



## Elder Law: Exploring trust option for the disabled

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Under both federal and state law, there are a variety of programs to help a person with disabilities.

Our society has embraced the collective need to help people with disabilities lead better lives. Services to do so may come in the form of medical care, home and community based services, prescriptions, various types of therapies, and related social services.

Pennsylvania, specifically, has generous programs relative to other states across the country. However, the financial requirements to qualify for these programs are strict. Basically, in order to qualify for important programs such as Supplemental Security Income and Medicaid, an applicant must have less than \$2,000 in assets.

**The Problem:** Let's look at a few scenarios: First, a person who has worked for several years and accumulated some savings and assets suddenly becomes disabled (possibly a work-related injury, catastrophic accident or simply general health decline). This person now needs expensive daily medical care that is typically not covered by insurance after a period of rehabilitation. So, there is a choice: do without the care or exhaust a lifetime of savings.

**Second Scenario:** A person is born with a disability or acquires such disability as a minor and then becomes an adult. Without proper planning by the family, that person may inherit assets some day; a house; an IRA; investments; etc. The mere receipt of (or legal right to receive) such assets will trigger the legal requirement to disclose such value to government program administrators, resulting in termination of important benefits and social structure (i.e. caregivers) that are vital to that person's daily survival.

**The Solution:** While there have been various legal planning techniques over the years, in 1993, Congress decided to clarify the situations in which people with disabilities could effectively protect assets from being spent down to pay for care that would otherwise be covered under government programs.

This declaration by Congress was part of the Omnibus Budget Reconciliation Act of 1993. The Act allows a disabled person to establish a “special needs trust” for his or her own benefit, without such trust assets being counted by the government toward the strict limitations of federal and state law.

The technicalities are as follows:

1. The trust beneficiary must be under age 65 at the time the trust is created and funded;
2. The beneficiary must be disabled under the Social Security Administration’s definition of disabled;
3. The trust must be for the “sole benefit” of the beneficiary;
4. The trust must be created by the parent, grandparent, guardian or the court; and
5. Upon the death of the beneficiary (or early termination of the trust), the state Medicaid agency that provided services for the person with disabilities must be paid back from whatever funds are remaining in the trust before it can be distributed to the heirs. This is known as the “payback” provision, and the trust is known as a “(d)(4)(a) payback trust” (the specific section of the law).

Special needs trusts have a variety of uses and can pay for a wide range of items for the beneficiary. The operative language of the trust indicates that the trustee should use the trust funds to supplement (not supplant) the government benefits that are available. In that way, the trust can truly enhance the life of a person with disabilities without compromising valuable government benefits and services.

While there is a payback provision, this only applies to the trust assets and does not impose liability on the person’s family to pay back the Medicaid benefits. Basically, whatever is left in the trust is used. If it is exhausted, then there is simply no payback.

In addition, Social Security does not require a payback from the trust. Therefore, a person with disabilities can benefit from thousands of dollars of Social Security payments over his or her lifetime without repaying them at a future date.

With the extremely high cost of health care, even a small amount of assets could be spent down in only a few months. By using a special needs trust, a person can “stretch” his or her savings for significantly longer than without the trust and enjoy a better life.

We have used special needs trusts in a variety of situations. However, it’s important to know that even if a person did not establish a special needs trust before they received money (through work, inheritance or personal injury settlement), it may not be too late to still reap the benefits of this planning technique. For example, if a person is receiving structured settlement payments from an injury settlement, it is possible to assign that structured settlement to a special needs trust, thereby allowing the person to qualify for government programs, which could save significant dollars for monthly health care costs.

Another consideration is when a person with disabilities turns 65, he or she may assume that there are no options to establish a special needs trust.

While it is true that a person age 65 or older cannot establish a traditional special needs trust as set forth in the Omnibus Budget Reconciliation Act of 1993, there are a variety of planning techniques available to older people with disabilities. The important thing to realize is that it is never too late to plan.