

TESTAMENTARY SPECIAL NEEDS TRUSTS: PLANNING AND ADMINISTRATION


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TWO SIDES OF THE COIN

Side A: Planning the Special Needs Trust

- Is it needed?
- Mandatory or "trigger?"
- What are the tax considerations?
- How will it be funded?
- How much should it hold?
- Who to name as trustee?
- Who should be the remainder beneficiaries?




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TWO SIDES OF THE COIN

Side B: Administering the Special Needs Trust

- Are the "trigger" conditions met?
- Is the Trustee able and willing to serve?
- Does the beneficiary receive benefits now?
- How will it be funded?
 - Specific amount?
 - Percentage of the residuary estate?
- If it is for a spouse, how do you tease out the Trust's share?




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PLANNING THE TRUST 

Things to Do

- Ask: What does the client do now to support the disabled person? What do they envision in the future?
- Spend time talking about the advantages and disadvantages
- Consider how soon the trust is likely to be established
- Talk about optimal funding (does it need \$10,000 or \$1,000,000?)
- Talk about the job of the trustee—who should be named?


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PLANNING THE TRUST 

Things to Avoid

- Assume all disabled people will need a trust
- Gloss over tax considerations
- Treat all Special Needs Trusts the same
- Overfund trusts unnecessarily
- Make it too complicated (“Nevermind, I’ll just leave his share to his sister.”)


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PLANNING THE TRUST 

Advantages to Discuss

- Preserves benefits and eligibility
 - SSI, Medicaid, LTC Medicaid
- No Medicaid payback if it is testamentary (differentiate from a first-party trust)
- Builds in trust protections (trustee, spendthrift)
- Makes it possible for a disabled person to have more than benefits will cover

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PLANNING THE TRUST 

Disadvantages & Challenges to Discuss

- Requires a will-based plan for spouses
- Income taxation
- Potential problems getting an IRA stretch
- Trustee hesitancy
- Remainder beneficiaries


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PLANNING THE TRUST 

Disadvantages & Challenges to Discuss

- Requires a will-based plan for spouses
 - A testamentary provision in a Will is the **ONLY** way a person can create a SNT for a spouse. (WAC 182-516-0115)
 - All other trusts for spouses are treated as first party SNT's and generally deemed available.
- What about a beneficiary designation of retirement account to Testamentary SNT?
 - Should be okay if the test. SNT was initially funded with estate assets.


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PLANNING THE TRUST 

Disadvantages & Challenges to Discuss


- Income Taxation
 - If you expect the trust to generate net income, the best-case scenario is a qualified disability trust in most cases.
 - As of 2020, a qualified disability trust can claim an exemption of up to \$4,300
 - The rest can be taxed at the beneficiary's marginal rate.
 - Great resource: <https://www.specialneedsalliance.org/the-voice/is-a-qualified-disability-trust-appropriate-2/>

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PLANNING THE TRUST 

- Qualified Disability Trust treatment requires:
 - The trust must be irrevocable;
 - The trust must be established for the sole benefit of the disabled beneficiary;
 - The disabled beneficiary must be under the age of 65 at the time the trust is established; and
 - The beneficiary must have a disability that is included in the definition of disabled pursuant to the Social Security Act.


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Disadvantages & Challenges to Discuss

- SECURE Act of 2020
 - To get the stretch for IRAs directed to a Special Needs Trust (which is an accumulation trust), you must make it a see-through trust and the beneficiary must be disabled.
 - Still a lot of controversy about this.


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Disadvantages & Challenges to Discuss

- Trustee Hesitancy
 - What is the relationship between the trustee and the beneficiary?
 - Is it “wishful thinking” to imagine the trustee in the role?
 - Does a professional make more sense?


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PLANNING THE TRUST 

Disadvantages & Challenges to Discuss

- **Remainder Beneficiaries**
 - They will continue to have rights as beneficiaries. Is this good?
 - Will they be alive when the primary beneficiary dies? Does the Will make a good plan for the trust estate?


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ADMINISTERING THE TRUST 

Things to Do

- Formalities—acceptance of role, trust notices, funding the trust
- Know the rules for specific benefits programs
 - What benefits does the beneficiary receive now? Are there benefits he or she should could obtain in the future?
 - Do not rely on general trustee guidance; the rules are very different across benefits programs and jurisdictions.

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ADMINISTERING THE TRUST 

Examples of how the actual benefits matter:

- **Beneficiary is on SSI and Medicaid:**
 - Food and shelter expenses paid by the trust (in-kind support and maintenance) will reduce the SSI benefit
 - Cash distributions will reduce and potentially disqualify the beneficiary
- **Beneficiary is on SSDI and Medicare:**
 - These benefits are not affected by the trust
 - However, the beneficiary may be receiving a Medicaid supplemental benefit with an asset/income limit!

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ADMINISTERING THE TRUST



Things to Avoid

- Assuming the Trustee will know what to do ("Good luck!")
- Funding the trust poorly (e.g., a house with no assets for maintenance and taxes)
- Adding the Beneficiary's own assets to the same trust (tainting it into a d4A)

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HOME POINTS

- Spend time on the planning process
- Think about how a special needs trust might work in the near-term AND the long-term
- Avoid trusts that everyone will want to PEDRA around

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