

THE MOVING TARGET:

Interaction between Government Benefits and the Supplemental Needs Trust (aka Special Needs Trust)

a supplemental paper to the power point

A Key Player in Winding Up Litigation: The SNT Attorney

Better the occasional faults of a government that lives in a
spirit of charity than the consistent omissions of a government
frozen in the ice of its own indifference.

–Franklin D. Roosevelt

We are confronted with insurmountable opportunities.

–Pogo

Patricia Flora Sitchler, CELA*
The Law Office of Patricia Flora Sitchler
P.O. Box 999
La Vernia, Texas 78121
210.816.1761
patricia.sitchler@gmail.com
www.patriciasitchler.com

*certified as an Elder Law Attorney by the
National Elder Law Foundation as recognized by
the Texas Board of Legal Specialization

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PATRICIA (PATTY) FLORA SITCHLER, CELA*
THE LAW OFFICE OF PATRICIA FLORA SITCHLER
P.O. Box 999
La Vernia, Texas 78121
(210) 816-1761

patricia.sitchler@gmail.com

*Certified as a Elder Law Attorney
by the National Elder Law Foundation as recognized by
the Texas Board of Legal Specialization

EDUCATION

J.D. Degree (magna cum laude), St. Mary's University School of Law, 1990
B.A. Degree (mathematics), Trinity University, 1975

PROFESSIONAL ACTIVITIES

Solo practitioner
Adjunct Professor of Law, St. Mary's University School of Law (1998 to present)
Co-Chair, Long Term Care, Medicaid and Special Needs Trusts Committee of the Real Property, Trusts & Estates Section of the American Bar Association (2010-2013)
Member, National Academy of Elder Law Attorneys (national and state chapters)(State Board of Directors, 2000 to 2006, 2009 through 2012, Texas Chapter President 2004-2005)
Member, Special Needs Alliance
Member of the College of the State Bar of Texas (1997 to present)
Member of the American Bar Association, State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers Association and San Antonio Trial Lawyers Association
Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)
Planning Committee Member, State Bar of Texas, Elder Law Course (2000, 2001, 2003-2008, 2013-2015)
Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)
Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference (1999 to present)
Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)
Listed in the 2011 Inaugural Edition, Martindale-Hubbell Bar Register of Preeminent Women Lawyers (and in 2012-2014)
Listed in Best Lawyers in America in Elder Law (2007-2014)
Listed in Texas Monthly Super Lawyers 2004-2014 in Elder Law and Top 50 Lawyers in South and West Texas (2013).
Listed in Scene in SA San Antonio's Best Lawyers in Trust and Estate Law (2008-2014)
Co-Author of Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas, Elder Law Trio Press, Houston, 2005.
Co-Author of Elder Law, Texas Practice Series Vol.. 51, Thomson-Reuters (formerly West Publishing), 2008 to present.
Named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning (2013) by the San Antonio Business Journal.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS

Author, The SNT Process, National Structured Settlements Trade Association, Fall Educational Meeting, Phoenix, Arizona, October 29, 2015.
Author, Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded- Doing it Right, Stetson University School of Law Basics of Special Needs Trusts, St. Petersburg, Florida, October 15, 2015.
Author, Powers of Attorney: Recent Developments, University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas August 6, 2015
Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2015 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2015.
Author, Creating a SNT without Creating Malpractice, State Bar of Texas Advanced Elder Law Conference, Houston, Texas, April 9, 2015.
Author, Cracking the Entitlements Enigma Code: What Practitioners Need to Know about Medicaid, Corpus Christi Estate Planners Counsel, Corpus Christi, Texas, November 20, 2014.
Author, Auditing the MERP Claim, Texas-NAELA Annual Fall Meeting, Fort Worth, Texas, October,

1, 2014

Author, Medicaid Do's and Don'ts, 2014 Medico-Legal Summit, South Texas Geriatric Education Center and the VA-GRECC, San Antonio, Texas, September 18, 2014.

