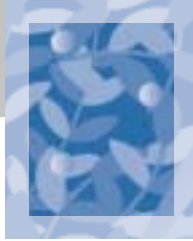


# Trusts



STABLISHING A TRUST PROVIDES A WAY TO SET ASIDE MONEY AND OTHER ASSETS FOR YOUR CHILD'S BENEFIT — DURING YOUR LIFETIME OR AFTER YOUR DEATH — WITHOUT JEOPARDIZING GOVERNMENT BENEFITS THAT MAY BE NEEDED. CREATING AND FUNDING A TRUST MUST BE DONE PROPERLY TO ASSURE THAT YOUR GOALS ARE MET.

*“Start by doing what's necessary, then what's possible, and suddenly you are doing the impossible.”*

*—Saint Francis of Assisi*

## What is a Trust?

A trust is a legal document that provides a way for someone to take care of assets, including money or property, for someone else. Trusts are not just an option for wealthy families — if set up early, even small, regular contributions can grow into a trust fund that can greatly enhance a person's quality of life, if planning is done properly.

Trusts can be created for many different reasons. If a person with a disability cannot make responsible financial decisions, a trust can direct who will handle those decisions, including how to invest and spend the trust money. Some people set up trusts to avoid probate, the process followed after a person dies owning assets.

Trusts can also be created to supplement the government benefits a person with a disability may be receiving (or later become eligible for as an adult) such as SSI, SSDI, Medicaid, or Medicare, without jeopardizing the benefits. These trusts are called “supplemental needs trusts,” “discretionary trusts,” or “special care trusts” and will be the focus of our discussion on trusts.

There are many different types of trusts. If your family member has SSI and Medicaid — and you don't want him or her to lose it — you must use a trust that is designed to supplement, but not supplant or replace, government benefits.

Even when you are able to leave money and/or other assets to your child, public financial assistance and health insurance are typically still vital to cover daily living costs and medical care. The money you leave in trust can supplement what the public benefits cover. Even if the SSI payment is not needed, the Medicaid will be needed unless your child becomes employed with health benefits or you can pay for private health insurance.

If you leave assets directly to your child that result in him becoming ineligible for SSI, he will most likely also lose Medicaid. If this occurs, the money you left your child may have to cover health insurance and support needs. This can be avoided with a supplemental needs trust.

## How to Create a Trust

A trust is created by a “grantor” who may be the parent of a person with a disability, another family member or other interested person. The grantor or others can fund the trust, which is done by titling bank accounts, stocks, or other assets in the name of the trust.

The “trustee” is the person named to be responsible for managing the trust fund for the benefit of someone else, the “beneficiary.” In our discussion, the beneficiary is the person with a disability. The grantor may serve as trustee while alive or name someone else.

Trusts are usually created by a will or “trust agreement.” They name the grantor, trustee(s), and beneficiary, and tell the trustee(s) how money should be spent for the beneficiary.

Trusts created by a will are called “testamentary” trusts and become effective upon your death. Your will can include all the information needed to direct where your estate will go when you die, including language setting up a trust and stating which assets will be owned by the trust.

You can change the trust terms any time you change or update your will. After you die, the trust terms cannot be changed and the trust will be created and administered using the language in your will.

Trusts that take effect while you are alive are called “inter vivos” trusts or “living trusts” and are created by a trust agreement. The trust agreement names the trustee and beneficiary, tells the trustee how to spend the trust funds, describes what will cause the trust to end and who is to receive the trust funds when it ends, and includes other information necessary to maintain the trust.

You can fund a living trust while you are alive, either all at once or a little at a time. You can also state in your will that some or all of your estate will be used to fund your living trust when you die. Other people can make contributions to the trust while they are alive or upon their deaths, through their wills.

## **Revocable vs. Irrevocable**

Living trusts can be “revocable” or “irrevocable.” A revocable trust is one that you can change or terminate at any time during your lifetime, as long as you have the mental capacity to make the changes. The assets in a revocable trust are still considered to be yours since you can regain possession of them. This may be important should your own situation change due to disability, health, job status or other circumstances.

