



ESTATE PLANNING
&
ELDER LAW SERVICES



PLANNING FOR SOMEONE
WITH SPECIAL NEEDS

Special Needs Planning involves the development of a plan to provide for the “special needs” of a disabled person. This typically involves the parent of a disabled child planning for when the parent will no longer be able to act as the child’s primary care giver. Planning can make all the difference in the life of the person with special needs, as well as for those who are left with the responsibility to care for the disabled person.

However, providing for a disabled person who is receiving, or who may need to receive, public benefits, such as Medicaid and Supplemental Security Income (SSI), must be done carefully. Assets (or an income stream) received directly by a disabled person who is receiving Medicaid or SSI (and some Veteran’s and Section 8 public housing) benefits may cause the person to lose those “need-based” benefits.

To prevent this from happening, “Special Needs Trusts,” also called “Discretionary Trusts,” “Supplemental Needs Trusts,” or “Amenities Trusts” can be utilized.



What is a Special Needs Trust?

The central purpose of a Special Needs Trust (“SNT”) is to hold assets for the “supplemental needs” of a disabled person, without disrupting his or her entitlement to certain public benefits. To accomplish this, the SNT must be carefully drafted to conform to Michigan (or other relevant state) and federal guidelines.

A SNT is drafted to be completely discretionary so that the disabled person, who is the SNT beneficiary, has no legal right to demand or receive mandatory distributions from the SNT. Instead, the Trustee of the SNT has absolute discretion whether to make distributions from the SNT for the “special needs” of the beneficiary. As a result, the SNT funds are considered “unavailable” to the beneficiary, and thus are not considered in determining the beneficiary’s eligibility for public benefits.

The term “special needs”, as commonly used, means that the SNT is designed to provide for the disabled person’s “supplemental needs,” but not their “basic necessities” or items provided through their public benefits. If distributions are made for these types of items or if distributions are made directly to the beneficiary, then the assets in the SNT will be considered “available” and will adversely affect the beneficiary’s eligibility for public benefits. That is why Proper Administration of a SNT is imperative.

There are two broad categories of SNT’s: Third-Party Special Needs Trusts and First-Party Special Needs Trusts. Which type to utilize is dependent, in large part, upon how the trust will be “funded,” by whom, and under what circumstances. Each type of SNT has different requirements in order for it to be compliant with federal and state laws. Regardless of the type of SNT used, it should always be part of an overall estate plan, which should include Powers of Attorney, and which may include a Will or a Living Trust.

Third-Party Special Needs Trusts

A Third-Party Special Needs Trust (“TPSNT”) is a type of SNT that is “funded” with the assets of a third-party, either by way of lifetime gifts or an inheritance that is left to someone.

The most common situation involves parents or grandparents leaving assets in a TPSNT in order to partially

or completely finance the anticipated lifetime “supplemental needs” of a disabled child or grandchild. These types of SNTs are set up during lifetime through “free standing” documents or through language included in a person’s Living Trust.

If a TPSNT is set up to completely finance a disabled person’s lifetime special needs, it is advisable to have a “Life Care Plan” prepared to determine the future needs of the disabled person to ensure that the TPSNT is sufficiently funded with assets. Doing so ensures that the actual future “supplemental needs” of the disabled person are properly identified and valued. If a monetary shortfall is identified, the TPSNT can be funded additionally with life insurance that will pay to the trust upon the death of the third party (e.g. a parent).

A Life Care Plan should include a thorough assessment of the person’s present and future financial, medical, emotional, and social needs. It should examine the impact that the death of the primary care giver (e.g. a parent or close family member) will have on the future expenses associated with the disabled person. Typically, such expenses increase because the care, management, and guidance previously provided by the primary care giver (e.g. parent) must instead be obtained from a professional for a fee. It is advisable to utilize a certified case manager to develop a Life Care Plan.



Another type of TPSNT often referred to as a Testamentary Special Needs Trust (“TSNT”). A TSNT is used when one spouse wishes to leave an inheritance to the other spouse (for their “special needs”) who is receiving or may need Medicaid assistance. If any assets are paid directly to the surviving spouse, such payments will disqualify him or her from those Medicaid benefits. If instead, the inheritance is left in a TSNT, for the benefit of the surviving spouse, the funds placed in the TSNT are considered unavailable and will not disqualify the surviving spouse from receiving Medicaid.

