

# Planning For a Family Member with Special Needs

## Part II

Reducing the risk of disqualifying an individual with special needs from eligibility for means-tested government benefits, and other questions answered.

**Question: What types of government programs are available to help fund the costs of care of a person with a disability?**

Answer: There are two basic categories of government programs that can help fund the cost of care of a person with a disability. “Means-tested” programs include Supplemental Security Income and Medicaid, which require limited resources and income for eligibility. “Employment-based” benefits, including Social Security Disability Income and Medicare, are not means-tested, but rather are keyed to a person’s work history, usually that of a parent of the person with a disability (although sometimes the person with a disability has his own work record upon which these benefits can be based). Many people with disabilities are eligible for a combination of means-tested and employment-based government benefit programs.

**Question: How does Special Needs Planning work together with the various government benefit programs for which a person with a disability might be eligible?**

Answer: Special Needs Planning, including the creation of a network of Special Needs Trusts, preserves access to those government benefit programs for which a person is eligible as a consequence of his disability. Any assets held in a properly drafted Special Needs Trust do not “count against” the beneficiary (*i.e.* the person with a disability) for purposes of “means-tested” government benefits, such as Supplemental Security Income and Medicaid. Employment-based government benefits, such as Social Security Disability Income and Medicare, are also not adversely impacted by Special Needs Trusts because they are not “means-tested.”

**Question: What is meant by a “network” of Special Needs Trusts?**

Answer: A proper Special Needs Plan will involve the creation of multiple Special Needs Trusts for the person with the disability, each of which is designed to receive funding from a different source. Proper Special Needs Planning involves the coordination of many sources of funding, which generally cannot be accomplished with a single Special Needs Trust.

**Question: Is there more than one type of Special Needs Trust?**

Answer: In the universe of Special Needs Trusts, federal and state governments will look at the source of the assets with which the Special Needs Trust is funded. If the person with a disability is funding a Special Needs Trust with his own assets, this is called a “first-party” or “self-settled” Special Needs Trust. If a Special Needs Trust is funded with the assets of anyone other than the beneficiary with a disability, this is called a “third-party” Special Needs Trust. A proper Special Needs Plan will include at least one first-party Special Needs Trust, and multiple third-party Special Needs Trusts designed to receive funding from different sources.

**Question: Does the government treat first-party and third-party Special Needs Trusts differently?**

Answer: Yes! While the property held in both a first-party Special Needs Trust and a third-party Special Needs Trust does not “count against” the beneficiary with a disability for purposes of “means-tested” government benefits, there are a number of critical limitations imposed by the government on a first-party Special Needs Trust that do not apply to a third-party Special Needs Trust.

**Question: What are the limitations imposed by the government on a first-party Special Needs Trust?**

Answer: A first-party Special Needs Trust can only be established by a few permissible “Settlers,” *i.e.* the person who signs the Trust Agreement with the Trustee. The law currently allows only the following persons to serve as the Settlor of a first-party Special Needs Trust: (i) the parent of the beneficiary; (ii) the grandparent of the beneficiary; (iii) a court-appointed conservator or guardian of the property of the beneficiary; or (iv) a court. Notably absent from this list is the beneficiary with the disability himself even if he should have mental capacity. The beneficiary must also meet the government’s definition of “disabled,” and be under 65 years of age when the Special Needs Trust is established and funded. The first-party Special Needs Trust must be irrevocable and for the “sole benefit” of the beneficiary. And finally, if any property remains in a first-party Special Needs Trust upon the death of the beneficiary, Medicaid (but not Social Security) has the right to be “paid back” from the remaining Trust property for any and all benefits paid on behalf of the beneficiary during his lifetime.

**Question: Why can’t the beneficiary of a first-party Special Needs Trust who still retains mental capacity set up his own Trust?**

Answer: No one knows for sure why current law imposes this limitation. The “Special Needs Trust Fairness Act,” which is making its way through Congress, would authorize a person who is disabled but mentally competent to sign his own Special Needs Trust Agreement, *i.e.* to serve as the Settlor of the Special Needs Trust. However, under current law that is still not permissible. Similarly, a person acting as attorney-in-fact under the beneficiary’s Power of Attorney cannot serve as the Settlor of the beneficiary’s first-party Special Needs Trust.

