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Property Code vs. Estates Code: Which is Appropriate When Creating Your SNT?

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I. INTRODUCTION TO STATUTES PROVIDING FOR COURT CREATED TRUSTS

There are two Texas statutes which control the creation of court created trusts in Texas one of which appears in the Texas Property Code at Chapter 142 and the other appears in the Texas Estates Code at Chapter 1301. While many of the provisions between 142 Trusts and 1301 Trusts are similar, they do have some differences in terms, in definitions, in procedures, and in operation.

As a general rule, 142 Trusts are created by district courts for incapacitated persons or minors without guardians while 1301 Trusts are created by courts exercising probate jurisdiction where a guardian may have already been appointed for the person or the person and estate. Frequently, a 1301 Trust is considered a less restrictive alternative to a guardianship of the estate. If a court has jurisdiction to handle guardianship cases, it may also create 1301 Trusts which are also known as Management Trusts.

Both statutes creating 142 Trusts and 1301 Trusts authorize the omission or modification of required statutory terms of these trusts to allow an incapacitated person or disabled person to qualify for public benefits. You will find no language in either statute which provides the necessary terms required by a (d)(4)(A) SNT regarding the pay back to the state(s) for medical assistance payments made to the beneficiary during the term of the trust. For a person with only a physical disability who wants to qualify for public benefits, using a 1301 Trust will be the least “invasive” trust in that disabled person’s life.

Because 1301 Trusts often involve a guardianship, attorneys who are applying for guardianship of the person along with the creation of a 1301 Trust should be sure they have completed the guardianship certification required under §1054.201, Tex. Estates Code. This certification requires four hours of training in guardianship law with at least one hour of alternatives to guardianship and supports and services which are available to proposed wards. Since 142 Trusts do not involve persons under a guardianship, this additional certification for the applicant’s attorney is not necessary for creation of that type of trust.

II. CHAPTER 142, TEXAS PROPERTY CODE TRUST

A. When is a 142 Trust Generally Used?

1. Trust created for minor OR incapacitated person without a legally appointed guardian.
 - a. Incapacitated Person defined as “a person who is impaired because of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or any other cause except status as a minor to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.” (See §142.007, Tex. Prop. Code).

2. Pending lawsuit is required to request the creation of a 142 Trust
 - a. Most frequently used with a personal injury or tort case
 - b. Consider using a 142 Special Needs Trust in divorce cases for child support payments for disabled children of the marriage, especially because child support can continue after a disabled child becomes an legal adult.
3. Upon finding by Court that trust would be in the best interest of the beneficiary.
4. 142 Trust are most likely to be created with lawsuits in the district court of Texas rather than in statutory probate courts or county courts at law. Once created, the 142 SNT cannot be terminated or revoked by the beneficiary or a legal guardian for that beneficiary if one is later appointed. (See §142.005(f), Tex. Prop. Code).

B. How Does Trust Get Created?

1. Requested to be created by next friend (often a parent) or guardian ad litem (not necessarily an attorney) appointed by Court. (See §142.001(a) Tex. Prop. Code).
2. Court creates the trust and appoints the manager of the trust.
3. Court has continuing jurisdiction and supervisory power over the trust and retains the power to terminate, revoke, modify, amend or construe the trust. (See §142.005(d) Tex. Prop. Code).

C. Who Manages the 142 Trust?

1. Manager appointed by Court serves as Trustee
 - a. Manager must be bonded if not financial institution, however, the manager can be the next friend or guardian who has acquired a bond (See 142.002(a)&(b) Tex. Prop. Code).
 - i. Cash bond of double the value of the property in trust; or
 - ii. Surety bond with solvent surety at least of equal value to property.
 - b. Corporate trustee not required for a trust of less than \$50,000, or for more than \$50,000 if no corporate trustee willing to serve and the person or entity appointed is in the best interest of the beneficiary.

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