

# **SPECIAL NEEDS TRUST OVERVIEW**

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b>	1
<b>II.</b>	<b>SPECIAL NEEDS TRUST OVERVIEW</b>	1
A.	<u>Why Use a Special Needs Trust?</u>	2
B.	<u>Self-Settled Special Needs Trusts</u>	2
1.	(d)(4)(A) Special Needs Trust	2
2.	(d)(4)(C) Pooled Special Needs Trust	3
C.	<u>Third-Party Settled Special Needs Trusts</u>	4
D.	<u>Differences Between Self-Settled Special Needs Trusts and Third-Party Special Needs Trusts</u>	5
E.	<u>Alternatives to the Creation of a Special Needs Trust</u>	5
F.	<u>ABLE Act</u>	5
<b>III.</b>	<b>AVAILABLE PUBLIC BENEFITS FOR PERSONS WITH DISABILITIES</b>	6
A.	<u>Benefits Not Based on Financial Need</u>	7
1.	Social Security Disability Insurance (“SSDI”)	7
2.	Medicare	8
3.	Military and Civil Service Survivor Benefits for Adult Children with Disabilities	9
4.	VA Disability Compensation	10
B.	<u>Benefits Based on Financial Need</u>	11
1.	Supplemental Security Income (“SSI”)	11
2.	Medicaid	13
3.	Housing Choice Voucher Program (“Section 8”)	14
4.	Veterans Administration Benefits	15
<b>IV.</b>	<b>TRUSTS AFFECTING MEDICAID ELIGIBILITY</b>	18
A.	<u>General Rules on Trusts “Established By” the Client</u>	18
1.	History and Purpose of Trusts Established By the Client	18
2.	Definition of “Established By” the Client (Self-Settled Trusts)	19
3.	Revocable Trusts Established by the Client	19
4.	Rules Applying to Irrevocable Trusts Established by the Client	19
B.	<u>Exceptions to General Rules Governing Trusts “Established By” the Client</u>	20
C.	<u>Rules Affecting Trusts Not “Established By” the Client (Third-Party Settled Trusts</u>	20
1.	Nature and Purpose of Third-Party Settled Supplemental Needs Trusts	20

	2.	Requirements for Third-Party Settled Supplemental Needs Trusts .....	21
<b>V.</b>		<b>DRAFTING (d)(4)(A) SPECIAL NEEDS TRUSTS .....</b>	<b>21</b>
	A.	<u>POMS Requirements</u> .....	21
	B.	<u>Additional SSI Requirements</u> .....	22
	1.	Disability Determination .....	22
	2.	Administrative Expenses .....	23
	3.	Irrevocability .....	23
	4.	Legal Authority to Act with Respect to the Assets of the Individual .....	24
	C.	<u>Miscellaneous Considerations</u> .....	25
	1.	Trustee .....	25
	2.	Prohibition of Contributions After Age 65 .....	25
	3.	Trust Protector .....	25
	4.	Distribution Provisions .....	25
	5.	Bonding and Surety .....	26
	6.	Qualification and Public Accountings .....	26
	7.	Powers of Trustee .....	26
	8.	Spendthrift Provision .....	26
	9.	Fees, Taxes and Administration .....	27
	10.	Trustee Compensation .....	27
	11.	Amendment .....	27
	12.	Grantor Trust Status .....	27
<b>VI.</b>		<b>DRAFTING (d)(4)(C) SNTs .....</b>	<b>27</b>
	A.	<u>POMS Requirements</u> .....	27
	B.	<u>Drafting the (d)(4)(C) SNT</u> .....	28
<b>VII.</b>		<b>DRAFTING PROVISIONS FOR THIRD-PARTY SNTs .....</b>	<b>28</b>
	A.	<u>POMS Requirements</u> .....	28
	B.	<u>Medicaid Requirements</u> .....	29
	C.	<u>Miscellaneous Provisions</u> .....	29
	1.	Purpose Clause .....	29
	2.	Non-Reduction Clause .....	29
	3.	Emergency Clause .....	30
	4.	Authority to Rent Property to the Beneficiary .....	30
	5.	Spendthrift Clause .....	30
	6.	Discretion .....	30
	7.	Termination Clause .....	30
	8.	Amendment Clause .....	31
	9.	Trustee .....	31

10.	Trust Protector .....	31
11.	Distribution Provisions .....	31
12.	Powers of Trustee .....	32
13.	Fees, Taxes and Administration .....	32
14.	Trustee Compensation .....	32
15.	Planning for Retirement Plan Distributions .....	32
D.	<u>Planning to Obtain an Annual Exclusion for Contributions to the SNT</u> .....	33
E.	<u>Caution</u> .....	33
<b>VIII.</b>	<b>SNT ADMINISTRATION</b> .....	<b>34</b>
A.	<u>Notification to the Social Security Administration</u> .....	34
B.	<u>Notification to the State</u> .....	35
C.	<u>Trust Administration Duties</u> .....	35
D.	<u>Written Advice</u> .....	36
E.	<u>SSA Policy Concerning Disbursements from an SNT</u> .....	36
F.	<u>Medicaid Requirements</u> .....	37
G.	<u>State Requirements and Decoupling</u> .....	37
H.	<u>Trust Taxation Issues</u> .....	38
1.	Income Tax .....	38
2.	Taxpayer ID Number .....	38
3.	Fiduciary Income Tax .....	38
4.	Qualified Disability Trust .....	39
5.	Gift Tax on Funding Trust .....	39
6.	Estate Tax .....	40
I.	<u>Investment of Trust Assets</u> .....	40
<b>IX.</b>	<b>LITIGATION ASPECTS OF ESTABLISHING SNTs</b> .....	<b>41</b>
A.	<u>Establishment Process for Inheritances and Excess Funds</u> .....	41
B.	<u>Establishment and Administration Process for Matrimonial Law</u> .....	41
C.	<u>Establishment Process for Personal Injury Claims</u> .....	42
1.	Involvement of Special Needs Attorney .....	42
2.	Medicaid Liens, Medicare Claims and ERISA Plan Reimbursement Claims .....	43
3.	TRICARE & Veteran’s Administration Reimbursement Claims .....	44
4.	ERISA Plan Reimbursement Claims .....	44
5.	Settlement of Personal Injury Claims .....	45
<b>X.</b>	<b>WHAT CONCLUSIONS CAN WE REACH?</b> .....	<b>45</b>
	<b>APPENDIX I</b> .....	<b>47</b>

