



## Frequently Asked Questions About Special Needs Trusts

Although Special Needs Trusts have been available under the Social Security Act since 1993, news of their substantial benefits has been slow to filter its way to all members of the bar. Since there is virtually no reason to fail to consider the use of a Special Needs Trust for a disabled plaintiff who qualifies for Medical Assistance and/or Supplemental Security Income benefits, an educated bar on this issue is essential to proper representation. In the paragraphs which follow, we try to answer some of the most frequently asked questions fielded by our office.

### **1. When should a Special Needs Trust be considered in litigation matters?**

**Answer:** Any time a disabled individual receives, or is otherwise qualified for, Medical Assistance or SSI benefits and a recovery of money due will cause disqualification of public benefits, a Special Needs Trust should be considered. Such situations could involve a personal injury settlement, an inheritance, an award of past benefits for SSI or other insurance programs. Since individuals who receive SSI and MA generally can possess only about \$2000.00 in liquid assets, any financial circumstance which would develop resources beyond that amount should be considered for a disabled individual.

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## 2. What is the least amount of a recovery for which a Special Needs Trust should be considered?

**Answer:** As set forth in the previous question, any recovery which jeopardizes the individual's MA and SSI should be considered for a Special Needs Trust. At the same time, however, for smaller recoveries, a variety of "spend-down" techniques could be used to purchase non-liquid assets which are excluded from consideration for MA and SSI eligibility. Excluded resources which could be purchased could include a home, household goods/effects up to a value of \$2000.00, an automobile, a burial space, burial funds, and term life insurance. Naturally, care must be taken in promptly obtaining such "spend-down" resources so that the settlement monies due to the disabled person do not disqualify the individual for public benefits. It is often wise to include such purchases directly in a court order which approves the settlement.

## 3. Who should be the trustee of a Special Needs Trust?

**Answer:** If the matter involves a minor or incapacitated person, the Rules of Civil Procedure appear to require the use of a corporate fiduciary. While some corporate fiduciaries require large settlements before accepting the role of trustee, other corporate fiduciaries are now accepting smaller settlements in selected cases. If a corporate fiduciary is not feasible, some judges have considered the appointment of a trusted family member, friend, or investment advisor as trustee. In cases not put into suit or otherwise not covered by the Rules of Civil Procedure, there is no requirement that a corporate fiduciary be used, although the expertise of such a fiduciary is generally wise in any larger settlement.

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#### 4. Are Special Needs Trusts simply a "loophole" which has recently been discovered in the law?

**Answer:** Not at all. In 1993, Congress explicitly authorized the creation of Special Needs Trusts for the purposes which I have described in this and other articles, i.e., to allow a disabled individual to receive public benefits while having access to monies, through a trustee, which can pay for the supplemental needs of the disabled individual to allow a more desirable quality of life. Naturally, the Trust itself must fulfill basic requirements to qualify under the 1993 law, the most significant of which is that upon the death of the disabled beneficiary, the State has the first lien upon the residue of the Trust to repay it for Medical Assistance paid during the lifetime of the beneficiary. However, not all Medical Assistance payments during the beneficiary's lifetime need be reimbursed, but only such amounts as are required by the State's "Estate Recovery Plan", which often does not mandate repayment of all Medical Assistance benefits. At the same time, however, any Medical Assistance lien relating to injuries of the disabled person which gave rise to the litigation must be satisfied prior to funding the Special Needs Trust.

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