
Using Special Needs Trusts for Disabled Beneficiaries

By Attorney Amy J. Eddy

Historically, parents and other relatives of disabled individuals have been advised to disinherit the disabled person for estate planning purposes. This is because an inheritance can have a devastating effect on the public benefits the disabled individual is receiving. Given the rising costs of medical care, it is often critical for a disabled person to continue to be eligible for public benefits.

Often this means that parents give their assets to another child or trusted relative with the expectation that he or she will provide for the disabled child. This may cause a problem because it does not take into account the fact that the other child or relative could die, get divorced or have financial problems, which all could result in a loss of the funds for the disabled person.

By estate planning with special needs trusts, parents and other relatives can continue to include the disabled individual in their estate plan. The individual can then maintain public benefits and a higher quality of life by enabling the funds to be used for items to supplement medical care and other public benefits.

A trust is a legal arrangement set forth in writing where funds or property of one person are given to a trustee. The trustee invests and manages the funds or property for the benefit of one or more beneficiaries.

A Special Needs Trust is a trust arrangement whereby income and assets are preserved and used for the beneficiary without interfering with or jeopardizing the beneficiary's eligibility for Medicaid, SSI (Supplemental Security Income) and other needs-based government benefits. The

assets in a properly drafted Special Needs Trust are not considered available for determining or continuing eligibility for public benefits.

The two most common types of Special Needs Trusts are third-party trusts and self-settled trusts:

1. Third-Party Trust. A third-party trust is one created and funded by a person other than the trustee or the beneficiary. The best example of a third-party trust is a trust created in a Will (called a testamentary trust). Sometimes the trust is funded prior to the death of the creator. In that case, it is called a living trust or inter vivos trust. Third-party trusts are not subject to a Medicaid lien upon the death of the beneficiary.

2. Self-Settled/Pay-Back Trust. A self-settled trust (sometimes called a "pay-back" trust) is one that is created from funds belonging to the beneficiary. Self-settled trusts can be used when an individual receives an inheritance that was not placed in a third-party trust in advance. They are also used to hold personal injury funds received by a disabled individual and sometimes in the divorce context where a spouse who will be receiving a property settlement is disabled. In order to be a valid self-settled Special Needs Trust, the trust must contain a provision that upon the death of the beneficiary, any funds remaining in the trust will be made available to the State up to the amount of Medicaid funding that has been provided. In addition, the trust must be created by a parent, grandparent, guardian or court order, the beneficiary must be under the age of 65, and the beneficiary must have a disability.

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Although an individual Special Needs Trust may be unlike any other in some respects, there are general provisions that are almost always included in a Special Needs Trust:

- 1. Purposes.** The trust usually includes a list of the types of distributions that would be of benefit to the beneficiary, such as medical, dental and therapeutic services not covered by public benefits, entertainment, travel and leisure expenses, educational and vocational expenses, and the like.
- 2. Non-availability of Funds/Spendthrift Provisions.** All Special Needs Trusts provide that funds held in the trust are not to be placed under the control of the beneficiary and that funds held in trust will not be available to satisfy debts created by the beneficiary.
- 3. Payments.** Most trusts provide specifically that disbursements from the trust are not to be made directly to the beneficiary but are to be in the form of direct payments to vendors or service providers.
- 4. Term/Revocability.** Many trusts state that they will not terminate until the death of the beneficiary.
- 5. Remainder Provisions.** The creator of a third-party trust generally states what is to be done with funds remaining after the death of the beneficiary. These provisions are very similar to comparable provisions in a Will.

A family member, corporate trustee or professional fiduciary can act as trustee. Since the funds placed in the trust do not belong to the beneficiary and the beneficiary has no rights to the disposition of the funds, the beneficiary does not have the choice of trustee.

The trustee is a fiduciary, meaning they are a person in a position of trust who holds assets of another or is responsible for protecting the interests of another. A particular duty that a trustee of a Special Needs Trust has is to assure that spending from the trust is done in such a way as to assure that eligibility for public entitlements is preserved.

Because of the mandate to maximize such benefits, a trustee of a Special Needs Trust must become very familiar with specific rules and procedures and be educated in how to maximize advantages of the trust without losing eligibility. The eligibility requirements for SSI benefits are the most restrictive of any generally available government benefit. The trustee must become familiar with the SSI rules to avoid spending trust funds on items that are considered In Kind Support and Maintenance, which will result in a reduction in benefits.

It is important to talk as a family to decide how to best provide for your disabled family member when you are no longer around to advocate on his or her behalf. Then consult with an attorney who has expertise in the area of disability benefits and Special Needs Trusts in order to be sure that a Special Needs Trust is properly structured and provides appropriately for future needs.



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