



SETTLEMENT CONSULTING

Special Needs Trust FAQs

What Is A Special Needs Trust?

The primary purpose of creating a Special Needs Trust is to continue the monthly tax-free SSI disability benefits and secure access to Medicaid. A Special Needs Trust (SNT) allows a personal injury victim to receive a personal injury settlement/award without disqualification from SSI or Medicaid.

The reason for this is because federal law allows money to be placed into an SNT and it is not a countable resource for purposes of qualifying for needs based public assistance programs (See 42 U.S.C. 1396p). In order to create a Special Needs Trust the personal injury victim must meet the definition of disability contained in the Social Security Disability definition (See 42 U.S.C. 1382c).

Is There More Than One Type Of SNT?

There are several different types of SNT's.

- 1. Disabled person under age 65** (42 U.S.C. 1396p(d)(4)(A)): this trust is established with funds of the disabled person (typically a personal injury settlement/jury verdict) for the benefit of a disabled person who is under age 65 at the time of drafting the SNT. After the death of the beneficiary, then the law requires that any remaining funds are first used to repay any Medicaid lien due for benefits paid during the lifetime of the beneficiary and only if there are any funds remaining, then they can be distributed to the heirs of the beneficiary according to the terms of the Trust.
- 2. Disabled person over age 65** (42 U.S.C. 1396p(d)(4)(C)): this trust is typically called a Pooled Trust and is again established with funds of the disabled person; however, this person is over age 65 at the time of drafting the SNT and, therefore, once the beneficiary passes, then any assets remaining in the Pooled Trust must remain in the Pooled Trust for the benefit of other disabled beneficiaries or must be paid to Medicaid.
- 3. Person who receives too much income to be qualified for Medicaid** (42 U.S.C. 1396p(d)(4)(B): sometimes called a Miller Trust; and
- 4. Third Party Special Needs Trust:** this trust would be established by someone else (parent, grandparent, etc.) for the benefit of a disabled person. This trust would provide for comfort and happiness for the benefit of the disabled person during their lifetime, but once that disabled person passes away, the grantor of the trust in establishing the trust, would have made a decision as to where any funds remaining in the trust would go.

How Do I Know If I Need An SNT?

If you do not have enough money to pay for all of your future medical care and support from your settlement and you are currently eligible for SSI/Medicaid, then you should consider establishing a SNT. Again, you must be disabled by the definition of Social Security Disability in order to qualify to use a SNT.

How Can An SNT Be Funded With Personal Injury Proceeds?

There are two ways the trust can be funded. First, all of the settlement proceeds could be placed in the SNT. The investment of the money by the trustee will cause the interest earned to be taxable. Second, part of the settlement proceeds can be used to seed the trust with the remainder being used to purchase a structured settlement annuity that will make payments into the trust. The interest earned on the structure is not taxed. However, once payments are made into the trust and invested by the trust, the interest earned by the trust is taxable.

What Are The Advantages Of A SNT?

There are several advantages to the Special Needs Trust:

- The personal injury victim has access to Medicaid rates and services. Yet he or she can still purchase medical services and equipment at regular rates whenever necessary.
- The trust beneficiary continues to receive SSI disability benefits adjusted upward for the cost of living each year. Over time, that also yields a significant amount of money.
- A trust is, as the Florida Supreme Court stated in *Kush v. Lloyd*, an ideal vehicle to provide continuity of fiscal management over a long period of time, even without consideration of eligibility for SSI and Medicaid; there are no annual guardianship reports to file, and trust withdrawals can be made on a regular as well as an emergency basis without court order.

What Are The Disadvantages Of A SNT?

The main disadvantage to establishing a Special Needs Trust is that the personal injury victim, or the family, cannot have unrestricted use of the money to spend in any way he, she or they see fit. However, with good planning and under the appropriate circumstances, the settlement proceeds can be used to substantially improve the life of the disabled person and his or her family, provide for future security, protect access to Medicaid, and manage the money in an efficient and secure manner. Another disadvantage is the trust must provide that upon the individual's death the state receives all remaining

amounts up to the amount of the public assistance paid on behalf of the individual. This payback provision must be included in an SNT. Only what is left after Medicaid is paid back can be paid to family members of the victim.

How Does An SNT Operate?

For purposes of maintaining SSI and Medicaid, the beneficiary must not have direct control of the funds. A trustee is selected to hold the assets and that trustee is usually a bank or trust company. The trustee must be directed to maximize the benefit of the trust where appropriate, paying for only those items for which the beneficiary is not otherwise eligible from government benefit programs, such as SSI, Medicaid, group homes, nursing homes, etc. The trust must be irrevocable.

Pay For?

The purpose of the trust is to retain Medicaid, and use trust funds to meet the supplemental, or “special” needs of the beneficiary. These can be quite broad, however, and include special education, health, comfort, medical and dental expenses, trained medical assistance staff (24 hours or as needed), independent medical check-ups, equipment, supplies, programs of cognitive and visual training, respiratory care and rehabilitation (physical, occupational, speech, visual and cognitive), eye glasses, transportation (including vehicle purchase), maintenance, insurance, essential dietary needs, and private nurses or other qualified caretakers.

