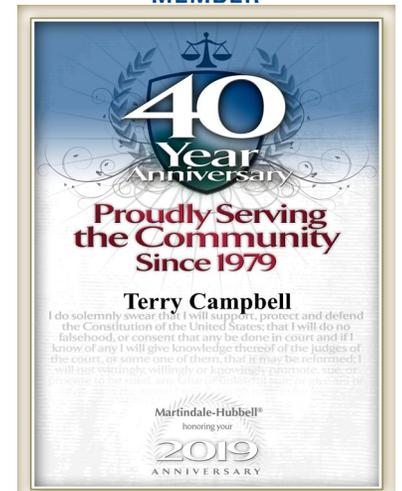


Special Needs Trusts

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There are an estimated one billion people with disabilities in the world, according to a 2011 report published by the World Health Organization.

The United States Census Bureau issued a report in 2010 concluding that 18.7% of the U.S. civilian non-institutionalized population reported a disability.

“Special Needs” has no one definition. It often refers to the overall consequences of a person’s disabling condition and the challenges that result. This term often refers to the overall consequences of a person’s disabling condition and the resulting life circumstances and challenges that result because of this condition. It can be both physical and mental challenges.

Do not disinherit a beneficiary with special needs – this is an outdated and incorrect approach.

Do not leave the disabled person's share to another family member to informally manage and control. This family member may not use the funds as intended and even a well-intentioned family member may fail to manage the funds for the benefit of the intended beneficiary.

If this family member dies, the assets he or she is holding for the disabled person may now pass to a spouse or other children who have no inclination or motivation to care for the disabled individual.

Special Needs Trusts are the foundation for planning with a beneficiary with a disability and the resulting special needs.

There are two types of Special Needs Trusts:

1. First-Party (self-settled) Special Needs Trusts, which are funded with assets belonging to the beneficiary or to which the beneficiary is legally entitled.
2. Third-Party Special Needs Trusts, which are funded with assets from a third-party (someone other than the beneficiary).

The term “Special Needs” is often used interchangeably with the term “Supplemental Needs”.

The vast majority of Special Needs Trusts are designed to preserve the beneficiary’s eligibility for the various means–tested government benefit programs for which a person with disabilities may qualify.

Congress specifically authorized the creation of a Single-Beneficiary Special Needs Trust to be funded with assets belonging to the beneficiary, as part of the Omnibus Budget Reconciliation Act of 1993 (“OBRA 93”). In addition to this federal statute, there are two additional primary sources of guidance regarding validity and effectiveness of Special Needs Trusts.

1. The Social Security Administration’s Program Operations Manual System (“POMS”).

2. The various state Medicaid manuals.

The **first** statutory requirement for a First Party Special Needs Trust is that the Trust is established by:

- An adult beneficiary who has mental capacity not withstanding his disability.
- The legal guardian of the property of the beneficiary.
- A parent or grandparent of the beneficiary.
- A court.

Notwithstanding the provisions of the federal statute regarding the authority of a “parent or grandparent” to establish and fund a trust, the Social Security Administration has taken the position that a parent or grandparent must also have independent legal authority over the beneficiary’s assets, e.g., as Court-appointed guardian or pursuant to a Power of Attorney.

The Special Needs Trust Fairness Act signed into law on December 13, 2016 allowed a mentally competent, yet disabled, beneficiary to establish his/her own First-Party Special Needs Trust. If the adult beneficiary has previously granted a Power of Attorney to a third-party which **specifically authorizes the establishment and funding** of a First-Party Special Needs Trust with the beneficiary's assets, the Social Security Administration will now allow the attorney-in-fact acting as Agent for the beneficiary to establish and fund the Trust.

The **second** statutory requirement is that the beneficiary is disabled within the meaning of the Social Security Act.

The **third** statutory requirement is that the Trust must be irrevocable.

The **fourth** statutory requirement is that the Trust is for the sole benefit of the beneficiary.

The transfer of a disabled individual's assets to a First-Party Special Needs Trust is an exempt transfer, and not subject to a transfer penalty, only if the Trust is "solely for the benefit" of the Trust beneficiary.

The **fifth** statutory requirement is that the beneficiary must be under the age of 65 when the Trust is established and funded with the beneficiary's assets.

- If the Trust was established prior to the date the beneficiary attains age 65, the Trust continues to qualify even after he attains age 65.
- It is not permissible to make additions to a First-Party Special Needs Trust after the beneficiary attains age 65.

The **sixth** statutory requirement is that upon the death of the beneficiary (or any earlier termination event) medical assistance providers, i.e., Medicaid **will be reimbursed** from any property remaining in the First-Party Special Needs Trust up to the total amount of medical assistance benefits paid on behalf of the beneficiary under one or more state Medicaid plans during his lifetime.

- This is often referred to as a “payback requirement”.

CAUTION: This is paid prior to any funeral expenses. Therefore, it is critical to prepay those expenses during the beneficiary’s lifetime.

