



LAW OFFICES OF

JOANNE SCHLENK MCAVEY, PLLC

MEMBER OF NATIONAL ACADEMY OF ELDER LAW ATTORNEYS  
PAST CO-CHAIR OF THE ELDER LAW COMMITTEE OF THE SCBA

1641 DEER PARK AVENUE  
DEER PARK, NEW YORK 11729  
(631) 243-4516  
FACSIMILE: (631) 243-2501  
ELDERCAREATTY.COM  
JOANNESCHLENKMCAVEYLAW.COM  
E-MAIL: MCAVEYPLLC@GMAIL.COM

## ELDER LAW NEWS UPDATE

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TO: Clients, Friends and Colleagues

\*\*Check out [www.eldercareatty.com](http://www.eldercareatty.com).

**SUBJECT: THE MIRACLE THAT IS THE SPECIAL NEEDS TRUST!**

### **WHAT IS A SPECIAL NEEDS TRUST ?**

With the passage of the *Omnibus Reconciliation Act of 1993*, a class of Trusts was created which neither affected the medicaid eligibility of the creator nor the beneficiary of the Trust: exempt trusts. So for those individuals who may be disabled and receiving government benefits, such as SSI (Supplemental Security Income) and Medicaid, a transfer of resources into a *Special Needs Trust* for their benefit, will not disqualify them from their continued receipt. The funds in trust may be used to enhance the disabled individual's *lifetime* experiences. Vacations, education, family outings, special services, computer equipment, etc. are some of the likely supports that Special Needs Trust may fund with impunity.

### **IN NEW YORK WE UTILIZE A CLASS OF FOUR TRUSTS**

**First Party Special Needs Trust**, an exempt trust, is funded with a disabled individual's own funds during lifetime. There are several requirements to establishing such a trust, that may include proceeds from a personal injury lawsuit. The individual must be under the age of 65, the funds must be his own, it must be created for his benefit by a parent, grandparent, legal guardian or a court, and there must be a payback provision to the Department of Health for medicaid paid. (Pending US legislation, known as the Special Needs Fairness Act, would allow the individual to create his own First Party Special Needs Trust.)

**Third Party Special Needs Trust**, may be created as a Testamentary Trust (by Will), exempt trust, for the benefit of any disabled beneficiary, including a spouse or child of any age. It is funded with property of someone other than the person with the disability, usually by the parent, grandparent or sibling. Third Party Special Needs Trust may also be created as a lifetime Trust, for the benefit of any disabled person of any age, except a Spouse or a child for whom the Creator is legally responsible, ie. under 21. In both instances, there are no payback provisions to the State, payments are totally discretionary by the Trustee, and at the end of life of disabled individual, the trust corpus may be left to whomever Creator chooses.

**Pooled Trust** is an exempt trust, which will accept *income* by the disabled over the age of 65, and are used primarily to spend down the overage income for those applying for community long term home care medicaid. In this way, an individual's excess income over \$825.00/month plus the \$20,00 disregard plus health insurance premiums, may be deposited into the pooled trust, which establishes a sub-account to pay the disabled beneficiary's household and utility expenses. It is a win-win arrangement because the disabled individual may access home health care aide assistance while utilizing his monthly income to pay his bills, albeit even indirectly.

**Sole Benefit Trusts** is a type of Third Party Special Needs Trust created solely for the benefit of a child of any age (over 65) or any disabled person under 65 years of age. Distributions, however, must be limited to payments over the life expectancy of the disabled beneficiary and upon death, any balance must be paid to the disabled beneficiary's estate.

All Special Needs Trusts should incorporate specific statutory language mandating that the use of funds not replicate what is being provided by the government. It is an excellent planning tool for those disabled individuals who may benefit from their own or others resources to enhance their life experience. Know that they exist!

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