



# Pooled Special Needs Trusts: Preserving the Assets of People with Disabilities

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*Mark Albertson, Attorney at Law • Albertson Law Group,  
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[mark@albertsonlaw.com](mailto:mark@albertsonlaw.com) • (877) 246-8772 x319

I am an attorney in Washington who focuses on helping families with special needs children. I am also program counsel for the Washington and Oregon Charitable Pooled Trusts. These trusts serve the needs of persons with disabilities who need to preserve eligibility for public benefits, when they receive funds from a lawsuits or unplanned inheritances. In many cases, the Pooled Special Needs Trust can be a cost effective tool to preserve eligibility for needs Supplemental Security Income (SSI) or Medicaid.

To appreciate Pooled Special Needs Trusts, one needs to understand Special Needs Trusts in general. Special Needs Trusts are in their essence, arrangements where funds can be invested for a recipient of SSI or Medicaid without losing eligibility. The Social Security Administration describes a valid Special Needs Trust as "a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions." If the beneficiary has no discretion over the distributions, the trust is not counted for SSI eligibility. Keep in mind that Special Needs Trusts mean a loss of control by the trust beneficiary. The Special Needs Trust cannot give cash directly to the beneficiary, but can pay for services directly and certain exempt resources without causing a loss of benefits eligibility.

Special Needs Trusts can be divided into two categories: Third Party Special Needs Trusts and Self-Settled Special Needs Trusts. The Third Party Special Needs Trust is typically created by a parent with the parent's assets for their disabled child. Third Party Special Needs Trusts generally are permitted great latitude, and upon the death of the beneficiary, any remaining assets in the trust can be left to anyone the grantor chooses without any liens by the government.

The second category is Self Settled Special Needs Trusts. A Self Settled Special Needs Trust is a trust that contains the assets of an SSI or Medicaid recipient. These trust were codified in the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) at 42 U.S.C. § 1396p (d) (4) (A)- Self Settled Trust, and 42 U.S.C. § 1396p (d) (4) (C)- Pooled Trust. With the (d)(4)(a) trust, the State Medicaid Agency must be repaid for any Medicaid used by the benefits recipient before amount can be paid to the beneficiary's heirs. Basically, the benefits recipient is making a bargain with the government to retain eligibility for SSI and Medicaid and they will repay the government upon their death for any benefits used during their lifetime. Of course, in many cases, the funds are long spent before the beneficiary dies.

The Self Settled Special Needs Trust (d) (4) (A) allows an SSI or Medicaid recipient to place their own funds in a trust for their needs, but the trust must be created for an individual under age 65 and established by a parent, grandparent, legal guardian of the individual, or a court. Federal law also requires that upon the death of the beneficiary, the State must receive all amounts remaining in the trust up to an amount equal to the total Medicaid used during the beneficiaries lifetime.

The Pooled Special Needs Trust (d)(4)(c) allows an SSI or Medicaid recipient to place their own funds in a trust for their needs meets the following conditions:

- The trust is established and managed by a nonprofit association.
- A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust are established solely for the benefit of the disabled individual by the parent, grandparent, or legal guardian of such an individual, by such an individual, or by a court.
- To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from the remaining amounts in the account an amount equal to the total amount of Medicaid assistance paid on behalf of the beneficiary under the State plan under this subchapter. Under Washington and Oregon law, however, the beneficiary can designate another charity to receive a portion of the proceeds, or the balance at the beneficiary's death can remain in the pool to assist other, less fortunate disabled people.

A Pooled Special Needs Trust is somewhat like a cross between a 401(k) and a Special Needs Trust. Beneficiaries do not get their own documents, but instead join the trust and establish an account for their sole benefit. The account is then administered like any other Special Needs Trust.

One of the major differences between the Self Settled Trust and the Pooled Trust is that Pooled Special Needs Trust has no age limitation and the benefits recipient can protect eligibility for SSI and Medicaid without their parent's permission.

Also, one challenge with individual special needs trusts is that the trustee's job is a big one. Accountings must be made, investments must be prudently handled, tax returns must be completed and distributions must be carefully made so that they do not jeopardize SSI/Medicaid benefits. Consequently, you are either asking a friend or family member to take on a long-term, high responsibility liability, or are asking a corporate trustee to handle the trust, which may have minimums above \$250,000 and fees at over 1% of the value of the trust. This is usually unworkable with smaller amounts of money.

### **Examples Where Pooled Special Needs Trusts Might Be Used**

Below are some examples of some of my clients that have benefited from utilizing a Pooled Special Needs Trust.

