

## Special Needs Trusts

Special Needs Trusts may be useful or necessary tools for persons with disabilities. There are two types of Special Needs Trusts: the **Self-Settled Special Needs Trust** and the **Third Party Special Needs Trust**. Self-Settled Special Needs Trusts are funded by a person with disabilities. Third Party Special Needs Trusts are funded by persons other than the individual with disabilities, such as parents and grandparents of the individual.

### **SELF-SETTLED SPECIAL NEEDS TRUST**

An individual with a disability may receive an inheritance or litigation proceeds, such as from a personal injury settlement. If that person receives needs-based government benefits such as Supplemental Security Income (SSI) or Medicaid, receiving those funds may make them ineligible for these benefits. Congress has provided a means by which a person with a disability can receive the benefit of this money but still remain eligible for the needs-based benefits – the self-settled special needs trust. There are two varieties of self-settled special needs trusts: the pooled self-settled special needs trust and the individual self-settled special needs trust.

#### *Pooled Self-Settled Special Needs Trust*

A pooled self-settled special needs trust is established and administered by a non-profit association, and is designed to manage resources for the disabled individual's benefit without affecting their eligibility for needs-based public benefits. Each beneficiary has his or her own pooled trust subaccount, but the assets in the subaccounts are pooled for investment purposes. The subaccount can be established by the beneficiary's parent, grandparent, legal guardian, a court, or by the beneficiary himself or herself. Because the pooled trust subaccount is funded by the beneficiary (self-settled), at the beneficiary's death the funds remaining in the subaccount, to the extent they are not retained by the trust, will be distributed to the Department of Medical Assistance services to repay Medicaid for medical assistance provided to the beneficiary during his or her lifetime.

#### *Individual Self-Settled Special Needs Trust*

An individual self-settled special needs trust can be established by a parent, grandparent or legal guardian of a beneficiary with disabilities, or by a court. The trustee appointed in the trust agreement is responsible for administering the trust, including recordkeeping, reporting, investing the trust's assets, and making distributions to the beneficiary. Because the trust subaccount is funded by the beneficiary (self-settled), at the beneficiary's death the funds remaining in the trust must first be distributed to the Department of Medical Assistance services to repay Medicaid for medical assistance provided to the beneficiary during his or her lifetime. Any funds remaining in the trust after this payback can be distributed to the remainder beneficiaries designated in the trust agreement.

### **THIRD PARTY SPECIAL NEEDS TRUST**

The best way for parents to provide for their children with special needs after the death of the parents is with a Third Party Special Needs Trust. The assets in a properly drafted Special Needs Trust are not available for purposes of eligibility for public benefits.

There are two types of third party special needs trusts: the pooled third party special needs trust, and the individual third party special needs trust.

#### *Pooled Third Party Special Needs Trust*

A pooled third party special needs trust is established and administered by a non-profit association, and is designed to manage resources for the child's benefit without affecting the child's eligibility for needs-based public benefits. Each beneficiary has his or her own pooled trust subaccount, but the assets in the subaccounts are pooled for investment purposes. Parents can set up the subaccount during their lifetimes and can fund the subaccount during their lifetimes or after their deaths. The parents can also establish the subaccount after their deaths by directing their executor to set up the account. Because the pooled trust subaccount is funded

by a third party (the parents), at the beneficiary's death the funds will be distributed to successor beneficiaries named by the parents.

### ***Individual Third Party Special Needs Trust***

An individual third party special needs trust can be created in the parents' wills (a testamentary trust), within the parents' revocable living trusts, or as a separate stand-alone (inter vivos) trust. The trust agreement should follow some basic guidelines:

- The trust must be funded with the family's funds, not the child's funds
- The trust must be managed by a trustee other than the child
- The trust must state that the beneficiary (child) cannot revoke or amend the trust, or direct the Trustee to make payments for food, shelter, or for any other purpose. This provision prevents the trust from being considered a resource for eligibility for Supplemental Security Income and Medicaid
- The trust should provide the trustee with the sole and complete discretion regarding distributions of income and principal

### **Funding a Third Party Special Needs Trust**

Parents can fund a third party special needs trust with life insurance, retirement assets, or other assets in the parents' estate. Please note that Social Security benefits, military Survivor Benefit Plan benefits, Civil Service Survivor Benefits, and benefits from the Department of Veterans Affairs cannot be assigned directly to special needs trusts.

### **CHOOSING A TRUSTEE**

The selection of a trustee is one of the most important decisions to be made when establishing a Special Needs Trust. Selecting the right trustee will ultimately lead to the best outcome and greatest benefit to the person with special needs. The parents have several options for trustees:

- Individual Trustee - family members or other persons

- Professional Trustee - a law firm, bank trust department, CPA, or trust company
- Non-profit Organization - one that has experience working with individuals with disabilities and public benefit programs

Parents may also want to consider appointing Co-Trustees and/or Trust Protectors (a person or entity who has the authority to remove a trustee).

### **DUTIES OF A TRUSTEE**

The trustee of a Special Needs Trust must carry out the terms of the trust agreement and be loyal to and act in the best interests of the trust beneficiary. A trustee must invest the trust assets properly, make distribution decisions, and report the trust's activity to the beneficiary.

### **CONCLUSION**

Persons with disabilities or their families should consult with an experienced elder law attorney to design the plan that will work the best for their family. The attorneys at Oast & Taylor can provide that expertise and are ready and able to assist you.

### **Learn More**

Call Oast & Taylor at 757-452-6200 or visit [www.OastTaylor.com](http://www.OastTaylor.com) to schedule a consultation with an attorney at one of Oast & Taylor's convenient office locations in Virginia Beach, Portsmouth, Chesapeake, or Elizabeth City, North Carolina.

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