

# Special Needs Planning

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April 2009

## I. INTRODUCTION

- A.** Special Needs Planning for Persons with Disabilities is planning for the special needs of individuals with disabilities (“SN Person” or “SN Beneficiary”).) When considering this planning, it is important to remember that the only constant is change.
- B.** There are two common styles of SPECIAL NEEDS TRUSTS:
1. those funded with assets of a third person (“Third Party Special Needs Trust”)
  2. those funded with the SN person’s own assets (“self-settled special needs trust” and “self-settled pooled account trust).
- C.** An effectively designed special needs trust can help ensure quality of life and quality of care for an individual with disabilities. Through such planning, people with disabilities, who are often vulnerable, can be provided with needed financial protections, care advocacy, and access to other resources to help manage their lives successfully. A pooled trust sub-account must be established either by the individual with special needs or on his or by his or her parent, grandparent; or guardian or conservator; or court order.
- D.** “Special Needs Trust” describes trust funds to supplement benefits not provided through government entitlement.

## II. DEFINITIONS

- A.** A “**special needs child**” can be defined as follows:
1. a child who (typically at birth) is mentally, physically or emotionally disabled, and because of the severity of the disability may be eligible for need based government benefits, such as Medicaid and Supplemental Security Income (“SSI”).
  2. Typical special needs children include those with cerebral palsy, autism, Fragile X syndrome, Down syndrome, mental impairment, etc. Such a child is referred to as a “developmentally disabled” individual.

## B. “Developmental disability”

Depending on the system, there are various definitions of “**developmental disability**.” Eligibility and priority for services under state and federal programs depend on fitting criteria for developmental disability or children’s disability.

The 1996 revisions to the Michigan Mental Health Code set criteria based on *functional* need, instead of a set diagnosis. For children older than 5 years, the Code requires a severe chronic condition, which:

1. relates to a mental and/or physical impairment;
2. occurs before age 22;
3. is likely to continue indefinitely;
4. results in substantial functional limitations in 3 or more of the following areas of major life activity: self care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living and economic self-sufficiency; and
5. reflects the individual’s need for combinations of special care and services which will be lifelong or of extended duration and individually planned and coordinated.

## III. SUPPLEMENTAL OR SPECIAL NEEDS TRUSTS

A properly drafted and administered SNT can be a powerful legal tool to protect and preserve assets and the personal dignity of a person with disabilities. The SNT can help assure quality of life while saving money that would otherwise need to be spent on basic life necessities, but for the availability of government benefits. It should be immediately apparent that:

*one primary goal of the SNT is to provide for quality of life/quality of care options without jeopardizing the SN Beneficiary’s eligibility for government benefits.*

### A. Government benefits

Before considering, establishing or administering a Special Needs Trust one must have at least a basic understanding of the public benefits programs available to provide assistance to beneficiaries with disabilities.

1. Two basic programs both operated by Social Security Administration (SSA):

- (a) Social Security Disability (SSD) - is not needs-based, but recipient must have sufficient participation to qualify (think social security benefits based on income earned;)

- (b) Supplemental Security Income (SSI) – is a welfare program, based on participant being disabled, and “poor.” “Poor” is defined by federal standards of no more than \$2,000 in available resources, excluding in most cases, a home, car, some household goods and small amount additional property.
  - i. SSI’s treatment of resources and income is important not only for purposes of understanding the program, but also because those eligibility rules are applied, in most cases unaltered, in determining eligibility for Medicaid, to be discussed later. It is also important to understand SSI’s rules governing “*In-kind Support and Maintenance*” (*ISM*), which is treated as income to the recipient even though he or she may not have directly received the income in question.
  - ii. Any payment directly to or for the benefit of an SSI recipient is ISM and treated as available for purposes of calculating eligibility IF the payment is either for food or shelter, or convertible into food or shelter by the recipient.
  - iii. In other words, payments of cash to the SSI beneficiary will usually result in ineligibility because the beneficiary could utilize the cash to provide himself or herself food or shelter even if the distribution is not in fact used for that purpose. (NOTE that the Social Security Administration changed its prior rule which treated “clothing” in the same fashion as food and shelter in March, 2005.)

2. Two medical benefits programs to the disabled are:

- (a) Medicare – a federal program, benefits for the elderly and disabled, but only those who are SSD recipients who have been receiving benefits for 24 months.
  - (b) Medicaid – a federal/state partnership program, and is a welfare program is SSI. It is possible to qualify for Medicaid without qualifying for SSI
3. There are other programs that may provide benefits for the developmentally disabled as well, including Title XIX.

