



**FITZWATER**  
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## Special Needs Group

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## I have a family member who experiences a disability. What is a special needs trust?

### What Is A Special Needs Trust?

A Special Needs Trust is a planning tool to benefit people who receive government benefits. This type of trust preserves eligibility for government benefits and establishes a separate fund that can pay for things over and above basic needs that improve the beneficiary's quality of life.

### Why Would Someone Need A Special Needs Trust?

Often a person with a disability receives public benefits. There are several government programs that provide people with disabilities with help. This help may take the form of cash, medical assistance, housing, or food. Many of these programs, such as Supplemental Security Income (SSI) and Medicaid, have financial eligibility requirements.

Most public benefits programs have a resource requirement that limits the amount of assets a person can own and still be eligible for the program. There are certain assets that do not count, such as a house in which the beneficiary lives and one car. For most programs, the limit for assets that are not excluded is \$2,000.

Similarly, if someone has monthly income that is too high, it may affect eligibility for benefits. The income eligibility limits vary among the programs.

With a Special Needs Trust, the assets can be given to the trustee of the trust, to be used for special needs. In some circumstances, income can be directed to the trustee as well.

### What Are Special Needs?

Special needs include any goods and services that are not food or shelter. 'Supplemental needs' is another term for special needs. As a result of a rule change in 2005, clothing can now be treated as a special need.

Special needs include, but are not limited to, the following: clothing; transportation, such as car expenses or bus pass; telephone; education; cable television; private rehabilitative services; occupational or physical therapy; private case management; medical services for which there are no other funds available; health insurance premiums; dental care; medication and supplements; psychological support services; companion care; respite care; durable medical equipment; massage; recreation and vacation; entertainment; computer equipment and services; personal care items and services.



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### Can A Special Needs Trust Pay For Food Or Shelter?

The most common way for a Trust to be written is to limit expenditures to items that are not food and shelter. This strict distribution standard has been proven to work for most, if not all, types of public benefits programs that limit the resources a person may own.

In some situations a more flexible standard, often called the hybrid distribution standard, can be included in the Trust. This allows the trustee to pay for food and shelter in certain limited circumstances. If a distribution is made for basic needs there are usually consequences, such as a reduction in government assistance, but in some cases the overall benefit is worth it. The hybrid standard is more flexible than the strict distribution standard but is not always desirable. Be sure to get advice from a knowledgeable attorney before deciding to include this authority in a Special Needs Trust.

### How Does A Special Needs Trust Work?

Distributions from a Special Needs Trust are paid at the discretion of the trustee. It is important that the trustee directly pay the person or business providing the special need. The beneficiary is ordinarily not given cash with which to make an allowed purchase. This is because the cash could be used to purchase a prohibited item, such as a meal or item of clothing. Receipt of the cash must be reported to the government agency providing assistance, and benefits may be reduced or eliminated for a period of time. To avoid this, the trustee should pay directly for the item requested.

### Who Should Be The Trustee?

A trustee can be a private person, such as a relative of the beneficiary. Alternatively, a professional trustee can be named, such as a financial institution or small business that offers fiduciary services in the local community. In some cases, both a relative of the beneficiary and a professional fiduciary are named as co-trustees.

Choosing the trustee for a Special Needs Trust is an important decision. The trustee will have an ongoing relationship with the beneficiary, and it is paramount that the trustee be sensitive to the beneficiary's needs and takes the time to understand the beneficiary's unique situation. The trustee must also exercise good judgment when making distributions and be knowledgeable about the impact of distributions on the beneficiary's public benefits. In addition, the trustee must be a prudent investor and good with record keeping and paperwork. Being a trustee is not an easy job!



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### How Are Special Needs Trusts Created?

Special Needs Trusts are often created by third parties wishing to give assets to the beneficiary without jeopardizing public benefits. The most common examples of this are Special Needs Trusts created by parents or grandparents for a child who has a disability. Mechanisms used by third parties to create and fund a Special Needs Trust are described below under Trusts Created by Parents, Grandparents, and Other Third Parties.

