The use of standardized forms when drafting special needs trusts is not always the best means of addressing the particular needs of the disabled. Just like those who are not disabled, people who have disabilities often need varying degrees of help to cope with their challenges. So an opportunity to provide help with financial resources should not go to waste. A special needs trust is a frequently used tool to protect the government benefits of disabled people who inherit property, settle claims, or win judgments. When drafting a special needs trust, an attorney can avoid errors by staying informed about how the various government benefit programs apply to a client’s situation and by remembering that standard forms cannot always address the specifics of a disabled person’s life and needs.

In California, the term “special needs trust” generally refers to an irrevocable trust that gives the trustee discretion to supplement, but not supplant, whatever is provided by government programs to the trust’s beneficiary. Counsel’s primary goal in drafting the trust is to enable the disabled beneficiary to benefit from both the trust and the government programs. However, many practitioners rarely attempt to tailor a special needs trust to a specific situation, since they do not understand the nuances of each government program. Even when practitioners attempt to refine a standard form, they often step onto a legal minefield. Too often, special needs trusts are strewn with drafting errors that do not cause trouble until after the drafter is no longer involved and the beneficiary or trustee is left alone to face problems in the administration of the trust.

To avoid drafting errors, counsel should understand the financial criteria for different government programs. Some programs—such as Supplemental Security Income (SSI), In Home Support Services (IHSS), and Medi-Cal—consider certain assets and income of an individual when eligibility is determined. Some, such as certain veterans and federally subsidized housing programs, consider only income. Others, such as Social Security Disabled Adult Child (DAC) benefits, consider only earned income.

Eligibility for one program can positively or negatively affect eligibility for another in complex ways. For example, Medi-Cal eligibility is automatic for a recipient of SSI or IHSS, but Medi-Cal may also be separately obtained. When someone obtains any amount of IHSS, the person has an additional advantage of Medi-Cal coverage without a Medi-Cal share of cost. The amount of IHSS may then be reduced, however, if the person uses Medi-Cal to pay for something that supposedly supplants IHSS services, such as an adult day health care center.

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is eligible for DAC income benefits for two years, the person is eligible for Medicare, but the DAC benefits increase the person's income and thus may reduce the amount of IHSS or Medi-Cal coverage.11

Counsel should also understand which, if any, government programs affect the quality of a beneficiary's life. Medi-Cal may be unimportant to adults who live at residential or adult care facilities (which currently are not subsidized by Medi-Cal)12 and who have private insurance or Medicare (which usually provides better reimbursement than Medi-Cal). On the other hand, if an adult requires skilled nursing care at a facility,13 is eligible for a skilled nursing waiver for home care,14 daily attends an adult day health care center to avoid skilled nursing placement,15 or has enormous monthly drug bills,16 Medi-Cal may be critical as one of the few payment sources for these items and services.

Likewise, SSI may be unimportant to an adult who is gainfully employed despite the disability,17 receives DAC income benefits almost equal to the SSI rate, or has a very substantially funded special needs trust. On the other hand, SSI is a lifeline for someone who has no other source of income, has a minimally funded special needs trust, or tries to prevent an eviction by a residential or adult care facility for failure to pay a higher monthly rate than that provided by SSI.18

Common Drafting Errors

Lack of knowledge of government-funded programs is not the only factor in the careless use of standard forms to draft special needs trusts. Counsel make four common drafting errors:
1) Inappropriate restrictions on a trustee's ability to make certain distributions.
2) Lack of attention to California regional center benefits.
3) Misapplication of state payback provisions.
4) Failure to adapt standard trust provisions that are unrelated to government benefits to suit the needs of a disabled person.

