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SPECIAL NEEDS TRUSTS**

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**SPECIAL NEEDS TRUST OVERVIEW****Molly Dear Abshire**

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# Special Needs Trusts Overview

by

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## I. INTRODUCTION

According to a study by the U.S. Census Bureau, it is estimated that over 85.3 million Americans are disabled. This number represents approximately 27.2% of the entire population of the United States.<sup>1</sup> Of these individuals, approximately 55.2 million suffer from a severe disability (about 17.6% of the population), and about 24.2 million people aged 18 and older need assistance with one or more activities of daily living.<sup>2</sup> The number of Americans with disabilities is expected to increase as the U.S. population ages. In light of the growing number of Americans with a disability, the need for special needs planning, as well as the establishment and administration of special needs trusts, is growing.

Attorneys not familiar with special needs planning or attorneys just beginning to practice in this area, are often confused and overwhelmed with the vast amount of knowledge necessary to adequately advise and plan for their clients. While only one tool in the attorney's bag, special needs trusts present an excellent opportunity to preserve both assets and the beneficiary's eligibility for government benefits. However, improper drafting or inadequate counseling in the preparation of a special needs trust can create disastrous consequences for the beneficiary, including the reduction or total loss of means-tested government benefits. Additionally, failure to keep abreast of the ever-changing Social Security policy regarding special needs trusts and revisions to Social Security's Program Operation Manual System ("POMS") can cause considerable adverse effects on a beneficiary's eligibility for public benefits.

The purpose of this paper is to provide an overview of special needs trusts, including the different types of special needs trusts, drafting techniques and administrative concerns. Additionally, this paper will provide an overview of the types of public benefits preserved by special needs trusts, as well as how these trusts affect the beneficiary's receipt of public benefits. Finally, this paper will explore the use of special needs trusts in a litigation context.

## II. SPECIAL NEEDS TRUST OVERVIEW

One of the most common tools used by attorneys in planning for public benefits is a special needs trust ("SNT"). Governmental benefits are designed to provide basic health care, food and shelter. As such, governmental benefits provide for only a meager existence to recipients. An SNT is designed to provide additional needs and extras, such as vacations, that

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<sup>1</sup> <http://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>

<sup>2</sup> <http://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>

normal governmental benefits do not provide. An SNT can either be self-settled or third-party settled depending on the source of the funding. Each of these types of trusts are discussed below.

CAUTION: When establishing or administering an SNT, it is important to correctly determine the source of the funding (i.e., a beneficiary's own funds or third-party funds). As discussed below, these two types of trusts have different requirements. Additionally, a catch-all trust that includes both self-settled and third-party funds is prohibited. Third-party funds should never be commingled with a self-settled trust, and vice versa.

#### A. Why Use a Special Needs Trust?

The purpose of a special needs trust is to preserve the governmental benefits of the beneficiary to provide for a source of funds available to the beneficiary for supplemental needs. More specifically, the purpose of a self-settled SNT is to avoid both the imposition of a period of ineligibility for SSI<sup>3</sup> or Medicaid because of the transfer of the resources to the trust, and the treatment of the trust as a resource for SSI or Medicaid eligibility purposes. Typically, self-settled trusts are used in tort recovery or settlements, inheritance received by the beneficiary outright (i.e., not in trust), or to hold equitable distributions in divorce or alimony payments.

Third-party SNTs permit a parent, grandparent or other person to provide for the needs of an individual with a disability that are not being met by public benefits. Therefore, in order to avoid a mandatory pay-back provision required in self-settled SNTs or to avoid the loss of public benefits, any bequest or gift to an individual with disabilities should be made via third-party SNT. Many cases have been observed where an estate planning attorney mistakenly drafted a self-settled SNT rather than a third-party SNT. The improper use of the self-settled (d)(4)(A) or (d)(4)(C) SNT could result in the unnecessary repayment of Medicaid benefits to the state and a potential malpractice action against the drafting attorney. Also, third parties who are interested in providing for an individual with disabilities should not commingle their funds with an already established self-settled trust. A separate third-party trust should be established in order to avoid the mandatory pay-back provision required in a self-settled SNT.

#### B. Self-Settled Special Needs Trusts

To provide for the payment of supplemental needs, federal law permits an individual with disabilities to retain his or her own resources in one of two types of self-settled SNTs. Without the creation of such a trust, the resources would count as an asset of the individual, disqualifying him or her from SSI<sup>4</sup> or Medicaid benefits.<sup>5</sup> The two types of self-settled trusts are commonly referred to as (d)(4)(A) and (d)(4)(C) SNTs.<sup>6</sup> These self-settled, or first-party, special needs trusts are funded with the beneficiary's own funds.

##### 1. (d)(4)(A) Special Needs Trust

A (d)(4)(A) SNT is a trust created (and funded) for the sole benefit of an individual with a disability under the age of 65 by the individual, by the individual's parent, grandparent or legal

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<sup>3</sup> 42 U.S.C. §1382b(c).

<sup>4</sup> 42 U.S.C. §1382b.

<sup>5</sup> 42 U.S.C. §1396p(d)(4).

<sup>6</sup> 42 U.S.C. §1396p(d)(4)(A), (C).

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