

# Special Needs Trusts: What Everyone Needs to Know

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# BIO

- ▶ Licensed to practice law since 1993 (first in Illinois, which is inactive; and then in Arizona)
- ▶ Undergraduate degree from University of Colorado, Boulder
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1. What is the purpose of a  
Special Needs Trust?

# What is the purpose of a SNT?

- ▶ The purpose of a SNT is to improve the quality of life for an individual with disabilities by **maximizing resources** and administering trust assets **without causing the beneficiary to lose eligibility for public assistance.**
- ▶ A SNT is designed to “supplement, not supplant” means-tested public benefits.

2. When might a Special  
Needs Trust be considered?

# When might a SNT be considered?

- ▶ A SNT is necessary if the intended beneficiary is “sufficiently disabled” to qualify for public assistance.
- ▶ To be “sufficiently disabled” to qualify for public assistance, the individual must be “permanently and totally disabled.”
- ▶ The Social Security Administration defines “permanently and totally disabled” as:
  - ▶ “...an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.”
  - ▶ 42 U.S.C. § 1382c(a)(3)(A)

3. Which public benefit programs are protected with a Special Needs Trust?

# Which public benefit programs are protected with a SNT?

- ▶ Two categories of public benefit programs:
  - ▶ Non-means-tested (non-need-based)
    - ▶ Social Security OASDI / SSDI
    - ▶ Medicare
    - ▶ VA compensation
  - ▶ Means-tested (need-based)
    - ▶ SSI
    - ▶ ALTCS - Medicaid
    - ▶ Medicare buy-in
    - ▶ VA pension
    - ▶ Federally subsidized housing
- ▶ SNTs are intended to protect eligibility for means-tested benefits.



# What public benefits might be lost with a SNT

- ▶ Medicare Savings Programs:
  - ▶ A grantor trust (ie a first party SNT):
    - ▶ Count the higher of the following amounts as unearned income:
      - ▶ Income received by the trust, except for interest earned by the trust, or
      - ▶ Disbursements from the trust directly to or for the benefit of the customer.

# Which public benefit programs are protected with a SNT?

- ▶ The eligibility rules are different for each program. It is essential to understand the public benefits the individual receives or for which he or she may apply in the future.
- ▶ Confirm all the benefits available to the intended beneficiary by collecting documentation directly from the agency. Relying on the client's representation that he or she is "on disability" is never enough.
- ▶ The existence of a SNT or distributions from a SNT may actually disqualify an individual for public benefits.
- ▶ Know what benefits the individual receives or may apply for in the future and analyze how a SNT can help—or hurt—the individual's particular circumstances.

# Non-means-tested public benefits

- ▶ Not all disability benefits are means-tested.
- ▶ Social Security Disability Insurance (SSDI) is funded through payroll taxes and is available to those who have a sufficient work history and contributed through payroll taxes. It is a form of insurance and is an entitlement. There is no asset limit for SSDI.
- ▶ Eligibility for Medicare starts in the 25<sup>th</sup> month following eligibility for SSDI and DAC.
- ▶ SSDI and Medicare are not means-tested. There is no asset limit.

# Means-tested public benefits:

## Supplemental Security Income (SSI)

- ▶ SSI is a federal stipend for low-income individuals who are age 65 or older, blind, or disabled. SSI provides monthly income to approximately eight million Americans.
- ▶ **Income:** The income limit for SSI eligibility depends on whether it is earned or unearned income.
- ▶ **Assets:** The asset limit for SSI eligibility is \$2,000 for a single individual and \$3,000 for couple.
- ▶ **Deeming:** Assets and income of a spouse in the household and the parents of a disabled child are considered for SSI eligibility.
- ▶ **Transfer penalty:** There is a three year look back period on transfers of assets. The transfer penalty is calculated by dividing the value of the asset transferred by the federal benefit rate, currently \$914.

