

The Voice, *The Official Newsletter of SNA*

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Welcome!

You are reading *The Voice*, a newsletter published by The Special Needs Alliance. Our purpose is to provide information--and answers--about special needs planning for family members and professionals. We hope this newsletter helps you. We invite your questions, suggestions and comments (please understand that we can not give individualized legal advice on the basis of an e-mail inquiry). We also encourage you to forward our newsletter to others who might benefit from the information here, or who might have similar questions.

Questions About Setting Up a Special Needs Trust



As noted in prior editions of *The Voice*, we encourage our readers to submit questions so that we may provide you with guidance on issues both of concern and interest. Below are one reader's questions and our responses:

"How would you get started to make a special needs trust?"

The first thing you should do is to meet with an attorney who is well-versed regarding the mechanics of drafting and administering special needs trusts. Additionally, you should select an attorney who devotes a significant portion of his or her practice to staying abreast of the various state and federal laws that are relevant to special needs trusts. Determining whether a special needs trust even is advisable and precisely how the instrument should be drafted to meet the particular needs of a client's and the family member for whom planning is being considered requires a thorough knowledge of public benefits (such as Medicaid, Medicare, Supplemental Security Income, and Social Security Retirement and Disability Income), as well as applicable federal and state laws relating to taxes and governing trusts and estates.

The attorney generally will ask you to provide certain factual information at or before the initial consultation. For instance, the attorney may request basic financial data relating to you and the family member for whom you are conducting disability or long-term care planning, details about the family member's disability, verification regarding any public benefits the family member currently may be receiving, and any prior

estate planning you personally have in place. Because this information is essential for proposing an appropriate plan for the disabled family member, many attorneys send out a client questionnaire prior to the initial consultation, while others simply may ask for this information over the telephone.

When you meet with the attorney, you should bring copies of all relevant documents and be prepared to discuss the information requested. Generally, the attorney will know by the end of an initial consultation whether a special needs trust is appropriate in your situation and may even have specific outlined a specific design for the document with you. Some times, however, additional information is needed before the specific recommendation for planning for the disabled family member can be finalized. As a result, a second meeting may be necessary before a final determination is made to prepare a special needs trust or an alternative estate planning tool.

"If your parents name you as the beneficiary of their insurance [and you are an individual with disabilities who receives public benefits] can that be put into a special needs trust?"

If a parent has a child with disabilities who likely will need public benefits during the course of his or her lifetime, the best approach is not to list the child directly as the beneficiary of life insurance policies (or IRAs, 401ks, etc.). Rather, the parent should consider naming the trustee of a previously-created special needs trust. This type of special needs trust, established by and with the funds of a parent (or any other relative) for a disabled individual's benefit, is known as a "third-party" special needs trust. Because the assets never belonged to the disabled child, the parent who establishes the third-party trust has the right to dictate how any remaining funds will be distributed upon the child's death.

If a parent fails to do this type of planning and, instead, names the child individually as the beneficiary of life insurance or retirement benefits, the child with disabilities will receive the funds directly. In most cases, receiving the cash benefits in hand will render the child ineligible for those public benefits programs that have income and resource limits. All is not lost, however, since the child still may put the funds into a special needs trust in order to reestablish financial eligibility, but that type of a trust -- known as a "self-settled" trust -- does not permit the parent to control what happens with any remaining funds at the child's death. There are two common types of self-settled trusts (the details of which are covered in other articles), both of which require the remaining trust funds first be used to reimburse the state for any Medicaid benefits paid on the child's behalf over the child's lifetime.

"Is it expensive to set up a special needs trust?"

The cost of a special needs trust will vary depending on several factors, including where you live, the drafting attorney's level of experience, the type of special needs trust being established, the complexity of the trust design, and the overall estate plan of the individual creating the trust. Due to these variables, an attorney may be unable to provide an estimate until after the initial consultation.

About the Author: [Ann N. Butenhof](#) practices law in Manchester, New Hampshire, where her focus is on special needs planning, public benefits issues, elder law and estate planning. Her background includes two separate stints as a lawyer with New Hampshire Legal Assistance, and before moving to New Hampshire in 1993 she practiced (and clerked for a federal judge) in Ohio. Her legal career has included a

number of important New Hampshire appellate cases, including the recent decision in [Appeal of Lowy](#), in which the New Hampshire Supreme Court upheld her arguments about the language of special needs trusts.

About this Newsletter: We hope you find this newsletter useful and informative, but it is not the same as legal counsel. A free newsletter is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation, including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while taking into account a whole panoply of laws, rules and practices, many not published. That is what The Special Needs Alliance is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting www.specialneedsalliance.com.