
An Hour on Special Needs Trusts

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- I. **Beginning at the beginning: what is a trust?**
 - A. All trusts hold property in the name of a trustee.
 - B. Trusts have these characteristics.
 1. Property management.
 2. Property sale.
 3. Property protection (from *some* creditors).
 4. Property transfers.
 - C. Characters in Trusts.
 1. Creator ("grantor, settlor, trustor").
 2. Trustee.
 3. Beneficiary
 - a. Present.
 - b. Future.
 - D. Basic details.
 1. When and how created.
 - a. While alive - a living trust.
 - b. After death - created in a will ("testamentary trust").
 2. Revocable or not.
 - a. A living trust can be revocable or irrevocable.
 - b. A testamentary trust cannot be revoked.
 - E. What a trust isn't.
 1. Conservatorship.
 2. Power of attorney.

II. The special needs trust.¹

- A. A special needs trust is a trust in which the Trustee as owner of the property has virtually complete discretion whether to distribute trust property (or income generated from trust property) to the beneficiary.
- B. Usual uses.
 - 1. Medicaid and SSI.²
 - 2. Creditor avoidance.
 - a. Preserving statutory exemptions for personal injury and Workers' Compensation awards.
 - b. Insulating trust assets from general creditors for other assets.
- C. Two basic types.
 - 1. The type is dependent upon whose assets fund the trust.
 - 2. Types.
 - a. First party. Mr. A. creates a trust and transfers Mr. A.'s assets to the trustee for the benefit (sometimes at Mr. A.'s death) of *Mr. A himself*.
 - b. Third party. Mr. A. creates a trust and transfers Mr. A.'s assets to the trustee for the benefit (sometimes at Mr. A.'s death) of a beneficiary *other* than Mr. A. (often his disabled child, sibling or spouse).
 - 3. General rules.
 - a. Medicaid and SSI.
 - (i) Mr. A. can dispose of his property anyway he wants to if he doesn't SSI or Medicaid for himself or his spouse.
 - (ii) Mr. A. can *only* dispose of his property in highly regulated ways if he or his spouse are receiving (or will within three or five years need to receive SSI or Medicaid payment for long term care).
 - b. Creditor avoidance.

¹ R. Shawn Majette, Special Trusts For Special Folks: [SSI, Medicaid, & Tax Issues in Virginia Special Needs Trusts](http://www.majette.net/SNT2014.pdf), <http://www.majette.net/SNT2014.pdf>.

² Although these trusts work for both SSI and Medicaid, the outline refers to Medicaid.

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- (i) First party trusts cannot be generally be used for creditor avoidance. Mr. A. cannot give his general assets to any trustee to defraud or hinder his creditors.³
 - (ii) Third party trusts *can* and usually *should* be used for creditor avoidance. Mr. A., father of brain injured Son, may create a trust for Son with Mr. A.'s assets that will be completely exempt from Son's creditors.
4. The Medicaid Third Party Trust - Mr. A.'s assets for someone else.
- a. Mr. A. for anyone other than Mr. A.'s spouse.
 - (i) Example: Mr. A. creates during his lifetime and funds with Mr. A.'s assets a trust for his benefit during his lifetime, continuing at his death for Son, who has TBI, with what's left at Son's death (the "remainder") passing to Son's children, or Mrs. A., or anyone / anything else. **Warning for this example:** Mr. A. (or Mrs. A.) may need long term care.
 - (ii) Example: Same, except created at Mr. A.'s death by his will.
 - b. Mr. A. for Mr. A.'s spouse.
 - (i) Must be created by will.⁴
 - c. Use of power of attorney to create, fund, or amend a trust.
 - (i) The power of attorney can be used to create a lifetime trust.
 - (ii) The power of attorney cannot be used to make a will.
5. The First Party "payback" trust - using Mr. A.'s assets for Mr. A., a Medicaid (or SSI) recipient.
- a. Elements common to successful First Party trusts.
 - (i) Always a living trust.
 - (ii) Mr. A. cannot be the trustee.
 - (iii) Mr. A. must be disabled.
 - (iv) Mr. A. must be under 65 when transfers are made into the trust. Penalty for long term care Medicaid possible for transferor into the trust. Anyone

³ Exception: Mr. A. may transfer assets to a "qualified" first party trust and retain an interest which will not be available to his creditors. Virginia Code § 64.2-745.1, Self-settled spendthrift trusts.