# Means-tested public benefits:

## ALTCS

- ▶ AHCCCS is jointly funded by the federal and state governments, and it is administered by Arizona. Medicaid covers children, the aged, blind, and/or disabled and others who are financially eligible. It provides health coverage to more than 50 million Americans.
- ▶ In Arizona a person who is eligible for SSI is automatically eligible for AHCCCS, and AHCCCS starts the same month as SSI eligibility.
- ▶ Most AHCCCS programs (for health insurance) have an income limit but NO asset limit.
- ▶ ALTCS—the long term care piece of AHCCCS has both an income limit and an asset limit.

4. Would a Special Needs Trust be useful if the beneficiary is not receiving means-tested public benefits?

## Would a SNT be useful if the beneficiary is not receiving means-tested public benefits?

- ▶ SNT is necessary: individual with disabilities is receiving means-tested public benefits and receives income or assets in excess of eligibility limits.
- ▶ SNT not necessary: individual is not “sufficiently disabled” under the Social Security Administration definition.
- ▶ SNT may be necessary: individual can be defined as “sufficiently disabled” but is receiving no public benefits or only non-means-tested public benefits at the time.
  - ▶ Goal would be to preserve the individual’s eligibility for means-tested benefits in the future.



5. Are there alternatives  
to Special Needs  
Trusts?



# Are there alternatives to SNTs?

- ▶ **Spend Down:** Is it possible to promptly spend down the excess resources on any of the following?
  - ▶ home or home improvements and repairs;
  - ▶ furniture;
  - ▶ clothing, jewelry, and other personal belongings;
  - ▶ books and education, including tuition;
  - ▶ entertainment, including vacations, stereo and television, and magazine and newspaper subscriptions;
  - ▶ motor vehicles and motor vehicle repairs;
  - ▶ funeral expenses through an irrevocable mortuary trust;
  - ▶ legal fees and accountant's fees
  - ▶ and many more.
- ▶ **Transfer of Assets:** determine impact on future benefits

# Are there alternatives to SNTs?

- ▶ **ABLE Act accounts:** Is an ABLE account right for your client?
  - ▶ Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE) was passed in 2014.
  - ▶ Allows states to set up programs that permit individuals with disabilities or their family members to make contributions to a 529A account (similar to 529 education account). [AZ-ABLE.com](http://AZ-ABLE.com)
  - ▶ Funds up to \$100,000 will not affect eligibility for SSI or ALTCS.
  - ▶ Requirements:
    - ▶ Beneficiary's disability must have been established before age 26.
    - ▶ Medicaid payback provision.
    - ▶ Distribution of account funds must be used for "qualified disability expenses" which include all purchases to improve the health, independence and quality of life of the beneficiary.
  - ▶ ABLE accounts can avoid spend down, costs of creating a SNT, and allows beneficiary to have more control over his own assets.

6. What are the differences between a First Party SNT and a Third Party SNT?

# What are the differences between a First Party SNT and a Third Party SNT?

- ▶ All SNTs are intended to maximize resources for individuals with disabilities.
- ▶ The fundamental difference between a first party SNT and a third party SNT is whose assets are used to fund the trust.
  - ▶ If a SNT is established for an individual with disabilities and is funded with that individual's assets, it will be a *first party SNT*. The individual's assets include those that he is legally entitled to.
  - ▶ If a SNT is established for an individual with disabilities but is funded with another person's assets, it will be a *third party SNT*. The assets in a third party trust can never be controlled or owned by the beneficiary.

# First Party SNTs

- ▶ a.k.a. self-settled SNTs, d4A SNTs, payback trusts
- ▶ A first party SNT must be irrevocable. That is, the grantor whose assets were transferred to the trust can have no authority to revoke or terminate the trust.
- ▶ The beneficiary must be disabled as defined previously.
- ▶ A first party SNT may only be established for the benefit of an individual under age 65.
- ▶ Only a court order, parent, grandparent, guardian or competent disabled beneficiary can establish a first party SNT.
- ▶ A first party SNT must include a Medicaid payback provision.
- ▶ Distributions must comply with ARS 36-2934.01.

