



## FREQUENTLY ASKED QUESTIONS ABOUT SPECIAL NEEDS TRUSTS AND TRUSTEES

### 1. WHAT IS A TRUST?

A Trust is a means of holding assets for the benefit of someone else. The person in charge of the Trust is called the “Trustee.” The person for whom the assets are held is called the “Beneficiary”.

### 2. WHEN DO YOU NEED A TRUST?

A Trust is useful for managing and protecting assets for someone when you do not want to give that person outright control of the assets. For example, Trusts are often used when a has a special need due to a disability or inability to handle money, or is too young to handle monetary assets.

For a person with a disability, the trust offers many advantages. For example:

- The assets are reserved for the Beneficiary’s benefit.
- You set the guidelines for the Beneficiary’s care.
- You choose the Trustee who manages the assets and makes decisions about distributions.
- If the Trust is a Special Needs Trust (qualifying discretionary trust), the assets in that trust will not count as income or as a resource for the purposes of determining the Beneficiary’s eligibility for SSI, Medicaid (aka Medical Assistance) and certain other public benefits.

### 3. HOW DO YOU CREATE A TRUST?

A Trust can be established during your lifetime by entering into a written agreement, called a “Trust agreement”. A Trust can also be established upon your death under the provisions of your Will.

### 4. ARE ALL TRUSTS ALIKE?

No, there are many types of trusts. However, all well-drafted trusts will have at least the following components:

- i. *Grantor/Settlor*: The person who establishes the Trust.
- ii. *Trustees*: the person or persons who manage the assets and decide on distributions.
- iii. *Assets*: the property held in the Trust. These include the assets (money, stock, insurance proceeds) contributed when the trust was first created, any assets added after that time, and the growth and earnings on those assets while they are still in the Trust.
- iv. *Beneficiary*: the person or persons for whom the assets are held in trust. These include the persons to whom the trustee can make distributions currently, as well as those persons who might receive distribution sometime in the future.
- v. *Purpose Statement*: a statement of (i) the purposes for which the Trust assets can be used, and (ii) the range of the Trustee’s discretion when deciding whether to distribute or not distribute Trust assets. The purpose statement provisions can be very specific, such as directing the Trustee to distribute “\$100.00 per month”. On the other hand, the provisions can be very broad, such as directing the Trustee to distribute “any or all the assets as the

Trustee deems best for the Beneficiary”. The Grantor decides how he or she wants the Trust assets used, and the lawyer drafts the Trust’s statement of purposes to bind or guide the Trustee.

- vi. *Termination time*: when the trust ends (eg. “when my son dies; when my daughter reaches the age of 35 years old).
- vii. *Final Distribution*: the directions of who receives any assets remaining in the Trust when it ends.

## 5. WHAT IS A SPECIAL NEEDS TRUST?

A Special Needs Trust is a discretionary Trust, giving the Trustee the broadest possible discretion in deciding distribution of assets on behalf of the Beneficiary. There are 2 basic categories.

- A **First Party Trust** (aka Self-Settled or Pay-Back Trust) is for assets that were once owned by the Beneficiary eg received as a gift, inheritance, or lawsuit. Upon the beneficiary’s death, remaining assets are used to pay back Medical Assistance for any services provided.
- A **Third Party Trust** is for assets that were never owned by the Beneficiary eg set aside by parents who wants to leave assets in a Trust for his or her child. It is created by a Trust agreement or Will. Any remaining assets go to the person(s) designated in the Trust.

## 6. WHAT DOES A TRUSTEE DO?

A Trustee has two principal roles:

- a. Manage the assets.

The Trustee must invest and preserve the assets. The Trustee must balance the goals of asset growth and protection from loss. In a trust with few assets, this might mean just investing the funds in a money market account or Treasury Bills. In a trust with significant assets, more diversified investment would be appropriate.

It is not necessary that the trustee be an expert in investment. The Trustee has the right to hire experts for advice at the Trust’s expense. However, it is important that the person serving as Trustee have some common sense about financial matters and not shy away from making financial decisions.

- b. Make decisions as to distributions.

