



Seminar Outline

Special Needs Trusts: A Guide for Families

I. Purpose

Special Needs Trusts are designed to permit financial resources to remain available to assist a disabled individual who receives, or may receive in the future, MH/MR and/or Medical Assistance and/or SSI benefits. They also protect such resources from immediate invasion by the Department of Public Welfare (or other providers of publicly-funded services) to reimburse the public treasury for the provision of MH/MR or MA benefits.

II. Three Types of Special Needs Trusts

A) Common Law – Third Party Funded: Permitted in Pennsylvania since 1987 for Trusts funded with monies not owned by the disabled beneficiary.

- Generally created via Wills or inter vivos trusts of family members
- No payback involved to Department of Public Welfare

Factors To Consider In Establishing A Common Law Discretionary Trust

- It must be clearly stated that (1) it is the intent of the settlor to supplement and not supplant public benefits and that such benefits be considered prior to distribution of any trust income or principal, (2) the trust is irrevocable, and (3) the trustee has total, absolute and unfettered discretion to pay, or refuse to pay, income or principal from the trust to the disabled beneficiary. Never instruct the trustee to make periodic (e.g. monthly) payments, as all payments should be discretionary and generally cannot

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

be made for food, clothing or shelter under MA or SSI rules.

- The courts will consider other factors if it is necessary to uncover the settlor's intent;
 - The existence of other beneficiaries;
 - The existence of remaindermen with a statement of intent that the settlor wishes the trustee to attempt to preserve at least some assets for the remaindermen;
 - The trustee is instructed to consider the interests of all other beneficiaries, including contingent beneficiaries, before making distributions;
 - The lack of a duty of the settlor to support the disabled beneficiary.

B) Self-Funded Special Needs Trusts (a.k.a. "Payback Trusts") – Funded by monies of the disabled beneficiary -- permitted under federal law since 1993 via OBRA-93

- Disabled beneficiary (only one)
- Must be created by parent, grandparent, guardian or the court
- Payback to state for Medical Assistance in a beneficiary's lifetime
- Total discretion of Trustee
- Irrevocable

C) Pooled Trust – Also permitted under federal law since 1993 via OBRA-93 to receive funds of the disabled beneficiary

- Non-profit Fiduciary must be the Trustee
- Uses a "Master Trust Agreement"
- Anyone can create a Pooled Trust, including the disabled beneficiary
- Residue remains in Trust for other disabled persons upon death of beneficiary
- Pennsylvania now requires up to 50% of residue to be available for Medical Assistance payback. Act 42 of 2005 - 62 P.S. § 1414(b)(3)(iii)

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III. Thorny Issues in the Creation and Maintenance of Special Needs Trusts

A) Creation of Special Needs Trusts - Preliminary Issues

1. Must DWP approval for the Trust be obtained?
 - a) Is the money arising from litigation involving a minor or incapacitated person? In what county?
 - b) What will DWP require?
 - (a) notice of expenditure of principal
 - (b) some limits on types of expenditures
2. Should you create a SNT if
 - the beneficiary is marginally disabled?
 - the beneficiary does not currently receive SSI or Medical Assistance, but may in the future?
 - the trust corpus is relatively small – can you spend down without losing eligibility (even if only for one month)?
 - the trust corpus is so large that SSI and MA could be irrelevant (and can the SNT be drafted in such a way as to pay out monies for food, shelter, clothing and cash payments until the beneficiary goes on to MA/SSI)
 - Other health benefits are available (e.g. Medicare, Adult Basic 1-800-GOBASIC)
3. Whose money is it, anyway? OBRA-93 Trust vs. Common Law Special Needs Trust – The Payback Issue
 - a) inheritance not yet paid out
 - b) injury settlement
 - c) past Social Security award

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- d) compensatory education fund
 - e) reversionary interest in property
 - f) can you combine - and is it ever wise to combine -- assets of the person with disabilities and assets of others?
 - g) life insurance companies are now marketing to families with persons with disabilities
4. What do you tell the Trustee about administering the Trust?
 5. Must the Settlor have the legal authority to manage the assets of the disabled beneficiary? What are the differing demands of DPW, SSA, MR/MR?
 6. What Social Security number do you use?
 7. Who should be the contingent beneficiaries?
 8. How do you get the court to act as settlor for the trust when no parent, grandparent or guardian is available?

B) Larger Trusts

1. Should you use a corporate or non-corporate trustee?
2. Which corporate trustee is best? Issues to consider are fees, customer service history, knowledge of SNTs and disability issues, and investment strategies.
3. Financial demands upon the trustee by the beneficiary and the family can be vexatious, and can include salaries for family members to care for the disabled beneficiary, housing for entire family, family vacations, vehicles not specially designed for the disabled beneficiary food, clothing, rent/mortgage, or cash for disabled beneficiary, furniture, electronic equipment, professional services.

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C) Smaller Trusts

1. Trustee

- a) Can you find a corporate trustee?
The Community Trust of Pennsylvania (610) 265-4700 (King of Prussia)
ARC Family Trust (412) 995-5000 (Pittsburgh)
- b) Will the Court appoint a non-corporate trustee in matters involving a minor or incapacitated person?

PA R.C.P., Rules 2039 and 2064. Counsel must also determine who should be the non-corporate trustee? Will the Court approve a family member, friend, financial planner, or attorney? Are conflicts of interest involved?

- c) Can you keep a trustee happy if the beneficiary or his/her family is demanding? Issues can involve payment of fees to trustee, investment counseling, and supportive/intervention/casework services.

2. Beneficiary

- a) Should the trustee accede to requests which will quickly deplete the corpus?
- b) Can principal be invaded? Will DPW object?
- c) How should the corpus be invested?

D) Improper SNTs – can they be “fixed”?