# Third Party SNTs

- ▶ A third party SNT is created to receive gifts and bequests from third parties, such as parents, grandparents, other family, or friends.
- ▶ A third party SNT is much more flexible than a first party SNT.
  - ▶ A third party SNT is not a creature of statute.
  - ▶ A third party SNT does not have to include a pay back provision.
  - ▶ A third party SNT can be drafted to benefit more than one beneficiary.
- ▶ A third party SNT can be created either in the third party's will (testamentary third party SNT) or during the third party's life (freestanding or living third party SNT)

7. What is the difference  
between a d4A Special  
Needs Trust and a d4C  
Pooled Special Needs  
Trust?

# What is the difference between a d4A trust and a d4C trust?

Federal law provides for two types of self-settled SNTs:

- ▶ The (d)(4)(A) SNT gets its name from the statute that authorizes it: 42 U.S.C. § 1396p(d)(4)(A). It must be created for the sole benefit of an individual with disabilities who is under age 65 and by the individual's parent, grandparent, guardian, court or competent disabled beneficiary.
- ▶ A pooled trust is authorized by 42 U.S.C. § 1396p(d)(4)(C). A pooled special needs trust is a trust created and administered by a nonprofit organization. The assets of different individuals with disabilities are administered in the pooled trust, but each beneficiary's assets are maintained in a separate account.
  - ▶ May be created by the individual with disabilities themselves.
  - ▶ Will require either a payback provision for medical assistance or the remaining assets can remain in the pooled trust for other beneficiaries

