

PRESENTED AT

19th Annual Changes and Trends Affecting
Special Needs Trusts
February 9-10, 2023
Live

Redlining the Basics of a SNT

Benecia Flores
John B. Henry, III, CELA

Authors Contact Information:

Benecia Flores
Petrosewicz Law Firm, P.C.
121 FM 359 Rd.
Richmond, Texas 77406-2401
benecia@petrolaw.biz
281.344.9455

John B. Henry, III
Law Office of John B. Henry, III, PLLC
Bellaire, Texas 77401
jbhenry@johnhenrylaw.com
832.464.5767

Table of Contents

- 1. Introduction**
 - a. Disclaimer**
 - b. Third-Party Special Needs Trusts are Not a Forms Practice**
 - c. Articles of Recommended Reading**
- 2. History of Third-Party Special Needs Trusts**
 - a. D4A Self-Settled Trust (Remember - not a 3d Party)**
 - b. Third-Party Special Needs Trust**
 - c. Key Terms**
 - A. Settlor**
 - B. Beneficiary**
 - C. Trustee**
 - D. Remainder(persons)**
- 3. Third-Party SNTs in the Program Operation Manual System and Medicaid for the Elderly and People with Disabilities Handbook**
- 4. Distributions**
 - a. Beneficiary – Who Gets Distributions**
 - b. Trustee Discretion**
 - c. Supplemental Needs**
 - d. Allowing Reduction or Loss of Benefits**
 - e. Distribution to Pooled Trusts**
 - f. Distributions to ABLE Accounts**
 - g. Crummey Powers**
 - h. Cristofani Powers**
- 5. Trustee**
 - a. Who is trustee?**
 - b. Successor Trustees**
 - c. Trust Protector**
- 6. Termination**
 - a. Timing of Termination**
 - b. DO NOT Include Payback Provision**
 - c. Powers of Appointment**
 - d. Remainder Beneficiaries**
- 7. Powers of Trustee**
 - a. A**
 - b. Power of Substitution**
- 8. Administration**
 - a. Spendthrift Trust**
 - b. No Bond**
 - c. Facility of Payment Clause**
 - d. Income Not Disbursed Added to Principal**
 - e. Trustee Compensation**
 - f. Protection of the Trustee**
 - g. Limited Power to Amend**
 - h. Homestead Exemption**

- i. **Permissible Methods of Distribution**
 - j. **Contingent Trusts**
- 9. Definitions**
- 10. Appendices**
 - A. Sample Third Party Trust**
 - B. POMS**
 - C. MEPD**

1. Introduction

a. Disclaimer

The authors thank Clyde Farrell for his continued investment into the legal community by way of providing a sample third party special needs trust attached to this article in Appendix A. We, the authors of this paper, believe that the provision of this sample trust is important for illustrative purposes for developing a focused, yet contextual understanding of the essential terms and provisions of a properly drafted third party special needs trust intended for approval and operation under the laws of Texas and state and regional special needs trust interpretation by governmental agencies—namely the Social Security Administration (SSA) and the Texas Health and Human Services (THHS). That being said, the trust included in Appendix A is not being offered or warranted by the authors or Clyde Farrell as specific legal advice for use in a particular client’s matter. As you will see in our discussion throughout this article, a third-party special needs trust is a tailored tool for the well-being of the intended beneficiary and not simply a form.

b. Third-Party Special Needs Trusts are Not a Forms Practice

As special needs trust practitioners, you often connect with clients and their concern for themselves¹ or their child, parent, sibling or other loved one. You are confronted with the realities of their lives, social networks, finances, physical and mental capabilities. According to the Center for Disease Control and Prevention (CDC), up to 1 in 4 adults in the United States have some form of disability.² The CDC further reports that one in six children aged 3 through 17 years have one or more developmental disabilities.³ Though a statistically significant portion of the American population has suffered and will suffer from some form of disability, those disabilities may be temporary, relapsing, remitting, permanent, partially disabling, physical, mental, or physical and mental, presenting with different signs and symptoms at different times. At the core of every special needs plan, then, is the beneficiary’s⁴ ability to either provide for their own care or have care be provided for them in the hopes to maximize the beneficiary’s quality of life.

