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## **The Evolution of Trusts in Elder Law and Special Needs Planning**

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# THE EVOLUTION OF TRUSTS IN ELDER LAW AND SPECIAL NEEDS PLANNING

This paper is not intended to be a discourse on basic trusts or general trust law. The libraries are full of treatises and articles that explain the history of trusts and the nuances of how this planning tool has developed. <sup>1</sup> Rather this presentation is intended to examine some of the ways that this versatile estate planning tool has been tailored for use in the areas of Elder Law and Special Needs Planning.

## Introduction

### A. Definition of Trust

1. “Express Trust” is defined in the *Texas Trust Code* <sup>2</sup> as a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person. <sup>3</sup>

2. The relationship need not necessarily be in writing in order to be effective and enforceable, *however*, the terms must be sufficiently clear that they can be proved in a judicial proceeding. <sup>4</sup>

3. Other kinds of trusts: Resulting or constructive trusts, business trusts (“Massachusetts Trusts”), deeds of trust, nominee arrangements without corresponding trustee duties. We’re not talking about these in this context.

**B. Additional Considerations for Public Benefits Trusts.** In addition to drafting for common law and state law compliance, the practitioner who drafts trusts to achieve or preserve public benefits must comply with the federal rules governing such instruments. Don’t forget that if you are drafting documents that may be used or subject to review in other states there may be rules and restrictions and rules specific to each state that you must consider for benefit eligibility purposes.<sup>5</sup>

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<sup>1</sup> Of particular use in preparing this paper was Professor Thomas M. Featherston, Jr.’s article from the State Bar of Texas Advanced Estate Planning and Probate Course, June 7-9, 2017 entitled “*The 21<sup>st</sup> Century Trust: An Evolving Concept*”.

<sup>2</sup> The Trust Code is found in the Texas Property Code, Title 9, Chapters 111-117.

<sup>3</sup> Texas Trust Code 111.004 (4)

<sup>4</sup> Texas Trust Code 111.004 (15) “Terms of the trust” means the manifestation of intention of the settlor with respect to the trust expressed in a manner that admits of its proof in judicial proceedings.

<sup>5</sup> In most trust instruments the trustee is given the power to determine the “situs” of the trust, which impacts the rules under which the trust is construed. This may or may not be a compelling argument when seeking public benefits in a state other than that in which the trust is originally drafted.

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