

Special Needs Trusts and Government Benefits Preservation

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Q. What is a special needs trust?

A. A Special needs trust (“SNT”) is a form of a pure discretionary, spendthrift trust designed to preserve a disabled person’s eligibility for government benefits. These public benefits may include means-tested programs where eligibility is based on financial need, such as Medicaid, Supplemental Security Income (“SSI”) or Food Stamps, or insurance programs where eligibility is based on criteria other than financial need, such as Medicare or Social Security Disability Income. For a description of the most common government benefits, see page 3.

Q. Are there different types of special needs trusts?

A. Yes. There are both private and pooled first party special needs trusts. In addition, there are Third Party Trusts as well.

Q. What is a first party private special needs trust?

A. The characteristics of a private special needs trust found at 42 USC §1396p(d)(4)(A) Trusts are:

- Individual trusts drafted by an attorney
- State specific
- For a beneficiary under the age of 65
- No additional funds may be added to the trust after the beneficiary is 65 years old, unless through a previously established structured settlement annuity
- Only parent, grandparent, guardian or a court may establish such a trust
- The trust agreement must grant Medicaid a first right of recovery against the trust assets upon the beneficiary’s death
- The trustee must be knowledgeable enough about government benefits to protect the beneficiary’s eligibility for said benefits
- The costs associated with drafting and establishing a private first party special needs trusts can vary depending on the facts of the case
- Approval of the trust from Medicaid must be secured in order for the trust to be deemed a non-countable resource

Q. What is a pooled special needs trust?

A. The characteristics of a pooled special needs trusts found at 42 USC §1396p(d)(4)(C) are:

- Trust is administered in accordance with one master trust agreement
- The trust is administered for the benefit of individuals nationwide
- Anyone can join a pooled trust, but Medicaid often considers joining a pooled trust after the age of 65 to be an improper transfer
- Unlike with private special needs trusts, a disabled individual may join the trust himself/herself
- Medicaid payback may be avoided by permitting the trust to keep the assets upon the death of the beneficiary
- The trustee must be knowledgeable about government benefits to properly administrator the trust
- The costs associated with joining a pooled trust are generally lower than those associated with establishing a private special needs trust
- An individual can join and establish an account with a pooled trust in a very short period of time
- The pooled trust trustee will secure the necessary government approval

Q. What is a third party special needs trust?

A. The purpose of a third party special needs trust is to preserve public benefits for an individual or family member with physical or mental disabilities. Money is provided to a trust for the benefit of a disabled individual via gift or inheritance. The trust is to provide for the disabled person's supplemental needs. The trust must be a pure discretionary spendthrift trust that grants the trustee the authority to determine if and when a distribution is appropriate and to deny a requested distribution if such a distribution could negatively impact the beneficiary's eligibility for benefits and/or overall well being. Third party special needs trusts can be testamentary or intervivos trusts and can be revocable or irrevocable. Also, and of great importance, Medicaid is not the primary beneficiary upon termination of the trust, rather the grantor can determine how the remaining trust assets are to be disbursed at the death of the beneficiary.

Q. What are the questions to ask when establishing a special needs trust administration?

A. The following questions should be asked:

- Does the client want to determine the trustee, financial manager, and the terms of trust administration?
- Does the trustee require a minimum deposit for trust services?
- Does the trustee have experience with special needs trust administration?
- What are the fees for trustee services?
- Will the trustee travel to meet with the beneficiary?
- How are disbursements requested and processed?

Q. What are some additional special needs trust considerations?

A. The primary goal of a special needs trust is to preserve an individual's means-tested government benefits. Therefore, it is important to learn if individual has a parent, grandparent or legal guardian who can establish the trust on his or her behalf. If not, a court order must be obtained to establish the trust properly.

Q. What happens upon termination of the special needs trust or death of the beneficiary?

A. Any money/property left in the trust must pay back Medicaid for all of the expenses paid for on behalf of the Medicaid beneficiary during the time the trust was in existence. Some states, however, take the position that Medicaid's right of recovery extends to all benefits provided during the trust beneficiary's lifetime. As a result, it is always important to speak with the state Medicaid office before advising a client about establishing a special needs trust.

Generally, any and all remaining money/assets/property in the trust after reimbursing Medicaid passes to the beneficiary's heirs at law.

