

WHAT YOU NEED TO
KNOW ABOUT
SPECIAL NEEDS
TRUSTS

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PROBATE, ELDER LAW AND ESTATE PLANNING



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WHAT YOU NEED TO KNOW ABOUT SPECIAL NEEDS TRUSTS

WHAT IS A SPECIAL NEEDS TRUST?

A special needs trust is created and funded by a “settlor” and administered by a “trustee,” who can either be an individual or a bank or trust company or other corporate entity.

A special needs trust is almost always irrevocable, as assets are that generally in a revocable trust are considered resources that belong to the grantor because they can be amended or revoked at any time. The purpose of a special needs trust is to create a pool of money to benefit a disabled person to provide for any of their needs which are not paid for by Medicaid, Medicare, SSI, SSD or any other public benefit, without disqualifying that individual from those public benefits, for having too many countable resources.

A special needs trust is discretionary. The trust document grants the trustee discretion regarding distributions and lays down the rules for administering the trust. These trusts are different from a support trust, which could require the trustee to pay the beneficiary of the trust on a mandatory periodic basis.

Administering special needs trusts can be very tricky and requires knowledge of public benefits. It is very important for the settlor and trustee to know how to properly create, fund and administer the trust.

DIFFERENT TYPES OF SPECIAL NEEDS TRUSTS

A. Self-Settled Trusts (Disability Trusts)

- A self-settled trust is where the grantor and the beneficiary of the trust are the same person. These trusts are governed by state and federal statute and regulation, and must be approved either by the Social Security Administration or the Colorado Department of Health Care Policy & Financing.
- People who would set up a self-settled trust are usually people who have received a large lump-sum amount of money for instance from the sale of a home, an inheritance, or from a personal injury settlement.
- In order to shelter assets owned by a disabled person in Colorado, funds either need to be put into a disability trust or pooled trust, which will be discussed later.

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1. The Disability Trust

- A disability trust must comply with federal and state statutes and regulations. Basic requirements under federal law state that a beneficiary must be:

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- Disabled according to Social Security
- Must be under age 65 when the trust is created and funded
- In addition the trust must:
 - Be created by a court, parent, grandparent or guardian on behalf of the disabled person
 - Pay back Colorado Medicaid for any medical expenses paid by the State for the beneficiary upon the death of the beneficiary. For an SSI recipient, a disability trust can only be created by guardian or a court if SSI recipient is over 18.
- Main issues to note about the self- settled disability trusts are:
 - They must be approved by Colorado Medicaid (DHCPF)
 - The trust must be terminated if the beneficiary no longer requires Medicaid or moves from Colorado (this last provision has been challenged and is considered illegal under federal law but Colorado still requires it)
 - Under a Colorado case called Seidenberg, it is imperative that a special needs trust be a discretionary trust, meaning that the beneficiary has no ability to demand distributions or otherwise control the trust assets.

2. The Pooled Trust

- The pooled trust is operated and administered by the Colorado Fund for People with Disabilities in Colorado. They are located in Denver and can be found at www.cfpdtrust.org.
 - A disabled person can join the pooled trust without court involvement or assistance by a parent, grandparent or guardian, if they are competent.
 - The pooled trust has been approved by Colorado Medicaid and the Social Security Administration.
 - People over 65 can join the pooled trust if they have an actuarially sound spending plan as part of their joinder agreement.
 - Medicaid does not get paid back with the remainder of the pooled trust. In Colorado, the pooled trust keeps the remaining trust funds upon the death of a beneficiary. This money goes into a charitable fund for the remaining beneficiaries of the pooled trust. Because of this, beneficiaries are not taxed on their earnings in the trust.

B. Third Party Trusts

- Third party trusts are created by “third parties” to benefit the disabled person. These types of trust can be created “inter vivos” during the settlor’s lifetime, or upon their death where it would be a “testamentary” trust, usually contained in the settlor’s will or revocable living trust.
- Third party trusts are not as restrictive as 1st party or self-settled trusts.
- These trusts do not count against the beneficiary as a countable resource by Medicaid because the resources come from third parties and do not belong to the disabled person. These trusts are not support trusts and are merely discretionary, meaning the disabled person cannot demand distribution nor have any control over the distributions from this trust.
- Under current law, Medicaid does not have any right to be reimbursed from the proceeds of a third party trust upon the death of the beneficiary.
- Beneficiaries must be disabled, but do not have to meet disability requirements under Medicaid or Social Security to become beneficiaries of these trusts.

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