

## Special Needs Trust Preserves Public Assistance Support for Your Disabled Family Member

*Summarized by Thomas T. Thomas*

If you are a parent, brother or sister, husband or wife of a mentally disabled person, you know that public assistance, in the form of Supplemental Security Income (SSI) and Medi-Cal health services, may be necessary to that person's quality of life. But this support brings stiff financial eligibility requirements. How do you provide for your family member after your death without depriving him or her of this support? The speaker at our July 25 meeting, San Francisco attorney **Baron Miller**, has specialized in estate planning and establishing Special Needs Trusts, which provide this assurance. He is not only an attorney with ten years of experience in this area but also has a mentally ill daughter.

"If a family member's mental illness is not stressful enough for you," Miller said, "now I'm going to talk about death. You probably have been wondering what will happen to your loved one, both emotionally and financially, when you die. I cannot help with the emotional side, but there is something you should do financially that will preserve your beneficiary's access to public assistance."

In order to be eligible for SSI, which automatically confers access to Medi-Cal benefits, a person may not own assets worth more than \$2,000—including any assets held in trust. "So, if you have a will or living trust that leaves your loved one more than \$2,000," Miller said, "you are making a present to the Social Security Administration of everything except for that \$2,000."

A Special Needs Trust avoids this penalty by limiting the uses to which the beneficiary—or the trustee acting on his or her behalf—can put the money you leave.

SSI is intended to provide for the basics: food, clothing, and shelter. The maximum SSI benefit is now \$712 per month. A person on SSI can only receive income or gifts of up to \$85 per month to provide for these necessities without jeopardizing his or her benefit. Anything above \$85 reduces the benefit by \$1 for every \$2 received. So, if a person had \$1,425 of outside income or trust payments, the SSI benefit would disappear and, with it, access to Medi-Cal.

The one exception to this rule is housing. A person may receive any amount of housing support, and the maximum reduction in SSI benefits is \$210. So your beneficiary could receive \$5,000 a month for an apartment on Nob Hill and still collect \$500 a month from Social Security to cover food and clothing.

When an attorney sets up a Special Needs Trust, he or she defines the purposes to which the trust funds may be directed. Acceptable uses are things like travel and transportation, entertainment, medical and dental services, case management, companionship, education, and rehabilitation. "The language of a will or living trust that sets up a Special Needs Trust must meet strict requirements

to be recognized by the Social Security Administration,” Miller said. “Simply including the words ‘Special Needs Trust’ is not sufficient. So I urge you to have an attorney prepare it or, if you used another source, have a lawyer at least look at it.”

After this brief introduction to the subject, he opened the floor to questions.

**If your major asset is your house, can you leave it in trust for your son or daughter to live in?**

Yes, but as stated above, this will reduce the SSI benefit by \$210 per month. However, you can set up a Special Needs Trust to pay other housing costs, like taxes and insurance without jeopardizing the benefit.

**What other things can a Special Needs Trust be used for?**

Generally, anything not related to food, clothing, and shelter. That includes telephone calls and personal amusements. For example, if you take your son or daughter to dinner, it could be classified as entertainment, instead of simply providing food. However, you or the trustee will have to fill out a form with the Social Security Administration showing the beneficiary’s other sources of income and support. If you have receipts and charge card statements, they would be subject to an annual review.

A beneficiary may also own a car of a certain value (formerly about \$4,000) for transportation to and from medical appointments.

**How do you provide for future changes in Social Security law with your Special Needs Trust?**

That’s really not possible. But you can usually word the document so that the trustee makes no payments that would disqualify the beneficiary from SSI assistance, unless it would be in the beneficiary’s best interests. For instance, paying \$1,000 in rent to provide adequate housing and incurring the \$210 benefit reduction would certainly be in the loved one’s interest.

**What happens to the money in the trust after the beneficiary dies?**

The Special Needs Trust must spell out the disbursement in that case. However, the Social Security Administration has no claim on the remaining value in a trust or any reimbursement from the trust. The assets in trust—such as a house, cash, or investments—are in the name of the trust, not the beneficiary.

