relatives' lives, in many ways analogous to an intensive case manager. By providing a mechanism which permits families to express ongoing personal concern and provide supplemental support for a person with disabilities, the State is bolstering the ability of families to help their relatives access services, maintain a better quality of life and, in some cases, remain in the community and more in the mainstream with all the attendant societal and financial benefits. In conjunction with educational efforts and program development, this legislation should help facilitate future care planning efforts for disabled individuals throughout the State.¹⁶⁹

As everyone benefits from government funded programs, there is no concern that society bears the burden of caring for the disabled. Furthermore, in adopting supplemental needs trusts, "[t]he State is bolstering the ability of families to help their relatives access services, maintain a better quality of life and, in some cases, remain in the community and more in the mainstream with all the attendant societal and financial benefits."¹⁷⁰ These advantages to families and to the state, benefit all and greatly outweigh the costs of contributing to Medicaid.

CONCLUSION

Due to the unique function of supplemental needs trusts, New York courts should recognize an exception to the no reformation rule. This exception to the no reformation should apply for three reasons. First, caring for the disabled is an important public policy. Accordingly, government assistance has changed in that it has evolved from a gift into a right, it is no longer associated with a stigma, and it is viewed as an insurance benefit rather than a charity. Second, reformation would allow the trustee to fulfill his duty of acting in the best interest of his ward. Finally, reformation is consistent with the doctrine of substituted judgment. However, reformation should only be permitted when it does not change the testator's testamentary intent, or unjustly enrich a party. Additionally, the requirements of EPTL §7-1.12 must also be satisfied. These requirements are sufficient safeguards to ensure that excessive and frivolous litigation does not occur. If these requirements are satisfied, the

¹⁶⁹ *Kamp*, 790 N.Y.S.2d at 854 (quoting Governor Coumo's memorandum on the bill enabling supplemental needs trusts).

¹⁷⁰ *Id.*

New York Court's should be able to reform a testamentary trust into a supplemental needs trust.

