

# Congress Passes Legislation That Will Enable Military Members to Name Special Needs Trusts as Beneficiaries of a Survivor Benefit Plan

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On December 15, 2014, Congress passed the Disabled Military Child Protection Act which allows military families to protect their Survivor Benefit Plans (SBP) by allowing the benefits to be directed to a qualified special needs trust. If there are any funds left in the trust when the disabled beneficiary dies, the funds are paid back to Medicaid for the cost of Medicaid funded services provided to the individual over his/her lifetime.

The Military allows military members who have special needs children to participate in the SBP. SBP permits monthly benefit stipends of up to 55% of the military member's pension to be paid for the benefit of a disabled adult child. Prior to the passage of this Act, benefits had to be paid directly to the child. The Disabled Military Child Protection Act will allow the survivor benefit to be paid directly to a payback special needs trust for the benefit of a child with a disability. If the benefits are distributed directly to the trust, the beneficiary will remain eligible for needs based benefits such as SSI and Medicaid.

Beneficiaries of a parent's SBP can now retain eligibility for Medicaid by assigning the military pension to the qualified special needs trust. A qualified special needs trust is sometimes called a 'payback' trust, first party trust, self settled trust, d4(a), d4(c) trust or an OBRA'93 trust. It is not the typical 3rd party special needs trust that parents provide in their wills and living trusts. By assigning benefits to a qualified special needs trust, these individuals will now be able to remain eligible for Medicaid which is the primary payer of residential placements available to persons with special needs. Up until now, individuals who received SBP were often locked out of Medicaid funded support programs because their income was deemed too high. If the pension benefits caused him to be over income for Medicaid but did

not provide sufficient income for private care, the beneficiary of a SBP was often in a worse off position because of the receipt of this pension. S/he had too much income to qualify for Medicaid but not enough income to meet one's medical and personal care needs.

It is anticipated that military regulations will be written by the end of this year or by early 2016. Early indications are that the designation to a trust can be made by the military member anytime during his lifetime, but also assignable by the benefit recipient if or when the benefit is being received. Retirees cannot make the assignment now, but hopefully will be able to do so by early next year. We were initially told that there was going to be a narrow window of opportunity to change the beneficiary designation from the disabled child to a trust. We are now told that there will not be a restriction as to when the designation to a trust can be made. Of course, until the regulations are written, we will not know for certain what will be allowed. If you know anyone who may be receiving SBP benefits or could be eligible in the future, it is important to get this information out to them so they are ready to make the change in beneficiary as soon as possible. It is important to meet with an attorney knowledgeable in drafting a 'Payback' trust. It is critical that the correct type of trust be designated as a beneficiary. If a typical 3rd party special needs trust is used that does not contain the restrictive language required in a payback trust, the assignment will not qualify the beneficiary of the trust for Medicaid and SSI. Parents can find the name of an attorney familiar with drafting qualified payback special needs trust through the websites for the Academy for Special Needs Planners (ASNP) or The Special Needs Law Alliance (SNA). ASNP AND SNA are two professional organizations for attorneys who concentrate in this very unique and dynamic area of law.

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To learn how we can assist, contact our Special Needs Practice Group Leader Frederick M. Misilo, Jr. at 508.459.8059 or [fmisilo@fletchertilton.com](mailto:fmisilo@fletchertilton.com).

Ask us about providing a seminar for groups of parents, professionals and advocates on special education issues.



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