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Special Needs Trusts Handbook^{KOLL}

by Thomas D. Begley, Jr. and
Angela E. Canellos

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Special Needs Trusts Handbook deals with special needs planning for the estimated 43 million Americans who have one or more physical or mental disabilities. The *Handbook* is designed not only to assist the practitioner in serving this community, but also to encourage practitioners to become advocates for the rights of persons with disabilities.

Many of these individuals are receiving or are eligible to receive means-tested public benefits, such as SSI, Medicaid, Section 8 housing, and benefits under other federal and state programs. Because these benefits are means-tested, the persons with disabilities are ineligible for these benefits if their income and assets exceed certain limits. Special needs trusts enable persons to receive inheritances, equitable distribution, alimony, child support, and personal injury settlements while maintaining their important public benefits.

Special needs planning goes well beyond special needs trusts. The practitioner should be familiar with the types of disabilities suffered by the potential client pool and members of clients' families, as well as the various types of challenges they are likely to meet and the resources available to assist persons with disabilities. Therefore, the *Handbook* covers a broad range of issues that lawyers in the fields of elder and disability law confront, including specific types of disabilities, the various public and private benefits that are available to persons with disabilities; estate planning for parents of children with disabilities; specific types of special needs trusts, and structured settlements in personal injury cases. Because drafting of documents is such a crucial component of this area, the authors have provided practice-tested tips and extensive practice aids, including appendixes with practice forms. A CD-ROM that accompanies the *Handbook* contains these appendixes for the practitioner's use.



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Chapter 4 Special Needs Trusts: General

- Update on issues regarding special needs trusts including summaries of recent court decisions nationwide.

Chapter 5 Third-Party Special Needs Trusts

- Update on issues regarding special needs trusts including summaries of recent court decisions nationwide.

Chapter 6 Self-Settled Special Needs Trusts

New or revised forms as follows:

- PI System Check Plan.
- Self-Settled Special Needs Trusts Questionnaire.
- Engagement Letter Establishment of Self-Settled Special Needs Trust.
- Self-Settled Special Needs Trust.
- Memorandum Explaining Special Needs Trust.
- Letter to State Medicaid Agency Requesting Trust Approval.
- Brief.

Chapter 7 Structured Settlements

- Excise tax on factoring structured settlements.
- Determining quality of insurance company.
- The Dark Side of Structured Settlements.

Chapter 9 Administration of a Special Needs Trust

- Updated figures for 2012.

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PREFACE

Special needs trusts and special needs planning is a growing area of law. According to Congressional Research Service, some 43 million Americans have one or more physical or mental disabilities. Many of these persons with disabilities are receiving or are eligible to receive means-tested public benefits, such as SSI, Medicaid, Section 8 housing, and benefits under other federal and state programs. Because these benefits are means-tested, the persons with disabilities are ineligible for these benefits if their income and assets exceed certain limits. Special needs trusts enable persons to receive inheritances, equitable distribution, alimony, child support, and personal injury settlements while maintaining their important public benefits.

Lawyers practicing in the field of elder and disability law should be familiar with the common disabilities suffered by members of the disability community, as well as the various public benefits, both means-tested and non-means-tested, that are available to persons with disabilities. There are number of important issues with respect to estate planning for parents of children with disabilities, including special needs trusts. There are various types of special needs trusts, including third-party special needs trusts, self-settled special needs trusts, and pooled trusts, and lawyers must be familiar with the various drafting issues that must be considered. In the personal injury arena, structured settlements are commonly used as part of the settlement package, and 468(b) trusts are also often used. Lawyers must be familiar with how structured settlements and 468(b) trusts work. Many persons with disabilities are incompetent or are minors and require the appointment of a guardian, and the guardianship statutes must be clearly understood. Even the most carefully drafted trust can be frustrated by improper administration, so the lawyer engaged in special needs planning must be familiar with the rules pertaining to the administration of a special needs trusts.

Special needs planning goes well beyond special needs trusts. The practitioner should be familiar with the types of disabilities suffered by the potential client pool and members of clients' families, as well as the

ACKNOWLEDGMENTS

Thanks to my co-author, Angela Canellos, who has forgotten more about disability law than I have ever learned. Special thanks to Sherry Ruckdeschel for her patience, perseverance, and hard work. Finally, thanks to my long-time editor and friend, Susan Chazin (Associate Publisher), for agreeing to publish this book, to Betsey Cohen (Managing Editor), for her patience in editing the book so that it is actually readable, and to Eric Cooper (Acquisitions Editor), who keeps us all on track and on schedule. Thanks also to Susan Green, who assisted in the research for this book.

Tom

First and foremost, thanks to my co-author Tom Begley, who invited me to join him in this endeavor and without whom I could have never been involved, and for all his knowledge and support through those long summer weekends spent consumed by this book. I, too, want to thank Betsey Cohen and Eric Cooper, who have always been there for us and kept us going. I also thank my staff for putting up with my anxiety about getting this and all my other work done on time and Tom's assistant Sherry, who knows more about word processing than I could learn in a lifetime.

