

¹FREQUENTLY ASKED QUESTIONS ABOUT FORMING A SPECIAL NEEDS TRUST IN MARYLAND

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1. What is a special needs trust?

A special needs trust, also called a supplemental needs trust, is a tool that allows friends and family members to provide financial support to a loved one who suffers from a disability without jeopardizing the loved one's eligibility for certain government benefits, such as social security disability income and Medicaid.²

In Maryland, there are two major categories of trusts that can be created for the benefit of a disabled person:

- A trust created under the Maryland Discretionary Trust Act allows a transferor, or creator of the trust, to create for the benefit of another person.³ This person can be disabled, but does not have to be in order to get the benefit of the trust. A trustee has full discretion as to how the proceeds of the trust shall be distributed to the beneficiary, and may provide for the needs of the beneficiary but only to the extent not provided for by other sources, including private and public benefit programs.⁴ The trustee must be very careful in making distributions for beneficiaries receiving social security benefits because if distributions are made improperly or put towards certain things, the government benefits of the beneficiary may be reduced.⁵ However, the government cannot seek reimbursement for state-provided care of the beneficiary from the trust property. For example, the state cannot compel the trustee to pay back social security benefits provided to the beneficiary from the proceeds of the trust.⁶
- A special needs trust can also be created pursuant to the federal social security laws.⁷ To benefit from this type of special needs trust, the beneficiary must be disabled. These types of trusts have many restrictions and mandatory provisions, but if done correctly, they will not disqualify an individual from receiving government benefits.⁸ Because these instruments are complex, it is best to get an attorney involved in setting them up. Unlike a Maryland Discretionary Trust, a beneficiary's own funds can be used to establish the trust.⁹ Also unlike a Maryland Discretionary Trust, when the beneficiary dies, the trust assets must be used to reimburse the government for social security and Medicaid

¹ *Disclaimer: This summary provides basic information about creating trusts for the benefit of individuals with disabilities and was prepared by the Pro-Bono Department of Hogan & Hartson LLP. This summary does not cover all the information on the subject matter, nor does it serve to provide legal advice. NAMI Montgomery County (NAMI MC) makes no representations or warranties as to the accuracy of the information contained in this summary. If you need legal advice, you should consult with an attorney. For other questions about this document please contact NAMI MC directly at 301-949-5852.*

² *Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21*

³ *Md. Code. Ann. Trusts & Estates § 14-401 et seq.*

⁴ *Md. Code. Ann. Trusts & Estates § 14-402(b)(3).*

⁵ *Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

⁶ *Md. Code. Ann. Trusts & Estates § 14-402(a)(4).*

⁷ *42 U.S.C. § 1396p(d)(4).*

⁸ *For a summary of the different types of special needs trusts and the different requirements, see Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

⁹ *Id.*

benefits received. If there is anything left over, the remainder can go to a designated beneficiary.¹⁰

2. Why do people form special needs trusts?

People form special needs trusts to improve disabled persons' quality of life beyond the level covered by government benefit programs such as Social Security or Medicaid. Unlike contributions made directly to a disabled person, if done correctly, distributions from a special needs trust will not reduce benefits that the disabled person would receive from such programs. For example, if a government benefit program decides how much to pay a disabled person based on the person's need, the program cannot take any special needs trust into account, even if that person receives money from a special needs trust.

3. What is a trustee?

The trustee is a person responsible for managing and defending the trust. If any legal problems with the trust arise, the trustee will be the one who is sued. A trustee must accept the position in writing.¹¹

Any trust must have at least one trustee. The trustee should be someone trustworthy and with experience managing trust assets. A trustee is a fiduciary, which means he or she has a duty to manage the trust property in the best interests of the beneficiary. Managing the trust property includes investing the property in a prudent way and deciding what expenditures will be made, how they will be made, and when they will be made for the benefit of the beneficiary.¹²

If the special needs trust has been created pursuant to the federal social securities laws, a non-profit association may be required to be the trustee.¹³

