

ESTATE PLANNING

# Powerful Ideas: Special Needs Trusts

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A Special Needs Trust (“SNT”) is a specific type of non-revocable trust created to hold property for its beneficiary, who suffers from some illness or disability. Conceptually, a trust is the separation of legal and equitable title to property. For property placed in a trust, the legal title rests with the trustee, and the equitable or beneficial title rests in the persons for whom the trust is created, or its beneficiaries. A trust is not an entity unto itself like a corporation but rather a form of holding title to property.

As a result of a disability, a person may have qualified or may be eligible to qualify to receive certain benefits or services from a governmental agency or program designed to support or assist persons with special needs. Often these programs specify or stipulate that ownership of assets over a certain amount or of a certain type may disqualify the individual from receiving these benefits. A potential solution to such an issue is to hold or retain assets in an acceptable and qualified manner that does not restrict or limit the individual with special needs’ eligibility for these programs. SNT are just such a solution. A SNT is specifically drafted to hold assets in a manner that will not jeopardize the eligibility or ability to qualify for government benefits for a person with special needs. A well-drafted SNT holds assets to provide supplemental support to the beneficiary for care and services that are not provided by the governmental program (typically food, housing, and basic healthcare) but without disqualifying its beneficiary from the governmental benefit being sought or received.

Certain government benefits are designed to support the individual with special needs. For such programs, the SNT is designed to supplement, not supplant, the support being provided to the beneficiary. As a result, provisions are drafted into the trust to pay for items and services that do not support the beneficiary but, rather, that pay for items and services that are not provided by the program. The types of government programs that provide benefits for which SNTs are commonly drafted to accommodate are Social Security Disability Insurance (“SSDI”), Supplemental Security Income (“SSI”), Medicaid, and Supplemental Nutrition Assistance Program (SNAP).

The treatment of a SNT depends upon the way it was created and funded. A SNT that is created by the individual with special needs or partially funded with their assets are referred to as a First Party SNT. Upon the death of the person with special needs, these assets may be subject to reimbursement claims by the government to recover the funds disbursed to or on behalf of the individual with special needs during their lifetime. Additionally, these types of trusts may not be created after the individual with special needs reaches age 65.

When another or a third-party creates and funds a SNT for the benefit of a person with special needs, these trusts are referred to as third-party SNT. Upon the death of the individual with special needs, these assets are not subject to any reimbursement claims by the government since these assets are not part of the decedent’s estate. In funding a third-party SNT, the grantors typically use part of their lifetime federal gift tax exclusion to fund the trust because gifts that attempt to use the annual federal gift tax exclusion amount, if done properly, would disqualify or reduce the individual with special needs’ benefits and defeat the trust’s purpose by effectively making a direct distribution of funds to the beneficiary. These trusts may also be funded with life insurance proceeds from designating the trust as a beneficiary or by designating the trust as a devisee of a last will and testament.

In creating a SNT, key persons are needed to help accomplish the task of caring for the individual with special needs. The primary key person is the trustee of the trust. A trustee holds the legal title to the trust’s property and holds the responsibility to administer the trust’s property, according to the trust’s terms, for the utmost benefit of the trust’s beneficiary. The person or entity selected to perform this critical role for the SNT’s success should be honest, caring, and wise. For the SNT to work properly, the trustee must be given discretion in making distributions for the beneficiary; therefore, a keen knowledge of what is and what is not permissible is crucial to avoid placing the beneficiary with special needs’ benefits or eligibility in jeopardy.

Another key person for the trust may be the trust protector. Although not required, the trust may provide a provision for a trust protector, which adds an additional layer of protection for the SNT against unforeseen changes in the law, political environment, or circumstances that occur after the irrevocable trust’s adoption. A trust protector may be given powers to remove or replace the trustee, change the trust’s situs, determine disputes that arise, terminate the trust, or the ability to amend or modify trust provisions, just to name a few. The trust protector ideally should not be a relative, subordinate, or



beneficiary, but rather a trusted advisor familiar with the beneficiary with special needs and with sharp business acumen to act as a resource and guide at critical times that come in administering a trust that will continue to exist for many years in the future.

Further, the language contained in the SNT is particularly important for the document to effectively function. Language drafted principally to address the programs the individual with special needs is seeking to receive is often best. Although federal benefits enjoy relative uniformity in their implementation across the United States, each state has its own nuances regarding their own public benefit qualification, eligibility requirements, and reimbursement claims procedures. Language in the trust that grants mandatory distributions to the beneficiary may reduce or disqualify the individual with special needs' benefits outright. As discussed above, even a right of withdrawal or "Crummey power" used to create a present interest gift may have the same effect. Additionally, defining or outlining payments that may be made that do not correspond with the authorized and permissible expenditures for the benefit program may also create problems for the person with special needs.

The trust's language should be drafted to provide supplemental benefits, not support. If the trustee is directed to make distributions for a typical distribution standard, such as for the health, education, maintenance, or support of the person with special needs, the trust will likely be deemed to be providing support and not supplementing benefits—thereby reducing or eliminating available public assistance.

Creating the SNT is important, but equally important is providing adequate funds for the trustee to supplement the care of the person with special needs. A SNT may be funded with any type of asset (i.e. property, retirement accounts, cash, securities). Additionally, life insurance can provide capital to supplement the care of an individual with special needs when they survive their loved ones and caregivers. A properly funded SNT designed to coexist with government entitlement programs can provide an effective means of providing for a beneficiary with special needs. The best alternatives in any given situation will be derived from consulting with an attorney familiar with special needs planning in the jurisdiction where the person with special needs resides.

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