

# *Brief Guide to* Special Needs Trusts

The best way to provide your special needs client with compassionate care and a comfortable life is to support your legal and financial decisions with reliable information and proven expertise.

As attorneys in the field of Disability and Public Benefits Law, we help to enhance your clients' quality of life. Every member of the alliance has the resources and legal expertise to help you maintain public benefits for your clients and develop effective estate plans that protect their assets.

This brochure is provided as a service of Special Needs Alliance and is informational only. It is not intended to serve as legal advice or replace the advice of a legal professional.



*Special needs require special attorneys*

Special Needs Alliance members  
are available nationwide.

To contact a member in your area, call

**877-572-8472**

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## How can a Special Needs Trust assist my client with disabilities?

A Special Needs Trust (SNT) provides for the maintenance of an individual with a disability or disabilities by complementing rather than replacing government benefits. It is a self-settled or third-party-created trust for the individual with a disability to access while maintaining eligibility for government need-based benefits. An SNT is distinguished from other trusts in that it is supplemental rather than supportive.

Distribution restrictions may bear upon an SNT, and the Trustee of an SNT may have full discretionary distribution authority, which may require the beneficiary to forfeit some government benefits. The trust must be valid under state law and must be manifested by a valid trust instrument or agreement. The Trustee holds fiduciary responsibility to manage the trust's corpus and income for the beneficiary.



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## Who is the “settlor” that establishes the trust?

An SNT is established by the individual with a disability or by the individual's spouse, parent, grandparent, legal guardian or the Court. These trusts are funded by assets belonging to, or controlled by, the beneficiary.

## Payback provision

The State receives all amounts remaining in trust upon the death of the individual, up to an amount equal to the total Medicaid payments made.

Most states require that any Medicaid and Medicare liens be satisfied prior to funding the trust. Insurance subrogation and hospital liens must also be satisfied.

## Source of funds

Although federal law allows a trust to be funded with any property owned by the beneficiary, some states restrict the funding of a trust to monies obtained from a personal injury award.

Most state Medicaid programs have not adopted any such limitation on the source of funds, nor is there any apparent provision federal law allowing such limits.

## Irrevocability:

The trust must be irrevocable so as to comply with general trust rules, and must further comply with Supplemental Security Income rules.

## Distribution standards:

While the statute does not address provisions for distributions to or for the beneficiary, such trusts typically require that distributions are made at the discretion of the Trustee or are limited to distributions that shall supplement, and not supplant, public benefits.

## Avoiding Malpractice

Using a Special Needs Trust where appropriate in a personal injury case is not an unusual or exotic practice. In 2004, a plaintiff's attorney and the guardian ad litem in the same case paid \$4.1 million in a malpractice settlement for failure to establish an appropriate trust. *Grillo v. Henry*, 96th Dist. Ct., Tarrant Co. (Tex.), Cause No. 96-167943-97, and *Grillo v. Pettiette, et al.*, 96th Dist. Ct., Tarrant Co., Cause No. 96-145090-92.

The use of an SNT and structured settlements in personal injury cases where the client is disabled and eligible for benefits will help protect the practitioner from malpractice claims.

## Requirements for an under sixty-five Special Needs Trust

The individual must be under the age of 65 at the time the trust is established. After the client reaches the age of 65, the trust's exception status continues as to assets transferred into it before that age. Assets cannot be added after 65. Additionally, the individual must be disabled pursuant to the requirements for Social Security Disability or SSI benefits.

## Does divorce terminate more than the marriage?

Divorce may affect the public benefits received by a person with a disability. The complexities of public benefits interpretation requires an attorney that specializes in public benefits and Special Needs Trusts.

## What happens to the trust when my client dies?

A Special Needs Trust is not an estate, and therefore does not require a probate court to transfer ownership to heirs. The trust shall continue to disburse funds until such time as all assets therein have been exhausted, or it may remain in effect until minor children reach a specified age.