4. What is a beneficiary?

A beneficiary is a person that is entitled to the benefits of the trust. For a special needs trust, the beneficiary would be the disabled person whom the founder of trust wants to assist. If the trust is created pursuant to the federal statutes, the resources of the individual beneficiary may be used to create the trust. This is often the case where the beneficiary is the recipient of a lawsuit settlement or award and that money is used to found the trust.¹⁴ Depending on the type of trust created, there may also be age restrictions on who may be a beneficiary.¹⁵ There can only be one beneficiary per trust, though at the death of the beneficiary, the remainder of the trust property can be given to a designated person.¹⁶

5. What is trust property?

Trust property is any property, including income and proceeds, held by the trust.¹⁷ The creator of a special needs trust must clearly identify trust property (for example, the creator cannot say "the majority of my property will be trust property," because that is unclear). Trust property can be cash, stock, real estate, or valuable objects.

6. How to create a special needs trust in Maryland?

¹⁰ *Id.*

¹¹ *Md. Code Ann. Trusts & Estates § 14-404.*

¹² *Md. Code Ann. Trusts & Estates § 14-402(b).*

¹³ *42 U.S.C. § 1396p(d)(4)(C). Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

¹⁴ *Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

¹⁵ *Id.*

¹⁶ *Md. Code Ann. Trusts & Estates § 14-403(e); see also Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

¹⁷ *Md. Code Ann. Trusts & Estates § 14-401(p).*

One can create a special needs trust in Maryland by preparing a trust document that identifies the trustee, the beneficiary, trust property, the purpose of the trust, among other things.¹⁸ The trust document should also make it clear that the special needs trust is created under the Maryland Discretionary Trust Act.¹⁹ The creator of the special needs trust should consult with an attorney when drafting the trust document; because improper drafting may lead to lawsuits or may negatively impact the beneficiary's social security, Medicaid or other government benefits. If a special needs trust is created pursuant to the federal social security laws, it must be submitted to the Maryland Attorney General, along with certain forms certifying that all of the provisions comply with the law.²⁰ These forms can be very complex and it is a good idea to work with an attorney who has experience with these trusts.

7. How to select the trustee for special needs trusts?

The selection of the trustee is crucial for a special needs trust. A trustee must be responsible, trustworthy, and careful. Moreover, a trustee should understand the disabled beneficiary's needs and how to meet them with the trust's resources, which requires that the trustee has regular contacts with the beneficiary as well as knowledge of the trust's financial structure (especially the rules governing programs that provide assistance to the trust). A bad decision made by the trustee can disrupt benefits and opens the trust to liability.

The creator of a special needs trust can designate himself, a family member, or a close friend as the trustee in the trust document. It is possible to have a corporate trustee, but this can be expensive. In certain special needs trusts created under federal law, the trustee must be a non-profit agency. Notably, the creator of a trust under the Maryland Discretionary Trust Act can remove a trustee at any time, unless he gives up this right in the trust document. A court can also remove a trustee if it finds breach of duties on the trustee's part.

8. Are special needs trusts revocable?

If a trust is created under the Maryland Discretionary Trusts Act, it may be either revocable or irrevocable. The creator of the trust may specify whether the trust is revocable in the trust document. If the creator makes no such specification, the trust will be revocable.²¹

A special needs trust created pursuant to the federal guidelines, however, must be irrevocable or it will not qualify for special exempt treatment.²²

¹⁸ *Md. Code. Ann. Trusts & Estates § 14-404.*

¹⁹ *Id.*

²⁰ *Md. Code. Ann. Trusts & Estates § 14-403(e); see also Lawrence Adashek & Imtiaz Jindani, A Most Powerful Tool—Supplemental Needs Trust, 41 Md. Bar J., Mar.-Apr. 2008, at 21.*

²¹ *Md. Code. Ann. Trusts & Estates § 14-402(e).*

²² *COMAR 10.09.24.08-2(C).*