

SPECIAL NEEDS PLANNING **WHAT OPTIONS ARE AVAILABLE?**

By Attorney Danielle Streed
Law Office of Danielle Streed & Associates, PLLC
480 W. Lovell, Kalamazoo, MI 49007; PH: 269-276-0055
Website Address: www.streedlaw.com

This article is designed to help you understand what protections are available if one of your beneficiaries is receiving government assistance. The general purpose of special needs planning is to improve that beneficiary's quality of life. Special Needs Trusts and the planning that goes with it can be complicated, both from a planning standpoint as well as an administration standpoint.

It is first important to determine if one of your potential beneficiaries is receiving benefits through a government program such as SSI, SSDI (disability) and/or Medicaid. Some government benefits do not impose a financial eligibility requirement. SSI and Medicaid are "means-tested" benefits. SSDI and Medicare are not. If a beneficiary is receiving SSI and/or Medicaid, that beneficiary cannot have more than two thousand (\$2,000) dollars in an account without losing those government benefits. However, keep in mind that even if a beneficiary is receiving SSDI (disability) and Medicare and they are not currently receiving SSI or Medicaid, it may still be a good idea to consider setting up a Special Needs Trust. Public benefit programs are continually at risk of budget cuts. Once you have passed away or if you are no longer competent, you will no longer have the ability to make changes to your Trust to address changes in the beneficiary's benefits. However, when setting up your Trust, you can address both your beneficiaries' current situation or benefits and any changes they may experience in future benefits.

SELF SETTLED SPECIAL NEEDS TRUSTS

When it comes to Special Needs Trusts, there are two commonly used Special Needs Trusts. The first is the **Self Settled Special Needs Trust**. This type of Trust is set up by the beneficiary (or someone acting on their behalf). To determine whether or not a Self Settled Special Needs Trust is the right type of Trust, you must first ask yourself "Does the beneficiary have the right to outright possession of the proceeds prior to the Trust being established?" For example, did the beneficiary inherit funds or did they receive funds recovered in litigation? In other words, the monies received are really the property of the beneficiary. If the answer is yes, then the Self Settled Special Needs Trust is the right Trust to use. If the beneficiary were to hold those funds in their name, outright ownership with full control will affect the government benefits that they are receiving.

The Self Settled Special Needs Trust must be set up with court approval. It typically involves some help from a family member or a court appointed guardian/conservator. A petition must be filed with

the court requesting that these funds be placed in a Self Settled Special Needs Trust. The Trust allows a Trustee to distribute income and/or principal for the benefit of the beneficiary, so long as it is not replacing any benefits already being covered by government assistance (such as housing, utilities and food).

A significant difference between the Self Settled Special Needs Trust and the Third Party Special Needs Trust is that the Self Settled Special Needs Trust requires that upon the death of the beneficiary any remaining funds must be paid back to the state Medicaid program as a form of reimbursement. This is why many of these Self Settled Special Needs Trusts are commonly referred to as “Medicaid Payback Trusts.”

THIRD PARTY SPECIAL NEEDS TRUST

A Third Party Special Needs Trust is the second type of Special Needs Trust. One of the biggest differences is that this Trust is established by someone other than the person with the disability. In many cases, but not always, it is a parent or a grandparent. The assets placed in a Third Party Special Needs Trust never belonged to the beneficiary. In most cases, the Third Party Special Needs Trust is set up with inheritance funds that pass into the Trust as opposed to passing outright to the beneficiary. This Trust also provides the Trustee permission to use income and principal for the benefit of the beneficiary without affecting the beneficiary’s government assistance. The difference between the Third Party Special Needs Trust and the Self Settled Special Needs Trust is that with a Third Party Special Needs Trust (set up by someone other than the beneficiary) this Trust does not require a payback provision to the Medicaid program. Upon the death of the beneficiary, any remaining funds in the Third Party Special Needs Trust can be distributed per the terms of the Trust and the funds do not have to be paid back to the state Medicaid program.

ACTING AS TRUSTEE

When it comes to serving as the Trustee of a Special Needs Trust, it is extremely important that you understand the restrictions or limitations when it comes to making a disbursement to or for the benefit of the beneficiary. If the beneficiary is receiving government benefits, many of those benefits are intended to provide for food and shelter and if funds are used from the Special Needs Trust to pay for any portion of their food and shelter expenses, the government assistance being received could be cut or significantly reduced. For example, if a beneficiary is receiving an SSI benefit of \$698 a month and funds from the Special Needs Trust are used to pay part of that beneficiary’s rent or to purchase food, the \$698 monthly benefit could be cut on the premise that the beneficiary is getting help from another source.

The good news is that there are several items that can be paid for with funds from the Special Needs Trust, without affecting the beneficiary’s assistance. Such uses include, but are not limited to, (1) clothing; (2) phone, cable and internet services; (3) vehicle, insurance, maintenance, gas; (4) prepaid

funeral/burial arrangements; (5) tuition, books and tutoring; (6) travel and entertainment; (7) household furnishings and/or furniture; (8) television, computer, and electronics; (8) care,

therapy and alternative treatments; (9) legal, guardianship and Trustee fees.

As stated earlier, the Special Needs Trust funds cannot be used for food and shelter. What is important to understand is that the Social Security Administration identifies shelter as mortgage payments, property taxes, rent, heating/fuel expenses, gas, electricity, water, sewer and garbage removal. In some cases, payment of a condominium assessment or condominium association fees may be viewed as a partial payment of water, sewer and/or garbage.

ABLE ACT

What if the above two Trust options seem too complicated in light of the amount of money in question. In December 2014 the federal government passed the ABLE Act. Able stands for Achieving a Better Life Experience. Although the State of Michigan has not completed all of the internal terms of how the ABLE Act will apply in Michigan, here is a brief overview of what the ABLE Act is intended to address:

The ABLE Act is part of Section 529 of the Internal Revenue Code which is more commonly referred to as the College Savings Account. With an ABLE account, a person with a disability can only have an ABLE account if they were severely disabled by age 26. What does it mean to have a disability before age 26? The individual must have been receiving supplemental social security income (SSI) or social security disability income (SSDI) benefits prior to age 26. Each person with a disability can have only one ABLE account and it must be set up in the state where the beneficiary lives, not in another state. With the ABLE account, contributions may not exceed \$14,000 in any given year. The maximum amount in an ABLE account will typically be set by State law, but at this point, it is anticipated that no more than \$100,000 can be placed in an account without the beneficiary losing their SSI benefits. Much like the Self Settled Special Needs Trust, when the ABLE beneficiary dies, any funds in the ABLE account must be paid back to the state Medicaid program.

What can the ABLE account funds be used for? They can be used for qualified disability expenses. If they are used for qualified disability expenses, there is no income tax or capital gain on the funds in the ABLE account, and use of the funds will not be counted as income to the beneficiary. Although we do not have a clear idea of what the qualified disability expense will cover, we do know from previous definitions that qualified expenditures have included education, housing, transportation, employment training and support, assisted technology and personal support services, health, prevention of illness, financial management and administrative services, legal fees, and funeral and burial expenses.

Depending on the amount of money that a disabled beneficiary has received or inherited will determine whether the ABLE account is the appropriate route to go or whether a Self Settled Special Needs Trust may be more appropriate.