**What happens if the trustee passes away?**

You can provide for alternative executors and trustees in your will or living trust. Or you can give the current trustee power to appoint his or her successor. If there is no successor, someone—usually the beneficiary’s public guardian—must petition the court to appoint a trustee.

**If an SSI recipient has assets greater than \$2,000 and puts them into a Special Needs Trust, what happens to the SSI benefit?**

According to a rule made last year, the person would not be eligible for SSI for 30 months after the assets were placed in trust.

**If a third party—say, a grandfather—wants to leave money to a disabled person, how can I prevent the gift from affecting his or her eligibility requirements?**

You should tell the grandfather to set up a Special Needs Trust in his will. Or you could set up a Special Needs Trust yourself today, and ask him to make the

gift to the trust. However, if the grandfather makes a gift or bequest directly to the disabled person, the Special Needs Trust cannot claim it on his or her behalf.

**What happens to the money in the Special Needs Trust during probate?**

A will is executed under court supervision, or probate, and during that time the assets are administered by an executor. Your disabled beneficiary, through the trustee who has charge of the Special Needs Trust, can petition the court to allow the executor to make disbursements to the trust during probate.

The alternative to a will is a living trust, which is not under court supervision and so has no probate period.

**How does trusteeship work? What keeps the trustee from being greedy and wanting to keep the money for him- or herself?**

The trustee must hold the money separate from his or her own personal assets. And he or she is charged with acting in a fiduciary manner—that is, for the benefit of the beneficiary. If the trustee has personal money problems, for example, his or her creditors cannot go after the trust assets.

However, trustees can embezzle the money. And there is no accounting made, unless the beneficiary complains and petitions the court for an audit. You can provide for a periodic audit in the Special Needs Trust document. You can also require the trustee to post a bond to protect the trust assets.

**Given that the nature of this illness—schizophrenia—sometimes includes paranoia, how can you protect the trustee from the suspicions of the beneficiary?**

Beneficiaries, even healthy ones, are usually suspicious of trustees. That's why it's often a good idea to have a third party or an institution administer the trust. But you should not expect a bank or trust company to determine the needs of a mentally ill beneficiary; the bank is just custodian of the money.

**If you don't have a healthy son or daughter who can act as trustee, how can you hire one? And what do they charge?**

A group in Los Angeles called the Planned Lifetime Assistance Network, or PLAN (formerly the Proxy Parents organization), will set up a Special Needs Trust, hire case managers to work with your beneficiary, and contract with a bank's trust department to administer the assets. They will even do an actuarial study to see how long the beneficiary is likely to live and whether the trust assets will provide for that period. PLAN charges \$1,000 for this service. Then there are hourly costs for the case managers. And the banks usually charge 1% to 2% of the asset value per year, with a minimum charge of \$1,500 to \$2,000. So, generally, it's not worth going through a bank if you only have \$30,000 to bequeath—but it may be worth it for \$100,000 or more.

PLAN was created by family members of mentally ill people, and its by-laws require that a majority of board members belong to the California Alliance for the Mentally Ill (CAMI). Contacts for the group are the executive director, John Siegel, in Los Angeles at (310) 454-7735 or (213) 413-1130. Bay Area representatives are Northern California directors Joe Shimizu at (510) 654-1037 and Al Kjar at (650) 573-5345.

With PLAN, you have two service options. Under the first, you pay the \$1,000 up-front fee and they arrange for the Special Needs Trust, contract with the

bank and case managers, and pay for all services. Then PLAN takes a percentage of the remaining trust assets after the beneficiary dies. Under the second option, it's pay as you go. While you're alive, and through the trustee after your death, you pay for PLAN's services by the hour.

Everyone's situation is different, and your loved one's situation may change over time. So you have to decide which approach is best for you and then build discretion and flexibility into your estate planning.