

**§ 36C-8B-13. Trust for beneficiary with disability.**

- (a) The following definitions apply in this section:
- (1) Beneficiary with a disability. – A beneficiary of a first trust who the special-needs fiduciary believes may qualify, now or in the future, for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits, or is an individual who has been adjudicated incompetent.
  - (2) Governmental benefits. – Financial aid or services from a State, federal, or other public agency.
  - (3) Special-needs fiduciary. – With respect to a trust that has a beneficiary with a disability, the term has any of the following meanings:
    - a. A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries.
    - b. If no trustee or fiduciary has discretion as described in sub-subdivision a. of this subdivision, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries.
    - c. If no trustee or fiduciary has discretion as described in sub-subdivisions a. or b. of this subdivision, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.
  - (4) Special-needs trust. – A trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.
- (b) A special-needs fiduciary may exercise the decanting power provided in G.S. 36C-8B-11 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability if both of the following conditions are satisfied:
- (1) A second trust is a special-needs trust that benefits the beneficiary with a disability.
  - (2) The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.
- (c) In exercising the decanting power pursuant to this section, all of the following rules apply:
- (1) Notwithstanding G.S. 36C-8B-11(b)(2), the interest in the second trust of a beneficiary with a disability may have either of the following characteristics:
    - a. Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. § 1396p(d)(4)(C).
    - b. Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. § 1396p(d)(4)(A).
  - (2) The restriction contained in G.S. 36C-8B-11(b)(3) shall not apply to the interests of the beneficiary with a disability.
  - (3) Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.
- (d) For the purposes of this section, the second trust shall not be deemed a termination of the first trust for the purpose of triggering a payback provision in the first trust provided the

second trust contains a payback provision complying with the reimbursement requirement of Medicaid law under 42 U.S.C. § 1396p(d)(4). (2017-121, s. 1; 2020-69, s. 2.)