

# Special Needs Trusts

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# Definition of Special Needs

Special Needs: Of or relating to people who have specific needs, as those associated with a disability. – The American Heritage Medical Dictionary (revised 2<sup>nd</sup> ed. 2007).

Disability: (A) The inability to engage in any substantial gainful activity by reason of any medically-determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continued period of time of not less than 12 months, or (B) blindness. 42 USC § 416(i)(1)

Substantial Gainful Activity: In 2013, the inability to earn \$1,040 per month if the person is disabled and \$1,740 if the person is blind.

<http://www.ssa.gov/oact/cola/sga.html>

# Planning Options for the Special Needs Person

1. Families can distribute assets to the Special Needs Person
  - Assets may disqualify the person from receiving government benefits
2. Disinherit the Special Needs Person
  - What if government programs are reduced or do not provide or eliminated?
3. Leave the property to another family member to provide for the benefit of the Special Needs Person.
  - Not a legally enforceable agreement, the other family member could take the money and run
  - A legal trust
4. Establish a Special Needs Trust for the special needs person
  - Recommended to preserve eligibility for government benefit programs

# What is a Special Needs Trust?

A Special Needs Trust (SNT), often referred to as a Supplemental Needs Trust, is a trust used to protect the assets of those with special needs and those wishing to provide for them while simultaneously preserving the Special Needs Person's eligibility for governmental benefits that pay for their basic needs of food, shelter and medical care.

# Types of SNTs

1. Self Settled
  - A. Funded with the Special Needs Person's own assets
    - i. Personal Injury Settlement
    - ii. Inheritance
    - iii. Savings
    - iv. Retroactive Disability Benefits Third Party Settled
    - v. Alimony
2. Third Party
  - A. Funded with Assets not Attributed to the beneficiary
3. Pooled Trusts
  - A. Funded with the assets of a Special Needs Person
4. Permissible Transfer Trusts under MassHealth
  - A. Funded as a disqualifying transfer exception

# Self Settled Trust

The assets in a Self Settled Trust are exempt under SSI and MassHealth regulations as long as the trust adheres to the following:

- Individual Must be under the age of 65;
- The trust must be Irrevocable;
- The trust must be created by a parent, grandparent, legal guardian or by court order; and
- The trust, must contain a MassHealth ‘Payback’ provision
  - At the death of the Special Needs Person, any remaining assets in the trust must be paid back to the Commonwealth up to the amount equal to the total medical assistance provided for the individual.
- See 42 USC § 1396p(d)(4)(A) and 42 USC § 1382B(c)

# Third Party Trusts

- Most often created as part of a parent's overall Estate Plan
- May be funded through
  - Wills
  - Life Insurance Policy on the Parent's Life
    - ILITs
  - Trust
- No 'payback' provision
- Remainder Beneficiary
- Trustee is given complete discretion in making distributions to or for the benefit of the Special Needs Person

# Funding Third Party Trusts

## Wills

- Wills
  - Bequeath to Special Needs Trust
  - Does not avoid probate
  - Important to discuss with grandparents and other relatives to make sure that assets are not left directly to Special Needs Person.
  - Sample Language
    - If any property would otherwise be distributed to my \_\_\_\_ whose name is \_\_\_\_, my fiduciary shall not distribute the property to the aforesaid individual but shall instead distribute to the acting Trustee of The Jane Doe Special Needs Trust FBO \_\_\_\_\_ u/d/t 01/01/2001, to be held, administered, and distributed in accordance with the terms of said special needs trust.

# Funding Third Party Trusts

## Life Insurance

- Pros:
  - Guarantee a source of income after parent's death
  - Flexibility
  - Do not have to give up control of assets
  - Can be relatively inexpensive if purchased at a young age
- Cons:
  - Subject to Estate Tax (ILIT Exception)
  - Does not fund trust until the insured's life ends

# Irrevocable Life Insurance Trusts

- Funded by life insurance, this instrument passes assets free from gift, estate, and income taxes.
- Donor makes annual gifts sufficient to pay premium and administrative expenses
- Must be gifts of present interest to qualify for yearly \$14,000 gift exception therefore a trust beneficiary must have an immediate right to the gifted funds which can be limited to thirty days “*Crummey* power.”
- Beneficiaries normally do not exercise their *Crummey* powers and the premium and administrative costs are paid for.
- Could be set up to distribute during lifetime of the grantor
  - A cash value policy could have a relatively small death benefit and higher premium
  - Could have a disability rider which would fund the trust for the settlor should he suffer a long term disability

# ILIT Caveat

## **IMPORTANT**

- It is recommended that a Special Needs Person not be given withdrawal rights if they are receiving means based benefits.
- The Social Security Administration will treat the trust beneficiary's failure to exercise the withdrawal right either as a gift, or as income in the month the premium payment is made to the trust and as a resource in the following month.
- It will then impose a period of disqualification on the SSI beneficiary.
- Restricting the withdrawal rights to non-disabled beneficiaries is usually sufficient for gift tax purposes or
- The gift can be credited against the donor's lifetime gift tax exclusion (\$5,250,000 in 2013).
- Giving up the *Crummey* tax benefits is almost always preferable to the trust beneficiary's loss of SSI benefits and likely MassHealth Benefits.