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E) Payback Issues

1. Planning for payback during trust administration.
2. Dealing with DPW at the termination of the Trust.

F) Support Issues

Ricco v. Novitski, 874 A.2d 75 (Pa. Super 2005). The existence of a Special Needs Trust for a child with disabilities is not a factor in determining the support obligations of the parents of the child, and a parent cannot evade support obligations due to the existence of a Special Needs Trust. Query: How will this case relate to the broad familial support obligations under Act 43 of 2005, 23 Pa. C.S.A. Section 4601 et. seq.?

G) Medicare Part D Drug Plan For "Dual Eligibles" Who Also Receive Medical Assistance

- Less need to create a Special Needs Trust for some persons dually eligible for Medicare and Medicaid where larger settlements are involved, because Medicare recipients can 1) purchase Part B (doctor visits) at modest cost, and 2) privately pay for Part D's exclusions together with any Medicare deductibles and co-pays

H) Fixing "Broken" Trusts

- The Department of Public Welfare and the Social Security Administration are reasonable in reforming broken trusts so long as a new payback trust is created which gives Department of Public Welfare prior notice regarding principal expenditures--even where the Trust is purportedly irrevocable
- A beneficiary or representative could also petition the court to reform the defective trust

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- The Structured Settlement Protection Act can be used to transfer payments to a payback trust where the periodic payments disqualify a disabled beneficiary from public benefits
- Notice must be given to all beneficiaries and their approval obtained, and ideally such notice and consent should extend to residual beneficiaries

I) Effect of Special Needs Trust On:

- Section 8 Housing (generally no disqualification, as the regulations focus mostly on income, not assets, and the law is murky) - See, 24 C.F.R. § 5.603(b)(2) - (value of irrevocable trust funds will not be considered an asset so long as the fund continues to be held in trust, and no members of the family or household have control of the trust. However, any income distributed from the trust is counted when determining annual income under 24 C.F.R. § 5.609); See, also 24 C.F.R. § 5.603(b)(3) - (value of any business or family assets disposed of by an applicant or tenant for less than fair market value, including a disposition in trust, during the two years preceding the date of application for the program or reexamination is considered part of net family assets)
- Food Stamps - 7 C.F.R. § 273.8(e)(8) - (resources having a cash value which is not accessible to the household, such as irrevocable trust funds, are excluded from the resources of a household)

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- General Assistance (usually received by recipient while awaiting Supplemental Security Income determination)- DPW will disqualify for assets in Trust despite regulations which appear to exclude Special Needs Trusts -- See, 55 Pa. Code § 177.23 (only resources which are legally available to the client are applied to the resource limitation); and 55 Pa. Code § 177.2 (legally available resource is defined as real or personal property or interest property which a person has, or can make available for his use, including partial interest in property which a person has the right, authority and power to liquidate)
- Support Obligations: Ricco v. Novitski, 874 A.2d 75 (Pa. Super 2005). The existence of a Special Needs Trust for a child with disabilities is not a factor in determining the support obligations of the parents of the child, and a parent cannot evade support obligations due to the existence of a Special Needs Trust. Query: How will this case relate to the broad familial support obligations under Act 43 of 2005, 23 Pa. C.S.A. Section 4601 et. seq.?

J) Rapid Spenddown

- To maintain SSI and/or Medical Assistance without use of a payback trust
- For fair market value (keep receipts)
- In calendar month of receipt
- Caution: a Social Security Administration caseworker may disqualify anyway--be proactive with the caseworker if necessary

K) How Does a Court "Create" a Trust Where No Parent of Grandparent or Guardian is Available?

- Court acts only as the technical Settlor
- The court need not sign the Trust, but should issue an order approving the Trust
- Review the Trust to make sure that it is consistent with the court acting as Settlor, e.g. the "\$20 rule" required by Social Security Administration (no judge will pay the \$20!)

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- L) Social Security Administration Idiosyncracies
- Trust must be created by a person with right to manage the monies of the beneficiary, i.e., “The \$20 Rule”)
 - Trust must have a named contingent beneficiary
 - Cannot use Trust for funeral or burial of a deceased beneficiary except via prepaid funeral/burial plans
 - In-Kind-Support-and-Maintenance Rule and Presumed Maximum Value Rule (see below)
- M) Payments for In-Kind-Support-and-Maintenance
- Presumed Maximum Value Rule limits reduction of SSI to about of SSI regardless of the amount of IKSM actually paid
 - The Trust should not put cash in family’s account to pay for food and shelter; rather the Trust should directly pay vendors, or
 - Reimburse the family for receipts of actual payments already made, or
 - Provide to the family a credit card where feasible
- N) Payments to Family as Caregivers - Court approval should always be obtained
- Reasonable rates must be used, and should reflect replacement of lost income of the caregiver
 - Who is the employer for withholding, workers compensation, unemployment, etc?

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- O) Purchase of Homes – Obtain approval of Court and Department of Public Welfare
- The house should be titled in the name of the Trust
 - The use of the home will likely be considered In-Kind-Support-and-Maintenance subject to the Presumed Maximum Value Rule, as will taxes and essential utilities
 - Will the Trustee agree to manage property?
 - What if the property declines due to neglect or due to declining property values?
 - Will the court require the beneficiary's family to pay some rent/expenses?
- P) Expansion of the Pool of Available, Competent Corporate Trustees since 1993
- Both commercial and non-profit Fiduciaries
 - Caution - Trustees sometimes request provisions in the Trust which limit their liability and allow the Trustee to use Trust resources to pay for extensive outsourcing of typical Trustee services from the Trust, but some courts are unwilling to approve these provisions
- Q) Many Investment Companies Now Market Insurance and Investments to Families of Persons with Disabilities

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