Also included are non-medical items, such as electronic equipment like radios, record or CD players, televisions, VCRs, computer equipment, vacations, movies, trips, travel to visit relatives or friends, summer or day camps, college or technical school tuition, and other monetary requirements to enhance the client’s self-esteem, comfort or situation, and generally pay expenses that are not “food and shelter” which are part of the SSI disability benefit payment. However, even “shelter” expenses is broadly defined and would exclude payments by the trustee directly to the lawn maintenance service employed to cut the client’s grass. In some cases, monthly mortgage payments can be made; however, the payments may reduce the client’s SSI monthly check due to the application of the “presumed value reduction” rule.

Medicaid will cover some of these items. For example, Medicaid will pay for a specifically fitted wheelchair, costing \$6,000. However, they will only pay once every five years. The SNT can pay for modifications or a new chair if needed on a more frequent basis than Medicaid will pay for. As another example, when Medicaid does not pay for second opinions prior to surgery, the trust can.

Sometimes the trust beneficiary may be covered under a parent's or spouse's employers' group health plan. Yet many of those plans have restrictions on the number of respiratory therapy or psychological counseling visits. If the private insurance does not pay, the trustee will look to Medicaid. But if neither pays, the trust is available to pay those medical bills.

What Happens If The Personal Injury Victim No Longer Qualifies For Medicaid?

If a personal injury victim wins the lottery, marries into (relative) wealth, inherits other money, becomes self-employed, or loses SSI eligibility and Medicaid for any other reason, the trust will continue to be available to meet the victim's needs, in the same manner as guardianship account funds would continue to be available, only easier — the limitations on expenditures in the SSI and Medicaid rules would not be a factor in decisions about disbursements.

What Happens To The Money Remaining In The Trust After The Death Of The Beneficiary?

1. If the beneficiary was under 65 when the Trust was drafted, then the law requires that any funds remaining in the SNT after the death of the beneficiary be paid first to the State of Florida, Agency for Health Care Administration, to repay any Medicaid lien. Remember, that although you are properly qualified for Medicaid during your lifetime, Medicaid has the right to demand reimbursement from your estate for any funds that they paid for your medical care during your lifetime. Therefore, only if there are any funds remaining in the Trust after Medicaid has been repaid, then those assets would be distributed to your heirs (whomever you decide them to be).
2. If the beneficiary was over 65 when the Trust was drafted, then the law requires that any funds remaining in the SNT after the death of the beneficiary, be retained in the Pooled Trust for the benefit of other disabled beneficiaries or, if there are none, then the funds must be paid to Medicaid.

Is There A Guarantee That If I Create An SNT I Will Always Qualify For Medicaid/SSI?

No. If you win the Florida Lottery next week, you will no longer be financially eligible for any needs-based (welfare) programs like SSI and Medicaid. The trust will still serve as an appropriate vehicle to manage your settlement proceeds without any restrictions on the use of the money.

Also, there is no guarantee that Congress will not amend the Medicaid statute, or that the Social Security Administration staff reviewing the client's trust and their new financial

situation will not make a mistake and attempt to disqualify the client. However, Congress' actions in 1992 and in August 1993 have shown movement towards expanding access to Medicaid benefits for disabled individuals. It appears that Congress is attempting to encourage other family members and the courts to financially plan for and use additional resources to meet disabled individuals' medical needs. With regard to children and SSI eligibility, Congress amended the Social Security Act in 1992 to expand SSI benefits for children, and to provide that if children who were previously denied subsequently became eligible and received large retroactive awards, such retroactive awards may be held in Special Needs Trusts.

Similarly, the Social Security Administration (SSA) has issued new amendments to its internal procedure manuals in March 1994 clarifying that individuals may be the recipients of trusts and still retain SSI (and Medicaid). New "deeming regulations" issued in January 1995 are also more expansive and extend SSI and Medicaid benefits to families previously disqualified. SSA has also distributed informational brochures to clients telling them that correctly drafted trusts will not eliminate eligibility for SSI benefits. However, there are literally tens of thousands of caseworkers across the country making individual claims decisions every day. No one can guarantee that they will not make a mistake and deny a claim for continued SSI and Medicaid benefits that should be approved.

There is one thing that is absolutely guaranteed: if the settlement award is more than \$2,000 and no Special Needs Trust is created, you will lose SSI and Medicaid when the Social Security Administration is advised of the settlement award. Furthermore, it is a crime to fail to report such a settlement to Social Security if it will affect future eligibility, and the Social Security Administration may seek to recover the resulting overpayments through collection by the U.S. Attorney's office.

None of the foregoing information should be constructed as legal advice. Please consult an elder law attorney regarding these issues.



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