



*Special needs require special lawyers.*

# How to Maintain Government Benefits for a Child Who Receives an Inheritance or Legal Settlement

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**W**hen a person with disabilities receives a significant amount of money—for example, from an inheritance or a legal settlement in a personal injury or medical malpractice action—eligibility for critical government benefits, such as Supplemental Security Income (SSI) and Medicaid can be lost because these benefits are for individuals with very limited assets. Unless proper legal steps are taken, money received will have to be “spent down” until it is nearly gone before the individual will again be eligible for government assistance.

Congress addressed this problem in the Omnibus Budget Reconciliation Act of 1993 when it enacted 42 U.S.C. § 1396p(d)(4)(A). The Act permits the creation of a self-settled trust for a disabled individual under age 65 to hold assets that would otherwise disqualify the individual for public benefits. The funds in the trust can then be used to pay for things that are not covered by SSI or Medicaid. This article will explain how d4A trusts operate and how they can be used most effectively.

## ***How is a d4A trust different from special needs trusts established using the funds of a third-party?***

A d4A trust is a “self-funded” special needs trust—that is, the money or property going into the trust belongs to the disabled trust beneficiary. This is fundamentally different from a “third-party” special needs trust established using money belonging to someone else (such as a parent or grandparent). And because d4A trusts are established with funds belonging

to the person with disabilities, with funds that would otherwise typically have to be spent on that person’s medical care, they are subject to stricter rules than “third-party” trusts. For example, with a d4A trust, any funds remaining in the trust after the beneficiary’s death must first be used to pay back the state for any Medicaid benefits received during the trust beneficiary’s lifetime (and hence these trusts are often referred to as “payback” trusts). With a “third-party” special needs trust, however, any remaining funds can go to other beneficiaries of the trust settlor’s choosing. Also, funds in a d4A trust must be used for the disabled beneficiary’s “sole benefit.” There is no such limitation for a third-party special needs trust.

For these reasons, assets belonging to a third party should never be added to a d4A trust. If a relative or friend wants to make a gift to an individual with disabilities, a third-party trust should be used to take advantage of the increased flexibility and avoid the payback requirement.

## ***When is a d4A trust needed?***

A d4A trust can be used when a person with disabilities under the age of 65 receives funds that will cause ineligibility for government benefits such as SSI or Medicaid. This may happen, for example, when a well-meaning relative leaves an inheritance for a loved one with disabilities outright, without using a third-party special needs trust. Another common situation is when a person with disabilities receives a personal injury or medical mal-

practice award. A d4A trust will allow these funds to enhance quality of life of the trust beneficiary without causing ineligibility for government assistance.

## ***Who can benefit from a d4A trust?***

The advantages of a d4A trust are only available to an individual with disabilities. For purposes of this trust, an individual is considered to be “disabled” if unable to support himself or herself through work. More specifically, the individual must be “unable to engage in any substantial gainful activity” by reason of a medically determinable physical or mental impairment that is expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months. Children under the age of 18 are considered to be disabled if they suffer from a physical or mental impairment of comparable duration and severity.

## ***How can the funds in a d4A trust be used?***

Generally speaking, the trustee of a d4A trust is authorized to spend trust principal and income for goods and services not otherwise provided through government assistance. For example, the trustee may be authorized to purchase more sophisticated medical or diagnostic treatment not generally considered to be “medically necessary” or to provide for private, rehabilitative care and recreation, or items such as electric wheelchairs and mobility aids.

Since 42 U.S.C. § 1396p(d)(4)(A)

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exempts the trust funds from consideration as countable resources of the disabled beneficiary, arguably no limitation on trust distribution standards is required. This offers a potential for abuse if trust funds are spent for lavish homes and extravagant vacations. Regulations refer to such trusts as "special needs trusts," suggesting that distributions to provide for primary care may result in loss of the federal exclusion. Moreover, without supplemental or special needs limitations in the trust document, the relevant agencies may rule that the trustee's decision not to pay for support or medical needs when the trust permits such expenditures constitutes an abuse of discretion or a breach of fiduciary duty.

To date, there is limited case law to assist trustees in determining the standards governing distribution from d4A trusts. The better practice, if possible, is to use reasonably well-defined supplemental needs or special needs trust provisions, such as limiting distributions to more sophisticated medical and diagnostic treatment, therapy, rehabilitation and mobility aids, private care providers, dental care, recreation, transportation, periodic outings, and entertainment, etc. Arguably, the state may have a cause of action against the trustee if no portion of the trust remains at the death of the individual because the trustee spent trust funds lavishly and improvidently.

### ***When is the best time to create a d4A trust?***

Because the d4A trust is to be funded with the individual's own assets, the trust should be created and funded as soon as possible to avoid unnecessary spenddown of the assets destined for the trust.

For personal injury recoveries, it is important that the trial attorney and client, with the assistance of a special needs attorney, make the decision about the suitability of a d4A trust before the settlement or judgment. The best approach is to obtain court approval for the establishment and funding of the trust at the time the settlement or judgment is being finalized. This minimizes the risk of the client losing eligibility for SSI and Medicaid while waiting for the trust to be finalized.

### ***What are the legal requirements for a d4A trust?***

The Social Security Administration publishes the Program Operations Manual System (POMS) that contains a seven-step chart to determine whether a trust is compliant with 42 U.S.C. § 1396p(d)(4)(A). If the trust fails any of the tests, the trust property will be considered a countable resource to the person with disabilities, and his or her eligibility for means-tested government assistance will be jeopardized.

- Was the trust established for an individual with disabilities who is under age 65?
- Was the trust established with the assets of an individual with disabilities?
- Is the individual with disabilities the beneficiary of the trust?
- Did a parent, grandparent, legal guardian, or court establish the trust?
- Does the trust provide that upon the death of the individual any state will be reimbursed for medical assistance paid on his or her behalf?
- Does the trust meet the special needs trust exception to the extent that assets of the beneficiary were put in the trust prior to the beneficiary turning age 65?
- Is the trust irrevocable?

The most common reason for the Social Security Administration to declare a trust invalid under d4A is the failure to comply with state trust laws regarding irrevocability. And, in addition to the factors listed above, individual states often impose additional requirements to qualify the trust property as non-countable assets under that state's Medicaid program.

### ***Who should serve as trustee of a d4A trust?***

While the trustee may be a family member (but should not be a parent of a minor child), if the value of the trust property exceeds \$50,000, consider the benefits of a professional trustee (perhaps with one or more family members serving as co-trustees or as advisors). Banks have traditionally served as professional trustees, as well as other professionals such as CPA and brokerage firms. However, not all

banks or firms will handle special needs trusts, and those that do typically have minimum fees that make trusts under \$300,000 uneconomical. But many states have non-profit corporations managing "pooled" special needs trusts; such corporations may act as trustee of smaller trusts.

### ***Who should draft the d4A trust?***

Planning for individuals with disabilities requires knowledge and understanding of fiduciary law, trust law, public benefits law and regulations, and tax law. This practice area requires experience and is not forms-driven. The d4A trust must conform to federal and state law and be customized to meet the current and anticipated future needs of the disabled beneficiary. The attorney who creates the trust needs to communicate with the relevant government agencies, particularly reporting the creation and funding of the d4A trust to the Social Security Administration and to the state Medicaid agency. The attorney should also advise on the selection and education of the trustees of the d4A trust. •

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**Editor's Note:** It has been brought to our attention that for several of the last monthly articles from Special Needs Alliance an incorrect toll-free number has been listed. The number above is correct so please make a note of it.