A TSNT must be set up in advance. Once the Medicaid recipient spouse is entitled to receive the funds, their eligibility will be jeopardized, unless they either “spend down” those assets or do further Medicaid Planning to preserve some of the assets.

A significant advantage of all TPSNTs is that any assets remaining in a TPSNT when the “special needs” beneficiary dies are paid to the contingent beneficiaries named in the trust document (e.g. other children, grandchildren, etc.) Unlike a First-Party Special Needs Trust, a TPSNT is not required to “pay back” the state upon the death of the beneficiary for government benefits provided to the “special needs” beneficiary during his or her lifetime.





First-Party Special Needs Trusts

A First-Party Special Needs Trust (“FPSNT”), also called a Self-Settled Special Needs Trust, is a type of SNT that is “funded” with assets owned by the disabled person, not a third-party. Hence, the designation “First-Party.” Typically, a FPSNT is used in situations in which a disabled person, who is dependent on Medicaid or SSI, receives an inheritance, gift, award, or settlement from a personal injury action.

In Michigan, two types of FPSNT’s are utilized: the Medicaid Payback (d4A) Trust (a/k/a “Medicaid Exception A Trust”) and the Pooled Account (d4C) Trust (a/k/a “Medicaid Exception B Trust”).

Like a Third-Party Special Needs Trust, a properly drafted, funded, and administered FPSNT will preserve a disabled person’s eligibility for Medicaid and SSI, because the assets placed in a FPSNT are considered unavailable for purposes of those programs. Similarly, the FPSNT must be irrevocable, its terms must conform to Michigan and federal guidelines, and it must restrict the use of the trust funds to the beneficiary’s “special needs.”

Unlike TPSNT’s, the “have your cake and eat it too” capability of preserving a disabled person’s assets — while, at the same time, preserving his or her eligibility for public benefits — comes at a price. The statute authorizing Medicaid Payback Trusts mandates that

these trusts contain a provision stating that, when the disabled beneficiary dies, the state has a priority claim against the remaining trust assets for the value of all medical assistance provided to the beneficiary during his or her life. For a Pooled Account Trust, the remaining trust assets stay in the master trust, with the non-profit entity, to be used for other disabled persons.

A Medicaid Payback Trust can be established for a disabled person under age 65, provided it is established by the person’s parent, grandparent, legal guardian, or by court order. A Pooled Account Trust can be established by a competent disabled adult, regardless of age, or by their parent, grandparent, legal guardian, or by court order. Our firm can assist with establishing these types of trusts and, if necessary, petitioning the probate court to obtain authority to create and fund the trust.

Proper Administration of a Special Needs Trust

Proper administration of a SNT is equally important as the proper establishment and drafting of the SNT. Failure to properly administer a SNT trust in strict adherence to the federal and state guidelines can result in a loss of SSI or Medicaid benefits. Therefore, it is extremely important to choose a well-qualified Trustee to manage the funds. Our firm is available to assist with the administration of any SNT.



Irrevocable Divestment Trusts (“IDT”)

In the context of Medicaid planning and VA benefits planning, it may make sense to gift or transfer away assets from a person who may need to apply for those benefits in the future. When doing this kind of planning, under both Medicaid and VA rules, the gift/transfer must be complete. You cannot retain any control over the transferred assets. Because of this, the transferred assets belong to the transferees and could be vulnerable to claims of their creditors or to their spouses in the event of a divorce.

Retaining control over those assets even after the gift/transfer occurs is often times desired and sometimes essential. Those goals can be best achieved utilizing what are often referred to as Medicaid Asset Protection Trusts, Irrevocable Divestment Trusts or Intentionally Defective Grantor Trusts.

Such trusts allow the gifted funds to be managed by a Trustee of your choosing (i.e. a child, sibling, etc.) and usually requires the consent of all or a majority of the “lifetime” trust beneficiaries (i.e. children) before a distribution can be made from the trust. This helps protect against the attachment of the trust assets by creditor of any one trust beneficiary.



In addition, any penalty period created by making such a gift, under either Medicaid or VA rules, can only be reversed by a return of all the gifted funds. Transferring the gifted funds to an irrevocable trust (versus gifting to individuals) improves the chance that all the funds will be available to be returned, if the trust beneficiaries so choose.

The attorneys at Estate Planning & Elder Law Services, P.C. recognize the absolute importance to you of a safe, secure future for a disabled loved one. We have decades of experience in helping families to preserve assets for the benefit of individuals with special needs – as well as in integrating special needs planning with comprehensive family estate planning.



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