Special needs trust forms frequently have two restrictions that can have deleterious effects upon a beneficiary's care and are usually unnecessary to protect government benefits in California. First, some forms provide that the trustee may pay only for "services and items" (a frequently used term that may be understood not to include housing) or that the trustee specifically may not pay for food, clothing, or housing. Second, some forms provide that the trustee cannot do anything that diminishes the beneficiary's government benefits.19

These restrictions in the standard forms stem from a misunderstanding of the eligibility requirements for Medi-Cal, SSI, and IHSS. Medi-Cal has specific rules regarding trusts and counts an irrevocable trust as a resource if it was established on or after August 11, 1993, for the benefit of the beneficiary or the beneficiary's spouse, unless it was created by a will.20 Medi-Cal then provides an exception for such an irrevocable trust established with assets of the beneficiary or the beneficiary's spouse if done so by a court, legal representative, parent, or grandparent for a beneficiary under 65 years old.21 To qualify for this exception, the trust also must provide that, upon the death of the beneficiary or the trust's termination, the state receive funds remaining in the trust for any Medicaid program expenditures for the beneficiary.22

There is no Medi-Cal requirement prohibiting a trust from using trust funds for food, clothing, or housing. If a trustee pays in kind for the beneficiary's food, clothing, housing, or utilities, the Medi-Cal program allot the beneficiary a small maximum amount of monthly income and thus may increase in the beneficiary's monthly share of cost.23 Significantly, however, the allotment is made only when any such item is paid in kind in its entirety in the particular month.24 A properly guided beneficiary, therefore, can use a minimal part of the beneficiary's income toward food, clothing, housing, and utilities and thus avoid even the small increase in the share of cost that results from in-kind trust distributions for these items.

As of January 1, 2000, the SSI and IHSS rules became similar to those of Medi-Cal with the comparable exception for certain trusts established with the assets of the beneficiary or the beneficiary's spouse for a beneficiary under 65 years old and with a Medicaid payback provision.25 For trusts not established with assets of the beneficiary or the beneficiary's spouse, SSI rules provide that the trust is not counted as a resource if the beneficiary does not have the legal authority to revoke the trust or direct the use of the trust assets for the beneficiary's support and maintenance.26 It should be noted that this restriction is on the beneficiary, not the trustee.27 In contrast to Medi-Cal, the SSI and IHSS programs automatically allot a maximum monthly income equal to one-third of the SSI federal benefit rate (or that amount plus $20, depending upon the person's living arrangements) when any portion (as opposed to the entirety) of a person's food, clothing, or shelter is paid by another party, including a trust, in a particular month.28

Admittedly, an absolute bar on the trustee's ability to spend trust funds on food, clothing, or housing or to diminish government benefits offers more reliability that the beneficiary's government benefits will not be impaired. This prohibition would also cover future events that are unforeseen. For example, the beneficiary may move to a state with more restrictive rules than California's.29 Even if the California, rules may change over time, and a court, administrative hearing officer, or Social Security or county eligibility worker may make a more restrictive approach on benefits.30

The possible benefits, however, of the absolute bar on the trustee's options are often outweighed by the high personal price of the restriction. For example, assume that the beneficiary is a 30-year-old man with Down Syndrome. He plans to take a step toward independence by moving into an apartment. He has a trust of $300,000 that generates $1,000 per month after expenses—just the amount to provide a rent subsidy that allows him to live in a nice apartment. He already receives DAC income benefits of $600 per month, Medicare as a result of the DAC benefits, SSI of $150, and Medi-Cal as a result of the SSI. While the beneficiary may be eligible for some services at home through IHSS, a California regional center through its supported living services program could supplement whatever services were needed but not provided by IHSS.31 The trust restrictions could serve to help protect SSI, but even if SSI were lost, the worst that would happen would be that the beneficiary would have $150 less each month and simply could apply to Medi-Cal separately.

On the other hand, what the beneficiary needs is a rent subsidy, particularly since a California regional center's supported living services program could pay for custodial and other care necessary for him to live independently but would not pay rent. However, if the trust prohibits either paying for housing or diminishing public benefits, the beneficiary cannot achieve his goal of living independently. The trustee's alternative may be to purchase a home, but a significant amount of the trust funds would then need to be placed in a single investment. Moreover, a lease instead of a purchase may provide needed flexibility if a change of residence is foreseeable. Additionally, a home purchase (and possible later sale) would involve significant transaction costs. Thus, the restriction in the trust that protects the $150 per month in SSI costs the beneficiary an important and otherwise achievable personal goal.

