



## How to Appropriately Utilize a Pooled Special Needs Trust as Part of Your Estate Plan

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Special needs law is a highly complex area of state and federal law. A subspecialty of estate planning, it's a multifaceted and detail-oriented field that focuses on the interplay between public benefits and estate planning documents (largely wills and trusts) that guide the way in which inheritances are left to persons with disabilities who may be receiving such benefits.

One of the most common estate planning tools used for beneficiaries with disabilities is the special needs trust. In the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Congress created three exceptions to the general rule that a person's assets are counted as resources when determining eligibility for means-tested public benefits: (1) the special needs trust, (2) the disability income trust, and (3) the pooled trust, which is the focus of this article.

### **Supplemental or Special Needs Trust Basics**

First, let's cover some basic ground. A supplemental or special needs trust (SNT) is a trust where assets are not considered a countable resource for the purpose of determining whether a beneficiary is eligible for means-tested public benefits. An SNT is established for the sole benefit of an individual who is currently qualified, or may in the future qualify, to receive certain means-tested government benefits, while maintaining the beneficiary's eligibility for such benefits. The purpose of the trust is to supplement the benefits the individual is already receiving, but not replace them—so, the trust generally should not be used to pay for things public benefits can pay for. The beneficiary must not have any access to or control over the assets of the trust and cannot have any power to revoke, amend, or terminate the trust. Furthermore, the standard for the trustee to make distributions must be one of pure, absolute, and unfettered discretion.

The two most common types of SNTs are third-party and first-party. In a **third-party SNT**, the source of the funds is from someone other than the special needs beneficiary. This is typically the case when a parent leaves funds to benefit their child with a disability under the parent's estate plan. In a **first-party SNT** (or self-settled or (d)(4)(A) or Medicaid

payback trust), the funds belong to the special needs beneficiary, such as a personal injury recovery, child support payments, or direct inheritance.

### **Pooled Special Needs Trusts**

We now turn our attention to **pooled special needs trusts (PSNTs)** as created by OBRA '93. Pooled special needs trusts are established and administered by a non-profit organization for the benefit of multiple special needs beneficiaries whose accounts and assets are “pooled” under the terms of a master trust agreement. Each beneficiary’s separate account is created through a joinder agreement (the pooled trust’s version of the contractual relationship established by a trust agreement) and must be for the “sole benefit” of each beneficiary with a disability. A pooled trust organization may choose to administer first-party **and** third-party trusts. Although each beneficiary has a separate account, the assets of all beneficiaries are pooled, which may yield a higher rate of return on investments, and investment fees are distributed among all the beneficiaries. Pooled trusts may also provide a more affordable planning option because they offer lower minimum funding requirements than most financial institutions, and yet have the benefit of professional management.

**First-party subaccounts** may be established by the beneficiary if he or she has capacity, or by a parent, grandparent, legal guardian, or court. First-party subaccounts are funded by the beneficiary’s own money, usually from a personal injury or workers’ compensation award, direct inheritance, Social Security back payments, alimony, or child support. A transfer of assets penalty may apply if the beneficiary is 65 years or older and varies by state and the benefit received.

**Third-party subaccounts** may be established by any individual—such as a parent, family member, or friend—wishing to do so for the benefit of a special needs beneficiary. Estate plans, life insurance policies, investments, retirement accounts, or other similar assets typically fund these third-party accounts. There is no Medicaid payback or age limitation for the beneficiary in a third-party subaccount.

### **Debunking Myths and Misconceptions About Pooled Trusts**

Pooled special needs trusts are one of the most underutilized resources in special needs planning and are not frequently discussed during estate planning. To increase awareness about the existence of and benefits to PSNTs, it may be a useful exercise to discuss and debunk myths surrounding them. For this article, I had the privilege of interviewing Yolanda Mazyck, CEO of Shared Horizons, a PSNT based in Washington, D.C. A native Pennsylvanian, Mazyck is a graduate of the University of Pittsburgh and has more than 35 years of nonprofit experience, primarily in the fields of substance abuse, criminal justice,

and disabilities. She worked as a certified addictions counselor and intervention specialist for nine years before accepting the position as Director of the Neighborhood-based Family Intervention Center in Sharon, Pennsylvania.

