



SPECIAL NEEDS PLANNING: ONE TRUST OR TWO

By Robert D. Vale

The importance of a Special Needs Trust was reviewed in a previous article in this paper. In that previous article, we noted that the purpose of the Special Needs, or Luxury Trust, is to provide assistance to the special needs child beyond that which is provided by public benefits without jeopardizing the child's access to those public benefits. There is no doubt that parents of special needs children recognize the need to establish a Special Needs Trust for the benefit of their special needs child. This article will review the two ways to establish a Special Needs Trust.

Many times, the Special Needs Trust is imbedded in the parents' trust. That is, the terms of the Special Needs Trust are incorporated in the parents' Revocable Living Trust and the Special Needs Trust springs into existence at the death of the surviving parent and the Special Needs Trust is funded with assets from the parents' trust estate as directed by the living trust. This is a traditional setup. It is generally less expensive to implement than the Stand Alone Special Needs Trust discussed below, however, it can be more difficult to amend this type of trust. In addition, the trust cannot receive benefits until both parents are dead, and thus the trust cannot be used to receive gifts from family members until both parents have died.

A Special Needs Trust can be a "Stand Alone" Trust, which means that this trust stands on its own terms, separate and apart from the parents' estate plan. It is established by the parents now and typically remains a revocable (changeable) trust until a triggering event occurs. A 'triggering event' could be the death of the parents, the gift of a retirement plan to the trust or the accumulation of a predetermined amount of assets in the trust; for instance, \$50,000.

The use of a Stand Alone Special Needs Trust allows for ease of amendment during the lives of the parents. If the Special Needs Trust is likely to receive gifts from sources other than the parents, the use of a Stand Alone Special Needs Trust makes a great deal of sense. Grandparents, aunts, uncles, other family members or friends may desire to leave a gift for the benefit of the special needs child. However, the gift should not be made directly to the child as such a gift could threaten eligibility for government assistance. Thus, a Stand Alone Special Needs Trust can be used to receive these gifts. The gift will flow to the trust and it will be available for the benefit of the special needs child without jeopardizing eligibility in government programs. In the event a relative wanted to assure that the gift is 'locked in,' the trust can be made irrevocable either by instruction written into the Stand Alone Trust or by a simple amendment to the trust.

In summary, the use of a Special Needs, or Luxury Trust, is necessary to assure that the special needs child can benefit from resources beyond those which are provided through government programs without jeopardizing the child's access to those programs. Whether the family uses traditional planning which embeds the Special Needs Trust in the Revocable Living Trust or the family estate plan incorporates a Stand Alone Special Needs Trust will depend upon the facts and circumstances of each family. The Stand Alone Special Needs Trust provides greater flexibility and generally is a more comprehensive planning instrument. However, because the Stand Alone Special Needs Trust is a separate trust with its own terms, it is generally more expensive to implement.