

THE PACKARD LAW FIRM

1100 NW Loop 410, Suite 100, San Antonio, TX 78213

Phone: (210) 340-8877 Fax: (210) 340-8787

Alison M. Packard

alison@packardfirm.com

Special Needs Trusts

A “Special Needs Trust” is a special type of trust intended for the benefit of a person with a disability that causes him or her to be unable to engage in productive work or to be unable to manage finances. Individuals with disabilities are often reliant on government assistance, commonly in the form of Social Security Disability Insurance payments (“SSDI”), Supplemental Security Income (“SSI”), Medicare, Medicaid and/or Medicaid Waiver programs. Some government benefits require the recipient to have very limited income and assets. One purpose of a special needs trust is to make funds available to help meet the disabled person’s needs and enable him or her to enjoy the best possible quality of life without losing eligibility for needs-based government assistance.

A special needs trust is managed by a Trustee (or Trustees) with fiduciary obligations to the beneficiary. The Trustee is responsible for investing funds, making disbursements, paying taxes and maintaining detailed accounts. The Trustee needs an understanding of government programs, including the strict regulations concerning the use of special needs trust assets, since improper use of funds could disqualify the beneficiary from public benefits such as SSI and Medicaid. In addition to handling these technical requirements, the Trustee should have a deep appreciation for the beneficiary’s needs and desires so that the trust will make the best possible contribution to the individual’s quality of life. A special needs trust can be managed by a professional trustee, or in some circumstances, by a reliable family member or friend serving as trustee.

Attorneys can draft different types of special needs trusts depending on the source of the funds, the desires of the grantor, the availability of appropriate trustees, and other factors.

FIRST-PARTY SPECIAL NEEDS TRUSTS

A **FIRST-PARTY SPECIAL NEEDS TRUST**, also referred to as a “**self-settled trust**,” a “**payback trust**,” or a “**D(4)(A) trust**,” is funded with assets or income that belong to the individual with the disability, who is also the beneficiary of the trust. In order for the assets of the trust NOT to count for Medicaid or SSI purposes, the trust must meet these basic requirements:

- The beneficiary must be disabled.
- The beneficiary must be under age 65 at the time the trust is established.
- The trust must be established by a parent, grandparent, guardian, court or individual with a disability if competent to do so. Then the beneficiary’s own assets are used to fund the trust.
- The trust must be irrevocable.
- The trust funds are used for the sole benefit of the disabled beneficiary.
- At the beneficiary’s death, the state Medicaid agency must be reimbursed from any remaining assets in the trust fund.

Situations where a First-Party SNT may be appropriate:

Lawsuit settlement. A first-party special needs trust can allow an individual with disabilities to receive a personal injury award without losing eligibility for public benefits. Lump-sum or annuity payments can be irrevocably assigned to the trust established by the court.

Divorce settlement/child support payments. If a disabled spouse qualifies for public benefits, the divorce settlement can direct monthly alimony or a lump sum distribution to be placed in a first-party special needs trust. Child support payments can also be irrevocably assigned to a first-party special needs trust by court order to protect the government benefits of an adult child with disabilities.

Inheritance or life insurance proceeds. An inheritance or life insurance payout can often cause a person to lose public benefits. If a third-party special needs trust has not been created, the inherited assets, now “received,” can be placed in a first-party special needs trust. (Although a Medicaid payback would be required in this situation, the first-party trust would allow the disabled individual to retain his or her inherited assets and government benefits.)

Military Survivor Benefits for disabled children. Because of the “Disabled Military Child Protection Act,” a military parent can now provide a survivor benefit for a child with disabilities and have it be paid to a special needs trust for that child’s benefit. Until this law was passed, military parents who chose a Survivor Benefits Plan (SBP) annuity option for their children risked interference with government benefits such as SSI, Medicaid and Medicaid Waiver programs.