# Pooled Trusts

- Established and run by a Non-Profit Organization.
- Separate Account for Each beneficiary.
- Corpus not counted as an asset.
- Account are pooled and invested and managed together in one fund.
- Can be established for a Special Needs Person under or over the age of 65.
- Upon the death of the beneficiary some of the remaining assets may be retained by the trust, some are used to reimburse MassHealth and any remaining funds after MassHealth has been completely reimbursed may be distributed to a residual beneficiary.

<http://www.familytrustofmass.org/> Family Trust of Massachusetts

<http://planofma.org/> Plan of Massachusetts and Rhode Island

# Permissible Transfers MassHealth

- Created when a parent, in a nursing home, in an attempt to qualify for MassHealth long term care, transfers their assets to a SNT for their Special Needs Person.
  - Assets transferred into this type of trust will not create an ineligibility period.
  - Must be for the sole benefit of the Special Needs Person.
  - Must require the Trustee to use the fund in an actuarially sounds manner based upon the special needs person's life expectancy or
  - Must contain a 'payback' provision
  - Child can be any age.
- Created when an individual in an attempt to qualify for MassHealth transfers to a SNT.
  - For the sole benefit of any person with special needs under the age of 65
  - Must require the Trustee to use the fund in an actuarially sound manner based upon the special needs child's life expectancy or
  - Must contain a 'payback' provision

130 CMR 520.019

<http://www.mass.gov/eohhs/docs/masshealth/regs-member/regs-memb-520.pdf>

# Trustee

A trust can be properly drafted and funded, but improper distribution by the Trustee can still cause the loss of government benefits for the Special Needs Person. It is crucial to choose a responsible and competent Trustee.

- SNTs should specifically direct the Trustee to use funds to supplement but not replace the benefits of governmental support.
- Must prohibit the Trustee from making payments directly to special needs person.
  - Cash distribution in excess of \$20 per month will be counted as unearned income and reduce the SSI benefit on a dollar-for-dollar basis
- Must expressly prohibit Trustee from using funds to pay for food or shelter or for medical care paid by MassHealth.
  - Such a use of funds would be counted as in-kind support and reduce the SSI benefit by the actual value of the item supplied or one-third of the federal benefit amount, plus \$20

# Choosing a Trustee

- Family Member
  - Pro: Knows the Special Needs Person's likes and dislikes, unique needs, family and religious background
  - Cons: May not be able to manage the assets properly. May inadvertently make decisions that effect SSI and/or MassHealth eligibility.
- Professional Trustees
  - Pro: Understand how to handle assets in conjunction with SSI and MassHealth rules and regulations. Expertise in dealing with tax issues and investing strategies.
  - Cons: Does not know Special Needs Person's likes, dislikes, ect.; Interested in managing the money more than providing for the supplemental needs of the Special Need Person; Difficult to remove from office (less difficult with MUTC)
  - Letter of Intent
  - Trust Advisor

# Letter of Intent

- Suggest that your client provide a Trustee with a letter of intent explaining the day to day activities and needs of the Special Needs Person, the likes and dislikes, and preferences.

# Trust Advisor

- Often a family member
- Works with a professional trustee to enhance the Special Needs Person's quality of life by:
  - taking the person on vacation;
  - out to dinner; and
  - advising the Professional Trustee of the Individuals like dislikes, etc.

# Trust Protector

- A specific person appointed by the settlor to represent their interests and intentions.
- Most often used to remove and appoint trustees.
- “The Protector shall have the right to remove any Trustee of a trust under this Trust Agreement, whether that Trustee is currently serving or named to serve in the future. If a Trustee is removed by the Protector, any successor trustee appointed by the removed Trustee shall not take office. The Protector shall also have the right to appoint an individual or corporation with fiduciary powers to replace the removed Trustee or whenever the office of Trustee of a trust become vacant.” Sebastian V. Grassi, Jr., *A Practical Guide to Estate Planning for a Family with a Special Needs Child* 106-107 (1<sup>st</sup> ed. 2009)

# Removing a Trustee under MUTC

- The Massachusetts Uniform Trust Code signed into law July 8, 2012 changes prior law which only allowed removal of a Trustee for just cause.
- The settlor, a co-trustee or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative if
  1. The Trustee has committed a Serious breach of trust;
  2. There is a lack of cooperation among co-trustees that substantially impairs trust administration;
  3. There is persistent failure to administer the trust properly;
  4. There is a substantial change of circumstances; or
  5. Removal is requested by all beneficiaries and removal is in the best interest of the beneficiaries and is not inconsistent with the material purpose of the trust.