California Regional Centers

Unfortunately, practitioners who fail to consider a beneficiary's personal development when drafting special needs trusts often neglect to consider California regional centers as well. These centers offer significant resources for adults in California who are
developmentally disabled, and practitioners drafting trusts can help beneficiaries take advantage of these resources without creating a financial liability for the trust. Financed with state funds, California regional centers are nonprofit corporations that provide public benefits to any adult in California who is developmentally disabled. Regional centers can pay for services related to long-term care at home or at a residential care facility that are impossible for adults to receive from any other government source in California.

Generally, regional centers do not base services on the financial resources of the disabled person or a trust for the person's benefit, but the nature of this entitlement may evolve as the state budget tightens. While no case law exists on the subject, some regional centers at administrative hearings have successfully taken the position that the resources of a trust for the person are "possible sources of funding for consumers" which must be sought prior to regional center payment. California Welfare and Institutions Code Section 4659 provides that such "possible sources of funding" may include "entities or programs required to provide or pay the cost of...services...[and] [p]rivate enti­ties, to the maximum extent they are liable for the cost of services, aid, insurances, or medical assistance to the consumer." To help a special needs trust fend off an attack by regional centers, practitioners should use specific language that follows the applicable Welfare and Institutions Code sections giving regional centers a mandate to seek other possible sources for their services.

Regional centers also may try to avoid financial responsibility for the trust beneficiary by disputing whether the beneficiary truly is developmentally disabled. The disabling condition must have originated prior to age 18, and, except for certain specifically named disabilities, must be closely related to mental retardation or require treatment similar to that required for individuals with mental retardation. The condition must not be one that is solely physical in nature, solely a psychiatric disorder, or solely a learning disability.

If, at a minimum, practitioners are aware of these issues, they can avoid undercutting the trustee's regional center eligibility—for example, by mentioning in a court petition or trust recitals that the beneficiary's condition started after age 18, is chiefly physical or psychiatric, or results in minimal cognitive impairment. On a more proactive basis, practitioners can try to use recitals, allegations in court peti­tions or programs required to provide or pay the cost of...services...[and] [p]rivate enti­ties, to the maximum extent they are liable for the cost of services, aid, insurances, or medical assistance to the consumer." To help a special needs trust fend off an attack by regional centers, practitioners should use specific language that follows the applicable Welfare and Institutions Code sections giving regional centers a mandate to seek other possible sources for their services.

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If, at a minimum, practitioners are aware of these issues, they can avoid undercutting the trustee's regional center eligibility—for example, by mentioning in a court petition or trust recitals that the beneficiary's condition started after age 18, is chiefly physical or psychiatric, or results in minimal cognitive impairment. On a more proactive basis, practitioners can try to use recitals, allegations in court petitions relating to the trust, and findings in court orders to support a position that the beneficiary is developmentally disabled as defined under the Welfare and Institutions Code. As a first step when an eligibility fight may be in the offing, counsel may consider providing notice to the applicable regional center of the hearing on any petition for the special needs trust with such allegations. This step may be taken even when the disabled person is not yet a regional center consumer.

Payback Provisions

In addition to ignoring regional center eligibility criteria, practitioners drafting special needs trusts often make one of two mistakes with state payback provisions. One mistake is to include a payback provision when it is not required, thus providing the state with reimbursement rights it would not otherwise have. The second is to include, in a required payback provision, language from Probate Code statutes that can cause Medi-Cal ineligibility.

For example, it is an error to include a payback provision as part of a parent's trust or will for the benefit of a disabled child or as part of one spouse's will for the benefit of the other, disabled spouse. The payback provision is only required for trusts established with the property of the beneficiary or the beneficiary's spouse, unless established by will. When a trust is established by a parent with the parent's own property in a traditional estate plan or is established with one spouse's property in a testamentary trust, no payback provision is required.