# Special Needs Trusts Overview

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## I. INTRODUCTION

According to a study by the U.S. Census Bureau, it is estimated that over 85.3 million Americans are disabled. This number represents approximately 27.2% of the entire population of the United States.<sup>1</sup> Of these individuals, approximately 55.2 million suffer from a severe disability (almost 18% of the population), and about 24.2 million people aged 18 and older need assistance with one or more activities of daily living.<sup>2</sup> The number of Americans with disabilities is expected to increase as the U.S. population ages. In light of the growing number of Americans with a disability, the need for special needs planning, as well as the establishment and administration of special needs trusts, is growing.

Attorneys not familiar with special needs planning or attorneys just beginning to practice in this area, are often confused and overwhelmed with the vast amount of knowledge necessary to adequately advise and plan for their clients. While only one tool in the attorney's bag, special needs trusts, present an excellent opportunity to preserve both assets and the beneficiary's eligibility for government benefits. However, improper drafting or inadequate counseling in the preparation of a special needs trust can create disastrous consequences for the beneficiary, including the reduction or total loss of means-tested government benefits. Additionally, failure to keep abreast of the ever-changing Social Security policy regarding special needs trusts and revisions to Social Security's Program Operation Manual System ("POMS") can cause considerable adverse effects on a beneficiary's eligibility for public benefits.

The purpose of this paper is to provide an overview of special needs trusts, including the different types of special needs trusts, drafting techniques and administrative concerns. Additionally, this paper will provide an overview of the types of public benefits preserved by special needs trusts, as well as how these trusts affect the beneficiary's receipt of public benefits. Finally, this paper will explore the use of special needs trusts in a litigation context.

## II. SPECIAL NEEDS TRUST OVERVIEW

One of the most common tools used by attorneys in planning for public benefits is a special needs trust ("SNT"). Governmental benefits are designed to provide basic health care, food and shelter. As such, governmental benefits provide for only a meager existence to recipients. An SNT

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<sup>1</sup> <http://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>

<sup>2</sup> <http://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf>

is designed to provide additional needs and extras, such as adaptive aides, caretaker expenses or vacations, that normal governmental benefits do not provide. A SNT can either be self-settled or third-party settled depending on the source of the funding. Each of these types of trusts are discussed below.

CAUTION: When establishing or administering a SNT, it is important to correctly determine the source of the funding (i.e., a beneficiary's own funds or third-party funds). As discussed below, these two types of trusts have different requirements. Additionally, a catch-all trust that includes both self-settled and third-party funds is prohibited. Third-party funds should never be commingled with a self-settled trust, and vice versa.

A. Why Use a Special Needs Trust?

The purpose of a special needs trust is to preserve the governmental benefits of the beneficiary and to provide for a source of funds available to the beneficiary for supplemental needs. More specifically, the purpose of a self-settled SNT is to avoid both the imposition of a period of ineligibility for SSI<sup>3</sup> or Medicaid because of the transfer of the resources to the trust, and the treatment of the trust as a resource for SSI or Medicaid eligibility purposes. Typically, self-settled trusts are used in tort recovery or settlements, inheritance received by the beneficiary outright (i.e., not in trust), or to hold equitable distributions in divorce or alimony payments.

Third-party SNTs permit a parent, grandparent or other person to provide for the needs of an individual with a disability that are not being met by public benefits. Therefore, in order to avoid a mandatory pay-back provision required in self-settled SNTs or to avoid the loss of public benefits, any bequest or gift to an individual with disabilities should be made via a third-party SNT. Many cases have been observed where an estate planning attorney mistakenly drafted a self-settled SNT rather than a third-party SNT. The improper use of the self-settled (d)(4)(A) or (d)(4)(C) SNT could result in the unnecessary repayment of Medicaid benefits to the state and a potential malpractice action against the drafting attorney. Also, third parties who are interested in providing for an individual with disabilities should not commingle their funds with an already established self-settled trust. A separate third-party trust should be established in order to avoid the mandatory pay-back provision required in a self-settled SNT.

B. Self-Settled Special Needs Trusts

To provide for the payment of supplemental needs, federal law permits an individual with disabilities to retain his or her own resources in one of two types of self-settled SNTs. Without the creation of such a trust, the resources would count as an asset of the individual, disqualifying him or her from SSI<sup>4</sup> or Medicaid benefits.<sup>5</sup> The two types of self-settled trusts are commonly referred to as (d)(4)(A) and (d)(4)(C) SNTs.<sup>6</sup> These self-settled, or first-party, special needs trusts are funded with the beneficiary's own funds.

1. (d)(4)(A) Special Needs Trust

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<sup>3</sup> 42 U.S.C. §1382b(c).

<sup>4</sup> 42 U.S.C. §1382b.

<sup>5</sup> 42 U.S.C. §1396p(d)(4).

<sup>6</sup> 42 U.S.C. §1396p(d)(4)(A), (C).

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