

SPECIAL NEEDS TRUSTS: ONE SIZE DOES NOT FIT ALL

BY RICHARD I. MILLER

Special Needs Trusts enable funds to be set aside for individuals with a disability without disqualifying a beneficiary from government benefits such as SSI and Medicaid. To qualify for SSI and Medicaid, an individual's resources cannot exceed \$2,000.

A properly designed Special Needs Trust will supplement public benefits without jeopardizing eligibility, because the transferred assets will not be treated as an available resource of the individual for government benefit purposes.

TRUST WORTHY: It is advisable to consult with an experienced professional before you establish or fund a trust to ensure your objectives are achieved and the financial security of the individual with a disability is preserved.



Special Needs Trusts enable funds to be set aside for individuals with a disability without disqualifying a beneficiary from government benefits such as SSI and Medicaid. To qualify for SSI and Medicaid, an individual's resources cannot exceed \$2,000. A properly designed Special Needs Trust will supplement public benefits without jeopardizing eligibility, because the transferred assets will not be treated as an available resource of the individual for government benefit purposes.

The term Special Needs Trust is often used generically and interchangeably when considering the preservation of assets for an individual with a disability who is receiving government benefits. It is important to understand, however, that there are two types of Special Needs Trusts that have different rules and consequences. Recognizing the difference between these instruments is critical prior to establishing and funding the trust.

THIRD-PARTY TRUST (Supplemental Needs Trust)

Third-Party Trusts are established with funds originating from someone other than the individual with a disability. In general, these funds are received by way of inheritance or gift from a family member.

SELF-SETTLED TRUST

Self-Settled Trusts are established with the funds of the individual with a disability. These funds are usually derived from a personal injury award, custodial account or the individual's own assets which were accumulated prior to disability.

Both types of trusts allow assets to be preserved for individual with a disability without disqualifying him or her from SSI or Medicaid. There are significant differences, however, in the way the trusts are funded, administered and distributed.

Most notably, a self-settled trust requires a payback provision – i.e. any funds remaining in the trust upon the death of the beneficiary must first be used to reimburse the State for benefits expended on behalf of the beneficiary. In addition, the Trustee must file an annual accounting with the State detailing how the funds are used. The nature of the disbursements can be questioned by the State, since every dollar spent during the beneficiary's life means there is less available to reimburse the State upon the beneficiary's death. A self-settled trust must only contain assets of the individual with a disability; be for the sole benefit of the individual with a disability; and established prior to the individual with a disability turning age 65.

A third-party trust has none of these restrictions. Any funds remaining in a third-party trust can be distributed as directed by the individual who establishes the trust. Likewise, there is no accountability to the State as to how the funds are disbursed during the lifetime of the beneficiary since no State payback is mandated. The Trust can also be established irrespective of the beneficiary's age.

The advantages of a third-party trust make this the preferred option, if possible. Avoidable mistakes, however, often result in assets passing directly to the individual with a disability, leaving the self-settled trust as the only option. For example, parents unintentionally leave inheritances to their child with a disability, through their will or inadvertently designate the child as a bene-

fiary of a retirement account, life insurance policy or annuity. It is also common for family members to establish UTMA or custodial accounts for minors with a disability, not realizing these assets vest with the child when he or she turns 18 or 21, thereby disqualifying the child from benefits. Once assets pass to the child, a self-settled trust may be the only recourse to salvage the situation. For this reason, it is critical to engage in proactive estate planning, so assets are distributed directly to a third-party trust.

In addition, it is important to consider who should be appointed as Trustee of a Special Needs Trust. The Trustee must be prepared to accept the responsibility of administering the Trust and understand the impact on the beneficiary's government benefits. For instance, distributions from a Special Needs Trust could unintentionally reduce SSI payments if made directly to the beneficiary or used to pay for food or shelter.

Navigating the complexities of special needs trusts and the maze of government benefits can be confusing and overwhelming, even for the most sophisticated parties. Before you establish or fund a trust, it is advisable to consult with an experienced professional to ensure your objectives are achieved and the financial security of the individual with a disability is preserved. •

ABOUT THE AUTHOR:

Richard I. Miller is a partner with Mandelbaum Salsburg P.C. based in Roseland, NJ 07068. www.lawfirm.ms He can be reached at (973) 736-4600.

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