## **B. Types of Special Needs Trusts**

### **1. Third Party Special Needs Trust**

- a) a SNT may be created by a donor who would like to set aside or bequeath assets to another individual without jeopardizing the

individual's eligibility for public benefits. The donor's goal is not necessarily to establish public benefits eligibility for the donor, though in some narrow circumstances this may also be one purpose behind establishment of the SNT.

- b) Third party SNTs are established most frequently when a parent would like to provide benefits for a child with a disability. (*Further discussion below*)
- c) This may also arise when the spouse of a Medicaid recipient, or potential Medicaid recipient, wishes to leave some or all of their estate in trust for the benefit of the recipient spouse.

## **2. Self settled Special Needs Trust**

- a) A SNT may also be established for an individual with a disability who seeks to set aside his or her own funds for his or her own benefit in a self-settled trust. This occurs most frequently when there is a lawsuit recovery or settlement.
- b) Creating and administering this type of trust is extremely challenging due to the heavy correlation between trust requirements and the often inconsistent and unclear rules of the public benefits programs with regard to such trusts. It is only by scrutinizing the rules of each program for which a client may wish to qualify that it is possible to draft a trust that will not jeopardize the public benefits eligibility of the beneficiary.

## **3. Sole benefit Special Needs Trust**

- a) Occasionally an individual will want to make a transfer to a child who is either a minor or disabled in order to help the transferor to become eligible for benefits like long-term care through Medicaid.
- b) While transfers to a disabled or minor child are permitted without penalty, transfers into a trust for that same child may result in a disqualification period unless the trust is for the "sole benefit" of the child (42 USC 1396p(c)(2)(B)(iv)). Some state Medicaid agencies interpret the "sole benefit" requirement to effectively require annuitization of the trust corpus.
- c) "Sole benefit" trusts have had limited utility until recent years, since they have been of interest only to individuals who wished to qualify for public benefits themselves, and who had a child with a disability for whom a trust could be established. With the adoption of IRC 642(b)(C) (establishing income tax benefits for "qualified disability trusts" created pursuant to the "sole benefit" trust rules), the usefulness of such trusts may be somewhat expanded. At least one commentator suggests that

such trusts can create significant income tax advantages for family estate planning.

#### **4. The Community Pooled Account Trust**

- a) In the case of a Community Pooled Account Trust, a nonprofit charitable organization establishes and manages a master trust. The child, the child's parents, grandparents, legal guardian, or the court establishes a trust account (within the master trust) solely for the benefit of the special needs child. (The special needs child generally can be of any age to use a Community Pooled Account Trust, although some states penalize a child if he or she makes contributions to the trust after the child reaches age 65.)
- b) The special needs child's disqualifying assets are then transferred into the master trust, and a separate trust account (also known as a "sub-trust account") is established by the charity for the sole benefit of the special needs child (but, for purposes of investment and management of funds, the master trust pools all the separate trust accounts).
- c) The charity, as trustee, administers the child's trust account and uses it to pay for the permitted supplemental needs of the child. Family members or friends can act as "advisors" to the trustee-charity concerning the needs of the child.
- d) Depending on the terms of the master trust and the joinder agreement that establishes the child's separate trust account, any funds remaining in the child's separate trust account at the child's death will, either: (i) be kept by the charity (and not be used to reimburse the government for medical benefits provided by any state's Medicaid program to the special needs child); or (ii) be used to first reimburse the government for medical benefits provided by any state's Medicaid program to the special needs child, and the remaining amount of the special needs child's separate trust account will then be distributed pursuant to a Protective Order issued by the Michigan Probate Court, pursuant to the child's exercise of a testamentary limited power of appointment (which limited power of appointment could be contained in the child's will, the Protective Order or the joinder agreement), pursuant to the child's will, or pursuant to the laws of intestacy.
- e) A Community Pooled Account Trust is best suited where the amount of non-exempt assets owned by the special needs child is not large enough to justify the cost of establishing and administering a Medicaid Payback Trust, or where the parents or child want to ultimately benefit the charity upon the death of the special needs child.

- f) Not all states have Community Pooled Account Trusts. Michigan, however, has seven Community Pooled Account Trusts.

