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Pooled Trusts for Older Clients

Renée C. Lovelace, CELA*

*Certified as an Elder Law Attorney by the National Elder Law Foundation
as recognized by the State Bar of Texas

Renée C. Lovelace
The Lovelace Law Firm, P.C.
Austin, Texas and Tyler, Texas
(512) 797-6294 * RCLovelace@aol.com

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By Renée C. Lovelace

Thirty years ago – on August 10, 1993 – OBRA '93¹ became effective, making sweeping changes to the trust and asset transfer components of Medicaid eligibility. A key provision of the Act created exemptions from countability for first-party pooled trusts². Third-party pooled trusts are often lumped together with first-party pooled trusts but are significantly different. Almost all pooled trusts will be **pooled special needs trusts**, now commonly referred to as PSNTs.

Thirty years later – as of August 11, 2023 – there are many pooled trusts across the country with many differences between them, along with unresolved legal questions and untapped opportunities. This presentation discusses:

Building Blocks – Page 2:

- I. Pooled Trusts in Texas vs. Everywhere Else
- II. Changing Legal Needs and Attorney Roles
- III. Why Older Clients Need Special Needs Trusts
- IV. Why Special Needs Trusts Fail
- V. How Pooled Trusts Solve Many Problems
- VI. The Legal Framework
- VII. The Critical Role of Disability and the *Disabled* Definition

Advising Clients – Page 20:

- VIII. Advising Clients On the Pros and Cons of Using Pooled Trusts
- IX. Finding and Comparing Pooled Trusts
- X. Identifying Conflicts of Interest
- XI. Why It Is Important to Understand Remainder Retention
- XII. Preserving Planning Options

Strategies for Older Clients – Page 38:

- XIII. Using Pooled Trusts for Family Members with Disabilities
- XIV. Using Pooled Trusts for Married Couples Who Want to Protect Each Other
- XV. Using Pooled Trusts for Surviving Spouses and Other Adults Age 65 and Over

Using vs. Starting Pooled Trusts – Page 52:

- XVI. Should You Start a New Pooled Trust to Protect Older Clients?
- XVII. Should Your Clients Use a New Pooled Trust Started by a Colleague?

¹ The Omnibus Budget Reconciliation Act of 1993 is commonly referred to as *OBRA '93*. The Deficit Reduction Act of 2005 made further changes to transfer penalties.

² 42 U.S.C. § 1396p(d)(4)(C). A similar change that applies to SSI eligibility was made by the Foster Care Independence Act of 1999, which amended the Social Security Act. See 42 U.S.C. § 1382b(e)(5).

I.

Pooled Trusts in Texas vs. Everywhere Else

Texas Is Different. In fact, Texas is significantly different from many other states when looking at pooled trusts. In many states, pooled trusts are the only option for special needs trusts of modest size. In Texas, however, we still have experienced corporate trustees with public benefits expertise who are willing to accept smaller special needs trusts, giving our clients more options. Meanwhile, we have a pooled trust that many believe to be one of the best in the country, and that many clients believe to be their best choice even when they have other appealing choices.³

For most Texas attorneys who are considering pooled trusts, The Arc of Texas Master Pooled Trust (The Arc MPT) will be as far as it is necessary to look to find a pooled trust that will meet the needs of clients and meet those needs well. However, as the pooled trust market continues to grow, there will be an increasing number of other pooled trusts vying for clients' attention and property.

One could argue that the success of The Arc MPT shows it is relatively easy to set up and operate a pooled trust that serves the community well – and that other nonprofits may easily be able to do the same thing. It is important to know how wrong that assumption would be.

The Arc MPT vs. Other Pooled Trusts. The Arc MPT started 25 years ago with a large volunteer support network, grant funding, and a well-informed and passionate board of directors. Even so, it took many years to become the powerhouse in the field that it is today.

Even if another disability organization – with committed volunteers, start-up funding, and a strong board of directors – could follow in their footsteps and start a new pooled trust, should they do so? We will discuss that question throughout this paper. Of much greater concern, however, are the sketchy start-ups around the country that are plentiful. *We care* about pooled trusts that are poised to harm disabled individuals and tarnish the entire market. The purpose of this paper is to emphasize:

- The importance of pooled trusts like The Arc MPT,
- The many reasons why clients *need* pooled trusts,
- Information about the pooled trusts field that will help attorneys develop more options for using pooled trusts,
- Identifying some of the ways to compare pooled trusts so that older clients will derive as much benefit as is reasonably possible from using pooled trusts, and
- Specific steps and strategies to consider to give clients more pooled trust planning options.

³ The Arc of Texas Master Pooled Trust is the most well-known pooled trust in Texas, highly regarded, and greatly appreciated by individuals, families, other benefactors, and attorneys.

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Title search: Pooled Trusts for Older Clients

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