The Trustee makes the decisions about how the Trust assets are used: for what, how much and when. The trustee is guided by the intentions of the person who originally established the Trust to the extent those intentions are stated in the Trust document (the Trust agreement or Will that created the Trust). However, because a Trust can last a long time and it is impossible to anticipate every set of circumstances, the Trustee will have to use its own judgment in making decisions about distributions.

## 7. WHAT HELP CAN A TRUSTEE GET?

The Trust ought to authorize the Trustee to retain experts or others for advice and information. For example, a Trustee could hire a lawyer, an accountant, a social worker professional advocate, financial planner, or stockbroker. A Trustee could engage a bank or investment company to handle the day to day management of the assets. A Trustee can, and should, seek out whatever help the Trustee reasonably believes it needs to carry out their duties. The costs of such help are payable out of the Trust.

It must be remembered, however, that the Trustee makes all final decisions. After all the advice is gathered, expert and otherwise, the Trustee is responsible for making the decisions about managing the assets and making distributions.

## **8. WHO CAN SERVE AS A TRUSTEE?**

There are professional Trustees, such as banks, Trust companies, and some attorneys. Look for a person with experience and knowledge about special needs trusts. However, under Maryland law any person who is an adult and mentally competent can serve as a Trustee. It is not unusual for a family member to serve as a Trustee.

## **9. WHO SELECTS THE TRUSTEE?**

The person who creates the Trust (the Grantor/Settlor) selects the first (sometimes called original) Trustee. The Grantor can also provide for successor Trustees by stating who they should be in the Trust document. The Grantor can also provide that the original Trustee has the right to select its own successor when the time comes .

## **10. CAN A TRUSTEE REFUSE TO SERVE OR RESIGN?**

Anyone can decline to serve as a Trustee. Once a person or company begins serving, resignation may require Court approval unless the Trust document permits resignation without going to Court. Most Trust documents do.

## **11. CAN A TRUSTEE BE REMOVED?**

For good cause, a Court can remove any Trustee. Also, many Trust documents specifically give some person the power to remove a corporate Trustee and replace it with another corporate Trustee. This gives flexibility to react to circumstances over time.

## **12. WHAT IF THERE IS NO TRUSTEE?**

A trust will never fail because of the lack of a trustee. If one is not otherwise provided for, the Courts will appoint a trustee.

## **13. HOW MANY PERSONS CAN SERVE AS A TRUSTEE?**

As many as you want and will accept the responsibility. As a practical matter, one or two is the usual number. Three is not unheard of. Four or more is difficult to manage.

## **14. DO ALL THE TRUSTEES HAVE TO AGREE ON A DECISION?**

Yes, unless the document that created the Trust provides otherwise. Often, the document will state that all decisions must be by majority vote.

## **15. WHO “OVERSEES” THE TRUSTEE?**

Unless the Trust document provides otherwise, the Trust is subject to the supervision of the Court. This means that accountings must be filed with the Court every year and that certain decisions must be approved by the Court. However, to avoid the time and expense, many Trust documents state that the Trust is not to be supervised by the Court.

If there is no Court supervision, it is wise to provide that someone else has a right to know what the Trust assets are and how they are being invested and spent. In some documents, that person is called a “Trust Protector.” This provides a safeguard for the beneficiary.

## **16. DOES THE TRUSTEE GET PAID?**

The trustee of a trust is entitled to commissions under Maryland law. These commissions are payment for the Trustee’s work and his or her assumption of responsibility and possible liability, serving as the trustee.

Professional Trustees are almost always paid commissions. Sometimes a family member who serves as a trustee will waive commissions. Commissions are payable out of the Trust.

## **17. WHAT IS THE AMOUNT OF THE COMPENSATION?**

A Maryland statute sets the formula for maximum annual commissions (with variation permitted for professional trustees). Each professional Trustee will have a statement of its commissions. Be sure to ask for it.

## **18. FOR MULTIPLE TRUSTEES, HOW ARE COMMISSIONS DIVIDED?**

The Trust document can set the division. If not, the Trustees must agree among themselves. Often, banks and other corporate Trustees do not share their commissions with other individual Trustees.

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