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2014 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 21, 2014.

Author, Winding Up the Settlement: The Government Benefit Elephant in the Room, State Bar of Texas Soaking Up Some CLE, May 15, 2014, South Padre Island, Texas.

Co-Author, Where Real Estate and Estate Planning Collide, State Bar of Texas, Advanced Elder Law Conference, April 3, 2014, Dallas, Texas.

Author, Cracking the Government Benefits Enigma Code: What Estate Planners need to know about Government Benefits; San Antonio Estate Planner's Counsel's Docket Call in Probate Court, February 21, 2014, San Antonio, Texas.

Author, And How are the Children: Planning for Children with Special Needs Trusts, University of Texas School of Law 2014, 10th Annual Changes and Trends Affecting Special Needs Trusts, February 6-7, 2014, Roundrock, Texas.

Co-Author, Elder Law Planning and Issue Spotting, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 24, 2014.

Author, Special Needs Trusts, Northeast Independent School District Continuing Education, San Antonio, Texas, October 24, 2013

Author, The Good News/Bad News Client: Adult Protective Services issues that may arise when caring for an Elderly or Disabled individual, University of Texas Health Science Center Medico-Legal Conference, October, 10, 2013.

Author, Winding up the Settlement: the Government Benefit Elephant in the Room, Corpus Christi Probate Conference, September 27, 2013

Author, Winding up the Settlement: the Government Benefit Elephant in the Room, Texas NAELA, Austin, Texas, September 7, 2013

Panelist, Ask the Experts, Estate Planning, Guardianship & Elder Law Conference, University of Texas School of Law, Galveston, Texas, August 8-9, 2013

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2013 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2013.

Panelist, Elder Law, Disability Planning and Bioethics Group: Current Issues Affecting Special Needs Trusts, American Bar Association Section of Real Property, Trust and Estate Law 24th Annual Spring CLE Symposia, Washington, D.C. May 2-3, 2013

Author, Administrative Appeals: Cutting it off at the Pass, State Bar of Texas Advanced Elder Law Course, Houston, Texas, April 11, 2013.

Author, Special Needs Trusts, Northeast Independent School District Continuing Education, San Antonio, Texas, March 21, 2013.

Author, Special Needs Trust: The Moving Target, University of Texas School of Law 2013, 9th Annual Changes and Trends Affecting Special Needs Trusts, February 7-8, 2013, Austin, Texas.

Co-Author, Elder Law Planning and Issue Spotting, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 25, 2013.

Co-Author, Where Real Estate and Estate Planning Collide, Texas Land Title Institute, December 6, 2012, San Antonio, Texas.

Co-Author, Where Real Estate and Estate Planning Collide, Tarrant County Probate Bar Association, November 1, 2012, Ft. Worth, Texas.

Author, Special Needs Trusts, Northeast Independent School District Continuing Education, San Antonio, Texas, October 25, 2011.

Author, Requirements of Reporting Abuse & Exploitation: Understanding the Difference between Abuse & Family Dynamics, Case Management Society of South Texas, October 12, 2012, San Antonio, Texas.

Author, Curing a Transfer Penalty, Texas Chapter of the National Academy of Elder Law Attorneys Conference, September 15, 2012, San Antonio, Texas.

Co-Author, The Collision of Real Estate Law and Elder Law: Shocks and Sparks, University of Texas School of Law Elder Law, Estate Planning and Guardianship Course, August 9-10, 2012, Galveston, Texas.

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2012 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 16, 2012.

Co-Author, Where Real Estate and Estate Planning Collide, State Bar of Texas Advanced Real Estate, July 13, 2012, San Antonio, Texas.

Author, Special Needs Planning, National Organization of the Disorders of the Corpus Callosum Conference, July 7, 2012, San Antonio, Texas.

Author, Acid Rock to Acid Reflux: How Will Boomers Pay for Disability? American Bar Association Section of Real Property, Trust, and Estate Law 23rd Annual Spring Symposia, May 3, 2012, New York, New York.

