



DOWN SYNDROME GUILD
OF DALLAS

Special Needs Trusts: Frequently Asked Questions

Adapted with permission from National Special Needs Network, Inc., and/or Jeffrey H. Minde Attorney and Counselor At Law P.A. These questions and answers are meant to be suggestive only; please contact your personal attorney regarding any legal matters.

WHAT IS A SPECIAL NEED TRUST & WHY USE IT? To Preserve Governmental Benefits And Protect Assets. A Special Needs Trust is a specialized legal document designed to benefit an individual who has a disability. A Special Needs Trust is most often a stand alone document, but it can form part of a Last Will and Testament. Special Needs Trusts have been in use for many years and were given an official legal status by the United States Congress in 1993.

A Special Needs Trust enables a person with a physical or mental disability, to have, held in Trust for his or her benefit, an unlimited amount of assets. In a properly-drafted Special Needs Trust, those assets are not considered countable assets for purposes of qualification for certain governmental benefits. Such benefits may include Supplemental Security Income (SSI), Medicaid, vocational rehabilitation, subsidized housing, and other benefits based upon need.

A Special Needs Trust provides for supplemental and extra care over and above that which the government provides. Each Special Needs Trust is its own "entity" with its own Federal Identification Number (Employer Identification Number) issued by the Internal Revenue Service. The Trust is not registered under either the Grantor's or the Beneficiary's Social Security Numbers.

MY FAMILY IS WEALTHY AND WE'RE NOT TOO CONCERNED ABOUT GOVERNMENTAL BENEFITS. WHY BOTHER CREATING A SPECIAL NEEDS TRUST? To Protect Your Disabled Family Member. Other types of Spendthrift or Family Trusts aren't appropriate for people with disabilities because they don't address the specific needs of the disabled beneficiary or his future lifestyle. Even in situations where a family may have significant resources to help a disabled family member a Special Needs Trust should be established to address these issues.

Monies placed in the Trust remain non-countable assets and allow the beneficiary to qualify for available benefits and programs. Why sacrifice services that might be available to your relative now and in the future? Just as importantly, Trust funds are not subject to creditors or seizure. Therefore, if the disabled beneficiary should ever be sued in a personal injury or other type of lawsuit, the beneficiary is not a "deep pocket" because monies placed in the Trust are not subject to a judgment.

IF HAVING MONEY CAUSES PROBLEMS FOR MY DISABLED DAUGHTER, WHY CAN'T I JUST LEAVE THAT MONEY TO HER BROTHER SO THAT HE CAN LOOK AFTER HER? Leaving Money To Others Can Create Serious Problems. "Disinheritance" was commonly used before the use of Special Needs Trusts was officially recognized by Congress. Disinheritance as a means of providing for a disabled or ill person puts the assets at risk.

Assets held by a non-disabled sibling for the benefit for of a disabled sibling could be subject to such liabilities such as judgments from automobile accidents, a bankruptcy, or a divorce. In such circumstances, the assets meant to benefit the person with the disability could go to pay the judgment creditors or the estranged spouse of the non-disabled sibling. Using a Special Needs Trust guarantees that the funds will be held only for the benefit of the person with the disability, and not for any other purpose whatsoever.

WHEN SHOULD I CREATE A SPECIAL NEEDS TRUST? A Special Needs Trust Is A Valuable Estate Planning Tool. A Special Needs Trust can be established at any time before the beneficiary's 65th birthday. It is very common to create a Special Needs Trust early in a child's life as a long term means for holding assets to benefit the disabled family member. As a part of Estate Planning, the costs of the creation of the Trust may be tax deductible.

Additionally, the special needs trust is the best receptacle for funds from third party sources, such as a personal injury settlement or a bequest from relatives or friends, Social Security back payments, insurance proceeds, or the like.

WHAT KIND OF ASSETS CAN BE USED TO FUND A SPECIAL NEEDS TRUST? Almost Any Kind Of Asset Can Be Used To Fund The Trust. Virtually any kind of asset can be used to fund a Special Needs Trust, including insurance proceeds, inheritances, lump-sum payments from Social Security Disability or Supplemental Security Income, settlements in legal matters, or just "piggy bank" money.