Another drafting error is found in an estate plan that requires a court order. Typically, special needs trusts are established in a court proceeding in connection with a litigation settlement or award for someone under 65 years old who would otherwise require a conservatorship. Other special needs trusts are also established in a court proceeding when that person would otherwise receive insurance proceeds or a probate distribution free of trust. In the former and probably the latter case, a payback provision would be required. Other special needs trusts established in court, however, should not require a payback provision. A cognitively disabled person with assets (for example, someone with dementia) may not yet have provided a special needs trust for an heir in his or her estate plan. In a conservatorship or comparable proceeding for the person with dementia, a court can create a will or trust or amend a revocable
trust to include a special needs trust for the heir.62 In connection with such a proceeding, a court will often require notice to the Department of Health Service, Department of Mental Health, and Department of Developmental Services, and at least one of the departments will take the position that a payback provision is required.63 Unfortunately, uninformed counsel often include, without opposition, whatever provisions a department may request.

An irrevocable trust may be modified in a court proceeding to change it into a special needs trust.64 If the property of the trust was not that of the beneficiary, then a payback provision may again be avoided. However, the determination may not be so easy, since certain property rights of the beneficiary under Medi-Cal, SSI, or IHSS rules may have been created once the as yet unmodified trust was established.

The second type of payback provision error occurs when counsel incorrectly conclude that applicable California Probate Code sections should not affect eligibility for government benefits. Attempts to refine special needs trusts by incorporating these sections into the payback provisions in special needs trusts may render a beneficiary ineligible for Medi-Cal.

Pursuant to the Probate Code, state and local agencies must make claims to a special needs trust within a certain period and, if trust property is insufficient to pay all such claims, the trustee must petition the court for instructions, and the claims will be paid from trust property as the court deems just.65 Medi-Cal rules, on the other hand, provide a trust cannot require the state to submit a claim in order to obtain reimbursement and that states should be paid back for expenditures for Medicaid programs prior to any other claims.66 The Medi-Cal rules even provide that any trust including the requirements described in the Probate Code is counted as a resource of the beneficiary even if it otherwise would have come under the exception for certain trusts established for disabled beneficiaries under age 65.67

**Boilerplate Provisions**

Even if a special needs trust correctly addresses the myriad issues concerning Medi-Cal and other government benefits, boilerplate trust provisions that are unrelated to government benefits may contain pitfalls. Otherwise standard provisions may create complications as a result of a beneficiary's disability. The selection or removal of a trustee is one example.

If the disabled beneficiary is young and one or more initially selected trustees are indeed trusted, the practitioner may want to provide in the trust for the ability of the trustee to select a successor. Unlike a typical trust for a child, a parent's special needs trust for a young beneficiary may function for more than 50 years, long after many individually named trustees are either deceased or too old to serve and many institutional trustees cease to exist. At the time the trust is drafted, siblings, who are often selected as trustees, may not be born or may be too young for a parent to determine how responsible they will be. A trust provision for a trustee to select a successor gives the parent an opportunity to take the decision out of the hands of the court and to make the decision one that is less subject to conflict.

If the beneficiary is only physically disabled, has good judgment, and is comfortable with only the initially selected trustee and no others at the time the trust is established, the practitioner may include a provision in the trust that permits a majority of the beneficiaries to select a successor trustee. The trust should then carefully define the term "beneficiary" as appropriate, because "beneficiary" may include contingent beneficiaries.68 A method of providing the beneficiary some control in this regard may be for the trust to give the disabled beneficiary a special power of appointment to select the contingent beneficiaries. Too much control by the beneficiary, however, may also make the trust vulnerable to challenge by a government agency on the grounds that the beneficiary actually can control not only the selection of the trustee but also the expenditure of the trust assets.

When a beneficiary has good judgment or family members are in a position to monitor the trust's activities, counsel may provide a more liberal standard for the removal of a trustee. Removal typically is based upon egregious conduct, but the instrument may also permit removal if the beneficiary or family members determine that removal of a trustee is in the best interests of the beneficiary.69 To guarantee a safe harbor against disinheritance, the trust may also provide that a petition based on such removal is not a contest.70 On the other hand, if the beneficiary is intelligent but because of a mental disability acts in a way that is detrimental to himself or herself, these trust provisions may be inappropriate. A clause permitting a beneficiary to select a successor trustee may afford the beneficiary too much control. Beneficiaries who cannot be relied upon to act in their own best interest may also be subject to undue influence in connection with the exercise of power of appointment over the contingent beneficiaries.