A recipient of public benefits may have assets of his or her own. In some cases it is possible to transfer the beneficiary's own funds into a Special Needs Trust and keep public benefits. This type of Trust is described below under Trusts Created With the Assets of the Beneficiary.

### Trusts Created by Parents, Grandparents, and Other Third Parties

A parent or other third party may set up a Special Needs Trust in several ways. The three most common ways are described below.

1. **By Will:** A person may create a Trust in his or her Will for the benefit of someone on public benefits. The rules for the Trust are written in the Will, but the Trust does not take effect until the person making the Will dies. The Special Needs Trust can specify who will receive any remaining assets in the Trust at the death of the beneficiary.
2. **Through a Revocable Living Trust:** It is also possible to establish a Special Needs Trust for someone on public benefits in a Revocable Living Trust, to take effect only when the person making the Revocable Living Trust dies. An exception is that a Special Needs Trust for a spouse should be established in a Will, and not in a Revocable Living Trust.
3. **Through an Irrevocable Living Trust:** Sometimes it is advantageous to set up an Irrevocable Living Trust with special needs provisions and transfer assets to it while the donor, such as a parent or grandparent, is alive. This way, if one or more people want to donate to a fund for the beneficiary by making lifetime gifts, a Special Needs Trust is in place to receive those gifts. In fact, the existence of an active Special Needs Trust often serves as an inducement to relatives and friends to make lifetime donations.

Also, relatives and friends can name the existing Special Needs Trust as a beneficiary in their own Wills. This encourages bequests that might not otherwise be made because the person making the bequest does not have to be concerned about the effect of the gift on government benefits.



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### Trusts Created with the Assets of the Beneficiary

A person who receives government benefits may have assets of his or her own that will jeopardize eligibility. For example, the person may sell a house that was an excluded asset and now have countable assets in excess of \$2,000. As another example, he or she may receive an inheritance directly because a parent who died did not create a Special Needs Trust in his or her Will. As a third example, the person may have been injured in an accident and be receiving a settlement or award to compensate him or her for an injury.

- 1. Payback Trust Exception:** There are rules that make it disadvantageous for people who are 65 years or older to create Special Needs Trusts in these situations if it will benefit themselves. However, for people who are under 65 years old, there is an exception that allows them to have a Special Needs Trust. This type of Trust is often called a 'Payback Trust' or 'Under 65 Disability Trust.'
- 2. Requirements for a Payback Trust:** There are four requirements for this type of Trust to qualify under the special exception described below:
  - a. The Payback Trust must be established by a parent, grandparent, court, or conservator.
  - b. The beneficiary must be disabled as defined in the Social Security Act. If the beneficiary is receiving Social Security Disability Income (SSDI) or Supplemental Security Income (SSI), then this requirement is automatically met. If not, then the beneficiary will have to prove the nature and extent of disability.
  - c. The beneficiary must be under 65 at the time the assets are being put into the Payback Trust.
  - d. At the beneficiary's death, the remaining Payback Trust balance, if any, must be given to any Medicaid agency that provided assistance to the beneficiary
- 3. Steps to Establish a Payback Trust:** The steps to set up a Payback Trust will depend on the circumstances, such as whether a parent or grandparent is available to participate in the process, and whether the beneficiary has capacity to make decisions. If the beneficiary does not have the capacity to make decisions, then a court will be involved to approve the Payback Trust. If not, then in some cases a court is not required.
- 4. Personal Injury Settlements and Awards:** In cases involving a personal injury, there are special issues that should be considered prior to trial or settlement of the case. If the case is resolved without addressing these issues, it can result in later complications and a loss of public benefits, particularly when a structured settlement is involved. Fortunately, with a little pre-planning, often a person receiving a settlement that is not in itself sufficient for lifetime needs can preserve public benefits so that the settlement funds can be used to maximize his or her quality of life. In these cases, legal advice should be sought from lawyers who have expertise in this area of the law.