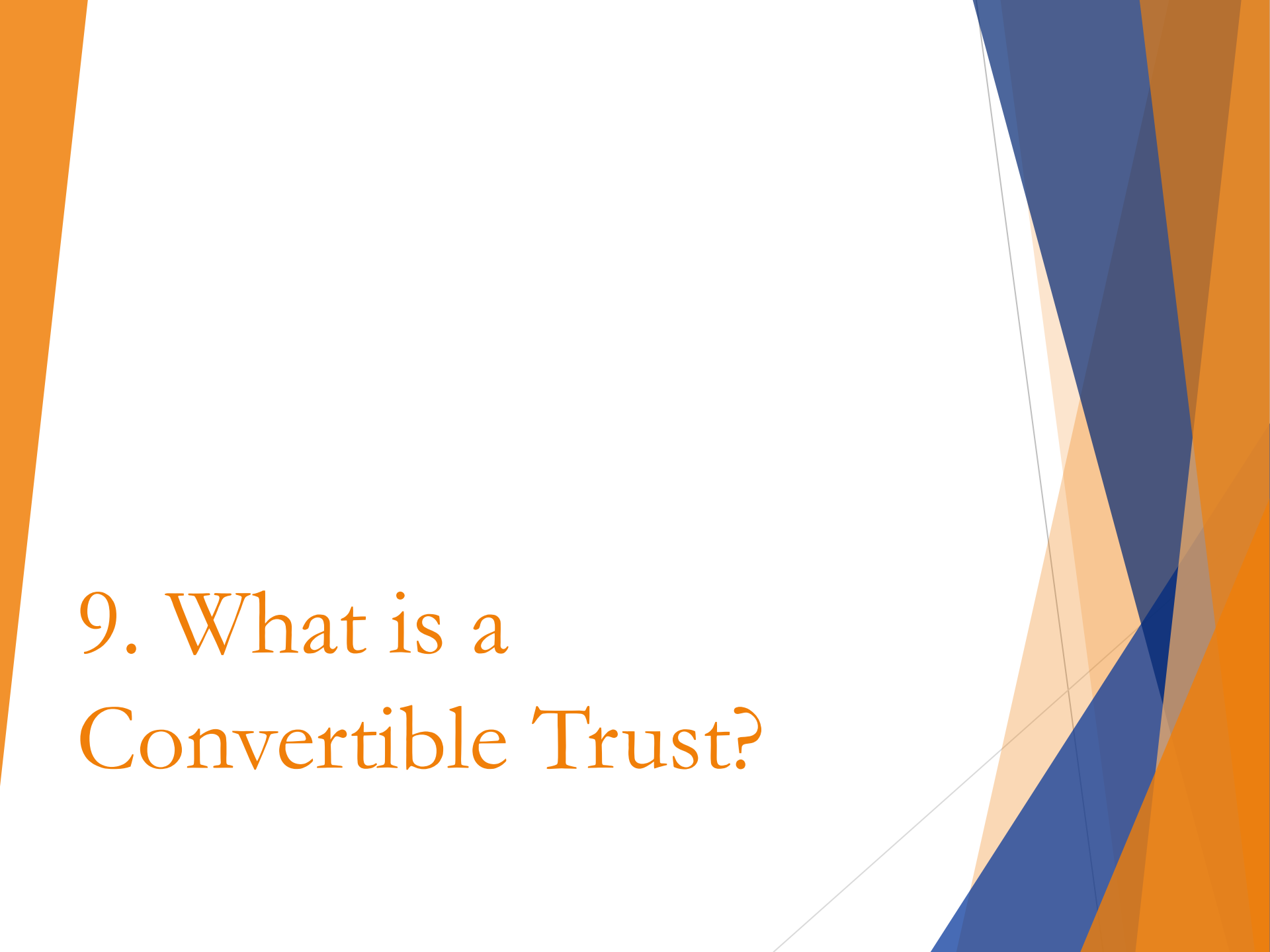




## 8. What is a Sole Benefit Trust?

# What is a Sole Benefit Trust?

- ▶ A Sole Benefit Trust is a type of third party special needs with first party features.
- ▶ A sole benefit trust considers the eligibility for public benefits for both the grantor and the beneficiary.
  - ▶ There is no penalty for transfers to a child with a disability so the grantor can be eligible for public benefits immediately.
  - ▶ The establishment of the trust will not disqualify the beneficiary from public benefits.
- ▶ Like a first party trust, the Sole Benefit Trust is a creature of statute. The Trust must be “actuarially sound.”



## 9. What is a Convertible Trust?

# What is a Convertible Trust?

- ▶ A convertible trust would be used when a client wants to provide for a loved one but he is unsure whether that loved one will be dependent on means-tested public benefits in the future.
- ▶ The trust will begin as a support trust that is flexible enough that it can “convert” to a SNT when needed. The Trust includes SNT language in case the beneficiary needs the SNT provisions.
- ▶ Useful when the beneficiary’s disability determination has not been secured.

# Non Grantor and Testamentary Trusts

- ▶ The trust is a resource when the beneficiary can terminate the trust to access the trust assets or can access the trust principal directly or through an order to the trustee. The maximum amount that can be accessed by the beneficiary is counted as a resource.
- ▶ NOTE If the beneficiary cannot terminate the trust, directly access the funds or order the trustee to make payments, the trust principal is not a resource, even if the trust otherwise allows for payments from the principal .

10. How is a Special  
Needs Trust  
administered?

# How is a SNT administered?

- ▶ Trustee must have complete discretion over distributions from the trust. It is crucial that the trustee understand the impact of distributions and purchases on the beneficiary's eligibility for public benefits.
- ▶ For example: Providing a beneficiary with food or shelter while the beneficiary receives SSI benefits can disqualify or reduce the amount of benefit the beneficiary receives.
- ▶ Trustee may provide distributions or purchases for other goods and services (as defined 36-2934.01 for first party SNT) and including, but not limited to, the following (for third party SNT):
  - ▶ books and education, including tuition;
  - ▶ entertainment, including vacations, stereo and television, and telephones;
  - ▶ household furniture and clothing (changed to permissible in 2005);
  - ▶ additional medical treatments, physical therapy, and medication costs not covered by public benefits;
  - ▶ legal fees and accountant's fees;
  - ▶ and many more.

## Conclusion: Final thoughts to keep in mind when considering a SNT

- ▶ The eligibility rules for the public benefits available to individual with disabilities are different. In particular, some are means-tested and some are not.
- ▶ Whose assets will be used to fund the trust? That variable makes all the difference in how the trust will be drafted and established.
- ▶ Different scenarios demand different trusts.
- ▶ It is always a good idea to include a “default” special needs trust in your general estate planning documents.

Thank you!



# THANK YOU

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