⁴ R. Shawn Majette, [Virginia Long Term Care Medicaid Planning Highlights](http://www.majette.net/documents/Medicaid_Planning_2-20-2014.pdf), 2014, http://www.majette.net/documents/Medicaid_Planning_2-20-2014.pdf, footnote 156.

can transfer assets to the trustee for the benefit of Mr. A. **BUT** Mr. A. must be under 65 when the assets are transferred to avoid a penalty for the transferor of the asset.

- (v) When Mr. A. dies before the assets can be passed on to anyone else (or used for anything else), Medicaid or a designee must be reimbursed or paid (the "payback " or "pay-over" trusts).
- b. Two types of First Party trusts.
 - (i) Individual trust (Mr. A. transfers assets to a trustee only for Mr. A.'s benefit).
 - (a) Individual trust, 42 USC 1396p(d)(4)(A).
 - (b) Statutory settlors are parent, grandparent, court, or guardian.
 - (ii) Pooled trust (Mr. A. transfers assets to a trustee of a trust which pools assets of many people with separate accounts for each, including Mr. A.).
 - (a) Mr. A. can be his own settlor.

III. Companion documents and proceedings.

- A. Non-impaired persons documents.
 - 1. Power of Attorney.
 - a. Gifting powers and trust creation, amendment and funding powers.
 - 2. Advance Medical Directive (Health Care Power Of Attorney).⁵
 - a. General.⁶
 - b. Protest.⁷ A protest (or "psychiatric" advance medical directive is useful when impaired person requires but refuses psychiatric care.⁸
- B. Proceedings to benefit impaired persons who cannot grant a financial or medical power of attorney, make gifts, or execute a will.⁹

⁵ Virginia Bar [checklist](http://www.majette.net/documents/ADChecklist-2009.pdf), <http://www.majette.net/documents/ADChecklist-2009.pdf>.

⁶ [Form](http://www.vhha.com/documents.html?id=342), <http://www.vhha.com/documents.html?id=342>.

⁷ [Form](http://www.vhha.com/documents.html?id=344), <http://www.vhha.com/documents.html?id=344>.

⁸ Lacking this or a complex guardianship order will require a civil commitment proceeding in order to secure necessary treatment. R. Shawn Majette, [Civil Mental Health Law: A General Practitioner's Practical Guide to Civil Commitment Rules in Virginia](http://www.majette.net/documents/EmergLaw.pdf), <http://www.majette.net/documents/EmergLaw.pdf>.

⁹ R. Shawn Majette, Virginia [Guardianship and Conservatorship](http://www.majette.net/documents/VaGurd09.pdf) 2012, <http://www.majette.net/documents/VaGurd09.pdf>.

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1. Conservatorship to manage property.
 - a. Day to day management of income.
 - b. Estate planning (to create first party trust or to provide for gifts / support for dependents).
 2. Guardianship to manage health care and living arrangements.
 - a. Involuntary admissions for mental health care and treatment.¹⁰
 - b. Restrictions on visitation.¹¹
 3. Anticipating changes: early and standby guardianship / conservatorship.
 - a. Impaired child turning 18.¹²
 - b. Aging or dying conservator or caretakers of incapacitated person.¹³

¹⁰ [Virginia Code](http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-805.1) § 37.2-805.1, Admission of incapacitated persons pursuant to advance directives or by guardians, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-805.1>.

¹¹ Warning: the law is unsettled on the question.

¹² A parent or guardian of a minor (or anyone when neither is living) may file a petition to appoint a conservator or guardian no earlier than six months before the impaired person's eighteenth birthday. When the impaired person is a minor and there is a living parent or guardian, anyone other than the parent or guardian may file no earlier than the respondent's eighteenth birthday. Virginia Code § 64.2-2001.

¹³ The court may appoint a standby guardian or conservator of an incapacitated adult. The standby can immediately assume his duties upon the death or judicial declaration of incapacity of the last surviving parent, child, or legal guardian of the incapacitated adult. [Virginia Code](http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.2-2013) § 64.2-2013, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.2-2013>.