



## **“Special Needs Trust for Financial Planning Professionals— A Primer”**

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In 1993, Congress amended the Social Security Act to permit individuals with disabilities to benefit from a “Special Needs Trust” to provide for needs related to their disabilities, while continuing to obtain critical public benefits such as Medical Assistance and Supplement Security Income. Such trusts may be funded either with the disabled individual’s own resources (such as through an inheritance, litigation recovery, or any other source). Disabled individuals may also possess special needs trusts which are funded through third-parties, such as by will, gift, or other transfers of assets.

The rules regarding the establishment of Special Needs Trusts differ substantially depending upon the source of the money. It is essential that financial planners possess at least some knowledge with respect to special needs trust to avoid developing a financial plan or providing financial products which might disqualify the disabled individual for critical public benefits. Because many disabled individuals are unable to obtain health coverage through any source other than through Medical Assistance, it is absolutely essential to avoid a financial or estate plan which could disqualify the disabled individual for these critical public benefits. A discussion of these types of Special Needs Trusts follows.

The first type of Trust is often referred to as a “Self-Funded Special Needs Trust” or as an “OBRA-93 Trust” under the Omnibus Budget Reconciliation Act of 1993, 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 fund the Trust with his or her own money, and continue to receive 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 “Third-Party Funded 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).

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The primary difference between a Self-Funded Special Needs Trust and a Third-Party Funded Special Needs Trust is that upon the death of the disabled beneficiary, any remaining monies of a Third-Party Funded Special Needs Trust 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 Self-Funded (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 modest in size, and a corporate fiduciary therefore cannot be obtained. Such Pooled Trusts can also be used where the corpus is larger, and the disabled individual or 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 best effectuate the interests of all relevant parties.

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