

Disabled Military Child Protection Act

On December 31, 2015, the Department of Defense released its policy implementing the Disabled Military Child Protection Act, providing guidance on who may assign survivor benefits to a special needs trust and the procedure for doing so. President Obama signed the Disabled Military Child Protection Act on December 19, 2014. This law allows a military parent to provide a survivor benefit for a child with a disability, and have it paid to a special needs trust for that child's benefit. Until this law was enacted, military parents of children with disabilities faced a serious dilemma at retirement - whether or not to choose the military Survivor Benefits Plan (SBP) retirement option for their children. The dilemma was that under prior law, the benefit could not be assigned to a special needs trust and could potentially interfere with the child's eligibility for means-tested government benefit programs such as Supplemental Security Income (SSI) or Medicaid.

Survivor Benefits Plan (SBP): Members of the military can elect several options to provide for a spouse or dependent child at the military member's retirement or death. The SBP will pay up to 55% of the military member's retirement pay to a spouse and/or dependent child when the retiree dies. The member can also elect a lower benefit at a lesser cost. The military member can select between coverage for a spouse only, a spouse and children, or children only. The member takes a reduction of about 6.5% in retirement pay for SBP for a spouse, and only about \$20/month for dependent children, including adult children with disabilities. The prior law provided that the SBP could only be paid to a "person," and the Defense Department took the position that "person" did not include a trust for a child with disabilities. SBP payments paid directly to a child with a disability will offset the SSI benefit as unearned income. If the military member elected SBP for his or her child with a disability, and if the SBP payment exceeds the SSI benefit amount, the child with a disability will lose SSI. In addition to (or in place of) the SBP, a military member can elect an array of benefits for a child with a disability. In most cases, a child with a disability who is over age 18 can be designated as an Incapacitated Dependent (DD Form 137-5) and be permanently eligible for military post privileges, as well as TRICARE health benefits. However, these military benefits do not include supportive living programs or vocational opportunities. Because SBP and TRICARE benefits are often insufficient to pay for all the help that may be needed by an adult child with a disability, the military family may need to look to other programs to provide for a child's needs.

If a child with a disability who is over age 18 has assets of less than \$2,000 and minimal income, the child will usually be eligible for SSI and Medicaid. Medicaid may duplicate TRICARE's health care benefits, but Medicaid "waiver" programs pay for a wide variety of services that TRICARE does not. Medicaid waiver benefits pay for supported living programs, in-home caregivers, mental health support services, day activity programs, job coaching and other services. TRICARE and Medicaid together provide a complementary mix of health care benefits and support services needed by many adults with disabilities.

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Legislative Solution: The Disabled Military Child Act (Public Law 113-291, amending Title 10, U.S.C. Sections 1448, 1450 and 1455) specifically authorizes military parents to elect that the SBP benefits for a child with a disability be assigned to a special needs trust. The trust must be a "first-party" special needs trust (SNT) that requires the trustee, upon the child's death, to reimburse the Medicaid plans of those States in which the child received Medicaid benefits during his or her lifetime, if any assets remain in the SNT at that time.

Policy Implementation: The Department of Defense issued its implementing policy on December 31, 2015. A military member or retiree may now, at any time, irrevocably designate a first-party SNT created for the benefit of a dependent child with a disability as the SBP beneficiary to receive any SBP payments that would otherwise be payable to the child. The policy specifically addresses two situations:

1. During the life of the military member or retiree. The assignment to a SNT may be done at any time.
2. After the death of the member or retiree. If SBP coverage for the dependent child was elected by the member during the member's lifetime, then the assignment to a SNT may be made by the child's surviving parent, grandparent, or court-appointed guardian.

The policy does not address a situation where the member did not elect SBP because of the prior inability to assign the benefit to a SNT, or a situation where SBP was elected but subsequently forfeited by appeal.

Assignment Process: To assign the SBP to a first-party SNT, the member (or the child's surviving parent, grandparent or guardian, as the case may be), may write a simple letter to the Defense Finance and Accounting Service indicating that intention. Alternatively, the member may use DD Form 2565, Section X (Data for Payment of Retired Personnel). The letter must contain the name and Tax ID Number of the SNT, which in most cases will be the child's Social Security Number.

The letter of assignment or completed DD Form 2565 must be accompanied by a separate statement from an active, licensed attorney certifying that the trust is a SNT for the sole benefit of the dependent child with a disability, and is in compliance with all applicable Federal and State laws. This will serve as the verification to the Department of Defense that the SNT receiving the assignment is the correct type of trust. The Department of Defense has provided a verification template for attorneys to use. The attorney's statement must be notarized and include the State in which the attorney is licensed, as well as the attorney's State bar number.

It is important to note that the SNT that may accept an SBP assignment is not the type of SNT that most families use as part of their estate plan. The SNT that must be used for the SBP is a first-party SNT (also often referred to as a (d)(4)(A) or self-settled SNT). There are very particular rules as to how a first-party SNT may be established and the required language that must be included. A member (or the child's surviving parent, grandparent or guardian, as the case may be) who wishes to assign the SBP to a first-party SNT should consult with an attorney who is knowledgeable in special needs planning and familiar with this very specialized type of SNT.