Co-Author, Where Real Estate and Estate Planning Collide, Advanced Elder Law Conference, April 12, 2012, Dallas, Texas.

Author, Managing Expectations and Personal Responsibility, University of Texas School of Law 2012 Changes and Trends Affecting Special Needs Trusts, Austin, Texas, February 10, 2012.

Author, Managing Expectations and Personal Responsibility, University of Texas School of Law 2012 Changes and Trends Affecting Special Needs Trusts, Austin, Texas, February 10, 2012.

Co-Author, Elder Law Planning and Issue Spotting, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 13, 2012.

Co-Author, Medicaid 101, State Bar of Texas Webcast, November 30, 2011.

Author, How to Protect and Not Forfeit your Client's Money and Government Benefits, Corpus Christy Estate Planners Council, Corpus Christi, Texas, November 18, 2011.

Author, Family Catastrophes, Trustees, and Trust Administration, Stetson School of Law 2011 Special Needs Trusts Conference, St. Petersburg, Florida, October 21, 2011.

Author, Acid Rock to Acid Reflux: Financing Boomer's Disability, The 2011 Medico-Legal Conference on Aging, San Antonio, Texas, September 29-30, 2011

Author, Special Needs Trusts, Northeast Independent School District Continuing Education, San Antonio, Texas, September 21, 2011.

Author, Unexpected Outcomes in Medicaid Planning, Texas Chapter, National Academy of Elder Law Attorneys, Austin, Texas, September 9, 2011.

Author, How to Protect and Not Forfeit your Client's Money and Government Benefits, Nueces County Probate Seminar, Corpus Christi, Texas, August 26, 2011.

Presenter, Power of Attorney, How to Protect Your Client's Estate and Avoid Guardianship, Nueces County Probate Seminar, Corpus Christi, Texas, August 26, 2011.

Co-Author, What Every Estate Planner Needs to Know about SNTs, University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 11, 2011.

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2011 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 18, 2011.

Quoted in Special Report: Protect Your Parents, Money Magazine, June 2011 (see also www.cnnmoney.com)

Author, And How are the Children: Benefits available for Children, State Bar of Texas Advanced Guardianship Course, Houston, Texas April 8, 2011

Author, Maintaining the Gold Standard - for yourself and SNA (ethics), Special Needs Alliance, San Antonio, Texas, March 12, 2011

Author, Cutting Edge v. Over the Edge: Ethics and Malpractice Issues for Medicaid Attorneys, State Bar of Texas Webcast, March 2, 2011

Author, The Before & After of a PI Settlement, The Medicare & Medicaid Crystal Ball, University of Texas School of Law, 2011 Changes and Trends Affecting Special Needs Trusts, January 27-28, 2011, Austin, Texas.

Presenter, Building Blocks of Wills, Estate and Probate: Elder Law Planning & Issue Spotting, State Bar of Texas Webcast, January 14, 2011.

Author, The Before & After of a PI Settlement, The Medicare & Medicaid Crystal Ball, NBI, December 7, 2010; Dallas, Texas.

Author, MERP: The Death Tax for the Poor; Texas NAELA Annual Meeting, September 11, 2010; The Woodlands, Texas.

Author, The Before & After of a PI Settlement, The Medicare & Medicaid Crystal Ball, ALI-ABA August 20, 2010.

Author, Cutting Edge v. Over the Edge: Ethics and Malpractice Issues for Medicaid Attorneys; State Bar of Texas Advanced Elder Law Court, July 24, 2010, Galveston, Texas.

Author, Elderly/Disability Issues & Medicaid, SSI & Medicare, 2009 Texas Graduate Trust School, Texas Bankers Association, Wealth Management & Trust, Dallas, Texas, July 19, 2010.

Author, The Before and After of a PI Settlement: The Medicare and Medicaid Crystal Ball, American Bar Association, Real Estate, Trusts and Estate Planning Section Spring Symposia, Philadelphia, PA, May 6, 2010.

