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Special Needs Trust
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**Decision Tree Analysis**

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# Special Needs Trust Decision Tree Analysis

## Table of Contents

|    |                                                                                              |    |
|----|----------------------------------------------------------------------------------------------|----|
| 1. | Does the Beneficiary Have a Disability? . . . . .                                            | 1  |
| 2. | Is the Beneficiary Sufficiently Disabled to Qualify for Public Assistance? . . . .           | 2  |
| 3. | Is the Beneficiary Receiving or Eligible For Needs-Based Public Assistance? . .              | 4  |
| A. | Two Categories of Public Assistance Programs. . . . .                                        | 4  |
| B. | A Brief Description of the Most Common Public Assistance Programs. . .                       | 4  |
| 1) | Programs Not Based on Financial Needs (“Non-Needs-Based”)..                                  | 4  |
| a. | Social Security. . . . .                                                                     | 5  |
| b. | Medicare.. . . .                                                                             | 5  |
| c. | Veterans Benefits. . . . .                                                                   | 6  |
| 2) | Programs That Are Needs-Based. . . . .                                                       | 6  |
| a. | Supplemental Security Income (SSI).. . . .                                                   | 7  |
| b. | Medicaid.. . . .                                                                             | 8  |
| c. | Federal Assisted Housing Programs. . . . .                                                   | 8  |
| d. | Veterans Benefits. . . . .                                                                   | 9  |
| C. | Only Needs-Based Public Assistance Requires a Special Needs Trust.                           | 9  |
| 4. | Whose Assets Are Going Into the Trust? . . . . .                                             | 10 |
| A. | Types of Trusts. . . . .                                                                     | 11 |
| 1) | Self-Settled Trust. . . . .                                                                  | 11 |
| a. | Definition. . . . .                                                                          | 11 |
| b. | When to Consider Using a Self-Settled Trust. . . . .                                         | 13 |
| 2) | Third Party-Settled Trust. . . . .                                                           | 15 |
| B. | Options. . . . .                                                                             | 16 |
| 1) | Assets From Third Party, and Beneficiary Not Entitled<br>to Needs-Based Assistance. . . . .  | 16 |
| 2) | Assets From Third Party, and Beneficiary Receiving<br>Needs-Based Assistance. . . . .        | 16 |
| 3) | Assets From Beneficiary, and Beneficiary Not Eligible<br>for Needs-Based Assistance. . . . . | 16 |
| 4) | Assets From Beneficiary, and Beneficiary Eligible for<br>Needs-Based Assistance. . . . .     | 17 |
| C. | If Using A Third Party-Settled Special Needs Trust. . . . .                                  | 17 |
| D. | If Using A Self-Settled Special Needs Trust. . . . .                                         | 17 |
| 5. | If Using A Self-Settled Special Needs Trust - Is the Beneficiary<br>Under Age 65? . . . . .  | 18 |

