Supplemental Needs Trusts: FAQs

Do you have a child with special needs? Learn more about how you can plan your estate so that your child receives the most support.

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01. Why use a supplemental needs trust?

To Preserve Governmental Benefits And Protect Assets...

A Supplemental Needs Trust (sometimes called a Special Needs Trust) is a specialized legal document designed to benefit an individual who has a disability. A Supplemental Needs Trust is most often a "stand alone" document, but it can form part of a Last Will and Testament. Supplemental Needs Trusts have been in use for many years, and were given an "official" legal status by the United States Congress in 1993.

A Supplemental Needs Trust enables a person under a physical or mental disability, or an individual with a chronic or acquired illness, to have, held in Trust for his or her benefit, an unlimited amount of assets. In a properly-drafted Supplemental Needs Trust, those assets are not considered countable assets for purposes of qualification for certain governmental benefits.

Such benefits may include Supplemental Security Income (SSI), Medicaid, vocational rehabilitation, subsidized housing, and other benefits based upon need. For purposes of a Supplemental Needs Trust, an individual is considered impoverished if his or her personal assets are less than $2,000.00.

A Supplemental Needs Trust provides for supplemental and extra care over and above that which the government provides.

Supplemental Needs Trusts had been used for years based upon case law. In 1993, Congress created an exception under the amendments to the Omnibus Budget and Reconciliation Act (OBRA-93) which specifically authorized the use of Supplemental Needs Trusts for the benefit of individuals who are under the age of 65 years and disabled according to Social Security standards. The Social Security Operations Manual authorizes the use of Supplemental Needs Trusts to hold non-countable assets.

Each Supplemental Needs Trust is its own "entity" with its own Federal Identification Number (Employer Identification Number) issued by the Internal Revenue Service. The Trust is not registered under either the Grantor's or the Beneficiary's Social Security Numbers.
According to Congress a Supplemental Needs Trust must be irrevocable. A properly-drafted Trust will include provisions for Trust termination or dissolution under certain circumstances, and will include explicit directions for amendment when necessary.

02. What can a supplemental needs trust be used for?

To Ensure That Your Disabled Family Member Has Every Opportunity For A Fulfilled And Happy Life . . .

According to the law, a Supplemental Needs Trust can be used for "supplemental and extra care over and above what the government provides." A properly-drafted Supplemental Needs Trust will work on a "sliding scale"; that is, in the impossible event that the government provides for 100% of the disabled beneficiary's needs the Trust will provide 0%. If there are no governmental benefits available, the Trust can provide 100%. Most people fall somewhere along the scale, and the Trust supplements governmental coverage. If a beneficiary falls into a Medicare "doughnut hole" for example, it becomes the Trust's job to cover the shortfall. Although there are Medicaid rules that say that the Trust cannot be used for housing or food, these rules have to be interpreted carefully. For example, there is no restriction on purchasing an accessible home or making accessibility adaptations to an existing home and having the Trust own or pay for them. Likewise, although foodstuffs are not strictly allowable under the rules, social events such as dinner parties are; likewise, vacations and entertainments are permitted.

It is important to remember that a Supplemental Needs Trust is a living legal document that is meant to not only maintain benefits eligibility, but also to bring enjoyment and new, positive experiences to the beneficiary.

03. My family is wealthy and we're not too concerned about governmental benefits. Why bother creating a supplemental needs trust?

To Protect Your Disabled Family Member…

Other types of Spendthrift or Family Trusts aren't appropriate for Special Needs persons because they do not address the specific needs of the disabled beneficiary or his future lifestyle. Even in situations where a family may have significant resources to help a disabled family member a Supplemental Needs Trust should be established to address these issues. Monies placed in the Trust remain noncountable assets and allow the beneficiary to qualify for available benefits and programs. Why sacrifice services that might be available to your relative now and in the future?

