

Frequently Asked Questions About Special Needs Trusts

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From www.FlemingAndCurti.com:

1 What is a "special needs" trust?

"Special needs" is just a term to describe any trust intended to provide benefits without causing the beneficiary to lose public benefits he or she is entitled to receive.

2 What kinds of public benefits do special needs trust beneficiaries receive?

Each special needs trust can be intended to protect different public benefits. Most commonly, special needs trusts are intended to permit Supplemental Security Income (SSI) and Medicaid recipients to receive some additional services or goods. In Arizona, the Medicaid program is known as AHCCCS (the Arizona Health Care Cost Containment System) or ALTCS (the Arizona Long Term Care System), depending on whether it covers acute care or long-term care, respectively.

3 Does the existence of a special needs trust qualify the beneficiary for public benefits?

No. The existence of a special needs trust does not itself make public benefits available; the beneficiary must qualify for the benefits program already, or qualify after the trust is established. If properly established, the special needs trust will not cause a loss of benefits (although in some circumstances the level of benefits may be reduced), but the trust does not make it easier to qualify.

4 What is a "supplemental benefits" trust?

Some lawyers prefer to use the term "supplemental benefits" rather than "special needs." Occasionally the term "supplemental needs" is used. All are interchangeable, and describe the purpose of the trust rather than being a limited legal term.

5 Who can establish a special needs trust?

Anyone can establish a special needs trust, but there are two general categories

of such trusts: self-settled and third-party trusts.

6 What is a third-party special needs trust?

A third-party special needs trust can be established by one person for the benefit of another. The person establishing the trust, called the settlor (or grantor or, sometimes, trustor) chooses to make some of his or her own assets available for the benefit of the disabled beneficiary. Third-party special needs trusts are often established, for example, by parents for their developmentally disabled or mentally ill children.

7 What special rules govern third-party special needs trusts?

There are actually few rules governing third-party special needs trusts. Since the beneficiary was never entitled to the money in the trust, the most important rule is simple: the trust terms should not create any entitlement to either income or principal. If the trustee has complete discretion whether to make distributions for the beneficiary, the trust principal and income will usually not be counted as available.

8 What can a third-party special needs trust provide for the trust beneficiary?

The cardinal rule for special needs trusts is that the trust may not provide food, shelter, or any asset which could be converted into food or shelter (including cash), to the beneficiary. In other words, the trust can provide for physical therapy, medical treatment, education, entertainment, travel, companionship, clothing, furniture and furnishings (such as a television or computer), and some utilities (like cable television and a telephone, but not electricity, gas or water). Distributions of cash to the special needs trust's beneficiary are almost never permitted (though even this central rule may have some limited exceptions).

9 I understood that a special needs trust could not pay for clothing. Has that rule changed?

Yes. In March, 2005, the old prohibition against providing clothing was dropped by the federal government. A trust drafted before the elimination of the clothing restriction may, however, still have language prohibiting expenditures for clothing; the trust document itself should be reviewed before a final determination.

10 Can a special needs trust be used to purchase a home, or pay rent, for the beneficiary?

Yes, but several caveats. There are special rules affecting the use of special needs trusts (or any third-party payment) for shelter. Those rules are very difficult to navigate, and depend heavily on the beneficiary's situation; secure

competent legal advice before making any decision about the provision of shelter.

11 Is it easy to establish a proper third-party special needs trust?

While the principles involved in third-party special needs trusts are simple, there are a myriad of choices involved in the actual drafting of a trust. In addition, the administration of a special needs trust can be extremely difficult. A seasoned lawyer, familiar with public benefits programs and special needs trust provisions, should always be involved in preparation of a third-party special needs trust. While many legal matters can be undertaken without a lawyer, or with a lawyer with general background, special needs trusts are complicated enough to require the services of a specialized practitioner.

12 What is a self-settled special needs trust?

Sometimes a public benefits recipient may have assets that prevent continued eligibility for benefits. In such a case, it may be possible and advisable to place assets into a special needs trust to regain or continue eligibility for government benefits.

13 What types of assets might an individual place in a self-settled special needs trust?

Self-settled special needs trusts are often established by individuals who have received a personal injury settlement (perhaps, but not necessarily, arising out of the incident that caused the disability) or inheritance. More rarely individuals with pre-existing wealth determine that it would be advisable to create a special needs trust.

