

14<sup>th</sup> Annual Changes and Trends Affecting  
Special Needs Trusts

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## Special Needs Trust Basics and Beyond

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## Top Trends and Pitfalls

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# Special Needs Trust Basics and Beyond Top Trends and Pitfalls

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# Special Needs Trusts Basics and Beyond Top Trends and Pitfalls

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Special needs trusts have been part of our lives for many years and have been adapting to law changes and agency interpretations since the beginning. After a quick review of basic special needs trust concepts, these materials will summarize the current status of what works, and what doesn't, when designing and drafting these trusts. It finishes with a review of some of the current trends affecting special needs trusts.

**I. First, an overview of the basics** To get this started, we begin with some basic definitions and explanations of some of the primary legal concepts that are important to special needs trusts. This will lay the foundation for some of the sections that appear later in these materials.

**A. What is a Special Needs Trust?** A special needs trust is a trust that allows money and other assets to be held in trust for the benefit of a person who has a disability in a manner that does not cause the person to be disqualified from needs-based (sometimes referred to as means-tested) public assistance programs, such as SSI (Supplemental Security Income)<sup>3</sup> and Medicaid.<sup>4</sup> For ease of reference, these materials will often refer to a person who is a beneficiary of a special needs trust as a "beneficiary."

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<sup>3</sup> Title XVI of the Social Security Act (SSI) is administered by the Social Security Administration. Title XVI appears in the United States Code at 42 U.S.C. Chapter 7, Subchapter XVI, §§1381 - 1385.

<sup>4</sup> Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.* and 42 C.F.R. Parts 430 to 456.

Special Needs Trusts are used to hold assets that otherwise would disqualify the beneficiary from Medicaid and SSI. This allows the beneficiary to continue to qualify for needs-based public assistance, which provides the beneficiary with a small amount of income, basic health care, and needed services. At the same time, the assets being held in the special needs trust can be used to pay for services and other things the beneficiary needs or will benefit from, but that public assistance will not provide.

In order to accomplish this, a special needs trust must qualify as an “exempt trust”. This means the assets in the trust will not be deemed to be “available” to the beneficiary and “countable” towards the maximum amount of assets (“available resources”) the beneficiary can have and still qualify for assistance (typically, this maximum is \$2,000). Failure to comply with the strict requirements will cause the trust assets to be “available” to the beneficiary and, if the trust has more than \$2,000 in it, the trust itself will disqualify the beneficiary from these programs.

**B. Three Types of Special Needs Trusts** There are three types of special needs trusts. All of them hold assets for the benefit of the beneficiary who has a disability without causing the assets in the trust to be countable towards the \$2,000 limit the beneficiary can have and maintain eligibility for needs-based public assistance, such as Medicaid and SSI.

One type of special needs trust only holds assets that belonged to someone other than the beneficiary or the beneficiary's spouse prior to being transferred into the trust. These are referred to as "third party-settled" special needs trusts.

The two other types of special needs trusts hold assets that formerly belonged to the beneficiary of the trust (or the beneficiary's spouse). Both of these are referred to as "self-settled" special needs trusts.

**C. Self-Settled v. Third Party-Settled Trusts** Every trust, whether a special needs trust or not, is either self-settled or third party-settled. Even as far back as the fourteenth

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