An irrevocable trust is more permanent because you cannot change or revoke it. When you transfer your assets into an irrevocable trust for someone else, you cannot take those assets back so they are no longer considered your assets. Your attorney can assist you in considering your needs and your child’s needs, and any tax implications, so you can decide whether a revocable or irrevocable trust is most appropriate.

Trusts are very complicated but can be very useful tools in setting up your estate plan. Whether a revocable or irrevocable trust is appropriate can be determined by an attorney, considering issues such as tax planning, protection of assets, long-term care planning, and probate issues. Be sure to use an attorney who is familiar with estate and tax planning techniques, as well as disability issues like government benefits.

## **Supplemental Needs Trusts**

If a person who is eligible for means-tested government benefits (e.g., SSI and Medicaid) directly receives money or other assets, through a gift, inheritance or some other way, and the additional assets put the person over the total allowable asset limit, he or she could lose benefits. If this occurs, the individual typically must spend the assets until they are below the asset limit and then re-apply for benefits. Sometimes, people with disabilities have housing, medical or other personal expenses that are so high that they spend the additional money very fast. A properly worded and administered supplemental needs trust avoids this. The individual may also create a “payback trust” or join a “pooled trust” with his assets. These are described in this section, including their advantages and disadvantages.

If a gift or inheritance is paid to a supplemental needs trust, rather than directly to your child, you can avoid the loss of benefits. Instead of spending the money on living and/or medical expenses, the gift or inheritance can be used to improve your child’s quality of life.

This might include things like an electric wheelchair or communication device not covered by insurance, a computer, vacations, visits to and from family, and other personal needs. The trustee must be careful in spending the trust funds on the beneficiary’s behalf, because expenditures for items that are covered by public benefits may jeopardize the beneficiary’s eligibility for those benefits.

Like most trusts, supplemental needs trusts vary widely and range from relatively simple planning tools to manage modest sums of money, to intricate agreements making up only a single piece of a complex estate plan. Supplemental needs trusts (SNTs) can be divided into three categories: (1) SNTs created and funded by someone other than the beneficiary; (2) SNTs funded with a disabled individual's own assets; and (3) Pooled SNTs.

### ***Trusts Created and Funded by Someone Else***

A trust that is created and funded by someone for the benefit of person with a disability is often called a "third-party SNT." If you create and fund a third-party SNT, the assets can go directly to the trust and never be owned by the beneficiary. Because the SNT will own the assets, the beneficiary will not become ineligible for government benefits. The trust funds can be used for the individual's benefit until his or her death, when any assets left in the trust will pass to whoever you named in the trust agreement or will.

Your attorney must determine the exact provisions for your SNT. He or she must consider information about you and your child and how you want the trust funds used. Your attorney should base his or her recommendations on your child's age, what benefits your child is receiving, the eligibility requirements for benefits, and the kind and amount of assets you plan to place in the trust.

### ***Trusts Funded with a Person with a Disability's Own Money***

Sometimes things happen unexpectedly and money is paid directly to a person with a disability rather than into a trust. This may happen through an inheritance from a family member, life insurance proceeds, or a personal injury settlement. If a person receives money or property in an amount that makes him or her lose benefits, there is a planning option that can help set aside some, or all, of the money for supplemental needs and allow the person to reapply for benefits quickly.

If an individual with a disability receives a sum of money or property, certain people (the individual's parents, grandparents, guardian or the court) can create a supplemental needs trust for the individual. The trust must have special language that guarantees that after the beneficiary dies the remaining trust funds will be used to pay back the State of Maryland for services paid for by Medicaid (including health care and community services). This trust is called a "payback trust," "OBRA trust," or "d4A trust". The Maryland Office of the Attorney General must approve all payback trusts to make sure that they meet the standards in the law. After the state is paid back, the assets left in the trust can pass to the people chosen by the grantor.