Helen is 58 years old, has inherited \$60,000 from an unexpected inheritance from her aunt, and is receiving SSI and Medicaid. Loss of her Medicaid would cause her great hardship. She has no parent or grandparent alive, and to establish a Self Settled Special Needs Trust would require a court order. Setting up a court ordered Special Needs Trust would cost \$5,000 to \$7,000, take 3 months or longer, and would require costly court supervision. Helen could instead join a Pooled Special Needs Trust at a fraction of the cost, have professional administration of the account, and avoid court supervision.

John has Multiple Sclerosis, has a residence worth \$400,000, and wants to sell the home and purchase a smaller residence for \$100,000. John would like to use the balance to pay for his care. Both SSI and Medicaid allow a benefits recipient to own a residence of any value, but if John retains more than \$2,000 in his own bank account, he will have a loss of eligibility. If John does not have a parent or grandparent alive, he would be faced with a costly legal procedure to authorize the establishment of a Self Settled Special Needs Trust. John could put the balance of the funds in a Pooled Special Needs Trust and then use the account to pay for his care that is not covered by Medicaid. If the trust pays for his attendant care directly, there will be no loss of his benefits.

Jane is the recipient of a civil rights settlement totaling \$50,000. Her wish is to use the funds to go to law school with the hope that someday she can get off public benefits. She placed her funds in the Pooled Special Needs Trust, and the trust is paying her tuition and buying her books. Her goal is to get a job with good medical benefits and not be reliant on public benefits for the rest of her life.

Sam is 67 years old and has become disabled because of a work related injury. He is receiving the maximum SSI, and Medicaid. Sam is going to receive a Workman's Compensation award of \$64,000. John is receiving Medically Needy Medicaid and feels it is unlikely that he is going to need to be in a nursing home so long as he has dependable attendant care. A Self Settled (d) (4) (A) Special Needs Trust is not an option because he is over the age of 65. The Pooled Special Needs Trust will pay for his attendant care directly.

Albert has Cerebral Palsy and receives SSI, Medicaid and Section 8. He inherited \$120,000 directly from his father. He wants to use the funds to purchase a residence, and through a program offered by Fannie Mae called HomeChoice he qualifies for a 3% loan, and can use his Section 8 Voucher towards payment of the mortgage. He estimates that it will take 9 months to qualify for the program. Albert places his funds in a Pooled Special Needs Trust and uses \$80,000 towards a down payment. The remaining funds are retained to pay for maintenance.

## **How to select a Pooled Special Needs Trust**

Pooled Special Needs Trusts are not without their problems and risks. There are many Pooled Trusts that serve their beneficiaries well, but there are others that are problematic. Sadly, some well-intentioned Pooled Special Needs Trusts fail because of poor administration or management. Questions that one should ask are

- **How long does it take to make a distribution?** Some trusts can take weeks from the time a request is made until the distribution is actually made. A well run Pooled Special Needs Trust should take no more than a week from time of request to time of distribution.
- **How are the funds invested?** The risk tolerance (ability to withstand financial loss with investments) of most benefits recipient is very low. Care needs to be made that the funds are not placed in risky investments.
- **Is the trust solid as a business entity?** Oddly enough, choosing a Pooled Special Needs Trust that has the lowest fee can be a mistake. The trust that has little or no cost is probably run by volunteers and may not be responsive, the most knowledgeable investors, or viable for the long term.
- **What is the policy regarding retained assets in the trust?** Many Pooled Special Needs Trusts require that some or all of the assets remaining in the trust upon the death of the beneficiary be retained by the non-profit that oversees the trust and is either redistributed to other recipients or pay for the general operating costs of the non-profit. Some do allow whatever may be remaining to be distributed to heirs the beneficiary selects. Keep in mind; the State Medicaid Agency will have a lien on the assets upon the death of the beneficiary that in many cases will be greater than the account.

## **Last Thoughts**

Pooled Special Needs Trusts are not a substitute for getting good counseling before committing funds to the Pooled Special Needs Trust. It is important to look at all alternatives before joining the trust. For instance, if the beneficiary needs an exempt resource such as a wheelchair van, it may be preferable to purchase the van outright rather than place the funds in the trust. If the beneficiary has debt, it is probably a good idea to pay off the debt. Two good sources for counseling before joining a Pooled Special Needs Trust is by consulting with an experienced Special Needs Trust Attorney or a qualified Special Needs Planner. A good place to locate an attorney is through the Academy of Special Needs Planners (ASNP) at their website: <http://www.specialneedsanswers.com>.

Pooled Special Needs Trusts can be an excellent solution when a person with a disability receives funds that could potentially cause a loss of eligibility for SSI or Medicaid. In addition, these trusts provide professional management that might otherwise be too expensive.