



USING A SPECIAL NEEDS TRUST TO PROTECT YOUR PUBLIC BENEFITS

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Individuals who have a disability or disabilities that require significant, long-term resource support often depend on public assistance benefits to help defray the overwhelming cost of treatment, even when they or their family would not otherwise require such support. Many of the public assistance benefits, including Supplemental Security Income (SSI), Medicaid (Medi-Cal in California), housing subsidies (Section 8), Aids Drug Assistance Program (ADAP), In-Home Support Services, food stamps, and utility payment assistance are characterized as “needs-based” assistance and have strict income qualifications. If income, gifts, an inheritance, or a lawsuit settlement in an amount that exceeds the income and resource limits goes directly to the disabled individual, she/he will be disqualified from receiving assistance. Therefore, it is essential that the assets of a public benefits recipient are constantly managed to insure that she/he does not exceed the income limits.

A common problem that arises in this context is that while public benefits do provide a critical source of supplemental income, they rarely cover all of an individual’s living expenses, and many recipients depend on their families for additional support. But the income eligibility

guidelines are strict and complex. For example, the Social Security Administration (SSA) considers all [assets](#), including income, resources, and property or payments that the beneficiary has a right to but does not receive, when evaluating a person’s income levels. [Income](#) includes earned income (i.e. wages, certain royalties), unearned income (i.e. pensions, state disability payments, unemployment benefits, interest income), in-kind income (food or shelter obtained for free or for less than fair market value), and deemed income (income of your spouse, parent or guardian). SSI benefits will be reduced dollar for dollar by the amount of countable income a party possesses. [Resources](#) include such things as cash, stocks or bonds, land, life insurance, more than one vehicle, other things that can be exchanged for cash and used to pay for food or shelter, and deemed resources. Resources specifically do not include the home a beneficiary lives in or the land the home is on. The limit for countable income is \$2,000 for an individual and \$3,000 for a couple living together. Finally, because an individual must be eligible for SSI to qualify for Medicaid benefits, if she/he does not comply with the income limits or the amount distributed causes the SSI benefit to be reduced completely, the individual will lose her/his Medicaid benefits as well. As a result, it can be very difficult to figure out how a family can provide the necessary financial support without putting the beneficiary over the income limits.

In 1993 Congress authorized the creation of Special Needs Trusts (SNTs), a form of trust designed specifically to address this problem. An SNT is any trust that is set up to provide benefits to a [disabled](#) person without causing the beneficiary to lose any needs-based public benefits she/he is otherwise entitled to receive. An SNT may be used to pay for medi-

cal and dental expenses, eye glasses, insurance, rehabilitation, education and training programs, and maintenance, including companion services and in-home health services that are not covered by the public assistance benefits. It may also be used to purchase an automobile for the beneficiary, and to pay for the beneficiary’s entertainment, vacations, athletic training, electronics and computer equipment. However, it is generally true that if an SNT provides the beneficiary with food, clothing, or shelter, or any asset (i.e. cash) that may be converted into food, clothing, or shelter, the beneficiary’s SSI benefits will be reduced by a value equal to the distribution.

To insure that distributions from an SNT do not affect a beneficiary’s public assistance eligibility, an SNT typically contains terms stating that the trust distributions should supplement, but not supplant, public assistance benefits. In general, the terms of an SNT must preclude the beneficiary from having [any](#) control or ownership of the trust assets or income, must establish the trust for the sole benefit of the disabled person, and must prohibit distributions to any other person. The only exception is that the trustee should be permitted to make direct payments to third parties that allow the beneficiary to receive “items that are not food, clothing or shelter.” The SSA Program Operating Manual System (POMS) specifically notes that such payments are not “income” for purposes of SSI qualifications.

There are two kinds of Special Needs Trusts: Third Party Special Needs Trusts and Self-Settled Special Needs Trusts.

[Third Party Special Needs Trusts](#)
Third Party Special Needs Trusts, sometimes called Supplemental Benefits Trusts, are trusts that are established by any person for the benefit of another using assets

that are owned by someone other than the beneficiary. This type of trust is often established by a parent for a disabled child, but may also be established by a sibling for the benefit of another sibling, or by one partner for the benefit of the other partner. These trusts can be set up during the lifetime of the grantor (the person whose assets are used to create the trust) or may be established through a will or trust at the grantor's death.

Although there is no federal statutory authority for a Third Party SNT, POMS does provide for the establishment of this type of trust.

A Third Party SNT may be *revocable* or *irrevocable*. If it is revocable, it is considered the property of the grantor because she/he maintains ownership of the trust assets and may terminate the trust at any time. Accordingly, the grantor will be subject to income tax for any income generated by the trust, and the trust assets will be included in the grantor's estate for estate tax purposes. Furthermore, as part of the grantor's estate, the trust assets are accessible to the grantor's creditors.

If the trust is irrevocable, it becomes a separate legal entity with its own Tax Identification Number and taxes will generally be paid by the trust. Trust assets will not be available to creditors of the grantor or of the beneficiary.

An important distinction between a Third Party SNT and a Self-Settled SNT (discussed below) is that it is not necessary to include a "payback provision" in a Third Party SNT. This is a clause which states that the Medicaid agency (Medi-Cal) will be repaid for benefits granted upon termination of the trust. A Third Party SNT may be terminated if the beneficiary is no longer in need of the public benefits, either because she/he recovers from her/his disability or because the beneficiary dies.

Self-Settled Special Needs Trust

Self-Settled Special Needs Trusts, often called a "(d)(4)(A) trust" because the authority for this type of trust can be found at 42 U.S.C. §1396p(d)(4)(A), are trusts established with the assets of a disabled person who is under 65 for her/his own benefit. These trusts are generally established when an individual who is a recipient of public aid receives an inheritance or personal injury settlement that is worth enough to disqualify her/him from receipt of the means-based benefits. It is important to note that any trust established with assets that would have been owned by the beneficiary, or the beneficiary's conservator or guardian, is considered a Self-Settled SNT.

A Self-Settled SNT may not be established by the disabled individual. Instead, it must be established by a judge, court-appointed guardian or conservator, or the parents or grandparents of the beneficiary. The trustee must have sole and absolute discretion over the use of the trust income and principal.

Self-Settled SNTs generally must include a "payback" provision which insures that the state Medicaid agency (Medi-Cal in California) will be repaid for benefits granted upon termination of the trust. The only exception is if a parent's assets are used to establish a Self-Settled SNT.

If a Self-Settled SNT is revocable, trust income and principal is considered "available" to the disabled person and will be included in a determination of income level. If a Self-Settled SNT is irrevocable, the trust assets are not considered "available" until they are actually distributed. The same tax implications described for a Third Party SNT apply to Self-Settled SNTs.

This article is intended to provide a brief summary of the interplay between Special Needs Trusts

and public assistance benefits. This is an extremely complicated area of law and we strongly recommend that you contact an experienced attorney before creating this type of trust instrument.

Additional Information can be found at:

<http://www.ssa.gov/notices/supplemental-security-income/spotlights/spot-trusts.htm>

<http://www.njelderlaw.com/elder%20news/2005/Art-1-5-12-05.PDF>

http://www.sfaf.org/services/financial_benefits.html

<http://www.disabilitybenefits101.org/>

http://www.canhr.org/publications/newsletters/NetNews/Feature%20Article/NN_200512.html

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