The drafting of special needs trusts is much more complicated than many lawyers may believe, and standardized forms are not always an appropriate means of addressing the needs of the disabled. Counsel cannot properly do their job simply by inserting new names in a form without considering the lives of the people named. Each special needs trust should be treated as something special. ■

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1. The Probate Code uses the term "special needs trust" but does not define it. See Prob. Code §§8904, 9665. The seminal Medi-Cal guide on trusts, Medi-Cal Eligibility Procedures Manual Letter No. 179 (May 15, 1997), provides a sample of a special needs trust but again no definition. A special needs trust should be distinguished from a so-called Medicare set-aside trust used for the narrow purpose of preserving Medicare benefits in workers' compensation settlements. See Centers for Medicare & Medicaid Services Letter to All Associate Regional Administrators (July 23, 2001).

2. SSI provides income assistance and is one of the few potential government subsidies in California for care at a licensed residential care facility or adult care facility, as opposed to a skilled or intermediate nursing facility. See 42 U.S.C. §§1391 et seq.

3. IHSS can pay vendors for personal care services at home. See Welf. & Inst. Code §§12600 et seq.

4. Medi-Cal, California's state Medicaid program, can pay for medical treatment, hospital stays, drugs, adult day health care centers, and skilled nursing care typically at a facility but sometimes at home under a waiver program. See Welf. & Inst. Code §§14000 et seq.

5. California veterans' programs can pay for a variety of benefits, including medical, skilled nursing, and domiciliary care. There are no financial requirements for eligibility for certain veterans' benefits. See 38 U.S.C. §§5101 et seq.

6. Federal housing programs can subsidize rent at residential units owned privately or by a nonprofit government agency. See 42 U.S.C. §§1437 et seq.

7. An adult whose disability began prior to age 22 can receive DAC income benefits based upon the work record of a parent of the disabled adult when the parent is disabled, retired, or deceased. See 20 C.F.R. §400.350.


9. Welf. & Inst. Code §12305. A share of cost is the monthly amount an individual must contribute toward medical bills each month, prior to Medi-Cal coverage, in the event the individual receives in excess of a specified level of income each month depending upon family size and living circumstances. Welf. & Inst. Code §14005.12(c)-(d); Cal. Code Regs. tit. 22, §§50651-50660.

10. For the IHSS mandate to consider alternative resources for supportive services that may be available from other agencies and programs, see California Department of Social Services, IHSS Manual Regs. §§50-763.91.


12. In many other states, Medicaid programs do subsidize care at facilities that are comparable to residential and adult care facilities in California. Legislation is regularly introduced in California (but so far has not been enacted) that would enable Medi-Cal to provide some subsidies for residential and adult care facilities. California recently authorized the development of a model program to evaluate such subsidies. See Welf. & Inst. Code §14323.26.

13. Welf. & Inst. Code §14323(c). Medi-Cal covers custodial care and skilled nursing care at skilled nursing facilities, whereas Medicare and supplemental "Medigap" insurance together cover only skilled nurs-
Special Needs Trusts
Sample Provisions and Comments

