

October is Special Needs Trust Month - so when do you need a Special Needs Trust? #2

By Wesley E. Wright and Molly Dear Abshire, as Published in the Houston Chronicle on Wednesday, October 15, 2014

Special needs trusts are created when assets are placed under the management of a third-party or financial institution for another person's benefit. The person managing the trust is called the "trustee" and the person for whom the trust is created is called the "beneficiary." The trust is specifically drafted to help manage trust assets for a disabled beneficiary or to help the disabled beneficiary attain or maintain eligibility for a means-tested governmental benefit, including SSI, Medicaid or subsidized housing. Special needs trusts are designed to supplement the benefits that the disabled beneficiary is receiving. Distributions from special needs trusts can include providing personal care attendants, physical therapy, home furnishings and technology, specially equipped vehicles, medical and dental care, vacations and even recreational activities.

Special needs trusts or "SNTs" can be divided into two categories: self-settled and third-party. Self-settled SNTs are funded with the beneficiary's own money, sometimes from a direct inheritance or from a personal injury settlement. Third-party SNTs are funded with assets that do not belong to the beneficiary but belong to the beneficiary's loved one, such as a spouse, parent or grandparent.

Many planning opportunities for both kinds of SNTs exist. It's important to understand that self-settled SNTs must contain a payback provision to the state for medical benefits paid on behalf of the beneficiary upon his or her death. Third-party SNTs do not contain payback provisions. The circumstances surrounding ownership of the funds that will be used to fund the trust dictate which type of trust must be used.

Self-settled SNTs are needed in situations in which a disabled person is in need of governmental benefits but is over the asset limit to qualify for benefits. If the disabled individual is younger than 65, then the beneficiary's parent, grandparent, legal guardian, or court can create a self-settled SNT in which to place the beneficiary's assets. When properly created and funded, assets in the SNT are no longer counted against the beneficiary when qualifying for certain benefits.

More on third-party special needs trusts: these are either styled "inter vivos," in which they are a standalone trust document created and funded, at least partially, during the settlor's lifetime, or "testamentary," in which one is tucked inside the Will of the disabled person's loved one.

There are many planning opportunities for third-party SNTs. One common use is with elderly spouses when one or both spouses are needing long-term care benefits. Instead of leaving their estate to each other in what are referred to as "I love you" Wills, each spouse leaves his or her half of the estate to a special needs trust in favor of the surviving spouse. Thus, upon the death of the first spouse, half of the assets are preserved for the surviving spouse in the testamentary SNT. If the surviving spouse later needs governmental benefits like long-term care Medicaid, then the assets in the SNT aren't counted

against the surviving spouse for determining eligibility. There is no age requirement that the testator or beneficiary be under the age 65 for this type of trust.

Another planning opportunity for a third-party special needs trust exists for parents of a disabled child. Rather than leaving an inheritance outright to the disabled child, which would cause the child to lose eligibility, a third-party SNT can be created allowing the disabled child to keep their governmental benefits.

When an elderly parent of a disabled child needs long term care Medicaid benefits then yet another planning opportunity exists. The aging parent can establish a third-party inter vivos SNT for the benefit of the disabled child. If properly created and funded, the aging parent can immediately apply for a means-tested governmental benefit such as long term care Medicaid without suffering a transfer penalty.

A special needs trust is an excellent estate planning tool, however the consequences of drafting and funding mistakes make the advice of a competent estate planning attorney.

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