During our interview, we discussed the four most common misconceptions regarding pooled trusts:

**Myth #1: PSNTs can only take small accounts.**

This, Yolanda shared, is the most common misconception regarding PSNTs. On the contrary, most PSNTs have no limit regarding account size or, if they do, it is to establish a modest minimum. When compared to the minimum of \$1 million required by many banks or professional trust companies to serve as trustees of a standalone SNT, the minimum required by Shared Horizons is \$5,000, placing professional administration and investment management more comfortably within reach for many more families.

**Myth #2: PSNTs are nothing more than check-writing services.**

Far from this, PSNTs like Shared Horizons take a comprehensive and individualistic approach to each beneficiary, using as their guidepost a person-centered approach that involves analyzing the public benefits (whether means-tested or entitlement) that the beneficiary is receiving, ensuring that all available benefits are being utilized and that the funds available in the beneficiary's PSNT subaccount are strategically utilized to fill in any gaps that public benefits do not cover. More than that, the PSNT also ensures that to the extent the beneficiary is capable, they can play a part in their day-to-day economic management by participating in the development of their quality of life plan and a TrueLink or Pexcard that is preprogrammed to allow expenditures that do not violate the particular rules of any benefits they receive. For bigger ticket items, the PSNT is at the ready to ensure the beneficiary's special needs trust is not being used to pay for things benefits otherwise cover; and to the extent the trust does need to be utilized, the cost being charged is appropriate to the service being rendered or the product being purchased and the beneficiary (or his or her advocate) is not being taken advantage of.

**Myth #3: At the beneficiary's death, the funds remaining in the subaccount are distributed at the sole discretion of the PSNT.**

Members of the public, including many lawyers, erroneously believe that at the death of the beneficiary the funds remaining in the PSNT subaccount are distributed at the sole discretion of the pooled trust—which means the pooled trust keeps all the money for itself. On this point, Yolanda was unequivocal: There should be no misconception regarding the distribution of funds remaining in a third-party account. In the joinder agreement that establishes the subaccount, the grantor (the person who creates a trust, including a pooled

special needs trust subaccount) determines where the remainder goes. Since there is no Medicaid payback for a third-party trust, there is nothing to interfere with the manifestation of this intent. When it comes to a first-party, or Medicaid-payback, subaccount, every pooled special needs trust has a different protocol. Shared Horizons' master trust document states that Medicaid has a right to recover up to 50% of the remaining balance, not to exceed what they paid towards the cost of care. The document further states that Shared Horizons can retain 50% to further its charitable mission.

**Myth #4: PSNTs are nonprofits that lack a knowledge base grounded in special needs law.**

While this may not be true of all PSNTs, Shared Horizons has a board of directors comprised of industry experts in the areas of estate and special needs planning, trust and probate attorneys, investment advisors, and bankers, along with special needs provider agencies. According to Yolanda, Shared Horizons has contracted attorneys who regularly provide counsel and guidance. The staff is composed of public service veterans, social workers, and accounting specialists, and they regularly conduct training and seminars throughout the year to sharpen the skill set that allows them to be of service to the special needs community. Yolanda often shares a quote from a founding board member involved in the search that resulted in her tenure as the executive director, recently changed to CEO, that said, "We focused on hiring someone with an in-depth knowledge of people with disabilities, the systems supporting them, and a person-centered philosophy. All other expertise is achieved through board membership."

**Security and Peace of Mind for People with Disabilities and Their Families**

A pooled special needs trust can improve the quality of life for those with disabilities. Because a PSNT is, at its heart, a special needs trust, its lodestar is preserving public benefits for its beneficiaries. The added benefit of combining assets for multiple beneficiaries is efficient management, cost-effectiveness, and professional oversight. In assessing which special needs trust to use as part of an estate plan, it's important to:

1. Investigate the nonprofit pooled trust itself;
2. If the PSNT utilizes an external trustee, understand which local/state/federal agencies it reports to and how frequently it is audited; and
3. When it comes to the investment arm of the PSNT, be sure there are checks and balances between it, the trustee and the nonprofit, so the best interests of the beneficiaries are always paramount.

When properly utilized, PSNTs have the potential to empower families to create a brighter and more inclusive future for their family members with special needs.

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