

SPECIAL NEEDS TRUSTS: SOME BASIC QUESTIONS AND ANSWERS

1. **What is the Definition of a Disability?** The laws relating to the Social Security Administration define disability as: “the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) 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 12 months.”
2. **What is a Trust?** A trust is a legal document which is created by someone for the benefit of someone else. It is generally managed by a third person or entity. As a general rule, the person who creates a trust is called the “grantor,” while the person who manages the property in the trust is called the “trustee,” and the person for whom the trust is created is called the “beneficiary.” The Trustee has significant responsibilities to the beneficiary known as “fiduciary duties.”
3. **What are Special Needs Trusts?** A Special Needs Trust (SNT) is a legal instrument which allows a disabled individual to have funds for their supplemental needs in the trust and still receive needs-based public assistance without regard to the amount of the funds in the SNT. It has all the features of a traditional trust as well as some restrictions on how the funds can be used for the beneficiary.
4. **Whose money or property gets put into an SNT?** It can be money and property belonging to the disabled person themselves or money given by one or more family members. If the assets going into the trust belong to the disabled person, it is considered a self-settled SNT. If the assets going into the trust are a gift or an inheritance from someone other than the disabled person, the trust is considered a third party SNT.
5. **What is the difference between a Self-Settled SNT and a Third Party SNT?** A self-settled SNT requires payback of funds from the SNT to the entity or organization who paid out the needs-based public funds to the disabled person. This money is not required to be paid back unless: (1) the disabled person is no longer disabled and no longer entitled to get public assistance OR (2) after the disabled person’s death. A third party SNT does not require a payback to any entity or organization either at the beneficiary’s death or upon a disabled person gaining capacity.
6. **Who creates the SNT?** It depends on whether the SNT is self-settled or third party. For Self-Settled SNTs - the trust can be created by: (1) a parent; (2) a grandparent; (3) a guardian; or (4) a Court, as long as the beneficiary is under age 65. For Third Party SNTs - the SNT can be created by anyone willing to do so and for a person of any age.

7. **Can you put funds from the disabled person and funds from a third party into the same SNT?** No. If you make the mistake of putting both self-settled funds and third party funds into the same SNT, the entire amount in the trust is subject to repayment to entities or organizations who paid out the needs-based public funds to the disabled person during their lifetimes. This is a common and dangerous mistake.
8. **How does a Self-Settled SNT get created?** The SNT should be drafted by an attorney who is knowledgeable about SNTs. If it is to be created by a parent or grandparent, the parent or grandparent hires an experienced elder or disability law attorney to draft the SNT. If the SNT is to be created by the Court, either the Guardian or a disabled person not suffering from a mental disability can apply to the Court to create the SNT. This is considered a Management Special Needs Trust when created by the Court and it remains under Court control until the disability is removed, the funds are fully spent down, or the disabled beneficiary dies. The Court will appoint an experienced attorney to draft the SNT and will then sign off on the creation of the Trust.
9. **Who has to approve the self-settled SNT after it is drafted?** The Social Security Administration has to review all self-settled SNTs for beneficiaries after they have been drafted to be sure the SNT complies with the language requirements of federal law; especially relating to the payback provisions and the decision-making power of the trustee regarding payments from the SNT. If the SNT is a court created SNT under a Management Special Needs Trust, then the trust will have to be approved by the Court after it is drafted and prior to the Court signing the Order creating the SNT.
10. **How does a Third Party SNT get created?** Again, the SNT should be drafted by an attorney who is knowledgeable about elder or disability law. The SNT may be drafted as either: (1) a part of your Will or (2) as a stand alone SNT.
11. **Who has to approve the third party SNT after it is drafted?** The Social Security Administration will likely want to review the third party SNT, so it should be submitted to them. Where there is no payback required, the Social Security Administration does not give the same amount of scrutiny to the third party SNT as they do to self-settled trusts.
12. **What is the Benefit of a Stand Alone SNT?** The benefit of a stand alone SNT for a particular disabled person is that once that document is created for the disabled beneficiary, anyone who wants to make a gift or leave funds to that disabled person at their death can use that stand alone trust. This means parents, grandparents, siblings, and other relatives can make gifts to the disabled person or leave them an inheritance into the stand alone trust without the need to pay for the creation of their own SNT for their disabled loved one.

13. **What is the Benefit of a Third Party SNT in your Will?** As a general rule, a Will which contains an SNT provision for a disabled person will not be as expensive as creating both the Will which leaves funds to the Trust **AND** the stand alone SNT for the disabled person. The drawback is that the SNT in your Will only works for what you plan to leave to that disabled beneficiary; other family members cannot use it.
14. **What if I don't have funds to pay for a lawyer to create the SNT?** There are a couple of options for getting your disabled beneficiary on needs-based public assistance without creating an SNT. The options are: (1) create an account for the beneficiary at the ARC of Texas and using their Master Pooled Trust OR (2) create an ABLE Account for the beneficiary (limited use).
15. **What is a Master Pooled Trust with the ARC of Texas?** The Master Pooled Trust with the ARC of Texas is a Texas based SNT designed to improve the quality of life for all individuals with disabilities while providing resources for their ongoing supplemental needs. You can join the appropriate trust (self-settled or third party) by completing the appropriate joinder application and paying a joinder fee. An account is then established for the specific beneficiary and the ARC manages the funds for your disabled beneficiary as the trustee.
16. **What is an ABLE Account?** The ABLE Act is a federal law that amended the Internal Revenue Code to create a tax-advantaged savings option for people with disabilities. A disabled person can put their own funds in the amount of up to \$14,000 per year up to a max of \$100,000 into an ABLE Account and not have that account count against them for need-based public assistance. Right now, Texans do not have the ability to create a Texas ABLE account, but it is possible to create an ABLE account for a disabled Texan by using another state's law. Because of the annual funding cap of \$14,000 and the overall account cap of \$100,000, the ABLE Account has limited applications for disabled persons.