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Occasionally, I am asked to prepare Wills for parents who have a special needs child. They have been told that their Wills must contain Special Needs Trusts or their child will lose his government benefits (Medicaid and SSI).

There are many differences between self-settled Special Needs Trusts, which are subject to many technical requirements, and third-party Special Needs Trusts created by Will.

Section 2338 of the Medicaid Manual, which has been in place since July 2003, defines several types of trusts including OBRA '93 Trusts and Medicaid Qualifying Trusts. It also sets forth the rules for trusts created by a Will. Those rules are fairly simple and straight forward:

1. Trust principal is not a resource to an individual who is not empowered to revoke the trust and use the principal for his own support and maintenance.
2. Trust earnings are not income to the beneficiary unless the trust requires, or the trustee allows payment to the beneficiary.
3. Trust distributions are income to the beneficiary if paid to him in cash. Distributions can also count as income, in certain circumstances, if paid to others on behalf of the beneficiary, depending upon the purpose of the payment.

So, a Will which creates a discretionary trust with an independent trustee, and which does not require any mandatory distributions or provide any demand rights should not count as a resource. The Trustee should, however, consult with an attorney knowledgeable about public benefits in order to not adversely affect the beneficiary's receipt of assistance.

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