

A GUIDE TO SPECIAL NEEDS TRUSTS

Why Create a Special Needs Trust?

A Special Needs Trust can be an important tool for a disabled individual who is, or may become eligible, for Supplemental Security Income or Medicaid but has excess assets preventing eligibility. Supplemental Security Income (SSI) is the Social Security program that grants income to people who are age 65 or older, blind or disabled with limited income and assets. Medicaid is the state-run federally funded program that pays for medical assistance for certain children, and individuals who are aged, blind, or disabled with limited income and assets. Eligibility for both SSI and Medicaid is based, in part, on the amount of the applicant's assets.

In order to qualify or maintain eligibility for Medicaid or SSI an individual may transfer his or her excess assets to a Special Needs Trust, without an imposition of a transfer penalty if the individual is under the age of 65. If an individual is over the age of 65, then a transfer of funds to a pooled trust / special needs trust will impose a period of ineligibility for Medicaid, which is discussed in further detail below.

There are two types of special needs trusts established with the assets belonging to the beneficiary. These trusts are established under sections (d)(4)(a) and (d)(4)(c) of the Omnibus Reconciliation Act of 1993 and are often referred to as "OBRA" trusts. Both trusts are irrevocable, are established with and hold the assets of the beneficiary, and serve to qualify the beneficiary and maintain his or her eligibility for public benefits.

Special Needs Trusts for People Under Age 65

The first type of trust, the (d)(4)(a) trust, may be established by a parent, grandparent, guardian, court, or the individual who has a disability. The beneficiary must be under the age of 65 years and no assets may be added to the trust after the beneficiary turns the age of 65. The trustee may be an individual or corporate trustee.

Special Needs Trusts for People Over Age 65

The second type of trust, the (d)(4)(c) trust, must be established by a parent, grandparent, guardian, court or by the person with the disability. These trusts are referred to as "pooled trusts" because the assets of the beneficiary are "pooled" together with the assets of other individuals for investment purposes. A pooled trust is administered by a non-profit organization trustee usually partnered with a corporate trustee. Each individual has his or her own sub-account within the trust, but the pooling of assets allows for more investment opportunities than the more traditional trust. On July 1, 2012, the "SMART ACT" was established in Illinois, which greatly restricted the use of pooled trusts for people over age 65. This Act stated that any funding to a pooled trust account for individuals over the age of 65 will be considered a "transfer of asset for less than fair market value" which will result in a period of ineligibility for Medicaid. The only exception to the transfer penalty is if the individual is a ward of the State or the County Public Guardian, in which case no transfer penalty will be imposed.

What Can The Funds in the Special Needs Trust Funds Be Used For?

The trustee must use the funds in the special needs trust solely for the beneficiary, but funds may not be distributed directly to the beneficiary. The trustee is prohibited from making gifts or purchasing items for an individual other than the beneficiary. For example, birthday gifts for the beneficiary's family are not allowed. Generally speaking, the funds held in a special needs trust may be used for those items that Medicaid and SSI do not pay for. Clothing, companion care, attorney's fees, taxes, payment of debts, furniture, and transportation are only some examples of potential items that may be paid for by the trust. The trust funds are generally not used to pay for medical care or nursing home room and board, which are paid for by Medicaid.

The trustee of the special needs trust communicates with the beneficiary, the beneficiary's family, agent or guardian to effectively administer the trust and ensure that the beneficiary's needs are being met. Upon creation of the pooled trust, a personal representative is designated for the beneficiary. The family member or personal representative may contact the trustee to request that funds be disbursed for a particular item. Alternatively, the relative or personal representative may purchase the item for the beneficiary and then submit the receipt to the trustee for reimbursement.

What is the Cost of a Special Needs Trust?

There is a cost associated with establishing and administering both types of Special Needs Trusts. An attorney must be hired to draft the necessary trust documents, and the trustee will usually assess an annual fee based on a percentage of the individual's trust assets. However, the financial benefit to the beneficiary and his family usually outweighs such cost. A corporate trustee brings investment expertise and experience with government benefits. Additionally, the government is essentially paying for the beneficiary's care while allowing the beneficiary to keep and use his assets to better his standard of living. The individual's alternative to the Special Needs Trust would be to use all of his funds toward the cost of his care in order to become eligible for Medicaid. Once eligible, the individual would not have any funds available for his ongoing needs.

What Happens to the funds in the Special Needs Trust when the Beneficiary Dies?

Upon the death of the beneficiary, the remaining funds left in the trust are used to pay back the State of Illinois for the amount paid by the State for the medical benefits and services provided during the beneficiary's lifetime. The trust never has to pay back more than what is left in the trust at the beneficiary's death, and the beneficiary's family is not responsible for the difference. Because the State is paid back at the lower Medicaid rate, and not the private pay rate, the payback amount can be significantly less than the amount the individual would have paid if they had paid privately. At death, if the amount owed to the State is less than what is left in the trust, the remaining funds may be distributed to remainder beneficiaries, such as the individual's family, friends, or charities. Some pooled trusts also require that a portion be retained by the non-profit trustee.

When you have questions related to elder or special needs law, think of the attorneys at Dutton Casey & Mesoloras. With over 100 years of combined experience, Janna Dutton, Kathryn Casey, Helen Mesoloras, Michaela Franco, and Melissa LaPointe are here to assist you, and those you care about. In addition, Janna Dutton and Kathryn Casey are two of only a few certified elder law attorneys in Illinois.

Resources:

National Elder Law Foundation – www.nelf.org

National Academy of Elder Law Attorneys – www.naela.org

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Appointments are also available in Arlington Heights,
Skokie, and Westchester, Illinois, or via video conferencing
or telephone.