Author, Cutting Edge vs. Over the Edge: Ethics and Malpractice Issues for Medicaid Planning, State Bar of Texas Advanced Elder Law Seminar, April 15, 2010.

Author, The Before and After of a PI Settlement: The Medicare and Medicaid Crystal Ball, 2010 Changes and Trends Affecting Special Needs Trusts, University of Texas School of Law Continuing Legal Education, Austin, Texas, February 11-12, 2010.

Author, Cutting Edge vs. Over the Edge: Ethics and Malpractice Issues for Medicaid Planning, Article, Texas Tech University School of Law Estate Planning & Community Property Law Journal and continuing legal education presentation, February 5, 2010.

Author and Co-Panelist with Art R. Rios, Bridget O'Brien Swartz, and Mary Schmidt-Smith, The Well Traveled SNT, 2009 Special Needs Trust: The National Conference, Don Cesar Beach Resort, St. Pete Beach, Florida, October 15-16, 2009.

Author, The Before and After of a PI Settlement: The Medicaid & Medicare Crystal Ball, 2009 Special Needs Trust: The National Conference, Don Cesar Beach Resort, St. Pete Beach, Florida, October 15-16, 2009.

Author, And How Are the Children? Planning for Children With Special Needs Trusts, Texas Naela Semi-Annual Meeting, Austin, Texas, September 12, 2009.

Author, Supplemental Needs Trusts, Structured Annuities & Medicare Set-Aside Allocations, San Antonio Trial Lawyers Association, San Antonio, Texas, August 20, 2009.

Author, Cutting Edge vs. Over the Edge: Ethics and Malpractice Issues for Medicaid Planning, University of Texas School of Law Continuing Legal Education, Moody Gardens, Galveston, Texas, August 13-14, 2009.

Author, Elderly/Disability Issues & Medicaid, SSI & Medicare, 2009 Texas Graduate Trust School, Texas Bankers Association, Wealth Management & Trust, Dallas, Texas, July 20, 2009

Co-Author with Bradley J. Frigon, Denver, Colorado, and Mary Alice Jackson, Sarasota, Florida, Avoiding Liability and Adding Value: What Every Personal Injury Attorney & Estate Planning Attorney Must Know About Special Needs Trusts - Part II, ALI-ABA Telephone seminar/Webcast, June 29, 2009

Author, Medicaid Planning for your Client: What you can do; What you must Know, Tarrant County Probate Bar Association, Fort Worth, Texas, June 4, 2009.

Author, Supplemental Needs Trusts, Structured Annuities and Medicare Set-Aside Allocations: When & How, Houston Trial Lawyers, Houston, Texas, May 14, 2009.

Author, The Perfect Estate Plan: But Did you Plan for the Disabled Beneficiary? Midland Estate Planners, Midland, Texas, May 7, 2009.

Author, The Perfect Estate Plan: But Did you Plan for the Disabled Beneficiary? Rio Grande Valley Estate Planning Counsel, McAllen, Texas, April 21, 2009.

Author, Supplemental Needs Trusts, Structured Annuities and Medicare Set-Aside Allocations: When & How, Capitol Area County Trial Lawyers, Austin, Texas, April 14, 2009.

Author, The Perfect Estate Plan: But Did you Plan for the Disabled Beneficiary? Corpus Christi Estate Planners, Corpus Christi, Texas, March 26, 2009.

Author, Supplemental Needs Trusts, Structured Annuities and Medicare Set-Aside Allocations: When & How, State Bar Medical Malpractice, Santa Fe, Mary 12, 2009

Co-Author with Bradley J. Frigon, Denver, Colorado, and Mary Alice Jackson, Sarasota, Florida, Avoiding Liability and Adding Value: What Every Personal Injury Attorney & Estate Planning Attorney Must Know About Special Needs Trusts, ALI-ABA Telephone seminar/Webcast, February 27, 2009

Author, And How Are the Children? Planning for Children With Special Needs Trusts, 2009 Changes and Trends Affecting Special Needs Trusts, University of Texas School of Law Continuing Legal Education, Austin, Texas, February 19-20, 2009.