### C. THIRD PARTY SN TRUSTS

Of the estate planning options available to parent to provide for their special needs child, parents often choose an inter-vivos “third party” stand alone supplemental needs trust for the benefit of their special needs child. The trust can be either:

1. Revocable (i.e., the trust can be modified or cancelled by the parents at a later date) or
2. Irrevocable (i.e., the trust is generally unchangeable, subject to certain limited exceptions).
3. The trustee of the supplemental needs trust is given complete discretion in making distributions to or for the benefit of the special needs child. A trust protector can be appointed with the power to:
  - (a) direct the trustee’s actions, and
  - (b) remove and replace a trustee.
4. Because the stand alone supplemental needs trust is a discretionary non-support trust with spendthrift provisions, the trustee has maximum flexibility to meet the beneficiary’s needs and maintain the beneficiary’s eligibility for government benefits.
5. This type of trust is also well suited to deal with possible changes in the amount of government benefits that may be available in the future due to changes in SSI or Medicaid funding, budget cuts, eligibility requirements, etc. Even if the special needs child does not receive need based government benefits such as SSI or Medicaid, and instead receives entitlement based government benefits such as Social Security Disability Insurance (“SSDI”) and Medicare, a special needs trust will always protect the special needs child from his or her inabilities, disabilities, predators and creditors. A third party special needs trust can, at the same time, be both flexible and protective.
6. An alternative to a third party stand alone supplemental needs trust is to have the parent’s last will and testament or their revocable living trust contain third party supplemental needs trust provisions.
7. The benefits of a *third party stand alone supplemental needs trust* are:

- (i) the trust *can be established by the parents* (or by any third party, such as the grandparents) for the benefit of the special needs child;
- (ii) the trust provides for the investment and management of the special needs child's inheritance by a third party—the trustee;
- (iii) the persons establishing the trust (such as the parents or grandparents) decide the terms and conditions of the special needs child's inheritance and who is to receive the balance of the trust funds when the special needs child dies—rather than having to reimburse the government for Medicaid and/or “cost of care” benefits provided to the special needs child;
- (iv) the persons establishing the trust can name who should serve as the initial trustee and as the successor trustees, thereby avoiding the risk of the probate court appointing a “stranger” as a trustee;
- (v) the trust avoids family conflict, since the trust spells out who gets what, when, how and why;
- (vi) the trust avoids a probate court guardianship for the special needs child's inheritance;
- (vii) the trust (if properly drafted) maintains the special needs child's eligibility for government benefits (assuming the child is otherwise qualified to receive government benefits);
- (viii) the trust coordinates government benefits and trust assets to meet the special needs child's lifetime needs;
- (ix) the special needs child can be any age (i.e., the trust is not limited to a special needs child under age 65);
- (x) the trust can provide for the appointment of an independent advocate for the special needs child, regardless of whether the child has a guardian;
- (xi) the trust protects the special needs child's inheritance from being seized by his or her creditors, and avoids the imposition of a Medicaid lien; and
- (xii) the trust can be “simple” or “sophisticated,” depending on the amount and type of assets that are used to fund the trust.

## 7. Trustee

- a) The trustee of the third party supplemental needs trust will act as a gatekeeper of the special needs child's inheritance. The trustee will typically distribute money for permissible "extra" quality of life items and services not provided for by government benefits. These distributions will not jeopardize the special needs child's receipt of (or qualification for) government benefits. Thus, the trustee "supplements" the benefits provided by the government—hence the name "supplemental needs trust."
- b) The trustee should avoid making distributions that will reduce SSI benefits or result in a loss of Medicaid coverage. Trust distributions for basic shelter, food, and direct payment of cash to the special needs child will reduce the child's SSI benefits, and may result in a loss of Medicaid coverage.
- c) In order to assist the trustee of the third party supplemental needs trust, a letter of intent should be prepared by the parents. The letter of intent serves as a blueprint that provides valuable information concerning the daily life of the special needs child. This is especially important when a new caregiver has to step in and manage the child's day-to-day activities. The letter of intent also provides information concerning the unique likes, dislikes, needs, preferences, and other critical information regarding the special needs child—all of which is helpful to the trustee and the caregiver.
- d) ***A word of caution.*** When making distributions from the third party supplemental needs trust, the trustee needs to be aware of the impact the distributions may have on the child's continued eligibility for government benefits, such as SSI and Medicaid. The rules concerning government benefits are constantly changing. Therefore, the trustee should consult with a lawyer or an advocacy agency (such as the local ARC—formerly known as the Association of Retarded Citizens" ([www.thearc.org](http://www.thearc.org))) who is knowledgeable about government benefits. Some lawyers who specialize in special needs planning are available to assist the trustee on an annual fixed fee basis; other lawyers are available on an hourly fee basis. **Choose your Trustee carefully.**

