

Special and Supplemental Needs Trusts in 2012

Susan E. Johnson-Drenth, CELA*

JD Legal Planning PLLC

2525 University Drive South, Suite B

Fargo, ND 58103

701-364-9595

855-299-9595

sdrenth@jdlegalplanning.com

**•Certified as an Elder Law Attorney by the National Elder Law
Foundation**



Copyright, Susan E. Johnson-Drenth,
2012. All rights reserved.

Overview

- Self-Settled Special Needs Trusts;
- Third-Party (Supplemental) Special Needs Trusts; and,
- Pooled Trusts.

Trust Basics

- Funds/assets in the trust are kept separate from other assets of the beneficiary.
- Separate tax identification number for the trust.
- Separate income tax return filed for the trust.
- Specific rules for distribution of principal and/or income of trust, based upon the terms of the trust.

Trust Basics

- A trust is a separate entity created by written document signed by the trustor, which is managed by the trustee for the benefit of the beneficiaries.

Trust Basics

- Trustor/Grantor:
 - One who creates the trust.
- Trustee (individual or company):
 - Must manage trust for best interests of beneficiaries.
 - Must be well-qualified and follow trust terms and trust law.

Trust Basics

- Beneficiary:
 - Primary Beneficiary – individual who initially benefits from trust.
 - Contingent Beneficiary – individual(s) or entity who benefit from the trust after primary beneficiary.
- Trust Estate:
 - Assets in the trust.

Third-Party and Self-Settled Special Needs Trusts - Generally

- Allow disabled individuals to supplement government assistance benefits such as Medical Assistance and SSI.
- Not considered an “available” asset; does not count toward income or asset limit.
- Usually cannot pay for food or shelter.
- Used for special or extra items not covered by government programs.

Third-Party Special Needs Trusts

- Established by anyone but the disabled individual or their spouse.
- Uses the assets of the individual establishing the trust.
- Cannot use the assets of the disabled individual.

Third-Party Special Needs Trusts

- When used, examples:
- Include as a provision in your Will; OR,
- Establish during your lifetime for the benefit of a disabled child (over age 18) or grandchild.

Self-Settled Special Needs Trusts

- Established with the assets of the disabled individual.
- Must be established by a parent, grandparent or legal guardian of a disabled individual, or the Court.
- Can never be established by disabled individual (except in a pooled trust situation).

Self-Settled Special Needs Trusts

- When used, examples:
- Disabled individual receiving a personal injury settlement asks the Court to establish the trust and transfers settlement proceeds to self-settled special needs trust.
- Disabled individual inheriting under a Will directly and not in a third-party special needs trust; Probate Court establishes self-settled special needs trust for inheritance.

Self-Settled Special Needs Trusts

- Examples (continued . . .):
- Disabled individual is direct beneficiary of life insurance and not in third-party special needs trust; guardian establishes a self-settled special needs trust for life insurance proceeds.
- Disabled individual receives \$15,000 lump sum SSI benefit; disabled individual or guardian transfer funds to a non-profit special needs pooled trust.

A Big Difference Between a Third-Party and a Self-Settled Special Needs Trust

- A self-settled special needs trust is funded *with the assets of the disabled individual* and a claim for Medical Assistance received during lifetime must be paid from the trust when the disabled individual dies (or when the trust terminates).
- There is no such requirement for payment of Medical Assistance claim in a third-party special needs trust, because the *disabled individual's assets were not used*.

Specifics of Third-Party and Self-Settled Special Needs Trusts

- Distributions may only be for a “special need” (examples):
 - Only for needs which asset-tested governmental programs do not provide;
 - Clothing;
 - Education;
 - Travel;
 - Special Equipment;
 - Computer; or
 - Modified vehicle.
- Never for food or shelter, if disabled individual receiving SSI (considered income equivalents).

Pooled Trusts

- Allowed by federal law.
- Disabled person or guardian must sign Joinder Agreement to Master Pooled Trust Agreement.
- Can be used for Self-Settled and Third-Party Special Needs Trusts.
- Used mostly for instances when there is no family to serve as trustee.

Pooled Trusts

- Self-Settled Special Needs Trusts assets are then managed the same as other special needs trusts, with payment for Medical Assistance claim at death (or may leave trust assets to divide among other pooled trust beneficiaries).
- Third-Party Special Needs Trusts are managed the same as a Self-Settled Special Needs Trust without a claim for Medical Assistance at death. Remainder in account can go to other heirs as directed.