M.G.L. c. 203E, Article 7 § 706

See also M.G.L. c. 203E, Article 4 § 410-414 (Modification or Termination of Trust)

# Governmental Programs

- Supplemental Security Income (SSI)
- Social Security Disability Income (SSDI)
  - <http://www.ssa.gov/dibplan/index.htm>
- MassHealth or Medicaid
- Medicare
  - <http://www.medicare.gov/>
- Subsidized Housing / Section 8
  - [http://www.massresources.org/section\\_8\\_housing\\_massachusetts\\_d.html](http://www.massresources.org/section_8_housing_massachusetts_d.html)
- Transitional Aid to Families with Dependent Children (TAFDC)
  - <http://www.massresources.org/tafdc.html>
- Kaleigh Mulligan Program
  - <http://www.massresources.org/kaileigh-mulligan.html>

# SSI

- Monthly stipend to meet basic needs of food and shelter
- Qualifying
  - 65 Years of age or older or mentally disabled or blind
  - Limited income and Less than \$2,000 in resources
  - Not working or working making less than \$37, 685
    - For threshold amounts in other states see  
<http://www.socialsecurity.gov/disabilityresearch/wi/1619b.htm>
  - U.S. Citizen
- In Massachusetts qualifying for SSI automatically qualifies the individual for MassHealth
- See <http://www.ssa.gov/pgm/ssi.htm>

# SSDI

- Federal Program that pays benefits to people in the work force who have become disabled and their families based upon the amount of Social Security Taxes they have paid on their earnings.
- Will automatically qualify for Medicare after receiving SSDI benefits for more than 24 months.
- Must be unemployed or making below threshold.

# MassHealth / Medicaid

- Federally and State funded health insurance program.
- Provides medical benefits for low and middle income individuals.
  - Institutionalized Individuals
    - Must pay all monthly income to institution with the exception of a personal needs allowance of \$72.80.
    - MassHealth pays for 100% of the balance for room and board.
    - If no income MassHealth pays 100% plus a \$72.80 personal needs allowance.
  - Community residents
    - Those who reside in apartments, private homes and state funded group homes.
    - Seven coverage types See MassHealth Member Booklet.  
<http://www.mass.gov/eohhs/docs/masshealth/appforms/member-booklet.pdf>
    - **MassHealth Standard**
      - SSI recipients automatically receive
      - Pays for 100% of most medical services including hospital care, outpatient services, medical equipment, doctor visits, mental health services, prescriptions, transportation, day programs and residential care.
- See <http://www.mass.gov/eohhs/gov/departments/masshealth/>

# Medicare

- An Insurance Program
- Divided into three parts
  - Part A Hospital Care
  - Part B Physician and outpatient services
  - Part C managed care program essentially a HMO
- To Qualify
  - 65 plus, disabled as defined by Social Security Act, blind, disabled child of a Medicare recipient whose disability occurred before the age of 22 or have third stage kidney disease.
  - U.S. Citizen
  - Worked at least 10 years

# Section 8 Housing

- Rental Assistance for low income individuals, families and high functioning Special Needs Individuals.
- Department of Housing and Urban Development (HUD) pays the tenant the difference between 30% of their income and fair market rental value.
- To be eligible must have income not in excess of 80% of the areas median income.
- Two year look back when submitting an application.

# TAFDC

- Transitional Aid to Families with Dependent Children.
- Government welfare program that gives financial benefits and health insurance to families with dependent children who struggled to meet the basics needs of their children.
- Must live in Massachusetts and be U.S. Citizen.  
see webpage

<http://www.massresources.org/tafdc.html>

# Kaileigh Mulligan Home care Program

- Home care program for severely disabled children.
- Does not count assets or income of parents when determining eligibility.
- Must meet disability standards.
- Must be under the age of 18.
- Require level of care equal to care provided in a hospital or nursing facility.
- Be approved for home care.
- Have \$2000 or less in countable assets.
- Have countable monthly income of \$60 or less or meet a deductible.
- See website <http://www.massresources.org/kaileigh-mulligan.html>

# In Conclusion

- Nearly 54 million Americans cope with special needs according to the National Organization on Disability (2007).
- 88 percent of parents who have children with special needs have not set up a trust to preserve eligibility for benefit such as Medicaid and SSI.  
[http://www.naela.org/Public/About\\_NAELA/Media/Aging\\_and\\_Special\\_Needs\\_Statistics.aspx](http://www.naela.org/Public/About_NAELA/Media/Aging_and_Special_Needs_Statistics.aspx)
- As Estate Planners it is our obligation to discuss Special Needs Trusts with our clients, help them find ways to fund these trusts through personal assets, third party assets or products such a Life Insurance, and inform them of the importance of choosing the right trustee.