THIRD-PARTY SPECIAL NEEDS TRUSTS

A **THIRD-PARTY SPECIAL NEEDS TRUST**, frequently referred to as a “**supplemental needs trust**,” is funded with assets belonging to a person other than the beneficiary. In fact, no funds belonging to the beneficiary should be used to fund the trust. Typical funding comes from gifts, proceeds of life insurance policies, or an inheritance from parents or grandparents. This trust has no provisions to pay back Medicaid upon the trust’s termination; rather, the person creating the trust decides how the trust estate is distributed when the beneficiary dies. A third-party special needs trust can be funded immediately or be testamentary in nature. This trust can be an extremely valuable tool for providing instructions on caring for a loved one with special needs.

POOLED TRUSTS

A **MASTER POOLED TRUST** (for either a first-party or third-party special needs trust) is often a practical alternative for small estates. Sub-accounts belonging to many beneficiaries are managed as a single entity, usually by nonprofit organizations that call upon the experience of social workers, money managers and special needs attorneys. Since many financial institutions do not handle small special needs trusts or may charge fees that are not cost-effective for modest trusts, pooled trusts can give families access to highly skilled trustees. (See, for example, The Arc of Texas Master Pooled Trust.)

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COMPARISON CRITERIA	FIRST-PARTY SNT	THIRD-PARTY SNT	ABLE ACCOUNT
Eligibility	Disabled beneficiary with trust established before age 65	Disabled beneficiary – no age limit	Beneficiary disabled before age 26
Number of trusts or accounts allowed	No limit on number of trusts	No limit on number of trusts	Only one ABLE account per beneficiary
Settlor/Maker	Trust established by parent, grandparent, legal guardian, court, or beneficiary (if competent)	Trust established by anyone other than beneficiary	Online account opened by person with disability, parent, legal guardian, or POA agent
Allowable Use	Distributions for sole benefit of disabled beneficiary as determined by trustee. Distributions for food and shelter may reduce SSI payments by 1/3 (“ISM”).	Distributions for benefit of disabled beneficiary as determined by trustee. Distributions for food and shelter may reduce SSI payments by 1/3 (“ISM”).	Qualified disability expenses (QDE’s) for benefit of disabled beneficiary. QDE’s including food and shelter do not cause ISM reduction.
Startup Cost and Management Fees	Attorney fees vary and may include court costs. Corporate trustee fees often 1% - 2% (with required minimum funds). Pooled trusts enrollment fees of \$200-\$1,000 with varying administrative costs (typically 1%-2%).	Attorney fees vary and may include court costs. Corporate trustee fees often 1% - 2% (with required minimum funds). Pooled trusts enrollment fees of \$200-\$1,000 with varying administrative costs (typically 1%-2%).	\$0 to establish (there may be a minimum deposit). Ongoing fees vary by state (average \$0 - \$60).
Annual Contribution Limit	No limit.	No limit. Other family members may contribute, but no funds belonging outright to the beneficiary may be added.	\$15,000 total annual limit (2020) from all sources. Additional contribution allowed from beneficiary’s work earnings up to poverty amount (\$12,490 for continental U.S.; \$15,600 for Alaska; \$14,380 for Hawaii – 2020)
Maximum Holdings	No limit	No limit	Varies by state (\$100,000 - \$529,000). Anything beyond \$100,000 is not exempt from SSI resource limit – SSI benefits are suspended until balance falls below \$100,000.
Medicaid Payback	Yes. Funds may not be used for funeral expenses prior to payback.	No Medicaid payback. The Grantor determines how remaining funds are distributed upon the beneficiary’s death.	Yes. Funds may be used for funeral, burial and QDEs prior to payback. (Some states do not require Medicaid payback for ABLE participants who are residents of their state and enrolled in their state’s plan.)
SSI Income	Cash, including gift cards or certificates paid directly to the beneficiary, is unearned income. Food and/or shelter is in-kind support and maintenance.	Cash, including gift cards or certificates paid directly to the beneficiary, is unearned income. Food and/or shelter is in-kind support and maintenance.	Disbursements may be made for QDEs without resulting in a one-third reduction in SSI. However, money taken out for rent or housing expenses must be paid in same month or it is counted as a resource.