Just as importantly, Trust funds are not subject to creditors or seizure. Therefore, if the disabled beneficiary should ever be sued in a personal injury or other type of lawsuit, the beneficiary is not a "deep pocket" because monies placed in the Trust are not subject to a judgment.

04. If having money causes problems for my disabled daughter, why can't I just leave that money to her brother so that he can look after her?

Leaving Money To Others Can Create Serious Problems...

"Disinheritance" was commonly used before the use of Supplemental Needs Trusts was officially recognized by Congress.

Disinheritance as a means of providing for a disabled or ill person puts the assets at risk. A non-disabled sibling holding assets for the benefit of a disabled sibling could be subject to such liabilities such as judgments from automobile accidents, a bankruptcy, or a divorce. Asset transfers, particularly of the beneficiary's own funds, other than to Supplemental Needs Trusts are usually considered "Transfers for purposes of benefit qualification," and are subject to a 36-to-60 month "look back" period, which in effect means that the disabled beneficiary might not be eligible to receive benefits for up to five years after the date of transfer.

Transfers to Supplemental Needs Trusts are exempt from this "look back" and do not cause a disqualification.

In such circumstances, the assets meant to benefit the disabled or chronically ill person could go to pay the judgment creditors or the estranged spouse of the non-disabled sibling. Using a Supplemental Needs Trust guarantees that the funds will be held only for the benefit of the person under the disability or chronic illness, and not for any other purpose whatsoever.

05. What must a supplemental needs trust say?

Supplemental Needs Trusts Need Special Language...

At a bare minimum, the Trust should state that it is intended to provide "supplemental and extra care" over, which is far above what the government provides.

The Trust must state that it is not intended to be a basic support Trust. It should not contain an estate tax provision called a "Crummey Clause."

A properly drafted Supplemental Needs Trust should reference the Social Security Operations Manual and the relevant portions from within the Manual that authorize the creation of the Trust. It must contain the required language regarding payback to Medicaid.

The Trust should also have language explaining the exception to the Omnibus Budget and Reconciliation Act (OBRA-93), provisions which authorize the creation of the Trust, and a copy of the relevant provisions from the United States Code (USC).

06. When should I create a Supplemental Needs Trust?

A Supplemental Needs Trust Is A Valuable Estate Planning And Investment Tool…

A Supplemental Needs Trust can be established at any time before the beneficiary's 65th birthday. It is very common to create a Supplemental Needs Trust early in a child's life as a long term means for holding assets to benefit the disabled family member. This is particularly true of parents who wish to leave funds for a child's benefit after the parents' death. The Supplemental Needs Trust is the estate-planning tool of choice for those parents. As a part of Estate Planning, the costs of the creation of the Trust are tax deductible.

Additionally, the disabled or chronically ill individual may at some time during his or her lifetime come into funds from third party sources, such as a personal injury settlement or a bequest from relatives or friends, Social Security back payments, insurance proceeds, or the like.

07. Is there an obligation to repay Medicaid, or other state and federal funding sources?

There May Be Repayment Obligations In Some Situations...

A properly drafted Trust will address the issue concerning paybacks to Medicaid or other such sources. The United States Congress mandates that repayment language must be included in all Supplemental Needs Trusts, whether repayment is required or not.

The amendments to the Omnibus Budget and Reconciliation Act of 1993 (OBRA-93) require that a payback be made to Medicaid, but only under certain specific circumstances.

A Supplemental Needs trust that is funded by parents or other third party sources will not be required to pay back Medicaid.
A Trust which is funded by a personal injury Settlement that is properly Court-ordered into the Trust will not be required to pay back Medicaid.

The only assets within the Trust that are subject to the repayment obligation is those assets which originally belonged to the disabled individual him or herself that are transferred into the Trust.

Examples of assets which would belong to the disabled individual in the first place could be such assets as earnings from a job, savings, certain Social Security back payments, personal injury recoveries which are not Court-ordered into the Trust, and the like.