Amidst the issue of actual or possible disability, you have the intended beneficiary who has lived or may live all or a portion of their lives with a disability—having their own hopes, dreams, families, social networks, and means. Taking the approach that a third-party special needs trust is a form disregards a primary focus of all special needs trusts – the person. Therefore, it is the authors’ position that a special needs trust necessarily requires person centered planning (“PCP”). A PCP “...approach identifies the person’s strengths, goals, medical needs, needs for home- and community-based services, and desired outcomes. The approach also identifies the person’s

¹ 42 U.S.C. 1396p(d)(4)(A) was amended by “21st Century Cures Act” (P.L. 114-255) adding “the individual” or beneficiary as permissible settlor of a first-party special needs trust.

² Centers for Disease Control and Prevention (February 5, 2023), Disability Impacts All of US, available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=Up%20to%201%20in%204,have%20some%20type%20of%20disability.>

³ Centers for Disease Control and Prevention (February 5, 2023), About Us, available at <https://www.cdc.gov/ncbddd/developmentaldisabilities/about.html#:~:text=Recent%20estimates%20in%20the%20United,one%20or%20more%20developmental%20disabilities.&text=Developmental%20disabilities%20are%20a%20group,%2C%20language%2C%20or%20behavior%20areas>

⁴ Throughout this paper, the term “beneficiary” will be used to refer to the beneficiary of a special needs trust.

preferences in areas such as recreation, transportation, friendships, therapies and treatments, housing, vocational training and employment, family relationships, and social activities. Unique factors such as culture and language also are addressed.”⁵

As discussed later, another consideration of special needs planning is whether such needs can or should be met by public benefits. It is possible that a beneficiary’s needs may be better met by a reduction in benefits or temporary or ongoing ineligibility for benefits. Therefore, drafting with flexibility in mind is core to navigating the needs of the beneficiary.

c. Articles of Recommended Reading

The authors felt it helpful to provide the following list of recommended reading to help develop and expand the drafting process:

1. Molly Abshire, Special Needs Trusts 101: The Basics, UT Law CLE Special Needs Trust Conference 19th Annual Changes and Trends Affecting Special Needs Trusts (2023)
2. Clyde Farrell and Christina Leshner, Maximizing Public Benefits, UT Law CLE Special Needs Trust Conference 19th Annual Changes and Trends Affecting Special Needs Trusts (2023)
3. Patricia Flora Sitchler and Kathy Lynch, Updated by Christina Leshner, And How are the Children? Planning for Children with Special Needs Trusts (2020), UT Law CLE Special Needs Trust Conference 16th Annual Changes and Trends Affecting Special Needs Trusts (2020)
4. Thomas D. Begley and Angela E. Canellos, Special Needs Trusts Handbook, Wolters Kluwer
5. Zimring, Morgan, and Frigon, The Fundamentals of Special Needs Trusts, Lexis Nexis
6. Abshire, Farrell, Sitchler and Wright, Texas Elder Law, West (Thompson Reuters)
7. ASNP’s Guide for Drafting the World’s Best Special Needs Trusts, Academy of Special Needs Planners
8. Natalie B. Choate, Estate Planning for Retirement Benefits under SECURE and Proposed Treasury Regulations (February 5, 2023) available at https://ataxplan.com/wp-content/uploads/2022/09/Estate_Planning_for_Retirement_Benefits_post_SECURE_and_Prop_Regs-OCT-1-2022.pdf

2. History of Third-Party Special Needs Trusts

Special Needs Trusts (SNTs) are tools used to maximize an individual’s eligibility for public benefits programs like Supplemental Security Income (SSI) and Medicaid by placing assets and/or income into a trust that is treated as exempt resource or asset that is not counted—most often we are concerned about Medicaid and SSI eligibility. Due to perceived abuses by families attempting to work around the strictures of income and asset rules, Congress passed the Omnibus Budget

⁵ Administration for Community Living (February 5, 2023), Person Centered Planning, available at <https://acl.gov/programs/consumer-control/person-centered-planning>.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Redlining the Basics of a SNT

Also available as part of the eCourse

[2023 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
19th Annual Changes and Trends Affecting Special Needs Trusts session
"Redlining the Basics of a SNT"