|    |                                                                                                                       |    |
|----|-----------------------------------------------------------------------------------------------------------------------|----|
| A. | A Brief Overview of the Law Regarding Self-Settled<br>Special Needs Trusts and Public Assistance Eligibility. . . . . | 18 |
| 1) | The Starting Place - OBRA 93. . . . .                                                                                 | 18 |
| 2) | Exception if Beneficiary and Trust Meet Certain Requirements. . .                                                     | 19 |
| 3) | Requirements to Qualify a Trust as a d4A<br>Special Needs Trust. . . . .                                              | 19 |
| 4) | Requirements to Qualify a Trust as a d4C<br>Pooled Special Needs Trust. . . . .                                       | 21 |
| 5) | The Primary Differences Between a d4A Trust and a<br>d4C Pooled Trust. . . . .                                        | 23 |
| B. | Return to Decision Tree Analysis. . . . .                                                                             | 24 |
| 1) | Beneficiary Age 65 or Older. . . . .                                                                                  | 25 |
| 2) | Beneficiary Under Age 65: . . . . .                                                                                   | 25 |
| 6. | If a d4A Trust Is Chosen, the Following Questions Should Be Asked. . . . .                                            | 25 |
| A. | Does the Beneficiary Have a Guardian? . . . . .                                                                       | 25 |
| B. | Does the Beneficiary Have Sufficient Intellectual Capacity to<br>Establish the d4A Trust? . . . . .                   | 26 |
| C. | Is There A Parent or Grandparent? . . . . .                                                                           | 26 |
| 1) | Parent or Grandparent Able and Willing to Establish Trust. . . .                                                      | 26 |
| 2) | No Parent or Grandparent. . . . .                                                                                     | 27 |
| C. | If None of the Above, Must Petition Court. . . . .                                                                    | 27 |
| D. | Other Questions That Must Be Answered. . . . .                                                                        | 28 |
| 7. | If a d4C Pooled Trust Is Chosen, the Following Questions Should Be Asked. .                                           | 28 |
| A. | Does the beneficiary have a guardian? . . . . .                                                                       | 28 |
| B. | Does the Beneficiary Have Sufficient Intellectual Capacity<br>to Execute the Pooled Trust Documents? . . . . .        | 29 |
| C. | Is There A Parent or Grandparent? . . . . .                                                                           | 29 |
| D. | If None of the Above, Must Petition Court. . . . .                                                                    | 29 |
| E. | Which Pooled Trust Should Be Used? . . . . .                                                                          | 29 |
| 8. | How to Fund the Self-Settled Special Needs Trust? . . . . .                                                           | 30 |
| 9. | Is a Self-Settled Special Needs Trust the Best Option? . . . . .                                                      | 30 |



# **Special Needs Trust Decision Tree Analysis<sup>1</sup>**

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When considering whether it is appropriate to utilize a special needs trust, and if so, which type of special needs trust to use, an attorney must ask and answer a series of questions. These materials and the accompanying decision tree flow chart walk the reader through the questions that should be considered and the possible options available.

This starts with the most basic question: does the person for whom a trust is being considered have a disability? For ease of reference, the term “beneficiary” will be used throughout these materials to refer to a person for whom the establishment of a special needs trust is being considered.

## **1. Does the Beneficiary Have a Disability?**

If a beneficiary does not have a disability, then this analysis stops immediately; there is no need to establish a special needs trust for a person who does not have a disability. Instead, an outright distribution to the beneficiary or a support trust for the benefit of the beneficiary should be considered.

However, even if a beneficiary has a disability, that alone is not enough. A beneficiary must be sufficiently disabled to qualify for needs-based public assistance before a special

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<sup>1</sup> These materials are an updated version of a presentation that was first made at the Stetson University College of Law 2013 Special Needs Trusts - The National Conference on October 17, 2013. They are current as of January 2017.

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needs trust should be considered. Therefore, the next question to ask when learning that a potential beneficiary has a disability is....

## **2. Is the Beneficiary Sufficiently Disabled to Qualify for Public Assistance?**

Just because a person has a disability does not mean the person is sufficiently disabled to qualify for public assistance. If a person is not sufficiently disabled, and for many public assistance programs - also sufficiently impoverished, then there is no need to consider establishing a special needs trust for the benefit of the person.

The most common threshold of disability that is used to determine eligibility for public assistance programs is the definition of “permanent and total disability” utilized by the Social Security Administration. In order to be sufficiently disabled for Supplemental Security Income (SSI) purposes and Medicaid in many states, the beneficiary must be “permanently and totally disabled”. This definition is found in 42 U.S.C. 1382c(a)(3)<sup>4</sup>.

“(3)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. (Emphasis added)

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he

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<sup>4</sup> Title XVI of the Social Security Act (SSI) is administered by the Social Security Administration. Title XVI appears in the United States Code as 42 U.S.C. §§1381 - 1385; 4 U.S.C. Chapter 7, Subchapter XVI.

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