Author, The Perfect estate Plan: But did you Plan for the Disabled Beneficiary? Docket Call in Probate Court, San Antonio, Texas, February 13, 2009

Co-Author with Bradley J. Frigon, Medicare Set Aside Trusts:&Critical Issues Surrounding&Personal Injury Awards, ALI-ABA Telephone seminar, December 3, 2008.

Author, Protecting your Client: Government Benefits, Liens and Trusts, San Antonio Trial Lawyers, November 20, 2008

Author and Co-Presenter with Molly Abshire, Medicaid Planning for Your Client: What You Can Do and What You Must Know , State Bar of Texas Webcast, November 5, 2008 from 12:30 pm to 1:30 pm

Co-Author with PiYi Mayo, Supplemental Needs Trusts and Personal Injury Recoveries, State Bar of Texas Webcast, November 5, 2008 from 2:00 pm to 3:30 pm

Author, Protecting your Clients and Yourself: Benefits, Liens & Trusts, Hidalgo County Bar Association Civil Law Conference, McAllen, Texas, October 30, 2008

Author, Medicaid Planning for your Parent: What you can do. What you must know. Estate Planning Council of Central Texas, Austin, Texas, October 28, 2008

Co-Author with Art R. Rios, Immigration Attorney, Immigration y Fideicomisos: Interpreting the Relationship Between Immigration Law and Trusts, Special Needs Trusts X, Stetson University, Don CeSar Beach Resort, St. Pete Beach, Florida, October 16-17, 2008.

Author, Elder Law: Ethical Considerations, Intermediate Estate Planning, Elder Law and Guardianship Course, University of Texas Continuing Legal Education, Galveston, Texas, August 14-15, 2008.

Author, Medicaid Planning for Your Parent: What You Can Do and What You Must Know, College of the State Bar of Texas Summer School, Galveston, Texas, July 18, 2008.

Author, Defining the Medicaid Program & Distribution Case Studies, Texas Bankers Association Conference, San Antonio, Texas, June 13, 2008.

Author, The Perfect Estate Plan - But Did you Plan for the Disabled Beneficiary? Advanced Estate Planning Course, State Bar of Texas, Dallas, June 11, 2008.

Author, Supplemental Needs Trust Distributions. Advanced Elder Law Course, State Bar of Texas, Dallas, Texas, March 5, 2008

Author, And How Are the Children? Planning for Children With Special Needs Trusts, 2008 Changes and Trends Affecting Special Needs Trusts, University of Texas School of Law Continuing Legal Education, Austin, Texas, January 31-February 1, 2008.

Author, Supplemental Needs Trusts: A Texas Perspective, Houston Estate and Financial Forum November Meeting, Houston, Texas, November 30, 2007.

Presentation, Taking Care of Parents, Education Service Center Region 20, San Antonio, Texas, November 12, 2007 and December 12, 2007.

Author, Supplemental Needs Trust: To Fund or Not To Fund--That is the Question, The Basics of Special Needs Trusts, Stetson University College of Law, Clearwater Beach, Florida, October 18, 2007.

Co-Author with H. Clyde Farrell, Planning Strategies After DRA 2005 & Texas Statutory & Rule Changes, Texas NAELA Fall Meeting, San Antonio, Texas, September 28, 2007.

Author, Changes & Developments on the Medicaid Horizon: The Aging of the Baby Boom Generation, CPA Symposium, San Antonio, Texas, August 30, 2007.

Co-Author with H. Clyde Farrell, Planning Strategies After DRA 2005 & Texas Statutory & Rule Changes, Intermediate Estate Planning, Elder Law and Guardianship Course, University of Texas Continuing Legal Education, Galveston, Texas, August 9-10, 2007.