Specifics of Third-Party and Self-Settled Special Needs Trusts

- Never distribute trust dollars directly to beneficiary – or else considered income.
- Trustee must purchase items on behalf of beneficiary (examples):
 - Computer;
 - Furniture;
 - Car;
 - Internet bill;
 - Gas for vehicle; or,
 - Differential for a private room.

Specifics of Third-Party and Self-Settled Special Needs Trusts

- Must be drafted by experienced attorney.
- Laws change frequently and the attorney should be up-to-date on changes.
- Attorney should do legal work to assure proper trust funding (so assets get to the trust, i.e. – proper beneficiary designations).

How do you know what kind of trust it is?

- Whose assets funded the trust?
 - Disabled individual = self-settled special needs trust.
 - Someone else = third-party special needs trust.
- Is the Medical Assistance claim paid at death or termination of trust?
 - Yes = self-settled special needs trust.
 - No = third-party special needs trust.

What is the best option for advance estate planning?

- Parents create a third-party special needs trust for child, with nominal funding (i.e., \$100).
- Parents' Wills provide for distribution to pre-existing third-party special needs trust for disabled child in the parents' estate plan.
- No assets made payable directly to disabled child (change beneficiary to trust).
- All assets made payable to trustee of third-party special needs trust.

What is the best option for advance estate planning?

- Disabled child:
 - Retains all government benefits.
 - Receives benefit of third-party special needs trust.
- Upon death of disabled child:
 - No payment for Medical Assistance claim.
 - Other children receive balance of trust estate.

Third-Party Special Needs Trust

Example 1

- Parent of 30 year old son with Down's Syndrome dies. Will provides that inheritance is distributed to pre-existing third-party special needs trust for son's share.
- Retirement plan and life insurance payable to trust, and not to son.
- Trust for son's share funded with home, cash and investments.
- Son has benefit of use of home, and distribution of trust funds for special needs (items not covered by governmental benefits).

Third-Party Special Needs Trust

Example 1

- Home owned by trust.
- Son taking computer classes:
 - Tuition and school costs paid by trustee.
 - Computer purchased by trustee.
- Trust pays for insurance, heat, garbage, internet and cable bills for house.
- Trust buys furniture and clothing for son.

Third-Party Special Needs Trust

Example 1

- Upon son's death, home and any remaining assets in trust are distributed equally to siblings outright.
- No payment for Medical Assistance claim upon son's death.

Self-Settled Special Need Trust

Example 1

- Parent of 21 year old disabled child dies and, in error, names child directly in Will (no third-party special needs trust for child).
- Guardian petitions Court probating the Will to create self-settled special needs trust by Court Order, so that disabled child receives no assets outright from estate, but is beneficiary of trust for his share instead.
- Funded with disabled child's assets (since trust not created before death); created by Court Order.

Self-Settled Special Needs Trust

Example 1

- Child's grandparents live in Hawaii and Florida:
 - Trustee pays for travel.
 - Trustee purchases plane tickets for child and one chaperone, if needed.
- When child dies, state Medical Assistance claim must be paid (since no third-party special needs trust in place before death of parent).
- Any remaining balance after payment of Medical Assistance claim distributed pursuant to terms of trust.

Self-Settled Special Needs Trust

Example 2

- 45 year old woman disabled from car accident receives lump sum SSI check for \$15,000.
- Rather than spend-down to \$2,000 SSI limit, join pooled special needs trust.
- Woman signs joinder agreement for pooled special needs trust.
- Transfer funds to trustee of pooled trust for management.

Self-Settled Special Needs Trust

Example 2

- Woman's share of pooled trust will be used to meet her special needs:
 - Trustee purchases TV, DVD player, bedroom set.
 - Remaining funds stay in trust for future needs.
- Upon woman's death, Medical Assistance claim will be paid.
- Remaining balance of trust pays according to terms of joinder agreement.

I have enjoyed my time with you today. If you have any further questions, please call me at 364-9595 or 855-299-9595.

Susan E. Johnson-Drenth, CELA*

*Certified Elder Law Attorney by the National Elder Law Foundation