Q. What are government benefits?

A. Government benefits are forms of healthcare and/or financial assistance that are made available to people within the United States. While eligibility for certain government benefits is based upon an individual's monthly income and the value of resources he/she owns, eligibility for other programs is based on the number of quarters of employment during which an individual paid taxes into the Social Security system. Examples of means-tested benefits are Medicaid, Supplemental Security Income, Food Stamps and Section 8 Housing Vouchers. Examples of entitlement-based benefits are Medicare, Social Security Disability Income and Disabled Adult Children's benefits.

Q. What is Medicare?

A. Medicare is a health insurance program that pays for an eligible individual's medical costs. Similar to SSDI, Medicare is an insurance program and not a program that is provided to people based on financial need. In simplest terms, Medicare pays for acute care, hospitalization, limited skilled nursing care, physician's visits, medications used in the hospital, and prescription drugs under Part D.

Q. What is Medicaid?

A. Like Medicare, Medicaid provides insurance coverage for basic medical and hospital care, as well as prescription drugs and long-term care services. In addition, and most often of critical importance to those with disabilities, Medicaid will pay for rehabilitative services, therapy (occupational and physical), and for care in either an individual's home, a group home or nursing facility. Many states also provide services through waiver programs to support individuals with disabilities in the community.

Q. How is one found to be eligible for Medicaid?

A. Generally speaking, one is found eligible for Medicaid upon the receipt of SSI benefits or by having limited resources (\$2,000 or less) and limited monthly income (less than \$710 per month).

Q. What is the Medicaid Waiver Program?

A. The primary objective of Medicaid Waiver Programs is to provide those with disabilities the opportunity to secure the healthcare they need out in the community rather than being forced to obtain such care in an institutional facility. The majority of waiver programs allow the states to disregard Medicaid provisions in order to deliver long-term care services in the community. For example, a waiver program may disregard the amount of income received or the assets owned by a disabled person and/or the disabled person's family members.

Q. What is Supplemental Security Income ("SSI")?

A. SSI is a means-tested Social Security (federal) benefits program that provides income to certain aged, blind and disabled people. The purpose of the SSI program is to provide certain individuals with income to be used for food and shelter. In 2013, the maximum amount of SSI for an individual is \$710 a month.

Q. What is Social Security Disability Income (SSDI)?

A. Social Security Disability Income (SSDI) is a benefit paid to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. Federal law requires this very strict definition of disability. In general, to get SSDI benefits, you must meet two different earnings tests: (1) a “recent work” test based on your age at the time you became disabled; and (2) a “duration of work” test to show that you worked (paid enough in social security taxes) long enough under Social Security. Certain blind workers have to meet only the “duration of work” test.

Q. What is Social Security’s definition of disability?

A. Social Security’s definition of disability is the inability to do any substantial gainful activity by reason of medically-determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. In other words, the injury must prohibit the person from performing his or her previous job or any other substantial gainful activity in the national economy.

Q. Can I become eligible for Medicare coverage after being determined to be disabled?

A. Yes. An SSDI beneficiary is entitled to receive health insurance coverage under the Medicare program after receiving SSDI benefits for a period of two years.

Q. What are Disabled Adult Child (DAC) benefits?

A. DAC benefits are SSDI benefits that are made available to a child (minor or adult) when his/her parent(s) reach retirement age, become disabled or die. The benefit is based upon the parent’s earning’s record with Social Security and is paid out as part of the parent’s Social Security benefit. In order for an adult child to access this benefit, he/she must have been determined to be disabled prior to the age of 22.

Q. Will an individual lose Medicaid coverage if the DAC benefit is greater than the SSI benefit?

A. No. Generally speaking, whenever an individual loses his/her eligibility for Medicaid due to the receipt of DAC benefits or an increase in a Social Security benefit, federal law ensures that the individual’s eligibility for Medicaid will remain in place.

Q. What is the amount of income an individual can receive per month and the total amount of resources that someone can own and still maintain his/her eligibility for SSI?

A. Generally speaking, a person can receive up to \$709 per month in income and can own \$2,000 in countable resources and still maintain his/her eligibility for SSI.

Q. What is a resource?

A. Resources are generally defined as those assets an individual or couple own and can apply, either directly or by sale or conversion, to meet basic needs of food, clothing and shelter. Resources may be available money, real property, personal property or other assets subject to provisions for relative responsibility.

Q. What are some examples of non-countable resources?

A. Non-countable resources include household goods and personal effects, an automobile, life insurance with a cash value not to exceed \$1,500, a prepaid burial plot or a burial fund up to \$1,500, and pre-paid funeral contracts valued up to \$10,000.