

New Jersey Law for Special Needs Children

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Third-Party Special Needs Trusts vs. First-Party Special Needs Trusts

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There are two types of special needs trusts – one designed to hold assets gifted or bequeathed to a person with special needs from a third party (a “Third-Party Special Needs Trust”), and one designed to hold assets that are already deemed to be owned by that person with special needs (a “First-Party Special Needs Trust”).

A Third-Party Special Needs Trust is created to receive gifts and bequests from third parties, such as parents and other friends and family members. These trusts can be set up at any time to receive gifts or bequests from various friends and family members or can be set up under a parent’s (or other family member’s or friend’s) Will to just receive assets from that person’s estate.

Whether a Third-Party Special Needs Trust is set up during someone’s lifetime or under someone’s Will, the basic terms of the trust are the same. Third-Party Trusts provide that during the lifetime of the person with special needs, the trustee can use trust assets to provide for his or her well being after first considering the benefits which are provided through governmental assistance. The trustee is directed to use the assets for such child’s special needs, i.e. to obtain goods and services to maintain or improve his or her comfort, welfare and care, including luxuries beyond basic needs. The trustee can use assets to supplement basic health care services, to pay the expenses of his or her vacations, and to make improvements to real estate that would provide suitable housing for him or her. The trust is set up to preserve a child’s eligibility for whatever governmental benefits may be available under New Jersey law or the law of the state where the person with special needs resides.

At the death of the person with special needs, 100% of the remaining trust assets can pass to anyone that the grantor (creator) of the trust decides at the time of the creation of the trust. These beneficiaries are often siblings or other family members of the person with special needs.

A First-Party Special Needs Trust is a trust created to own the assets currently owned in the name of a person with special needs. These assets may be gifts or bequests from well meaning family or friends that were given to person with special needs either outright or in a trust that does not qualify as a special needs trust. These assets may also be assets received by a person with special needs in a lawsuit.

A First-Party Special Needs Trust can only be set up by a parent, grandparent, guardian or a court. A First-Party Trust can only be set up for someone who is deemed disabled under the [Social Security Administration](#) definition. For a minor, a person would be considered disabled if he or she “has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” An individual age 18 and older is “disabled” if he or she has a medically determinable physical or mental impairment, which results in the inability to do any substantial gainful activity; and can be expected to result in death; or has lasted or can be expected to last for a continuous period of not less than 12 months.

Under a First-Party Special Needs Trust (as with the Third-Party Special Needs Trust), the trustee can use trust assets to supplement (but not replace) any benefits or governmental assistance such person is or may become entitled to receive.

One major difference between a Third-Party and First-Party trust is that in a First-Party Trust, at the beneficiary’s death, the remaining trust assets will reimburse Medicaid for any monies expended while the Trust was in existence for medical care, home health care or nursing home care of the person with special needs. Thereafter, any other public assistance programs which have a valid right of reimbursement under state or federal law will be repaid.

Any remaining trust assets will pass to those persons appointed by the person with special needs in his or her Will to receive the assets. If a person with special needs is under the age of 18 and/or is incompetent, then the assets will pass to those persons entitled to receive the assets under the intestacy laws of New Jersey.

There are also many reporting requirements for a First-Party Special Needs Trust that are not required for a Third-Party Special Needs Trust. Any new appointment of trusteeship must be disclosed to the [Division of Medical Assistance and Health Services](#). In addition, as is required under Medicaid regulations (10:71-4.11 of the [New Jersey Regulations](#)), the trustee must file annually an informal accounting of the administration of the trust's assets, income and expenses with the agency charged with the beneficiary's Medicaid eligibility re-determination. Additionally (as is required by state law), the State of New Jersey must be given 45 days advance written notice of any expenditure by the trust in excess of \$5,000, or of any amount which would substantially deplete the principal of the trust. Finally, subsequent additions to the Trust must be reported to the appropriate determination agency (any agencies from which such beneficiary is receiving benefits, such as Medicaid).

Although the First-Party Trust may preserve some of the assets of a person with special needs during his or her lifetime, at that person's death, the money is subject to the claims of Medicaid and other agencies. Therefore, it is important that assets are never titled in the name of a person with special needs in order to prevent the need for a First-Party Trust. However, if assets are already in his or her name, it is important to create a First-Party Trust to at least preserve the assets during his or her lifetime.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North, 25 Main Street
Hackensack, NJ 07601
Phone:
(201) 489-3000

900 Third Avenue, 16th Floor
New York, NY 10022
Phone:

(212) 752-8000

500 Delaware Avenue, Suite 1410

Wilmington, DE 19801

Phone:

(302) 652-3131

300 East Lombard Street, Suite 2000

Baltimore, MD 21202

Phone:

(410) 230-0660