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As attorneys in the field of disability and public benefits law, we help to enhance your child's quality of life. Every member of the alliance has the resources and legal expertise to help you maintain public benefits for your child and develop effective estate plans that protect your assets.

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## Brief Guide to Special Needs Trusts



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## How can a Special Needs Trust assist my client with disabilities?

A special needs trust (SNT) provides for the maintenance of an individual with disabilities by supplementing, rather than replacing, government benefits. It can be either a self-settled or third-party-created trust for the individual with a disability to pay for necessities, while maintaining eligibility for government need-based benefits.

An SNT is distinguished from other trusts in that it is supplemental rather than supportive. Distribution restrictions may apply to an SNT. The trustee of an SNT should have full discretionary distribution authority, although certain distributions may cause the beneficiary to lose some government benefits. The trust must be valid under state law and must be created by a valid trust instrument or agreement. The trustee holds fiduciary responsibility to manage the trust's principal and income for the beneficiary.

## Who establishes the trust?

For self-settled SNTs involving certain benefit programs, an SNT is established on behalf of the individual with a disability by the individual's parent, grandparent, legal guardian or the court. These trusts

are funded with assets belonging to, or controlled by, the beneficiary. Third party SNTs are established by any third party with funds belonging to anyone other than the beneficiary. Third party SNTs have greater latitude of terms.

## Payback provision

The Supplemental Security Income (SSI) program and some state Medicaid provisions require that the state receive all amounts remaining in a self-settled SNT upon the death of the individual, up to an amount equal to the total Medicaid payments made. Most states require that any Medicaid liens be satisfied prior to funding the trust. Insurance subrogation, Medicare, and hospital liens must also be satisfied, if applicable.

## Source of funds

Federal law allows a self-settled trust to be funded with any property owned by a beneficiary. Some states restrict the funding of a self-settled SNT to monies obtained from a personal injury award, although most state Medicaid programs follow the federal law.

## Irrevocability and Distributions

The self-settled SNT must be irrevocable so as to comply with general trust rules and must further comply with SSI and Medicaid rules. While the statute does not limit provisions for what type of distributions can be made to or for the beneficiary, such trusts typically require that distributions be made at the discretion of the trustee or be limited to distributions that shall supplement, and not supplant, public benefits. However, agencies may put limits on certain types of distributions from self-settled trusts in order to receive benefits.

## Avoiding legal malpractice

Loss of benefits resulting from failure to create a self-settled trust may constitute legal malpractice.

Using a special needs trust where appropriate in a personal injury case is very common. In a Texas case, a plaintiff's attorney and the guardian ad litem in the same case paid \$4.1 million in a malpractice settlement for failure to establish an appropriate trust. There have been numerous other cases throughout the country with similar liability. An SNT can be used to hold structured settlement payments in personal injury cases, where the beneficiary has a disability and is eligible for benefits.

## Requirements for an under age sixty-five special needs trust

The individual must have disabilities and be under the age of 65 at the time the self-settled trust is established when SSI and some Medicaid programs are involved. After the client reaches the age of 65, the trust's exception status continues as to assets or structured settlements transferred into it before that age. Assets cannot be added after age 65. Additionally, the individual must continue to have a disability pursuant to the requirements for Social Security Disability or SSI.

## Does divorce terminate more than the marriage?

Divorce may affect the public benefits received by a person with a disability. The complexities of public benefits interpretation require an attorney who focuses on public benefits and special needs trusts.

## What happens to the trust when my client dies?

A special needs trust is not an estate and, in most states, does not require a probate court to transfer ownership to heirs. However, careful attention must be made in determining Medicaid's interest in any assets remaining in the self-settled SNT upon the death of the beneficiary. A third party trust will not require Medicaid to be paid back.

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