### ***Pooled Supplemental Needs Trusts***

A "pooled supplemental needs trust" can provide a way to benefit from a supplemental needs trust without creating one yourself. A nonprofit agency creates a pooled trust and selects a trustee. Individual people have separate accounts, but all the money is pooled together and invested by the trustee. Individual beneficiaries get the services of a professional trustee and more investment options because there is more money overall.

If a person receives money from a gift, inheritance or settlement which causes the loss of government benefits, he or she can put the money in a pooled trust account and reapply for benefits. Accounts in pooled trusts can be created by an individual's parent, grandparent, guardian or a court. An attorney is not needed to establish an account in a pooled trust.

The account is funded initially with the individual's own money. After the trust is created and initially funded, others can make contributions to the trust. It is important to note that if someone does contribute to the trust, the terms of the trust govern that money.

Unlike a payback trust, after the beneficiary dies, the trust can keep the beneficiary's share. If the trust does not keep it, the assets left in the beneficiary's account must be used to pay back the state for all Medicaid funds spent for that particular beneficiary. After the state is paid back, any remaining assets can go to other people named by the person who created the account for the beneficiary. The Maryland Attorney General's Office must also approve all pooled trusts.

## Trust Considerations

SNTs are only one type of trust and there are many variations of SNTs. If you are considering setting up a SNT, you must cover several key issues with your attorney. You must decide whether the SNT will become effective while you are alive or take effect upon your death, whether it will be funded with the beneficiary's assets or someone else's assets, how much discretion the trustee will have and who will serve as trustee. Your attorney must be able to explain each of the options to you, including their pros and cons.

We have provided a list of questions in *Appendix H* to consider when evaluating a trust.

## Estimating How Much Money is Needed to Fund Your Trust

In estimating your child's annual supplemental needs, you may want to consider the many different possible costs that may be incurred. Realize that you may not be able to address all of your child's needs through the trust, either because of the expense or other reasons. It is still worth planning. All of us, with or without disabilities, have goals — some are attainable and some not. Likewise, we all prioritize our needs.

Some things to consider are:

- Educational or vocational expenses
- Costs for living supports and advocacy services that are not otherwise covered
- Equipment and assistive technology (e.g., wheelchairs, communication devices, computers)
- Medical and dental expenses not covered by government benefits
- Expenses related to the upkeep and maintenance of a home
- Miscellaneous emergency reserves
- Expenses related to hobbies, vacations, recreation, and seeing friends and relatives
- Other items like TVs, stereos, and furniture (often you can avoid affecting government benefits by having the trust own these items and allowing the beneficiary to use them)
- Other personal expenses

Your plan will be based on estimates as there is no way for you to know exact costs, especially for future needs. This is still useful information for your plan. Once you have estimates of your child's needs and potential costs, you can calculate how much money and/or assets you should put into the trust. A financial planner can be of assistance in helping calculate rates of return on different investments and developing an effective financial plan to fund your trust.

## Funding the Trust

Several different types of assets can be used to fund a trust. Cash and/or investments such as certificates of deposit and stocks can fund a trust. You can give your trustee the authority to decide which investments, if any, he or she will buy with the trust's assets. If someone transfers one type of investment into the trust, unless otherwise stipulated, the trustee can decide to change the type of investment. The trustee is expected to make responsible investments.

Parents can purchase life insurance policies on one or both of their lives and stipulate that when the insured parent dies, the trust becomes the owner of the life insurance proceeds. Life insurance proceeds can be payable to a living trust already in existence or to a testamentary trust that only becomes effective when the parent dies. The amount of coverage and the type of policy you should choose depends on several factors, such as your age, your child's needs, and how much money will be needed to provide for those needs.

### Funding a Trust

Most people don't have tens of thousands of dollars readily available to fund a trust. That's okay — you don't have to fund a trust all at once. Following are some examples of ways to fund a trust.

**Caution:** Consult an attorney or tax advisor about your individual circumstances. For instance, there may be tax consequences donors should consider.

