

OKC COMMUNITY FOUNDATION

SPECIAL NEEDS TRUSTS by Lee M. Holmes, Attorney, CELA*

What is a Special Needs Trust?

Special Needs Trusts (SNT), also sometimes called Supplemental Needs Trusts, are Trusts which hold, manage, and distribute assets and income under Trust provisions which prevent disabled beneficiaries from being ineligible for government benefits. SNTs can be Testamentary Trusts (a trust established under a Last Will and Testament) or Intervivos Trusts (a trust established during life). SNTs have special provisions which can prevent the assets and/or the income of the Trust from being counted as a resource (asset) or income to the beneficiary.

There are many types of SNTs under different federal laws or state laws. The type of SNT which someone may need depends various factors such as age, amount of resources, whether the Trust is for themselves or a disabled beneficiary, etc.

Why would you need a Special Needs Trust?

Special Needs Trusts are used so a disabled or a potentially disabled person can obtain or preserve the benefits of SSI (Supplemental Security Income) or Medicaid or other asset or income based programs. Government programs such as SSI and Medicaid are means tested programs. To be eligible, the applicant for benefits must have limited countable assets and/or income. For example, for SSI or Medicaid, the applicant must have less than \$2,000 of countable assets (sometimes called resources).

Countable assets vs. exempt assets: Many assets owned or available to the applicant are not countable assets. Those assets are "exempt assets." Examples of exempt assets are personal effects, clothing, personal jewelry, household furniture and furnishings, a prepaid irrevocable burial policy (maximum of \$7,500), burial lots, one vehicle (with exceptions and sometimes equity value is limited to \$4,500). A home may also be exempt.

All other assets are countable resources. Examples of countable resources are bank accounts, stocks, bonds, rental real estate, annuities and extra vehicles. Of course, there are always exceptions.

When Should There Be a Special Needs Trust?

A Special Needs Trust should be drafted for all known disabled beneficiaries, even those not presently utilizing government programs. For example, if a person has a disabled child or grandchild, they should provide in their Will or Living Trust for a SNT for the disabled child or grandchild. Even if the disabled child or grandchild is not currently eligible for a government benefit, they may become eligible in the future.

A person cannot create his own SNT. However, under some limited situations, a disabled person may put his assets in a SNT of which he is the primary beneficiary so that he will stay qualified or to get qualified.

Should a parent just disinherit a disabled child or grandchild? Usually no. Simple but not wise. The disabled child may need more financial assistance than the well child. Leaving all the assets to the well child who "I know will take care of my disabled child" is short sighted. The well child may become disabled or die leaving the assets to someone who does not have the same concern for the disabled child.

Who Should Plan To Have a Special Needs Trust?

That depends on the situation. Examples: A parent with a disabled child should nearly always provide for the disabled child with a SNT. A spouse with a disabled spouse can establish a Testamentary Special Needs Trust so the disabled spouse can be eligible for Medicaid to pay nursing home expenses or to qualify for the ADvantage Waiver program for in home help and prescriptions. A disabled parent who wants to qualify for Medicaid benefits to pay for prescriptions or Nursing Home care may be able to transfer the assets to a Special Needs Trust for a disabled child and the transfer will not cause a transfer penalty for the parent's Medicaid eligibility. The various possibilities are too numerous to list. The general rule would be that if there is a person who is

disabled and on government assistance or who may some day qualify for government assistance, then an attorney experienced in SNTs should be consulted.

How Does a Special Needs Trust Work?

A Special Needs Trust should provide:

Intent: It is the intent of the Grantor that assets and income not be deemed available to the disabled beneficiary. It is the intent of the Grantor to supplement government benefits, not to replace government benefits.

Discretionary distributions: The Trustee has complete, unfettered discretion to NOT make distributions to the disabled beneficiary. The Trustee has authority to provide benefits which otherwise are not available from government benefits.

Fortunately in Oklahoma, the Trustee may make disqualifying distributions, when appropriate, in the sole discretion of the Trustee. So in Oklahoma, a Special Needs Trust may be a "trigger trust" - one which at times may make disqualifying distributions and at other times limits distributions to special needs.

Why is this important? The beneficiary may not currently need government benefits, but needs distributions for health, maintenance and support.

Who handles a Special Needs Trust?

A Trustee(s) manages the funds and assets in a SNT and makes distributions. Generally the disabled beneficiary should not be a Co-Trustee, although the disabled beneficiary may be a Co-Trustee if they do not have power to vote on distributions. Corporate Trustees are good at managing funds and are becoming knowledgeable about Special Needs Trusts, Medicaid and SSI programs. Individuals as Trustees must be given special instructions and advice relating to many matters, especially distributions to or for the beneficiaries.

May the Trustees of a Special Needs Trust make disqualifying distributions?

Yes. Depending on how the document is drafted, the Trustees should have the option of making distributions to or for the beneficiary which cause ineligibility for Medicaid or other government benefits. Nearly all Trusts in Oklahoma (present law and interpretation) should have this option. Even self-settled (d)(4)(A) Trusts in Oklahoma may have this option. This option is not appropriate in other states, e.g. Colorado. Therefore, the attorney drafting the trust should be experienced in SNTs and their application in Oklahoma.

Can a disabled person, already on Medicaid, who receives an inheritance stay qualified?

It depends. If the disabled person is under age sixty-five (65), then the inheritance can be transferred by the disabled person to a SNT specially created by a parent, grandparent, court or guardian. This Trust is allowed under 42 USCA 1396 p (d)(4)(A) (sometimes called a (d)(4)(A) Trust or a "payback Trust"). At the death of the beneficiary, any assets remaining in the Trust must first be used to pay back Medicaid for costs paid for the beneficiary.

Disclaimer: The above is a very short summary of some of the aspects of SNTs. It does not constitute legal advice. If you feel that you need a Special Needs Trust, you should consult with experienced legal counsel.

[PHOTO PROVIDED]

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Mr. Holmes is Certified as an Elder Law Attorney by the National Elder Law Foundation as approved by the American Bar Association. He dedicates his law practice to assisting people for qualification for Medicaid for Nursing Home care, or for at home care and prescriptions, and to assisting people with estate planning for disabled beneficiaries who may be on some type of government assistance or may some day need such assistance.

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