Author, Acid Rock to Acid Reflux: How Will Boomers Pay for Disability? Lorman Education Services, San Antonio, Texas, July 17, 2007.

Author, Elderly/Disabled Issues, Texas Bankers Association, Trust Section Graduate Trust School, Dallas, July 16, 2007.

Author, Medicaid and Elder Planning in Light of DRA 2005. Lorman Education Services, San Antonio, Texas, July 17, 2007.

Author, Elder/Disability Issues and Medicaid and SSI. Texas Bankers Association Graduate Trust School, Southern Methodist University, Dallas, Texas, July 16, 2007.

Author, Acid Rock to Acid Reflux: How Will Boomers Pay for Disability? Financial Planning Association, San Antonio, Texas, June 27, 2007.

Author, What Every Estate Planner Needs to Know About Elder Law. Thirty-Fourth Annual Estate Planning Seminar, Corpus Christi Estate Planning Council, Corpus Christi, Texas, May 14, 2007.

Author, Are you out of luck if Medicaid says NO? Most Common Means-Tested Benefits Other than Medicaid, Advanced Elder Law Course, State Bar of Texas, Houston, Texas, April, 2007.

Author, And How Are the Children? Planning for Children With Special Needs Trusts, 2007 Changes and Trends Affecting Special Needs Trusts, University of Texas School of Law Continuing Legal Education, Austin, Texas, February 15-16, 2007.

Panel Participant, Medicaid Transfer Rules and Medicare Part D Benefits Plans, State Bar of Texas Live Webcast, November 6, 2006.

Author, Supplemental Needs Trusts and Guardianship, Downs Syndrome Conference, San Antonio, Texas, September 16, 2006.

Author, Acid Rock to Acid Reflux: How Will Boomers Pay for Disability? CPA Symposium, San Antonio, Texas, August 31, 2006.

Author, Dealing with the Disaster of the Deficit Reduction Act of 2005, Medicaid Amendments, The University of Texas Ninth Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 10-11, 2006.

Panel Participant, Government Benefits: Medicare and Structures, 2006 Annual Meeting and Conference, National Structured Settlement Trade Association, Rio Grande, Puerto Rico, May 7-10, 2006.

Author, Fiduciary Litigation Issues in Elder Law and Guardianships, State Bar of Texas, Houston, Texas, May 11-12, 2006.

Presentation, Panel Discussion regarding state rules affecting Structured Settlement Annuities paying into Supplemental Needs Trusts; National Structured Settlement Trade Association Annual Meeting, Puerto Rico, May 8, 2006.

Author, Medical Powers: What do they mean? Who can act? What works in the real world? And to What Extent Do They Empower a Guardian? Guardianship Course, State Bar of Texas, Dallas, Texas, March 9, 2006.

Author, Supplemental Needs Trust: A Texas Perspective, Advanced Court-Created Trusts Seminar, Wealth Management & Trust, a Division of Texas Bankers Association, Dallas, Texas, February 10, 2006.

Author, Supplemental Needs Trust: A Texas Perspective, The University of Texas School of Law and the Trust Financial Services Division of the Texas Bankers Association 2006 Changes and Trends Affecting Special Needs Trusts, Austin, Texas, February 10, 2006.

Numerous presentations 1996 through 2005.

