

14<sup>th</sup> Annual Changes and Trends Affecting  
Special Needs Trusts

University of Texas School of Law

February 15, 2018  
Austin, Texas

## Special Needs Trust Basics and Beyond

~~~~~

## Top Trends and Pitfalls

Craig C. Reaves, CELA, CAP

Author Contact Information:  
Craig C. Reaves, CELA, CAP  
Reaves Law Firm, P.C.  
4400 Madison Avenue  
Kansas City, Missouri 64111  
[Craig@ReavesLawFirm.com](mailto:Craig@ReavesLawFirm.com)  
816-756-2100

# Special Needs Trust Basics and Beyond Top Trends and Pitfalls

## Table of Contents

|      |                                                                                                        |    |
|------|--------------------------------------------------------------------------------------------------------|----|
| I.   | First, an overview of the basics. . . . .                                                              | 1  |
| A.   | What is a Special Needs Trust? . . . . .                                                               | 1  |
| B.   | Three Types of Special Needs Trusts. . . . .                                                           | 2  |
| C.   | Self-Settled v. Third Party-Settled Trusts. . . . .                                                    | 2  |
| 1.   | Self-Settled Trust. . . . .                                                                            | 3  |
| 2.   | Third Party-Settled Trust. . . . .                                                                     | 10 |
| D.   | Trust Distribution Standards. . . . .                                                                  | 10 |
| 1.   | Types of Distribution Standards. . . . .                                                               | 11 |
| 2.   | Special Needs Distribution Standard . . . . .                                                          | 11 |
| II.  | Special Needs Trusts - What Works, Might Work, and Does Not Work. . . . .                              | 12 |
| A.   | What Works for Special Needs Trusts. . . . .                                                           | 12 |
| 1.   | Including Authority to Amend the Special Needs Trust . . . . .                                         | 13 |
| 2.   | Utilizing a Trust Protector. . . . .                                                                   | 15 |
| 3.   | Using General Language When Describing Trustee<br>Distribution Powers . . . . .                        | 17 |
| 4.   | IRA Paying to a Special Needs Trust. . . . .                                                           | 19 |
| 5.   | Beneficiary Establishing the Beneficiary's Own d4A Trust. . . . .                                      | 22 |
| B.   | What Might Work, But May Not In Your State . . . . .                                                   | 22 |
| 1.   | Transfers to d4C Pooled Special Needs Trust After<br>Beneficiary is 65. . . . .                        | 23 |
| 2.   | Pure Discretion Distribution Standard In Third Party-Settled<br>Special Needs Trust . . . . .          | 23 |
| 3.   | Not Providing for Medicaid Payback to Multiple States in a<br>d4A Trust . . . . .                      | 24 |
| 4.   | Waiting Until the Beneficiary's Death To Pay Funeral<br>and Burial Expenses From a d4A Trust . . . . . | 26 |
| C.   | What Does Not Work. . . . .                                                                            | 28 |
| 1.   | Ignoring the POMS. . . . .                                                                             | 28 |
| 2.   | Using Trust Forms Drafted for Another State, Unless<br>Carefully Modified . . . . .                    | 29 |
| III. | Trends Affecting Special Needs Trusts. . . . .                                                         | 30 |
| A.   | More Cases Are Relying on POMS. . . . .                                                                | 30 |
| B.   | Coordinating ABLE Accounts With Special Needs Trusts. . . . .                                          | 32 |
| C.   | Issues With SSA Trust Review Process. . . . .                                                          | 34 |
| D.   | Crowdfunding. . . . .                                                                                  | 35 |
| E.   | Commoditization of Special Needs Trusts. . . . .                                                       | 36 |
| F.   | Continuing Attacks on Public Assistance. . . . .                                                       | 37 |

# Special Needs Trusts Basics and Beyond Top Trends and Pitfalls

By Craig C. Reaves, CELA<sup>1</sup>, CAP<sup>2</sup>  
Reaves Law Firm, PC  
Kansas City, Missouri

Special needs trusts have been part of our lives for many years and have been adapting to law changes and agency interpretations since the beginning. After a quick review of basic special needs trust concepts, these materials will summarize the current status of what works, and what doesn't, when designing and drafting these trusts. It finishes with a review of some of the current trends affecting special needs trusts.

**I. First, an overview of the basics** To get this started, we begin with some basic definitions and explanations of some of the primary legal concepts that are important to special needs trusts. This will lay the foundation for some of the sections that appear later in these materials.

**A. What is a Special Needs Trust?** A special needs trust is a trust that allows money and other assets to be held in trust for the benefit of a person who has a disability in a manner that does not cause the person to be disqualified from needs-based (sometimes referred to as means-tested) public assistance programs, such as SSI (Supplemental Security Income)<sup>3</sup> and Medicaid.<sup>4</sup> For ease of reference, these materials will often refer to a person who is a beneficiary of a special needs trust as a "beneficiary."

---

<sup>1</sup> Certified Elder Law Attorney by the National Elder Law Foundation. Neither the Supreme Court of Missouri, nor the Missouri Bar reviews or approves certifying organizations or specialist designations.

<sup>2</sup> Member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (NAELA).

<sup>3</sup> Title XVI of the Social Security Act (SSI) is administered by the Social Security Administration. Title XVI appears in the United States Code at 42 U.S.C. Chapter 7, Subchapter XVI, §§1381 - 1385.

<sup>4</sup> Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.* and 42 C.F.R. Parts 430 to 456.

Special Needs Trusts are used to hold assets that otherwise would disqualify the beneficiary from Medicaid and SSI. This allows the beneficiary to continue to qualify for needs-based public assistance, which provides the beneficiary with a small amount of income, basic health care, and needed services. At the same time, the assets being held in the special needs trust can be used to pay for services and other things the beneficiary needs or will benefit from, but that public assistance will not provide.

In order to accomplish this, a special needs trust must qualify as an “exempt trust”. This means the assets in the trust will not be deemed to be “available” to the beneficiary and “countable” towards the maximum amount of assets (“available resources”) the beneficiary can have and still qualify for assistance (typically, this maximum is \$2,000). Failure to comply with the strict requirements will cause the trust assets to be “available” to the beneficiary and, if the trust has more than \$2,000 in it, the trust itself will disqualify the beneficiary from these programs.

**B. Three Types of Special Needs Trusts** There are three types of special needs trusts. All of them hold assets for the benefit of the beneficiary who has a disability without causing the assets in the trust to be countable towards the \$2,000 limit the beneficiary can have and maintain eligibility for needs-based public assistance, such as Medicaid and SSI.

One type of special needs trust only holds assets that belonged to someone other than the beneficiary or the beneficiary's spouse prior to being transferred into the trust. These are referred to as "third party-settled" special needs trusts.

The two other types of special needs trusts hold assets that formerly belonged to the beneficiary of the trust (or the beneficiary's spouse). Both of these are referred to as "self-settled" special needs trusts.

**C. Self-Settled v. Third Party-Settled Trusts** Every trust, whether a special needs trust or not, is either self-settled or third party-settled. Even as far back as the fourteenth

Find the full text of this and thousands of other resources from leading experts in over 30 legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: SNT Basics and Beyond - Top Trends and Pitfalls

First appeared as part of the conference materials for the  
14<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"SNT Basics and Beyond - Top Trends and Pitfalls"