SPECIAL NEEDS TRUSTS

A "Special Needs Trust" is a unique type of trust intended for the benefit of a disabled person who is unable to engage in productive work or manage finances. Individuals with disabilities are often reliant on government benefits such as Supplemental Security Income ("SSI"), SNAP food assistance, and Medicaid or Medicaid Waiver programs. These types of government benefits require the recipient to have very limited income and assets. One purpose of a special needs trust is to make additional funds available to meet the needs of an individual with disabilities, enabling him or her to enjoy the best possible quality of life without losing eligibility for means-tested government assistance.

A special needs trust is managed by a trustee (or trustees) with fiduciary obligations to the beneficiary. The trustee is responsible for investing funds, making disbursements of trust funds, paying taxes and maintaining detailed accounts. The trustee needs an understanding of government benefits for individuals with disabilities, including the strict regulations concerning the use of special needs trust assets since improper use of funds could disqualify a beneficiary from certain programs. The trustee should have an appreciation of the beneficiary's needs and desires so that the trust will make the best possible contribution to the individual's quality of life. A special needs trust can be managed by a professional trustee, or in some circumstances, by a reliable family member or friend serving as trustee.

Attorneys can draft different types of special needs trusts depending on the source of the funds, the desires of the grantor, the availability of appropriate trustees, and other factors.

FIRST-PARTY SPECIAL NEEDS TRUSTS

A **FIRST-PARTY SPECIAL NEEDS TRUST**, also referred to as a **"self-settled trust,"** a **"payback trust,"** or a **"D(4)(A) trust,"** is funded with assets or income that belong to the individual with the disability, who is also the beneficiary of the trust. In order for the assets of the trust NOT to count for Medicaid or SSI eligibility purposes, the trust must meet these basic requirements:

- The beneficiary must be disabled.
- The beneficiary must be under age 65 at the time the trust is established.
- The trust must be established by a parent, grandparent, guardian, court or individual with a disability if competent to do so. Then the beneficiary's own assets are used to fund the trust.
- The trust must be irrevocable.
- Trust funds must be used only for the benefit of the disabled beneficiary.
- At the beneficiary's death, the state Medicaid agency must be reimbursed from any remaining assets in the trust. This "Medicaid payback" applies to all states where the beneficiary may have lived over his lifetime.

Situations where a first-party special needs trust may be appropriate:

- **Lawsuit settlement**. A first-party special needs trust can allow an individual with disabilities to receive a personal injury award without losing eligibility for public benefits. Lump-sum or annuity payments can be irrevocably assigned to the trust established by the court.

- **Divorce settlement/child support payments**. If a disabled spouse qualifies for public benefits, the divorce settlement can direct monthly alimony or a lump sum distribution to be placed in a first-party special needs trust. Child support payments can also be irrevocably assigned to a first-party special needs trust by court order to protect the government benefits of an adult child with disabilities.

- **Inheritance or life insurance proceeds**. An inheritance or life insurance payout can often cause a person to lose public benefits. If a third-party special needs trust has not been created, the inherited assets, now "received," can be placed in a first-party special needs trust. (Although a Medicaid payback would be required in this situation, the first-party trust would allow the disabled individual to retain his or her inherited assets and government benefits.)

- **Military Survivor Benefits for disabled children**. Because of the "Disabled Military Child Protection Act" (signed in 2014), a military parent can now provide a survivor benefit for a child with disabilities and have the annuity paid to a special needs trust for that child's benefit. Until this law was passed, military parents who chose a Survivor Benefits Plan (SBP) annuity option for their children risked interference with government benefits such as SSI, Medicaid and Medicaid Waiver programs.

THIRD-PARTY SPECIAL NEEDS TRUSTS

A **THIRD-PARTY SPECIAL NEEDS TRUST**, frequently referred to as a "**supplemental needs trust**," is funded with assets belonging to a person other than the beneficiary of the trust. In fact, no funds belonging to the beneficiary should be used to fund the trust. Typical funding comes from gifts, inheritances, proceeds of life insurance policies, etc. This trust has no provision to pay back Medicaid upon the trust's termination; rather, the person creating the trust decides how the remaining trust property will be distributed when the beneficiary dies.

A third-party special needs trust can be created by a parent, grandparent, legal guardian, sibling or other relatives or friends of the trust beneficiary. It can be irrevocable at the outset or revocable until certain events occur (death of settlor who established the trust, retirement funds paid into the trust, large contributions by individuals other than settlor, etc.) A third-party special needs trust can be established and funded at any time or be established under the provisions of a will ("testamentary trust") after the death of the settlor. A third-party special needs trust can be an extremely valuable tool for providing instructions on caring for a loved one with special needs.

POOLED TRUSTS

A **POOLED TRUST** (for either first-party or third-party special needs trusts) is a trust that is created and administered by a non-profit organization. Separate accounts, or "subaccounts," are established for each individual beneficiary, and the funds from each subaccount are pooled for the purpose of investment and management. Pooled trusts often call upon the experience of social workers, money managers and special needs attorneys. Since many financial institutions do not handle small special needs trusts or may charge fees that are not cost-effective for small trusts, pooled trusts can give families access to highly skilled trustees even with modest trust estates.
(See, for example, The Arc of Texas Master Pooled Trust.)

CHOOSING A TRUSTEE

The trustee of a special needs trust is the person or entity who will manage the trust and make decisions about how to invest or spend funds. Either or both parents of the beneficiary may serve as the trustee, or a relative, friend, or professional corporate trustee may be designated. Choosing a trustee to serve after the death of the beneficiary's parents is often a very difficult decision. A successor trustee must have a basic understanding of disability-related government benefits and must be willing to work with the agencies providing such benefits. The trustee should be a reputable professional organization or an individual with high integrity. Most importantly, the trustee must be committed to improving the life of the beneficiary.

USE OF TRUST FUNDS

Trust funds must be used only for the benefit of the special needs beneficiary. However, the funds may be used for almost anything that would improve the life of the beneficiary, so long as the trustee, in his or her discretion, determines that the disbursement is in the best interest of the beneficiary. For example, a special needs trust may pay for computers, cell phones, clothing, bedroom furnishings, books, games, crafts, educational expenses, social and recreational expenses, hobbies, legal expenses, travel expenses, etc. Most special needs trusts are drafted to allow disbursements for food and shelter at the discretion of the trustee, with an understanding that certain government benefits may potentially be reduced by such distributions. Special needs trusts can be powerful tools to improve the lives of individuals with disabilities by providing needed resources while preserving needs-based government benefits.