14 If the special needs trust is actually established by a guardian, or a court, is it still "self-settled?"

Yes. Federal law makes it clear that a trust established with assets which would have belonged to an individual, or his or her conservatorship, is self-settled regardless of who signs the trust instrument. (Note that in some states other than Arizona, the term "guardian" is used instead of "conservator"--the difference does not change the result)

15 Why would someone with assets want to place his or her money in a special needs trust just to qualify for government benefits?

Many benefits available from the public sector are extremely expensive when paid for privately. Some are practically unavailable except through the public system.

16 What restrictions are placed on self-settled special needs trusts?

Self-settled special needs trusts are much more complicated than their third-party equivalents. Usually (but not always), a self-settled special needs trust must comply with a federal law first enacted in 1993. That law requires that most self-settled special needs trusts actually be established by a judge, a court-appointed guardian or the parents or grandparents of the beneficiary (Social Security regulations may limit creation of trusts to the first two categories in most circumstances). In addition most self-settled special needs trusts will have to include a provision repaying state Medicaid agencies (like ALTCS or AHCCCS, in Arizona) for any benefits, payable at the death of the beneficiary. Such a provision is often called a "pay-back" provision.

17 Must every special needs trust include "pay-back" provisions?

No. Absent unusual circumstances, only self-settled special needs trusts require a provision repaying the state for Medicaid benefits. Third-party special needs trusts (those established by with one person's money for the benefit of a different person with a disability) do not ordinarily include any provision for repayment of government expenditures.

18 Is it difficult to act as trustee of a special needs trust?

The rules governing a trustee's actions can be complicated and confusing. The trustee must look to the language of the trust itself, be familiar with the law governing trusts generally, know how to properly file necessary tax returns and provide accountings as required, and also be aware of public benefits rules and the impact the trust's expenditures may have on the beneficiary. Most trustees of special needs trust will want to retain an attorney to provide continuing advice. Court accounting requirements and public benefit agency demands can significantly increase the level of complication. While it is no substitute for competent and independent legal advice, we were heavily involved in preparation of the Special Needs Alliance's Handbook for Trustees, available online at no cost. Caution: your state rules, or your trust document, might make the information in our trustee's handbook inapplicable in some circumstances. Once you have reviewed our guide, you should realize the importance of securing good legal advice.

Some unanswered FAQs:

19 What discretion should the trustee of a third-party SNT be given?

20 What is the difference between the following types of trusts:

- 1. Income only**
- 2. Support**

3. Discretionary support

4. Special needs

- 21 Are there other types of trusts that should be considered?**
- 22 Must every special needs trust be irrevocable?**
- 23 What is the income tax treatment of a self-settled special needs trust?**
- 24 What is the income tax treatment of a third-party special needs trust?**
- 25 What is the income tax treatment of a pooled special needs trust?**
- 26 Must every special needs trust have its own EIN? Can the beneficiary's Social Security number be used some or all of the time? How about the settlor of a third-party special needs trust?**
- 27 What is a Qualified Disability Trust and what difference does it make?**
- 28 Should the parent of a child receiving needs-based public benefits consider simply disinheriting that child rather than establishing a special needs trust?**
- 29 Can a UGMA account be converted into a special needs trust? What effect will it have on eligibility for the minor?**
- 30 Can a 529 plan be converted into a special needs trust?**
- 31 What beneficiary designation should be used if an IRA or qualified plan is to be left for a person with a disability?**
- 32 If a special needs trust purchases a home for the beneficiary, how should title be taken? Does it make a difference if the trust is a self-settled or third-party SNT?**
- 33 Is the same answer applicable for an automobile or other vehicle? Are there other assets that raise specific titling concerns?**
- 34 What is "In-Kind Support and Maintenance," and why should a trustee care?**
- 35 Who has any obligation to report distributions to or for the benefit of someone receiving SSI or Medicaid? Does the trustee have any**

obligation to report?

- 36 Who should be trustee of a special needs trust? Are the answers (or choices) different for self-settled, third-party and pooled trusts?**
- 37 Can a SNT be amended?**
- 38 What is a “trust protector,” and how might it be useful to have such a person named in a SNT?**
- 39 Must the trustee of a SNT be represented by an attorney? Must the beneficiary be represented?**
- 40 Your profound, simple or just interesting question goes here.**