TABLE OF CONTENTS

I.	INTRODUCTION: THE FOCUS OF THIS PAPER.....	1
II.	THE SUPPLEMENTAL NEEDS TRUST.	1
A.	DEFINITION.	1
B.	BRIEF HISTORY OF THE SUPPLEMENTAL NEEDS TRUST.	1
III.	GOVERNMENTAL BENEFITS THAT ARE SUSTAINABLE WITH A SUPPLEMENTAL NEEDS TRUST..	6
A.	MEDICAID ASSISTANCE PROGRAM.	6
B.	SUPPLEMENTAL SECURITY INCOME ("SSI").	33
C.	OTHER GOVERNMENT BENEFITS	38
IV.	DEFINING A SUPPLEMENTAL NEEDS TRUSTS.	40
A.	STRICT SNT.....	40
B.	BROAD SNT..	40
C.	DISCRETION TO PARTIALLY DISQUALIFY BENEFICIARY.	41
D.	TOTALLY DISCRETIONARY TRUST.	41
E.	TWO TRUST APPROACH.	41
F.	STRATEGIC PLANNING..	42
G.	EXISTING TRUST.	42
H.	WHAT KIND OF DISTRIBUTIONS ARE ALLOWED?	44
I.	SUPPLEMENTAL TRUST PROVISIONS.....	58
V.	SELF-SETTLED SUPPLEMENTAL NEEDS TRUST.	62
A.	FUNDING THE SELF-SETTLED SUPPLEMENTAL NEEDS TRUST.....	63
B.	WHO WILL FUND THE SELF-SETTLED TRUST?	66
C.	SUBROGATION	70
D.	TROUBLESOME TRUSTS.	79
E.	TRUSTEES..	81
VI.	THIRD PARTY FUNDED SUPPLEMENTAL NEEDS TRUST.....	83
A.	FUNDING THE TRUST	83
B.	SUBROGATION.	86
C.	TRUSTEES.	86
VII.	THE REVIEW PROCESS.....	87
A.	NOTICE TO GOVERNMENT AGENCIES.	87
B.	CONFIDENTIALITY AGREEMENTS.	88
C.	SUBSEQUENT ELIGIBILITY REVIEWS BY GOVERNMENT AGENCIES.	88
	APPENDIX I - Medicaid Reference Amounts for 2015-2016.	90
	APPENDIX II - The State Medicaid Manual is too large to attach. It is found at the Center for Medicare and Medicaid Services website as follows: www.cms.gov ; then select "regulations & guidance;" then select "manuals;" then select "paper-based manuals;" then select "45" being The State Medicaid Manual.	91
	APPENDIX III - Medicare Reference Amounts for 2015-2016.	92
	APPENDIX IV - Federal Poverty Rate for 2016.	94
	APPENDIX V - December 31, 2015 Office of the Assistant Secretary of Defense Memorandum announcing that the child Survivor Benefit Plan annuity can be directed to a SNT.	95

SUPPLEMENTAL NEEDS TRUSTS A TEXAS PERSPECTIVE

I. INTRODUCTION: THE FOCUS OF THIS PAPER.

Since passage of the Omnibus Budget Reconciliation Act of 1993,¹ the use of Supplemental Needs Trusts (also known as Special Needs Trusts or “SNT”) has grown to such proportions that just about every practitioner has heard of the trust but there is still much confusion about the terms and reasoning behind a SNT. The intent of this author is to define a SNT, set out when it is generally used, list some strategies for creating the trust and a brief discussion of the tax implications of the trust.

II. THE SUPPLEMENTAL NEEDS TRUST.

A. DEFINITION. A supplemental needs trust is a broad term encompassing self-settled and third party created trusts. It is a trust created for an individual with the intent of allowing distributions from the trust to the beneficiary while the beneficiary has the option of maintaining eligibility for governmental “needs based” benefits.

The operative words describing this trust are “supplemental needs” thereby distinguishing this trust from a “support” or other type of trust. Other words used to describe the supplemental needs trust are instructional such as a limitation that trust distributions should “supplement and not supplant governmental benefits.” SNTs may have very strict distributions restrictions prohibiting certain distributions. More broadly, SNTs may give the trustee full discretion to make distributions even to the extent of causing the beneficiary to forfeit some but not all governmental benefits.

B. BRIEF HISTORY OF THE SUPPLEMENTAL NEEDS TRUST. Practitioners have always taken legal steps to draft trusts so that the beneficiary does not forfeit valuable governmental need based benefits. The Medicaid program has long been one of the most regulated of the “need based” programs and therefore, the SNT sprang from Title XIX of the Social Security Act.

