

**PRESENTED AT**

**14<sup>th</sup> Annual Changes and Trends affecting  
Special Needs Trust**

February 15 and 16, 2018  
Austin, Texas

**The Intersection of Real Estate and SNTs**

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## **THE INTERSECTION OF REAL ESTATE AND SPECIAL NEEDS TRUSTS**

You have recently been appointed as the trustee of a special needs trust for a beneficiary who was in a car wreck. The beneficiary is currently in a wheel chair, unable to walk and has some brain damage that will take years of therapy to reverse. The beneficiary's spouse has just walked into your office and is jubilant about the house that they have found. It only costs \$500,000.00 and since the trust established from the proceeds of the car wreck has \$600,000.00 it in there should be no issue about the purchase. Right? In describing the house, the spouse tells you that the house has two stories with the most beautiful staircase, a wonderful living room with only one step down and a master bedroom that takes up the second floor. The kitchen has two stoves, although it is narrow because of the island in the middle. And the backyard has that wonderful pool with the waterfall. The pool is six feet deep at the deepest part. And the best part is the wrap around front porch, which has six steps leading up to the front door.

The above scenario, while unfortunately not that uncommon, has an easy answer because the house would use up all the funds that are earmarked for therapy. But what if the house the spouse found really fits the client's needs and is within the budget of the trust account? What should the trustee look for when considering the purchase? How should the trustee title the property and/or convey out property already owned by the trust? This paper will help answer some of those questions.

The paper is divided into two sections. The first section explains how the trustee of the trust should hold or convey title to property and the reasons why. The second Section sets out some practical items that need to be considered when a property is being purchased or sold.

### **BASICS OF A TRUST:**

#### **WHAT IS A TRUST?**

A trust is a relationship between assets and individuals. In a trust relationship, an individual or entity holds legal title to the property of another for the benefit of that person or for a third person. For example: Hans Solo conveys property to Princess Leia for the benefit of Luke. Hans Solo has created a trust and is called the settlor or grantor. Princess Leia is holding the property for the benefit of Luke and is called the trustee. Luke is the beneficiary of the trust.

#### **DEFINITIONS RELATING TO TRUSTS**

*Inter vivos trust or living trust:* A trust that becomes operative during the lifetime of the settlor.

*Testamentary trust:* A trust that becomes effective upon the death of the settlor, such as a trust set forth in a will.

*Trustor, Settlor or Grantor:* The creator of the Trust. This person creates the trust by transferring title to real or personal property to a trustee under an agreement that the trustee will administer for the benefit of another (the beneficiary).<sup>1</sup> If more than one person contributes property to a trustee of a trust, each person is the settlor of the portion of the property in the trust attributable to that person's contribution to the trust.<sup>2</sup>

*Trustee:* A person or legal entity holding legal title to real or personal property under an agreement for the benefit of another (the beneficiary).<sup>3</sup> The Texas Trust Code says that a Trustee "means the person holding the property in trust, including an original, additional or successor trustee, whether or not the person is appointed or confirmed by a court.

*Trust Property:* property placed in trust by one of the methods specified in section 112.001 (of the Texas Trust Code) or property otherwise transferred to or acquired or retained by the trustee for the trust.<sup>4</sup>

*Beneficiary:* A person for whose benefit a trust is created and who is, therefore, entitled to the benefits of the trust; someone possessed of the enjoyment of property, the legal title to which is vested in the trustee.<sup>5</sup>

## **WHAT LAW APPLIES TO TRUSTS?**

The Texas Trust Code, which is located in the Texas Property Code, contains the statutory provisions which relate to trusts. Sections 101, 111, 112, 113, 114, 115, 116, 117, 121, 123, and 124 of the Texas Trust Code are the relevant statutory sections. If a trust is silent as to certain terms, then the statute will fill in the blanks. In addition, the statute states that certain terms cannot be superseded even if the trust documents attempts to do so.

## **DRAFTING THE TRUST:**

The purposes of various trusts differ. Therefore, different trusts may need different provisions. Legally, a trust can contain almost anything that the drafter wants to include. However, the type of trust will determine if it is wise to include those provisions. In addition, under statute there are certain provisions that cannot be legally enforced. When drafting a trust, it is important to remember that the terms of a trust may not supersede the statute with regards to the following<sup>6</sup>:

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<sup>1</sup> "19.44 Trust And Trustees." *Trust And Trustees*, [www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search](http://www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search).

<sup>2</sup> Texas Trust Code Section 111.004(14)

<sup>3</sup> "19.44 Trust And Trustees." *Trust And Trustees*, [www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search](http://www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search).

<sup>4</sup> Texas Trust Code Section 111.004(17)

<sup>5</sup> "19.44 Trust And Trustees." *Trust And Trustees*, [www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search](http://www.vuwriter.com/en/underwriting-manuals/1995-12/UMTX00000156.html?search).

<sup>6</sup> Texas trust code 111.0035

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First appeared as part of the conference materials for the  
14<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"The Intersection of Real Estate and SNTs"