<table>
<thead>
<tr>
<th>Provision Language</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>Regional Centers</strong></td>
<td>Neither the trust nor the trust estate shall be considered a possible source of funding to supplant any payment or program by any regional center for a person with a developmental disability. Neither the trust nor the trust estate shall be liable for the cost of any services, aid, insurance, or medical or other assistance to the beneficiary. The beneficiary is developmentally disabled as defined in Section 4512 of the California Welfare and Institutions Code. The beneficiary became disabled prior to age 18 due to...and continues to be disabled. This provision tracks language from California Welfare and Institutions Code Section 4659 regarding the mandate of regional centers to seek other possible sources of funding. Further recitals in the court order or trust may elaborate upon why the beneficiary is developmentally disabled as defined in this code section. Cognitive disabilities should be emphasized. References to physical, psychiatric, and learning disabilities should be avoided when possible.</td>
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<tr>
<td><strong>Liberal Distribution</strong></td>
<td>The trustee may pay to or for the benefit of the beneficiary as much of the trust net income and principal as the trustee determines, in the trustee's sole and absolute discretion, to be necessary or advisable from time to time to meet the beneficiary's special needs. The term &quot;special needs&quot; means the requisites for maintaining the beneficiary's good health, safety, and welfare when those requisites are not otherwise being provided to the beneficiary by any other source, including any local, state, or federal government or public, private, or nonprofit entity. This provision is comparable to the one contained in Medi-Cal Eligibility Procedures Manual Letter No. 179 (May 15, 1997). Nonetheless, the language should not be considered a safe harbor. Unlike some other forms for distribution standards, the definition of special needs is not limited only to &quot;services&quot; and &quot;items&quot; and thus provides more flexibility to the trustee. However, the terms &quot;support&quot; and &quot;maintenance&quot; are purposely excluded from the definition of special needs.</td>
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<tr>
<td><strong>Allowing Payments That May Diminish Public Benefits</strong></td>
<td>In determining whether to make a distribution, how a distribution will be made, and the amount to distribute, the trustee shall consider how to supplement, not supplant, any public benefits otherwise available to the beneficiary. However, in the trustee's sole and absolute discretion, the trustee may make a distribution that negatively affects certain public benefits of the beneficiary if, in the trustee's sole and absolute discretion, it is in the best interests of the beneficiary for the trustee to do so in light of the goals of this trust. This provision gives the trustee the flexibility to act in a way that does not place the preservation of public benefits above all other considerations. The cross-referenced goals of the trust should include enhancing the beneficiary's quality of life as well as supplementing but not supplanting public benefits, so that those benefits can be protected. The term &quot;public benefits&quot; should also be defined. The provision carries some risk that the trust estate may be considered available for eligibility purposes for a government program. However, that risk must be weighed against the risk that, without such a provision, the trustee could not pay for needs that are critical to the beneficiary's quality of life. The trust still should provide that it is irrevocable, that it is intended to supplement but not supplant public benefits, that no part of the trust estate should be considered an available resource or income of any kind to the beneficiary, and that the beneficiary may not revoke the trust or control, direct, or compel the use of the trust estate for the beneficiary's support or maintenance or any other purpose.</td>
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Operations Manual System (POMS) §§01120.500-504; Department of Social Services All-County Letter No. 00-42 (May 19, 2000).


27 Id.


29 Some states have much more restrictive rules than those of California. See, e.g., Ohio Rev. Code §1339.51(D)(4). On the other hand, other states have relatively liberal safe harbors permitting a trustee to make distributions that diminish public benefits under certain conditions. See, e.g., N.Y. Estates, Powers & Trusts §7.112(e)(2)(i).

30 California cases have held that the state may have the right to be reimbursed from a “support trust” for the costs of institutionalizing a beneficiary due to mental illness. Estate of Johnson, 198 Cal. App. 2d 503 (1961); Estate of Hinckley, 195 Cal. App. 2d 164 (1961); Estate of Lackmann, 156 Cal. App. 2d 674 (1958). Other courts have found that a trust providing the trustee with discretion to provide certain items, including “maintenance” and “support,” was an available resource for Medicaid eligibility purposes. See, e.g., Metz v. Ohio Dept. of Human Servs., Ohio Ct. App. 6th Cir., No. OT-00-048 (Aug. 17, 2001).

31 For IHSS, see California Department of Social Services IHSS Manual Regs. §30-7775.

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36 Id.; see also Prob. Code §§2580 et seq.

37 At least the notice provisions of Probate Code §§3600 et seq. arguably could be interpreted very broadly to apply to all court orders resulting in payment for the benefit of a minor or incompetent person, not only those orders made under Probate Code §§3600 et seq. See reference to “judgment” in Probate Code §3600, references to “judgment” and “order” in Probate Code §3610, and broad definition of “judgment” in Code of Civil Procedure §577.


40 Prob. Code §§3600 et seq., 3160 et seq.


42 Id.; see also Prob. Code §2580 et seq.

43 See Prob. Code §24(c).

44 See Prob. Code §15642.

45 See Prob. Code §21306.

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