## IV. GUARDIANSHIPS

- A. The appointment of a guardian and conservator for a special needs child who is developmentally disabled is governed by the Michigan Mental Health Code and not by Michigan's Estates and Protected Individuals Code ("EPIC

Under Michigan's Mental Health Code, a developmentally disabled person can have two types of guardian:

1. a "guardian of the person" to deal with the physical aspects of the special needs child, and
2. a "guardian of the estate" (which is analogous to a conservator) to deal with the financial aspects of the special needs child. A guardian of the person or estate can be either a:
  - a) "plenary" guardian (i.e., a guardian with full powers), or
  - b) "partial" guardian (i.e., a guardian with limited powers that are spelled out by the Court).

**B.** Generally speaking, the Michigan Probate Courts prefer a "partial" guardianship whenever possible (and appropriate) in order to encourage the development of maximum self-reliance and independence in the special needs child. MCL 330.1602.

A partial guardianship may not continue for more than five years, at which time the partial guardianship must be reviewed and renewed. MCL 330.1626(2).

**C. Advantages to Guardianship**

1. Provides the incapacitated individual with a representative that has legal authority to act on his or her behalf where there would otherwise not be anyone able to act in that capacity.
2. Theoretical court supervision to prevent dishonesty or mismanagement.
3. Can be a life saver

**D. Disadvantages to Guardianship**

1. Loss of autonomy
2. Overrides the incapacitated individual's own desires.
3. Costly.
4. Public proceedings.
5. Burdensome

6. The incapacitated individual subject to a guardianship loses the right to:

- (a) drive
- (b) marry
- (c) enter into a contact
- (d) vote

## **V. OTHER INSTRUMENTS**

### **A. General Durable Powers of Attorney (“GDPA”)**

1. If an adult special needs child is mentally competent, he or she should have a GENERAL DURABLE POWER OF ATTORNEY (“GDPA”) prepared by an estate planning attorney. Once the child becomes an adult (age 18 in Michigan), a parent’s right to know, monitor, advocate and intercede in the special needs child’s affairs may be limited or prohibited absent the child’s consent, a court order (such as a guardianship of the estate), or a “GDPA.
2. A GDPA will permit the person named as the power of attorney to assist the special needs child in his or her financial affairs. The GDPA is highly recommended because it is the least costly and least intrusive method of assisting the adult child in his or her non-medical affairs. When the special needs child dies, the authority given the person named as power of attorney under the GDPA automatically expires, as does the authority of a court appointed guardian.

### **B. Representative Payee**

1. Additionally, a parent may become the “representative payee” of the special needs child’s SSI, SSDI and Social Security benefits, thus avoiding a court appointed “guardian of the estate” or conservatorship. 20 C.F.R. 404.2001.
2. A representative payee is the Social Security Administration’s version of a financial power of attorney (as concerns the benefits in question). However, as with a conservatorship or guardian of the estate, an annual report must be filed with the Social Security Administration documenting how the funds were used for the benefit of the special needs child.

### **C. Alternatives to Developmentally Disabled (“DD”) Guardianship**

When the child turns 18, the parents no longer are recognized as the legal guardians. In the last twenty years, a strong trend has existed against the categorical removal of rights through the establishment of a developmental disability (“DD”) guardianship. Such guardianships have been inappropriately encouraged by school and agency personnel either through misunderstandings or for the convenience of the providers.

If necessary, the DD guardianship require specialized assessments evaluating psychological, physical, social and educational condition, adaptive behavior and social skills. MCLA 330.1612(1)(b). A physician or psychologist must participate in the report and recommendations about the most appropriate rehabilitation plans and living arrangements. MCLA 330.1612(1)(d)(E). Partial guardianships are encouraged and the duration is only five years. MCLA 330.1626(2).

#### ***Alternatives to Guardianship/Conservatorship are:***

1. *Special Needs Trust/Trustee*
2. Joint ownership of assets
3. Electronic banking.
4. Representative Payee
5. General Durable Power of Attorney for financial matters
6. Durable Power of Attorney for health care