1. Prior to June 1, 1986. The Medicaid program was originally established in 1965. It was designated Title XIX of the Social Security Act, found at 42 U.S.C. §1396 et seq. The purpose of the Act was “to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services.”² In the early days, a person receiving or anticipating the use of governmental benefits would attempt to meet the low asset requirement by transferring assets into a trust for him/herself. Few of these trusts successfully protected benefits, as common law and public policy prohibited a person from placing his assets in trust to the detriment of creditors.³

1 42 U.S.C. §1396p.

2 Sanders v. Pilley, 684 So.2d 460, 464 (La. 1st Cir. 1996) writ denied, 691 So.2d 90 (La. 1997), citing to Atkins v. Rivera, 477 U.S. 154, 156, 106 S.Ct. 2456, 2458, 91 L.Ed.2d 131 (1986).

3 See, e.g., Vanderbilt Credit Corp. v. Chase Manhattan Bank, 473 N.Y.S.2d 242, 246 (A.D. 1984).

However, some case law held that if the beneficiary never had possession of funds that funded a trust, then the trust would not be considered grantor created.⁴ Therefore, petitioners in a personal injury suit would have the court or defendant apply any recovery directly into a trust so that the beneficiary never actually had possession of those funds.

Texas regulations address trusts created prior to June 1, 1986. A Medicaid Qualifying Trust disqualifies an applicant for Medicaid assistance.

“(a) A Medicaid-qualifying trust (MQT) is a trust that a recipient, the recipient's spouse or guardian, or anyone holding the recipient's power of attorney establishes using the recipient's money. The recipient is the beneficiary of an MQT. A trust meeting this definition that was established between June 1, 1986, and August 10, 1993, is an MQT. A trust meeting this definition that was established before June 1, 1986, is treated as a standard inter vivos trust.”⁵(emphasis, mine)

If a Trust is an inter vivos trust, it is defined in the Texas Administrative Code as

(a)(2) A trust established while the person creating the trust is still living. (b) Resources in a testamentary or inter vivos trust are countable to a person if the person is the trustee and has the legal right to revoke the trust and use the money for the person's own benefit. (1) If a person does not have access to the trust, then the trust is not counted as a resource. (2) If a person's access to a trust is restricted (that is, only the trustee (other than the person) or the court may withdraw the principal), then the value of the trust as a resource is not counted, even if: (A) the person's legal guardian is the trustee; (B) the trust provides a regular, specified payment to the person; or (C) the trust provides for discretionary withdrawals by the trustee. (3) If a trust is not counted as a resource, payments from the trust made to or for the benefit of the person may be counted as income only if the payments would ordinarily be counted as income in accordance with 20 CFR § 416.1102 [noting that cash and payments for food or shelter are countable income to an individual].⁶

Thus, since the Trust was created prior to June 1, 1986, it must be treated as an inter vivos trust. Under inter vivos trust rules, so long as the trust does not allow the beneficiary any access to the fund, then it should not be countable as a resource and should not need to be amended to include the 1993 statutory payback provision for Medicaid eligibility purposes.

2. June 1, 1986 to August 10, 1993: Then in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA' 85)⁷, Congress defined a Medicaid Qualifying Trust (“MQT”), codifying common law and public policy prohibiting an individual from using

4 See, e.g., *Kegel v. State*, 113 N.M. 646, 649, 830 P. 2d 563, 566 (1992) holding that a personal injury award that was directed by a guardian pursuant to court order were not funds belonging to the individual beneficiary.

5 1 Texas Administrative Code §358.337.

6 1 Texas Administrative Code §358.336.

7 Public Law 99-272 §9506(a)

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Title search: The Moving Target: Interaction between Government Benefits and the Supplemental Needs Trust (aka Special Needs Trust)

Also available as part of the eCourse

[A Key Player in Winding Up Litigation: The SNT Attorney](#)

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12th Annual Changes and Trends Affecting Special Needs Trusts session
"A Key Player in Winding Up Litigation: The SNT Attorney"