The disabled individual's estate then might be liable for an amount equal to the Medicaid used during the lifetime of the disabled or chronically ill individual.

It is not uncommon for a Trustee or a disabled individual to ask a court to direct certain assets into the Trust. In that event, those assets may not be subject to the repayment provision of OBRA-93.

08. My sister disabled. Can I set up a trust for her?

Yes, But…

The United States Code section that authorizes Supplemental Needs Trusts states that "a parent, grandparent or guardian" is authorized to establish a Supplemental Needs Trust. Siblings, caregivers or friends are not mentioned at all. However, the law does not forbid siblings and others from setting up Supplemental Needs Trusts. The law does not specify whether the "guardian" mentioned must be Court-appointed or can be a "guardian-in-fact," such as a concerned sibling. And it does permit an interested third party (such as a sibling) to establish the Trust under certain circumstances. A well-written Supplemental Needs Trust established by someone other than a parent, grandparent or legal guardian should include a citation to this law for the sake of clarity.

In addition, the Courts in most States have recognized the right of a sibling, friend or caregiver to establish a Trust, and caselaw supports the idea.

Some Attorneys are very reluctant to create a Trust under such circumstances because benefits providers and agencies often create "red herring" difficulties around this issue. Be cautious, and make sure you work with a lawyer familiar with this problem and that the Trust is properly drafted.

09. I have twins with Down Syndrome. Can I use one trust for both of them?

Just As Your Children Are Exceptional So Are Their Trusts…

Each disabled individual must have his or her own Trust document. The law requires that each Supplemental Needs Trust contain specific examples of what constitutes supplemental care for the beneficiary. No one's needs, not even twins, are absolutely identical. This is particularly the case as people get older and their abilities change.

10. I'm very confused. I heard a lawyer say something about having two separate trusts.

It Really Isn't Necessary…

This confusion stems from the Social Security Regulations, which make a distinction between "First Party" (or self-funded) Supplemental Needs Trusts that contain the beneficiary's own money and "Third Party" funded Trusts that contain money from other sources. "First Party" money is usually subject to the Medicaid repayment requirements. Therefore, many lawyers insist on creating separate Trusts. This costs more and is often confusing to the Trustee.
A well-drafted Supplemental Needs Trust should be able to hold money from both "First Party" and "Third Party" sources. Funds from the different sources can be held and managed in the Trust in separate accounts.

11. I heard that a pooled trust does not have to repay Medicaid. Why bother using a supplemental needs trust?

Pooled Trusts Aren't For Everybody…

"Pooled" or Cooperative Master Trusts are a special form of Supplemental Needs Trust, which can be established by not-for-profit organizations or groups on behalf of their membership (for example, a group home may create one for its residents). In theory, Cooperative Master Trusts are an excellent device to aid the disabled. In practice, they have many drawbacks. **Cooperative Master Trusts are no longer exempt from the Medicaid repayment rules**. **Medicaid has implemented recent rule changes that specifically state that funds placed in Cooperative Master Trusts ARE subject to the 36-to-60 month asset transfer "look back" period under certain specific circumstances; hence, transferring funds to a Cooperative Master Trust MAY disqualify a beneficiary from benefits for up to five years.**

The money that is placed in a Cooperative Master Trust is used generally to address the needs of all the members of the group, not just the specific needs of your disabled family member. Once you place your money in the pool it usually cannot be withdrawn or returned to you. You generally cannot direct where the Trust avails will go if your family member leaves the group for any reason. Your money typically remains in the pool to assist future members. **Before investing in a Cooperative Master Trust be sure to ask the Trust Representative about this important issue.** A stronger, better-managed Cooperative Master Trust may be able to return funds to you should your disabled family member no longer be a member of the pool.