Examples of reasons to create a First-Party Special Needs Trust for disabled beneficiary:

- The disabled person directly inherits assets which would otherwise disqualify the disabled person from means tested benefits such as Medicaid.
- The person receives a personal injury award which would otherwise disqualify a person from Medicaid and other benefits.

Third-Party Special Needs Trusts are not subject to most of the federal statutory requirements mandated for First-Party Special Needs Trusts. Most importantly, there is no Medicaid payback requirement for a Third-Party Special Needs Trust that is drafted properly from the outset.

- The beneficiary does not need to meet any particular definition of disabled.
- There is no age limitation on the beneficiary or the time of funding of the Trust.
- The beneficiary need not be the sole beneficiary of the Trust.
- **The Trust must be irrevocable as to the beneficiary.** The beneficiary cannot hold the right to revoke or terminate the Trust or to demand the use of Trust funds for his support of maintenance under the terms of the Trust.

Third-Party Special Needs Trusts may be established *inter vivos* (during the Settlor's life), including as part of an estate plan under a Revocable Living Trust or it may be established under the Will as a Testamentary Trust.

“Pooled” Special Needs Trusts

- In addition to the single-beneficiary First-Party Special Needs Trust authorized by law, a Trust may be established through a “Pooled” Special Needs Trust arrangement.
- A “Pooled” Special Needs Trust must be established and managed by a non-profit association.
- A first-party sub-account with a “Pooled” Special Needs Trust must contain the assets of an individual who is disabled.

The “Pooled” Special Needs Trust must maintain a separate first-party sub-account for the sole benefit of each beneficiary with a beneficiary but may “pool” the assets for purposes of investment and management.

A “Pooled” Special Needs Trust must be established by:

1. The beneficiary’s legal guardian.
2. The beneficiary’s parent or grandparent.
3. A Court.
4. The beneficiary himself or herself (or his or her attorney-in-fact acting under a Power of Attorney).

There is a similar payback provision at the time of death, except if the Estate Recovery claim exceeds the remaining amount in Trust, the Trust assets are retained by the non-profit in its charitable fund.

A separate sub-account with a “Pooled” Special Needs Trust may also be established with assets from a third-party. While the beneficiary of a third-party sub-account with a “Pooled” Special Needs Trust must still satisfy the government’s definition of “disabled”, there is no restriction on who can establish the third-party account, the beneficiary’s age does not limit the timing of the establishment or funding of the account and **there is no Medicaid payback with a third-party sub-account.**

In Wisconsin we have two excellent “Pooled” Special Needs Trust arrangements:

1. Wispact Inc.

www.wispact.org

2. Life Navigators

www.lifenavigators.org

Wispect Inc.

is a private non-profit organization that administers “Pooled” and Community Special Needs Trusts. Based in Madison, Wispect manages the Special Needs Trusts for more than 3,000 people throughout the State of Wisconsin. Wispect provides services for the beneficiary that include:

- Ensuring that the funds spent meet the Public Benefit rules.
- Assisting in bill payment options for recurring bills.
- Expediting emergency distributions.
- Discussing options with the beneficiary and/or advisor on how funds can best be used to protect benefits.

The Trustee managing funds for Wispect is Capital First Trust Company.

Life Navigators

was founded by parents who were committed to developing programs and educational opportunities for their children with intellectual and developmental disabilities.

Life Navigators envisions an inclusive community where individuals with disabilities and their support networks experience full participation and maximized independence.

Prairie Trust is the entity that manages and invests the funds that are part of the “Pooled” Trust arrangement.

Special Needs Trusts are not counted as available resources for purposes of a beneficiary's eligibility for most means-tested government benefits, including Medicaid and Supplemental Security Income (SSI).

A properly drafted Special Needs Trust will specify that the Trustee is not obligated to and cannot be compelled by, the beneficiaries, a Court, or anyone else to use the assets of the Trust to provide for the beneficiary's support or maintenance.

Distributions are in the discretion of the Trustee; however, there is a broad range for distributions.

While it would depend upon the circumstances for some of these distributions, permissible disbursements include payments directly to providers of services for the benefit of the beneficiaries; household services, including cable T.V., internet, telephone, security alarm, housekeepers; professional services, including those of attorneys, accountants, care managers, benefit advocates, investment advisors; personal services such as dry cleaning, laundry, hair stylists, personal attendants, companions, counseling and therapies.

Permissible disbursements include payments directly to the providers of goods for the benefit of the beneficiary (excluding food and shelter), including medical equipment, household appliances, furniture, clothing, cameras, computer equipment, sporting equipment, subscriptions, tickets to recreational or entertainment events.

Other permissible disbursements are “quality of life” expenditures such as appropriate vacations, club memberships, a pet or service animal.

A properly drafted Special Needs Trust will specify the intent that the Trust should “supplement, but not replace” any public or private benefits for which the beneficiary may be eligible as a consequence of his or her disability.

The Trustee should also be given the latitude to “opt out” of such benefits if they are not “reasonably available” to the beneficiary, where if the benefits are insufficient or otherwise inadequate to provide fully for the beneficiary’s needs.

Please consult with an experienced attorney in planning for a loved one with special needs.