



“Elements of A Self-Funded Special Needs Trust”

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The use of special needs trusts in personal injury litigation is growing substantially. Wherever an injured plaintiff receives Medical Assistance benefits and/or Supplemental Security Income from the Social Security Administration, a special needs trust should be considered. In most personal injury settlements, monies directly received by the injured plaintiff will disqualify the recipient for SSI and MA benefits. However, by use of a properly drafted special needs trust, these important government programs can continue without interruption.

Prior to 1993, the Social Security Act appeared to prohibit the creation of special needs trusts to allow disabled individuals to qualify for Medical Assistance. However, the Omnibus Budget Reconciliation Act of 1993 expressly permitted special needs trusts in certain situations. The key components of an OBRA-93 special needs trust are fourfold. First, the beneficiary of the Trust must be disabled as that term is defined in the Social Security Act. Second, the creator of the Trust must be the beneficiary's parent, grandparent, legal guardian, or a court of competent jurisdiction. Third, the Trust must be irrevocable and the trustee must have complete discretion to give all, some, or none of the benefits to the disabled beneficiary. Fourth, the Trust must provide that upon the death of the disabled beneficiary, the primary contingent beneficiary is the Medical Assistance program for services provided to the disabled individual after the creation of the Trust, but only to the extent required by the state's "Estate Recovery Plan".

The positive aspects of a special needs trust are substantial in almost every personal injury settlement of a disabled plaintiff who is, or in the future may be, eligible for SSI or MA. In future notes, additional questions involving the use of Special Needs Trusts for minor disabled children and the broad range of appropriate expenditures from such Trusts will be explored.

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