



Special Needs Trusts

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When a loved one has a disability, providing for that person can become the central goal of estate planning. The tool estate planners use is the Special Needs Trust, or “SNT.” The purpose of an SNT is to ensure the loved one receives needed public benefits (such as Supplemental Security Income and Medicaid) while also enjoying the little extras that provide for a good quality of life.

Two sources of funds for the SNT require two different sorts of trusts. One, called a “Third Party” SNT, is funded as part of an estate plan. By that, we mean the source of funds going into the SNT is from a friend or family member. The second type is called a “First Party” SNT, where the source of funds going into the SNT is from the disabled person himself or herself. This SNT has many complicated requirements that do not apply to the “Third Party” SNT. Nevertheless, it can be useful to preserve the inheritance of a beneficiary for whom a Third Party SNT was not created, or to preserve the proceeds of a judgment or settlement. There are two types of First Party SNTs. One is set up by a parent, grandparent or the court and can be drafted to allow the beneficiary to choose his or her trustee. Another, called a Pooled Trust is already set up and the beneficiary simply joins the existing trust with his or her own sub-account pooled together for investment purposes with other sub-accounts. However, because this is a book about estate planning, we will focus on the first type, the Third Party SNT funded as part of an estate plan.

Estate planning SNTs have few rules. They must contain very particular standards about how distributions for the benefit of the beneficiary are to be made but otherwise are flexible tools. In practice, the way an SNT works is the beneficiary (or his or her guardian or conservator) asks the Trustee to make a distribution. The Trustee considers whether he or she is permitted to make the distribution and whether making the distribution is in the best interests of the beneficiary. If all is well, the Trustee makes the distribution by paying for the good or service directly from the trust account to the vendor. The money never passes through the beneficiary’s hands. This is important because any money the beneficiary receives may reduce his or her Supplemental Security Income or may even cause a total loss of Medicaid benefits.

When creating an SNT, a grantor (the person setting it up) should consider a variety of tools. While an SNT can be a very short, very simple document, the best working SNTs often have more detailed provisions in them to ensure the beneficiary's well-being. Some provisions to consider include the following.

TRUSTEE

The SNT must have a Trustee. This person will have tremendous power and responsibility. In addition to deciding which distributions will be made and which will not be made, the SNT Trustee must invest the funds prudently so they last for the lifetime of the beneficiary. While it is tempting to name family and friends as Trustee, consider the fact that the beneficiary may outlive them. Consider also whether those potential Trustees have the time and inclination to keep thorough records, invest the trust assets wisely, file tax returns, and ensure their distributions comply with government benefits laws. Being a Trustee is hard work!

Many corporations, including banks and brokerage houses, have trust departments that will manage SNTs as Trustee. Ask your attorney which corporations in your area have the best reputation for handling SNTs. Not all trust departments handle SNTs, and of those that do, there is a wide variety in the way they handle SNTs. Do they assign a single trust officer to the account? Will that person ever meet the beneficiary? Do they hire Care Managers or Advocates to ensure the best possible care? What is their investing philosophy and track record?

Corporations charge a percentage of the trust assets each year as their fee. Individual Trustees either charge a percentage or are compensated on an hourly basis for the work they do.

ADVISORY COMMITTEE

Once you have chosen a Trustee, consider who else might want to be involved in ensuring your beneficiary has a good quality of life. Those people can be named to an Advisory Committee to advise the Trustee. The Advisory Committee is a formal body that can arrange itself in any convenient manner. Some meet by phone. Some meet in person. Some are composed of just two or three people. Others have twelve members. Committees of between three and twelve people seem to work best.

ADVOCATE OR CARE MANAGER

If your Trustee is a corporation or a person who cannot personally ensure the beneficiary is receiving the best possible care, it may make sense to authorize or even require the Trustee to hire an Advocate or Care Manager. This person's job is to visit the beneficiary and make recommendations about living arrangements and distributions. Advocates and Care Managers usually charge for their time by the hour.

TRUST PROTECTOR OR ADVISOR

Because benefits laws are constantly changing, it is possible your trust could become invalid in time, which would cause your beneficiary to lose benefits. You can nominate a person or firm to make administrative changes to your trust to enable it to keep pace with legal changes. If you don't nominate anyone, there is always the opportunity to go to court to ask the court to change the trust but that may be expensive and uncertain. There is no guarantee the court will say "yes."

Many families name their attorney or CPA as the Trust Protector but you can choose anyone who is legally savvy enough to hire an experienced attorney and follow his or her advice.

MEMORANDUM OF INTENT

While your trust can contain many of your wishes for how your money is spent, it is best limited to those things that will not change. For example, if your beneficiary loves to fly in airplanes, perhaps your trust will recommend (it cannot require without breaking the SNT rules) that the Trustee purchase a couple of round-trip plane tickets for the beneficiary each year. If, however, your beneficiary's current passion is electricity and how it works, it may be best to leave that out of the trust as it might change. For all those things that are important to your beneficiary but may change, the Memorandum of Intent fills the gap. It is a place to list your beneficiary's doctors and therapists, to write about your beneficiary's preferences, to decode your beneficiary's non-verbal communications, or just to make your caring voice heard throughout your beneficiary's lifetime.

The Memorandum of Intent should be referenced in the trust but is not a part of the Trust. This is because you might accidentally say something that could invalidate the Trust if the Memorandum of Intent were actually incorporated into the Trust. Think of the Memorandum of Intent as a letter to your Trustee explaining how things should really work.

YOUR ATTORNEY

Choosing an attorney to draft an SNT is not always an easy task. Drafting an SNT is highly specialized and you want someone who is experienced in this area. Be sure the attorney you are working with devotes a substantial portion of his or her practice to special needs planning. Choose someone whom you can trust because an SNT lasts for the lifetime of your beneficiary and the attorney you choose is a crucial member of the SNT team.

Special needs planning can seem daunting. With the right attorney, however, it is an exploratory process leading to great peace of mind. It can also lead to new discoveries. You might discover you want more people to surround your beneficiary and set about to make new friends. You might discover your beneficiary is surrounded by caring family and now the financial piece is in place to ensure they can follow your wishes. No matter what, you will find that having

a Special Needs Trust in place provides you with a sense of peace because you will know your beneficiary will be well taken care of.

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