



## Planning for Individuals with Special Needs

A planning issue that reaches across the entire spectrum of the community is how to provide for individuals with special needs. This planning is very complex because solutions depend on the individual's degree of disability, the range and level of governmental services available for the individual and the assets of the family.

A further level of complication is added because the rules for creating solutions and obtaining governmental benefits vary considerably from state to state.

The general principle underlying special needs planning is simple to say but hard to implement: maximize eligibility for governmental programs and use family resources to supplement these programs in a way that enhances quality of life for the disabled person.

### Means-tested programs

Government benefits fall into two categories: those that are means-tested and those that are not based on income or assets. The two most important programs, Medicaid and Supplemental Security Income (SSI), are means-tested. Medicaid provides long-term health care and SSI provides a monthly income supplement to meet basic needs.

Qualifying for these programs is very important and certain types of trust can be created that will permit qualification even if the disabled person has some income and assets.

### Special needs (first-party) trusts

The type of trust to be created depends on whose assets are being used to fund the trust. Special needs trusts (SNTs) — also known as first-party trusts — are those

funded with the beneficiary's own funds. These are typically funds awarded as a result of a lawsuit, such as a medical malpractice or accident injury case, or funds that the beneficiary had accumulated prior to the disability.

SNTs have to meet strict legislative and administrative requirements and can only be established by a court, the beneficiary's legal guardian, parents or grandparents. The trust must be irrevocable and for the sole benefit of a beneficiary under age 65 who is "disabled" using the Social Security definition at the time of the trust's creation.

On the death of the beneficiary, any assets then remaining in the trust are subject to a "payback" in favor of all state agencies that have provided medical assistance (but not SSI benefits) during the beneficiary's life up to the amount of the remaining trust assets.

### Use a Letter of Intent

What will happen after both parents die? Parents have worked hard to establish necessary care and support services. They updated their estate plan to make sure that the appropriate trust and financial arrangements are in place. But how will the trustee know what to do on a personal level?

The parents should prepare a letter of intent to a successor caregiver or trustee to document the child's likes, dislikes, needs, preferences and other important personal information. This way the trustee can better ensure continuity in care for the child and that long established routines are not upset.

## Supplemental needs (third-party) trusts

Supplemental needs trusts (also known as third-party trusts) are those set up by someone else, such as parents, and funded by persons other than the beneficiary. These trusts are not subject to strict SNT rules but have to be structured to avoid jeopardizing any government benefits for which the beneficiary may be eligible. At the death of the beneficiary, any remaining trust assets can pass to other family members.

Supplemental needs trusts are usually established either during the lives of the parents or at the death of the surviving parent in their will or trust. Funding usually takes place at the death of the surviving parent, although if other relatives are planning on leaving assets to the beneficiary, these bequests should be coordinated so that assets end up in the supplemental needs trust and not in the beneficiary's name (or SNT). Life insurance is often used to fund these trusts.

## What expenses can be paid by the trust?

During the life of the beneficiary both types of trust can provide supplemental benefits to the beneficiary and there is no restriction on the amount that can be used for this purpose. Supplemental benefits include health benefits not otherwise covered, such as dental and vision services, and educational and leisure opportunities, such as music lessons, sports activities and vacations.

## Who should serve as trustee?

Perhaps the most important issue to be addressed with both of these types of trusts is who should be the trustee. In general, the trustee must be familiar with all of the benefit programs available and their respective eligibility requirements. Family members may not have the required expertise and for some programs, such as housing assistance, having a family member as sole trustee may cause ineligibility. As a result, a corporate or professional trustee or co-trustee is recommended.

## What happens if the beneficiary's assets don't justify creating and administering an SNT?

"Pooled trusts" are an alternative that are administered by nonprofit agencies. Each beneficiary has her own trust sub-account but the assets are pooled for investment and management purposes. These trusts qualify as SNTs and have slightly different requirements as they can be created by the beneficiary and the beneficiary can be over age 65 at creation. In addition, at death of the beneficiary, the remaining assets can be made available to other pooled trust beneficiaries rather than subject to the payback requirements.

## What if the parents don't want to create a supplemental needs trust?

There are three commonly suggested alternatives, none of which will satisfactorily provide for the disabled person. The first is simply making an outright distribution. This will result in disqualification for means-tested benefits, at least until the distribution is spent.

The second is disinheriting the disabled person. Although this solves the qualification requirements for means-tested programs, it leaves the disabled person without a safety net in the event that programs are withdrawn, eligibility rules change or are no longer available.

The third alternative is to give assets to another family member to "look after" the disabled person. In practice this rarely works as the assets belong to the family member and get diverted to their use. These assets also become available to the family member's creditors, including a divorcing spouse.

There are a lot of other issues and complexities that need to be dealt with that are unique to each case. However, with a basic understanding of the rules for qualification for governmental benefits an advisor can help clients to begin the process of implementing a suitable plan.

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