



## **When A Self-Settled Special Needs Trust May Not Be the Best Option: Thinking Outside of the Box**

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When a personal injury settlement is received, the first reaction for many people is, “Let’s use the money to fund a self-settled special needs trust and preserve whatever public benefits the individual may be eligible to receive.” However, this may not always be the best option. When plaintiffs and their personal injury attorneys consult with special needs planning attorneys, they can explore goals and options (especially the pros and cons) for dealing with a large settlement, including options other than a special needs trust.

### **What Are Your Goals?**

For plaintiffs receiving personal injury recoveries, goals often include the following:

- *Benefit Themselves.* Plaintiffs want to improve their quality of life.
- *Benefit Spouse.* Plaintiffs want to improve the standard of living of their spouse, which sometimes requires either gifts to their spouse or the purchase of items for the spouse, which would also constitute gifts if made by the trust.
- *Benefit Others.* Plaintiffs want to benefit other family members, including children. Transferring assets, including assets purchased for the benefit of others, to family members constitutes a gift, which would temporarily disqualify the plaintiff from many public benefits.
- *Legacy for Children.* Most parents would like to preserve a legacy for their children. A Medicaid payback provision in a self-settled special needs trust makes this difficult.
- *Buy a Home.* Nearly every plaintiff has three wishes: a home, a car, and a trip to Disney World. Buying a home is at the top of the list. But, if the home is purchased by the trust and occupied by other family members, in many states those other family members must pay a pro-rata share of the expenses of maintaining the home. And, if the trust makes a distribution to the plaintiff to purchase the home in their own name, in most states the home would be subject to a Medicaid lien or estate recovery.

These goals are difficult to achieve because of the disadvantages of a self-settled special needs trust set forth below.

### **Pros and Cons of Using a Self-Settled Special Needs Trust**

Before making this decision, several factors should be considered.

#### **Advantages of a Self-Settled Special Needs Trust**

- The money in the trust is not counted as an asset.
- No transfer penalty is imposed for transferring assets.
- Immediate eligibility or no interruption of benefits.
- Expert investment management.
- Expert trust administration.

#### **Disadvantages of a Self-Settled Special Needs Trust**

- Payback to Medicaid on death.
- Intense supervision by many state Medicaid agencies.
- Possible conflict between trustee and beneficiary over appropriate distributions.
- “Sole benefit of” restrictions.
- Other family members cannot benefit.
- The beneficiary must be under age 65.

#### **What Potential Alternatives Would There Be to A Self-Settled Special Needs Trust?**

- *Allocation.* In appropriate situations, the personal injury attorney can arrange for the court to approve an allocation of funds to individuals other than the plaintiff. This is common in wrongful death cases.
- *Settlement Protection Trust.* A settlement protection trust could be established. It is a support trust with a health, education, maintenance, and support (“HEMS”) standard. Distributions are much less restrictive than those permitted in a self-settled special needs trust. The disadvantage is that the plaintiff would lose their public benefits.
- *Settlement Protection Trust with Special Needs Provisions.* This could be useful in the following situations:

- Child Under 18. If there is a child under 18 not yet eligible for SSI because of parental deeming, a settlement protection trust can be established and administered until the child is 18, when the trust could automatically trigger a transfer to the special needs subtrust.
- Belt and Suspenders. A settlement protection trust can be established with a provision that if it is later determined that the benefits are more necessary than anticipated, a transfer to the special needs subtrust could be triggered.
- *Long-Term Care Planning*.
  - Spend Down for Items Needed by Plaintiff and/or Spouse. When engaging in long-term care planning, if the plaintiff can give up benefits for a limited time, usually not to exceed five years (often less), he or she can usually eventually resume those benefits.
  - Gifts to Spouse. If the plaintiff is married, the plaintiff's spouse can purchase a Medicaid-compliant annuity. This does not incur a Medicaid transfer of asset penalty.
  - Transfer to Family Members. For a significantly large recovery, assets could be transferred to other family members, resulting in a loss of Medicaid benefits for a period not to exceed 5 years.
  - Transfer Assets – Pay Through Penalty. In many instances, assets can be transferred, and the plaintiff can pay through the resulting penalty period, which could be less than 5 years.
  - Transfer Assets to a Child Under 21, Blind, or Disabled. This can be done without a transfer of asset penalty.
  - Tax Considerations. In pursuing any of these strategies, tax considerations must be considered including carry over basis, step-up basis, retirement plan rules, the tax effect on the transfer of a deferred annuity, and state estate or inheritance taxes.

### **When Not to Use a Self-Settled Special Needs Trust**

- *Large Settlements*. If the personal injury recovery is large enough, consideration should be given to accepting the settlement, funding a settlement protection trust, giving up benefits, and purchasing private medical insurance.
- *Age 65 Or Older*. If the individual is age 65 or older, a self-settled special needs trust is not possible (unless state law allows a self-settled pooled trust option). For

example, in nursing home abuse or neglect cases, the instinct of the personal injury attorney is often to fund a self-settled special needs trust. However, after the settlement or recovery is achieved, the personal injury attorney realizes that the age requirement cannot be satisfied. By doing long-term care planning like described above, a significant portion of the recovery can usually be protected. Even if the individual is under age 65 but in a nursing home, additional long-term care planning may be beneficial because there may be very little that can be spent to enhance the quality of life of the nursing home resident with the use of a self-settled trust.

- *Benefit Of Other Individuals.* If a personal injury recovery is achieved and deposited in a self-settled special needs trust, it is difficult for other family members or friends to benefit from the recovery. Often it is difficult to spend a lot of money enhancing the plaintiff's quality of life. By engaging in long-term care planning, it may be possible for a spouse and other family members to benefit from long-term care planning strategies.

### **Disadvantage of Forgoing a Self-Settled Special Needs Trust**

One disadvantage to pursuing a strategy that would cause the temporary loss of public benefits is that the individual would have to reapply for those benefits after the expiration of the period of ineligibility. The intersection of personal injury recovery, public benefits law, and trust law can be challenging to navigate, so legal advice about various options, including thinking outside of the box is crucial. Contact a [Special Needs Alliance](#) member attorney in your area to learn more about your particular situation.

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