You do not have control over how the money is spent, as a rule. As a result, your family member may not get all the services he or she needs or might want. Management of Pooled Trusts is often given over to Accountants, Professional Trustees, Financial Planners, or financial institutions. Due to their relative rarity, Cooperative Master Trusts are frequently mismanaged and many have failed, leaving the group members without funds. Cooperative Master Trusts *can* work well if you find one that is properly written and supervised and if you are willing to relinquish control of your assets to others. If this is an

option that appeals to you, you are well advised to seek out a group that you know well and trust, can serve your special needs, and which has an established track record of successful Trust management. **Be cautious.**

12. I'm my son's trustee. That makes me his guardian, right?

Not Right…

Parents often assume that because they are their children's caregivers that they are also their lifetime guardians. This is not correct. Every person over the age of eighteen is presumed to have the legal rights of an adult no matter what their abilities.

In order to be someone's Guardian a parent or sibling must go to Court and petition to become responsible for that person. They must demonstrate to the Court that the disabled person is unable to act responsibly on their own behalf.

Merely setting up a Trust, becoming a Trustee, becoming a Power of Attorney, or being someone's Representative Payee for Social Security purposes does not make you a Guardian even if you may have effective control of the disabled person's finances and provide for all their needs.

There are several types of Guardianship. If you feel one is necessary consult an Attorney familiar with Guardianship law to determine which is proper for your circumstances.
There are several types of Guardianship. If you feel one is necessary consult an Attorney familiar with Guardianship law to determine which is proper for your circumstances.

I just created a family trust for a wonderful couple in their late 40s. She had wanted to create living trust for over five years, but struggled to bring up the conversation in the business of life. *Plus, who wants to talk about death?* After a medical scare, the couple found that it was much easier to make the commitment and contact me to make the trust.

What was remarkable, was to see the relief that she and her husband had after we completed the trust. They were confident, assured, and ultimately at peace with the future.

As I was leaving their home after delivering the final documents, she shared this with me as we stepped outside: "That was five years wasted."

So you don't have to waste five years, I've put together these tips for bringing up a difficult subject with your spouse:

1. **Current Events -** One way to ease into the conversation is to talk about how you have seen a situation in the news or know of something that has happened to someone you know, regarding their families and a living will.

   "I just saw on Facebook that my good friend Laura from high school passed away. I called and talked to Sarah, and she said that the family is grieving, and there is a lot of division amongst Laura's children. Apparently, they didn't have family trust, so it's turned into a big mess… Don't you think it's time that we look at a trust for our family?"

2. **Talk About Your Children** - If you are anything like me, you love talking about your children. If you and your spouse are enjoying a conversation about how your children are growing up, take a moment to talk about the what ifs.

   "Eleanor is already six years old. I love that girl! … I hate to talk about this, but if you and I were to get in a car accident and die, who would take care of her? I know we want to be around forever, but that's not reality. We need to take steps to make sure that Eleanor will be in good care…"

3. **Joke about Inheritance** - Talking casually about inheritances can easily help break the ice and lead into a conversation about your estate plans.

   "After how he drove me car over Thanksgiving, I know one thing for sure, our son will not inherit my BMW. That's for our more careful daughter to enjoy… Don't you think it's time we talk about what will happen after we pass? Yes, lets talk about inheritance, but what about the rest? Who will care for our youngest? Who will be our trustee?"

13. About Mom and Dad's Estate Plan

If you are wanting to talk to your parents about a living will, but do not know how to start the conversation, you can always talk to your siblings and think of a how you can all talk to them in a group. This will help by not placing all the stress on yourself, but also help your parents see that the entire family is concerned and wants the best for them.

Then when the family has gathered together, maybe for dinner, open the conversation with something meaningful but easy to talk about:

> "Do you and Mom want to live in this big house forever? What are your plans for retirement? Do you want to live here or move to a warmer climate?

By asking simple questions like these, you can easily lead into an estate planning conversation.

14. Bottom Line: Now Not Later

Talking about estate planning and living wills is never easy and some are often hesitant to talk to their families because they just don't know how to bring up the conversation without making everyone uncomfortable. But the conversation is essential. Take the step and do it today!