**Question: What is the government’s definition of “disabled?”**

Answer: If the beneficiary is over 18 years of age, he must prove that he is unable to engage in any “substantial gainful activity” by reason of his physical or mental impairments which are expected to result in death or which have lasted, or can be expected to last, for a continuous period of at least 12 months. If the beneficiary is under the age of 18, disability is defined as a medically determinable physical or mental impairment that causes “marked and severe functional limitations” that can be expected to cause death or that have lasted, or can be expected to last, for at least 12 months. These definitions of “disabled” only apply in the context of a first-party Special Needs Trust.

**Question: What does the term “sole benefit” mean in the context of a first-party Special Needs Trust?**

Answer: Both the federal and state governments strictly apply the concept of “sole benefit” to require that any and all disbursements from a first-party Special Needs Trust can benefit only the beneficiary with the disability, and not anyone else. This is currently a major battleground for those who administer Special Needs Trusts, as a violation of the sole

benefit rule can result in the disqualification of the Trust and the consequent loss of means-tested government benefits for the beneficiary.

**Question: Why must the beneficiary of a first-party Special Needs Trust be under age 65 when the Trust is established and funded with his assets?**

Answer: No one knows for sure why Congress imposed this age 65 limitation. If a first-party Special Needs Trust is established prior to the date the beneficiary attains age 65, the Trust continues to qualify even after he attains age 65. However, it is not permissible to make additions to a first-party Special Needs Trust after the beneficiary attains age 65.

**Question: Is there any limit on the Medicaid payback obligation applicable to a first-party Special Needs Trust?**

Answer: Both the federal and state governments insist that upon the death of the beneficiary of a first-party Special Needs Trust, Medicaid (but not the Social Security Administration) must be reimbursed from the Trust property up to the total amount of medical assistance benefits paid on behalf of the beneficiary under any state Medicaid plan(s) during his lifetime, even if this results in completely exhausting the remaining Trust property. While this sounds draconian, a proper Special Needs Plan will coordinate with other third-party Special Needs Trusts for the beneficiary (to which this Medicaid payback obligation *does not* apply), so that a first-party Special Needs Trust is depleted first before the beneficiary dies, thus minimizing the possibility of a Medicaid payback.

**Question: The limitations that apply to a first-party Special Needs Trust do not also apply to a third-party Special Needs Trust?**

Answer: Third-party Special Needs Trusts are not subject to the following limitations that apply only to first-party Special Needs Trusts: (i) there is *no Medicaid payback for a third-party Special Needs Trust* that is drafted properly from the outset; (ii) any one can serve as the Settlor of a third-party Special Needs Trust; (iii) the beneficiary need not meet any particular definition of “disabled;” (iv) there is no age limitation on the beneficiary or the timing of funding a third-party Special Needs Trust; and (v) the beneficiary need not be the “sole” beneficiary of the Trust. However, as with first-party Special Needs Trusts, a third-party Special Needs Trust must be irrevocable as to the beneficiary, *i.e.* the beneficiary cannot hold the right to revoke or terminate the Trust.

**Question: I’m so confused! Is it possible to schedule a Special Needs Planning workshop that addresses all of these questions?**

Answer: Yes, of course! Please feel free to reach out directly to [klewis@sgrlaw.com](mailto:klewis@sgrlaw.com) to discuss scheduling a Special Needs Planning workshop for your family or group.

Kristen M. Lewis, Esq. Smith, Gambrell & Russell, LLP [klewis@sgrlaw.com](mailto:klewis@sgrlaw.com)  
Page Harty, CFP, CDFA, Partner SignatureFD, LLC [page.harty@signaturefd.com](mailto:page.harty@signaturefd.com)