#### ***Assets that can fund a trust include:***

- cash, savings and certificates of deposit (CDs)
- stocks and bonds
- mutual funds
- life insurance
- pension plans
- real estate and personal property

#### ***Some options for building up funds in a trust include:***

- Start with a lump sum that you are willing and able to contribute. This could be a modest amount or a large amount.
- Direct subsequent gifts to the trust. Others (perhaps grandparents) may wish to do the same.
- Make systematic investments. Contribute a set amount every month or every other month. Have an amount automatically transferred from your bank account.
- Make the trust the beneficiary of your life insurance.

## Helping with Housing Costs

A trust can own a home. Money and other assets in the trust can be used for the home's upkeep. This option can offer a long-term living arrangement. When adequate supports are properly planned for and provided, people with disabilities can continue living in their own homes.

You can transfer your home into a trust, either while you are alive or upon your death. You can also create a trust that authorizes the trustee to use the trust funds to buy a home for your son or daughter. If you have sufficient assets, the trust can buy the house outright. If not, trust funds could be used toward down payment and closing costs and/or to help pay the mortgage payments. The trust could also loan money to your son or daughter for a down payment or rent a home to your child if that would have the least detrimental affect on his or her benefits. Individual circumstances will determine the best option.

SSI considers a person to have an ownership interest in a home held in trust for his or her benefit because the home is used to provide the person a place to live. Therefore, a home owned by a supplemental needs trust should not be considered a resource to the individual and should not result in a reduction or loss of SSI.

However, mortgage payments and property taxes paid by a trust could be counted and reduce your child's SSI. Other costs like gas and electric and water bills paid by the trust will result in a reduction of SSI in the months they are paid. As discussed in the Government Benefits section, it could be worth taking the reduction in order to receive this assistance.

There are housing costs that you or a trust can cover that will not affect SSI and Medicaid. It might be easier to have the trust pay for these and have your son or daughter pay for direct shelter costs, if he or she can afford them. Examples include: telephone and cable bills, home maintenance and repairs, and furniture and appliances within a \$2,000 limit. Remember that payment must be made directly to the store or vendor. If you give money to your child for any purpose, it will be considered income and reduce his or her SSI dollar for dollar.

Please also note that transferring real estate to a trust may have significant tax implications for you and/or the beneficiary. For these reasons, when considering homeownership as an option, be sure to have a careful review by an attorney knowledgeable about these issues.

***Please note that you must carefully plan how you will assist with housing costs to avoid, or minimize, the effect on your child's public benefits, specifically SSI. SSI policy is not always clear. Refer to the "Government Benefits" section for more details.***

## Choosing a Trustee

The trustee is responsible for administering the trust, so you must select your trustee very carefully. You should also name a “successor trustee” to take over if your trustee is unable, or unwilling, to continue.

The will or trust agreement that creates the trust should include instructions for the trustee as to how and when to give money to the beneficiary. It may give the trustee guidelines but allow him or her to decide how exactly the trust fund will be spent. The trustee has other responsibilities, including managing and investing the trust money, filing tax returns for the trust, and keeping track of how money is spent for the beneficiary.

The trustee must be someone who can administer the trust properly, so as not to jeopardize government benefits. Benefits can be negatively affected even with the best worded trust, if the trustee distributes trust funds incorrectly.

A trustee should be capable of managing the amount of money in the trust. A trustee should also be familiar with ways to invest money, even though many trustees seek professional investment advice. Even trusts with relatively small amounts may be invested, although the investment strategy may be fairly straightforward.

It is helpful if the trustee is familiar with the beneficiary’s needs and preferences. It is also important for the trustee to share your vision for your child, especially because the trustee will make important decisions after your death.

Maryland law, as well as the trust document, require the trustee to spend the trust money for the beneficiary rather than the trustee’s own benefit. Even though these legal protections are available, you should still be very careful in choosing who will serve as trustee.

Some grantors choose a family member or friend to be a trustee, while others name a bank or other financial institution. Financial institutions may only manage trusts over a certain minimum — sometimes as high as \$500,000 — and charge fees for their services that may be based on the amount in the trust or the amount of income the trust generates. Friends or family members serving as trustee may be willing to do so at little, or no, cost. A trust can be written to financially compensate the trustee for his or her time and service, even if you name a friend or family member.