



"The Three Types of Special Needs Trusts"

By Dennis C. McAndrews, Esquire

In our work for personal injury attorneys, a particular form of Special Needs Trust is generally used to accept the proceeds of a personal injury settlement. This type of Trust is often referred to an "OBRA-93 Trust" which refers to the omnibus Budget Reconciliation Act of 1993, the Act which explicitly authorized the creation of such Trusts to allow a disabled person to continue to receive Medical Assistance benefits. This form of Trust also generally permits a person with disabilities to continue receiving Supplemental Security Income (SSI) and benefits under Pennsylvania's Mental Health and Mental Retardation System.

The second type of Trust is sometimes referred to as a "Common Law Special Needs Trust". These Trusts have been recognized in Pennsylvania since a decision of the Pennsylvania Supreme Court in Commonwealth v. Lang, Department of Public Welfare, 515 Pa. 428, 528 A.2d 1335 (1987). In Lang, the Pennsylvania Supreme Court recognized that a Special Needs Trust could be created for an individual with disabilities with the money of another person, either through a Will (a testamentary trust) or the Trust created during the lifetime of the settlor (an inter vivos Trust). The primary difference between an OBRA-93 Trust and a Common Law Special Needs Trust is that upon the death of the disabled beneficiary, any remaining monies can be left directly to a designated contingent beneficiary (e.g. siblings or offspring of the disabled beneficiary of the Trust) without the necessity of a "payback provision" for the benefit of the state agency which administers the Medical Assistance Program. This "payback provision" is required under OBRA-93 Trusts, since it is the disabled person's own money which is being used to fund the Trust, and Congress viewed such a "payback provision" as the necessary tradeoff in enacting OBRA-93. Naturally, such a payback to the state administrative agency only occurs if monies remain in the OBRA-93 Trust at the death of the beneficiary (or other termination of the OBRA-93 Trust).

The final type of Special Needs Trust is known as a "Pooled Trust". In a Pooled Trust, the trustee is a non-profit organization which manages the funds of many individuals (typically other disabled persons) and invests these funds collectively, while maintaining separate accounts for each individual beneficiary. Upon the death of each beneficiary, the monies in that beneficiary's account can either be used to repay the state agency which administers the medical assistance program or remain in the Trust to be used for the benefit of other persons with disabilities. However, specific contingent beneficiaries cannot be named under a Pooled Trust. The Pooled Trust is generally – though not exclusively – used where the corpus available to fund the Trust is

McAndrews Law Offices, P.C.

30 Cassatt Avenue
Berwyn, PA 19312
Phone: (610) 648-9300
FAX: (610) 648-0433

Wyomissing, PA ● Phone: (610) 374-9900
Harrisburg, PA ● Phone: (717) 221-1422
Scranton, PA ● Phone: (570) 969-1817

modest in size, and a corporate fiduciary cannot be obtained. Such Pooled Trusts can also be used where the corpus is larger, and the disabled individual or a non-disabled settlor desires to ensure that the monies available after the death of the disabled beneficiary are to be used for other individuals with disabilities.

In every case in which a Special Needs Trust is considered, a careful evaluation must be undertaken to determine the appropriate type of Trust to be used to maximize the benefits for the disabled individual and to effectuate the interests of all relevant parties.

If you would like to receive an electronic copy or more information regarding this article, please visit our website at <http://www.mcandrewslaw.com/> or call (610) 648-9300.

McAndrews Law Offices, P.C.

30 Cassatt Avenue
Berwyn, PA 19312
Phone: (610) 648-9300
FAX: (610) 648-0433

Wyomissing, PA ● Phone: (610) 374-9900
Harrisburg, PA ● Phone: (717) 221-1422
Scranton, PA ● Phone: (570) 969-1817