Many people neglect to set up a trust when they receive assets, particularly lump sums of governmental benefits. However, it is important to realize that monies received as "back pay" for SSI or SSDI claims become income to the beneficiary when received. Ironically, this sudden influx of income can disqualify a person from the benefits they were just approved for.

For SSI, the rule is straightforward: A recipient cannot have more than \$2,000 in assets. SSDI employment, income, and asset limits are more complex and confusing and need to be anticipated. In order to maintain benefits qualification, a trust is a necessity as a "safe harbor" for any assets belonging to the disabled beneficiary.

CAN ANY LAWYER CREATE A SUPPLEMENTAL NEEDS TRUST? Just As Most Podiatrists Aren't Neurosurgeons... A family or person that wishes to benefit an individual with a disability will be well advised to utilize the services of an attorney that specializes in Special Needs issues. A poorly written trust can cause a loss of benefits, a loss of savings, or other financial and legal hardships for the beneficiary or the trustee, some quite severe, including civil litigation or criminal prosecution in certain extraordinary circumstances. Using a law firm that specializes in special needs issues assures you that the attorney is familiar with the benefits systems, the proper creation of the trust, and ultimately the defense of the trust in the event that it should be challenged by a court, the Social Security Administration, Medicaid, or the like.

MY SISTER IS DISABLED. CAN I SET UP A TRUST FOR HER? Yes, But... The United States Code section that authorizes Special Needs Trusts states that "a parent, grandparent or guardian" is authorized to establish a Special Needs Trust. Siblings, caregivers or friends are not mentioned at all. However, the law does not forbid siblings and others to set up a Special Needs Trusts. A well-written Special Needs Trust established by someone other than a parent, grandparent or legal guardian should include a citation to this law for the sake of clarity. Benefits providers and agencies often create "red herring" difficulties around this issue. Be cautious, and make sure you work with a lawyer familiar with this problem and that the Trust is properly drafted.

I HAVE TWINS WITH DOWN SYNDROME. CAN I USE ONE TRUST FOR BOTH OF THEM? Just As Your Children Are Exceptional So Are Their Trust. Each disabled individual must have his or her own trust document. The law requires that each Special Needs Trust contain specific examples of what constitutes supplemental care for the beneficiary. No one's needs, not even twins, are absolutely identical. This is particularly the case as people get older and their abilities change.

I'M VERY CONFUSED. I HEARD A LAWYER SAY SOMETHING ABOUT HAVING TWO SEPARATE TRUSTS. It Really Isn't Necessary. This confusion stems from the Social Security Regulations, which make a distinction between "First Party" (or self-funded) Special Needs Trusts that contain the beneficiary's own money and "Third Party" funded Trusts that contain money from other sources. "First Party" money is usually subject to the Medicaid repayment requirements. Therefore, many lawyers insist on creating separate Trusts. ***This costs more and is often confusing to the Trustee.*** A well-drafted Special Needs Trust should be able to hold money from both "First Party" and "Third Party" sources. Funds from the different sources can be held and managed in the Trust in separate accounts.

WHY NOT JUST USE A POOLED TRUST? Pooled Trusts Aren't For Everybody. “Pooled” or Cooperative Master Trusts are a special form of Special Needs Trust that can be established by not-for-profit organizations or groups on behalf of their membership (for example, a group home may create one for its residents). While it is true that Cooperative Master Trusts are exempt from the Medicaid repayment rules, the money that is placed in a Cooperative Master Trust is used generally to address the needs of all the members of the group, not just the specific needs of your disabled family member.

Once you place your money in the pool it usually cannot be withdrawn or returned to you. You cannot direct where the Trust avails will go if your family member leaves the group for any reason. Your money remains in the pool to assist future members. You do not have control over how the money is spent. As a result, your family member may not get all the services he or she needs or might want.

Cooperative Master Trusts can work well if you find one that suits your circumstances. It provides a way for a family of more modest means to obtain professional expertise and trust services that would be unavailable to them on an individual basis. If this is an option for you, you are well advised to seek out a group that you know well and trust, can serve your special needs, and which has an established track record of successful trust management.

I'M MY SON'S TRUSTEE. THAT MAKES ME HIS GUARDIAN, RIGHT? Not Right. Merely setting up a trust, becoming a trustee, becoming a Power of Attorney, or being someone's Representative Payee for Social Security purposes does not make you a guardian even if you may have effective control of the disabled person's finances and provide for all their needs.