

# Statutory Trust Helps Disabled Obtain Public Benefits

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on September 1, 2003.

As the baby boomers age, their passage through time is like an avalanche growing in momentum and affecting many different aspects of the world in which we live.

This phenomenon also has an effect on the numbers of those persons who are or who will become disabled. Families of the disabled will most likely become acquainted with the intersection between private assets and public benefits. Since public benefits such as Medicaid and MHMRA can be a huge financial benefit to those who achieve eligibility, the issue becomes how to keep any influx of assets to the disabled person from affecting the current or potential public benefits to which the disabled person may be entitled.

Parents may wish to avoid affecting the public benefits of their disabled child when they die by leaving funds for the benefit of the child in a special needs trust. Although, what happens if the money does not come from the parents or from another relative, but from an entirely different source?

Instead, let's say, for example, that the funds come from a personal injury settlement award. Perhaps the disability occurred as a result of an automobile or other type of accident. The disabled beneficiary, if not made ineligible by the money coming in from the settlement, may be entitled to and in great need of public benefits. Because programs administered by Medicaid are all means tested, meaning that the beneficiary must have limited assets and income, the problem is not infrequent.

The federal government and the State of Texas have provided ways to address this problem. The Texas Legislature has approved the opportunity for court-created supplemental needs trusts to be established. Texas Probate Code '867 stipulates that a guardian or attorney ad litem, or an incapacitated person=s guardian ad litem, can establish a court-created trust of this type. Generally, if the award occurred in a civil court proceeding, a trust of this type would be established upon application by the incapacitated persons next friend or appointed guardian ad-litem pursuant to Texas Property Code '142.

Both of these statutes allow for the trust to be established in conjunction with federal regulations at 42 USCA '1396(p)(d)(4)(A), which allows the trust to be established by a parent, grandparent, guardian, or court to be utilized for the benefit of a disabled person under age 65 without being counted against the beneficiary for eligibility of public benefits.

The results can be extremely advantageous for the disabled individual because the trust may provide for payment of extra goods and services that the public benefits program will not pay for, without interfering with the public benefit program itself. The funds may be utilized for telephone, cable TV, some types of medical equipment which are not otherwise paid for by public benefits programs such as, sports wheelchairs, air beds which reduce the occurrence of decubitus and the breakdown of skin, handicap-equipped vans, private-duty sitters and the incremental costs between a Medicaid semi-

private room and the cost of a private-pay room to name a few. Payments may not be made from the trust to meet the beneficiary's basic food, clothing and shelter needs.

If there is a down side to a self-settled court created supplemental needs trust, it is that the assets of the trust are subject to being paid back to the Medicaid program upon the death of the beneficiary to the extent that Medicaid benefits were advanced on behalf of the beneficiary. To do otherwise, however, would in many cases cause the court award to be prematurely exhausted.