

ELDER & SPECIAL NEEDS LAW

FREQUENTLY ASKED QUESTIONS SPECIAL NEEDS PLANNING

Q. WHAT IS SPECIAL NEEDS PLANNING?

A: A lawyer's role in special needs planning is unique. It encompasses and overlaps with various fields of law and social work. It is an area of law where the focus is not around a specific subject matter, but around the myriad of issues facing families caring for individuals with special needs such. This can include life care planning, Medicare, Medicaid, SSI, housing program eligibility, tax planning, preparation of estate planning documents, powers of attorney, and guardianships.

OUR SERVICES INCLUDE:

- Creating, administering, and trustee representation of special needs trusts
- Assisting with eligibility for needs-based public benefits and advocating against benefit denials
- Preparing powers of attorney and estate planning documents
- Guardianships

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Q. WHO NEEDS SPECIAL NEEDS PLANNING?

A. Individuals with complex medical issues and/or disabilities, and the families that support them. Special needs planning can help individuals navigate the complex laws of public benefits eligibility, insurance benefits, develop a life plan, and the estate planning necessary to provide support.

Q. WHAT IS A SPECIAL NEEDS TRUST?

A. A special needs trust is a term referring to several different types of trusts intended to support an individual with complex medical issues or disabilities. The individual benefiting from the trust is the beneficiary. These trusts are drafted in a way to allow the beneficiary to receive public benefits as a supplement to any public benefits without losing eligibility. There are three main types of special needs trusts. Two of the trusts are created with the special needs individual's own assets: a (d)(4)(A) or first-party special needs trust and a (d)(4)(C) special needs pooled trust. The third type of trust is created with assets from someone other than the special needs beneficiary, also known as a supplemental needs trust or third-party special needs trust.

Q. WHAT IS A D4A FIRST-PARTY SPECIAL NEEDS TRUST?

A. A (d)(4)(A) trust holds assets that belong to the individual with special needs. These assets typically include an inheritance or accident settlement. A (d)(4)(A) trust is named after the federal statute authorizing the trust which has certain mandatory provisions. The statute requires a "payback provision," meaning that any assets remaining in the trust at the death of the beneficiary be used to pay the state Medicaid program back before other distributions are made. The trustee of a statute trust can be an individual or corporation.

Q. WHAT IS A LIFE CARE PLAN?

A. A life care plan is generally created by the parents or family of a special needs individual that sets out the diagnosis, treatment needs, daily and ongoing care needs, goals, and wishes for the future of the individual. This plan should explore goals for medical and community support for the individual. It should also address decision-makers, family, friends, or professional support.

Q. WHAT IS A D4C SPECIAL NEEDS POOLED TRUST?

A. A (d)(4)(C) or special needs pooled trust holds assets that belong to the individual with special needs like the (d)(4)(A) trust. A (d)(4)(C) trust is also named after the federal statute authorizing the trust which has similar mandatory provisions. The trust is called a pooled trust because a non-profit sets up and manages the trusts so that individuals with special needs, the beneficiary, can pool their resources with other beneficiaries for investment purposes. The non-profit is the trustee of the trust. The statute requires that any assets remaining in the trust at the death of the beneficiary be used to pay the state Medicaid program back or go to the non-profit that manages the trust before other distributions are made.

Q. WHAT IS A SUPPLEMENTAL NEEDS TRUST OR THIRD-PARTY SPECIAL NEEDS TRUST?

A. A supplemental needs trust or third-party special needs trust is most often used by parents or family members to assist an individual with special needs. The trust can hold assets contributed by the parents or family members and will not affect the special needs beneficiary's qualification for needs-based public benefits. The trust works similar to the (d)(4)(A) or (d)(4)(C) trusts but **does not** have to pay the state Medicaid program back at the death of the special needs beneficiary. The trustee of a supplemental needs trust or third-party trust can be an individual or corporation.

Q. CAN I JUST LEAVE ASSETS TO OTHER FAMILY MEMBERS?

A. It is rarely a good idea to disinherit a family member with special needs and rely on other family members to provide for the individual with special needs. There is no guarantee that the other family members will use the assets to provide for the individual with special needs. Even if the family members do not intentionally take the assets for their own use, they could inadvertently lose the assets should they be sued due to a car accident, a personal injury, in the event of divorce, or should the entrusted person pass away prior to the individual with special needs. The entrusted person may incur additional personal tax liability, like capital gain or income tax, due to the sale or earnings from assets entrusted to them. Finally, the entrusted person is left with little or no guidance on how to use the assets for the individual with special needs.

Q. HOW CAN A SUPPLEMENTAL OR SPECIAL NEEDS TRUST HELP THE BENEFICIARY?

A. A supplemental or special needs trust is intended to enhance the quality of life of a special needs beneficiary. The trust enhances quality of life by allowing the beneficiary to continue to qualify for needs-based public programs that would cover things like housing, modest income, and medical care. The trust can then supplement the beneficiary's needs by purchasing products, services, and experiences for the beneficiary. Some examples include, uncovered medical treatment or caregiving, a car, car insurance, cell phone, cable television, movies, shows, vacations, cloths and personal items.

Q. DOES A SPECIAL NEEDS BENEFICIARY HAVE TO RECEIVE PUBLIC BENEFITS?

A. No! A properly drafted supplemental or special needs trust can be flexible enough to provide for the needs of a beneficiary, even if he or she does not qualify or does not want to qualify for public benefits. There are some cases where the trustee may decide to provide for the beneficiary's needs without obtaining public benefits or partially disqualifying a beneficiary for benefits. This can include paying for private health insurance or a more expensive place for the beneficiary to live.

Q. WHAT IS AN ABLE ACCOUNT?

A. ABLE accounts were authorized in 2014 by federal statute. The accounts allow individuals disabled prior to age 26, or someone on their behalf, to establish an account that will not disqualify them for public benefits. The accounts are like education savings accounts and are set up through a state plan. ABLE accounts are limited to a maximum funding of \$100,000 and cannot receive contributions of more than \$16,000 per year in 2022. Distributions from ABLE accounts are not penalized so long as the funds are used for qualified expenses, such as transportation, work training, and even housing. ABLE accounts are an excellent way to empower special needs individuals and maximize independence if the special needs individual is able to manage finances.

