



Inter Vivos vs Testamentary Special Needs Trust: How to Choose?

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A Special Needs Trust (SNT) for a loved one is a wonderful way to provide support without endangering eligibility for important public benefits. However, the decision to set up an SNT is only the first step—next, you must decide whether the SNT should be established through a will and funded on death (a “testamentary” trust), or if it should be established now as a standalone document (an “inter vivos” or “living” trust). This article describes the advantages and disadvantages of each option in terms of special needs planning.

Establishing an SNT through a Last Will and Testament

A trust created under the terms of a person’s last will is a testamentary trust. A testamentary trust has no legal effect during the testator’s lifetime. It comes into existence only upon the testator’s death, and only if the conditions set forth in the will are satisfied, including that the intended special needs beneficiary survives the testator and is entitled to receive property from the estate.

By way of just one example, John’s will leaves his entire estate to his wife, Lucy. If Lucy does not survive John, the will directs that John’s assets pass instead to a special needs trust created for the benefit of his disabled son, Marco. Under this example, the special needs trust comes into existence only if both conditions are met: (1) Lucy predeceases John, and (2) Marco survives John. Upon John’s death, the individual appointed under the will to administer the estate (the Executor or Personal Representative) initiates the estate administration. As part of that administration, and only if the above conditions are satisfied, the Executor establishes the special needs trust in accordance with the terms of the will and funds the trust with estate assets. Once the testator has died, the person administering the estate (typically called the Executor or Personal Representative) opens the administration, and, in the process, establishes the SNT and funds it from the assets of the estate, as well as any other assets that pass outside of probate by beneficiary designation and correctly name the Trust.

Testamentary Special Needs Trusts (SNTs) are one of several tools parents can use to ensure continued support for a disabled child after their death. During their lifetime, parents can provide direct support to their disabled children from their own resources, and after they pass, the SNT can carry on that support, preserving both care and financial stability. In addition, pursuant to relevant state laws, testamentary SNTs can be used as a planning tool for disabled spouses who are also receiving public benefits. This avoids a scenario where assets inherited from one spouse result in the surviving spouse being disqualified from public benefits because of a program’s asset limits, or a scenario where inherited assets make it difficult or impossible to apply for benefits in the future.

Testamentary SNTs are generally cost-effective because expenses are defrayed until the death of the Testator, at which point the SNT is created, funded, and begins administration. A testamentary trust is a good way to build a plan for a disabled loved one without requiring immediate action beyond the estate documents and any relative beneficiary designations.

Establishing a Standalone Trust

An **inter vivos trust**—also known as a **living trust** or a **stand-alone trust**—is a trust document that exists by itself and is created by a grantor during their lifetime. An inter vivos SNT may be funded right away, or it may receive funds over time. Distributions can be made for the benefit of the beneficiary as soon as the trust is funded, avoiding the delays that often occur with testamentary SNTs, which rely on the probate process for creation and funding.

An inter vivos SNT may be revocable or irrevocable during the lifetime of the grantor. A **revocable** inter vivos SNT is more flexible and allows the grantor to change the terms or potentially revoke it if they are alive and capacitated. This allows for a “test drive” of the trust, including the grantor’s choice for who should serve as trustee (the person who administers the Trust according to the terms the trust document lays out). When the grantor dies, or upon certain defined conditions, the trust becomes irrevocable, and the value of the assets may be included in the grantor’s estate for purposes of calculating estate taxes.

Alternatively, an **irrevocable** SNT cannot be changed or terminated by the grantor once it is established (although, if included in the terms of the trust, the grantor may vest a trustee or trust protector with the authority to make specific changes as necessitated by changes in federal or state law). This can be useful for a variety of circumstances: for example, if multiple people are funding the trust, they may want defined, concrete terms for the trust’s management that are not under the control of the grantor, nor do they want any potential tax consequences associated with the trust. When properly planned in conjunction with a tax advisor, an irrevocable SNT can be used to accomplish gift tax goals, since a gift to an irrevocable trust is generally a completed gift.

An inter vivos SNT can effectively support a disabled loved one while the grantor is still alive, allowing them to manage the trust and guide the beneficiary. This provides the beneficiary with familiarity before the grantor's death, avoiding confusion and stress during a difficult time. Additionally, an inter vivos trust ensures timely support, as it is already established and doesn't rely on estate administration.

An important note: this type of trust is usually not the best option when planning for a spouse. If one spouse creates a trust during their lifetime for the benefit of the other spouse, it is typically treated as a type of trust that mandates Medicaid payback provisions and meets other specific requirements. While not discussed in-depth in this article, it is a planning consideration to be discussed in detail with your advisor.

How to Choose?

When planning for a person with a disability, the following questions can help determine which type of SNT is most appropriate:

- Is the beneficiary of the trust the grantor’s spouse, or another loved one?

- Is the grantor the only person contributing to the trust, or are there multiple people who would like to contribute?
- Is the trust being established to help the grantor achieve gifting goals for tax purposes?
- Would the grantor like the flexibility to eliminate the trust if they change their mind?
Is the grantor concerned that their sudden death could disrupt the support they currently provide to a loved one? Is an immediate, consistent source of support crucial to the beneficiary's existence?

Both testamentary and inter vivos special needs trusts, as well as a host of other planning options such as nested SNTs within a revocable living trust, may allow the grantor to provide ongoing support for a loved one with a disability while preserving eligibility for public benefits and ensuring long-term financial stability and peace of mind.

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