



Trusts & Special Needs Trusts

An Interview with Attorney Richard Cox Bishop, Shelburne Falls, Massachusetts

What is a trust? What kinds of trusts are there and why would you need one?

A trust is an agreement formulated by a donor trustee to use financial resources or property in specific ways to benefit a third party. Some common uses of trusts are: (1) to make arrangements for people with personal issues---people with disabilities, for example, or underage children; in the event of the death of the donor trustee; (2) to set up assets in such a way that they avoid being tapped by nursing homes, legal suits, divorced spouses, bankruptcy court, or otherwise ‘protected from attack.’ (3) to set up ownership under a separate identity to avoid probate, income taxes or inheritance taxes.

None of these arrangements can be made at the last minute, except avoidance of probate.

What are some common misunderstandings about trusts?

A common statement is that “everything I own is in a trust,” but if it is a revocable trust, it will not protect the resources from being taken by the state to repay for Medicaid nursing home care. Medicaid now has a five year look back. (A revocable trust, will, however, help an estate administrator avoid probate and speed up the settlement of the estate.)

In other words, to determine if a property or estate (including a house) can be taken by the state to recover the Medicaid costs for nursing home care, after death (or after the spouse’s death), the state administering Medicaid looks back 5 years BEFORE the person, age 55 or over, is admitted to a nursing home to determine which resources can be used to repay the state for a person’s nursing home care that has been covered by Medicaid. So an irrevocable trust would have to be set up five years before the first person of an aging couple goes into a nursing home. (Special exceptions are made for legally married spouses, many of which still do not apply for same-sex couples).

We know nursing homes are extremely expensive, but aren’t medical expenses for seniors over 65 covered by Medicare?

Medicare covers senior’s medical expenses, but an exception is made for long-term nursing home care. Medicare only covers no more than the first hundred days of nursing home care. Once that is exhausted, the person in a nursing home must use private funds until they have “spent down” their resources and are within \$2,000 (and ownership of a car) of being entirely exhausted of funds. Then they can apply for Medicaid (in Massachusetts that is Mass Health) to continue nursing home care. An exception is made for the spouse of the person in the nursing home, and for recipients of some “special needs trusts.”

What are the rules for creating a special needs or “self settled” trust to support a dependent, such as a relative on disability?

There are very specific rules for the ways trust money can be used to help a person on welfare or on disability. For example, if a person on welfare is to sustain governmental supports through the social security system (SSI), monies from a trust cannot be used for rent, mortgage payments or for food---but trust funds can be used for a vacation, cable, telephone service, laundry, repairs, clothing, recreation costs, to buy a car, or to buy a house.

The rules are complex enough that it is often difficult to find a person to serve as the administrator of a trust. (See Special Needs Trust Administrators Manual). A family member who administers a trust, often called a “Trustee” needs information on what is a legitimate trust expense and a legitimate form of payment, without violating the rules for SSI or SSDI. For example, the value of a car owned by the person on SSI is limited, but some special exceptions are made for wheelchair and lift vans. And a trustee can use trust funds to pay for gas, maintenance, repairs or insurance without disrupting SSI eligibility, but the beneficiary cannot draw on a trust account that gives him or her cash advances to pay for these expenses without disrupting SSI. And, there are special rules for excise and sales taxes on cars or vans.

Once again, special needs trusts should be well-considered in advance. They can be set up in advance, but designed so they do not actually kick-in until the donor dies and resources are then automatically shifted into an irrevocable trust.

In our area, ARC has set up a bank which will, for a fee, administer a special needs trust.

This is a complex area of law, that needs be set up carefully by an experienced attorney.

Please call the Franklin County Bar Association 413-773-9839, The Worcester County Bar Association 508-752-1311 or FCHCC 413-773-5555 or 978-544-2259 for more information.

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