Angela

This book is dedicated to my late daughter, Sharon, who died too young at age 41, but left her dad the best son-in-law anyone could have, Bob Brooks, and two marvelous grandchildren, Casey and Matthew. Matthew suffers from cystic fibrosis and is the inspiration for my doing this book.

Tom

This book is dedicated to my friends and family who have been there to support me through the hard times. My family, too, has been touched by childhood disability and I know the challenges that families face, particularly parents, in coping with and caring for their children with disabilities.

Angela

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§ 1.01 SPECIAL NEEDS PLANNING/GENERAL

Some 43 million Americans have one or more physical or mental disabilities.¹ This number is increasing as disabilities such as autism and Alzheimer's disease become more prevalent. Disabilities do not discriminate on the basis of age, race, or national origin. Some individuals with disabilities are wealthy, some are poor, many are middle class. An elder and disability law attorney with knowledge of disabilities can be of great value to these individuals and families.

[A] Planning

Special needs planning involves much more than trusts. Trusts are simply documents. The real value that an elder and disability law attorney and other members of the disability team bring to the table is the ability to assist in lifetime financial and personal care planning for the person with disabilities. The lawyer must understand the clients, their disabilities, their limitations, their strengths, their hopes, and their dreams. Planning involves an understanding of public benefits laws, tax laws, and the laws pertaining to special needs trusts.

Laurie Hanson, a special needs attorney in Minnesota, suggests that in planning for special needs children the following concerns must be addressed:

- An Individualized Education Plan (IEP) must be developed. The IEP must take into consideration the transition from high school at age 18 to post-school activities ensuring that all transition services are accessed.
- Letter of Intent
- Cost of services
- Apply for SSI at age 18
- Decide who will be guardian and obtain appointment of guardian at age 18, if the disability is mental illness or a cognitive disability that creates incapacity
- Decide how funds will be managed

¹ 42 U.S.C. § 12101(a).

[C] Disability

What is a disability? The Social Security definition of disability is set out in § 2.02[B][1] of this book. However, this definition is designed to determine whether persons with disabilities are entitled to public benefits. There are many persons who do not meet this definition, but whose lives are nonetheless affected by a disability. Section 1.02 contains a discussion of common disabilities, including their characteristics and support groups available to assist those suffering from the disability. Some people are disabled at birth. For example, a person with Down Syndrome is born that way. Other persons become disabled later in life. For example, schizophrenia often does not manifest itself until the teenage years or even later. Other people are disabled at any time in life as a result of an incidence such as medical malpractice or a personal injury accident. Disability can be physical or it can be mental. Disabilities affect people from all walks of life.

[D] Terminology

There is a movement afoot to stress the importance of terminology in referring to persons with disabilities. Acceptable and unacceptable terms include the following:⁴

<i>Acceptable Terms</i>	<i>Unacceptable Terms</i>
Person with a disability.	Cripple, cripples—the image conveyed is of a twisted, deformed, useless body.
Disability, a general term used for functional limitation that interferes with a person's ability, for example, to walk, hear, or lift. It may refer to a physical, mental or sensory condition.	Handicap, handicapped person or handicapped.
People with cerebral palsy, people with spinal cord injuries.	Cerebral palsied, spinal cord injured, etc. Never identify people solely by their disability.

continues

³ [Reserved].

⁴ <www.sanantonio.gov/ada/EtiquetteHandbook.asp>.

<i>Acceptable Terms</i>	<i>Unacceptable Terms</i>
A person who has (name of disability). Example: A person who has multiple sclerosis.	Afflicted with, suffers from. Most people with disabilities do not regard themselves as afflicted or suffering continually. Afflicted: a disability is not an affliction.

[E] The Hartford Study

The Hartford issued a study revealing some interesting facts about the lack of preparation on the part of parents of children with disabilities.^{4.1} The study showed that parents of America’s 2.6 million children with special needs have not planned for the future of their children after the parents are gone. Highlights of the study included the following:

- 62% of parents of children with special needs have no plan to cover the cost of caring for the child when they are no longer able to do so.
- Parents who do have a plan often make mistakes that will disqualify their child from government benefits on which they now depend.
- 23% of parents spend at least \$500 per month to address their children’s special needs.
- 60% of parents believe these costs will continue into adulthood, but less than half have a plan to cover the costs.
- Of the parents with a plan, only 42% are confident that it will cover their child’s lifetime needs.
- 65% plan to cover the anticipated cost of care with life insurance.
- 85% with a child under age 5 have life insurance.

^{4.1} Most Parents of Children With Special Needs Lack a Plan to Cover a Lifetime of Care, The Hartford, April 2009.

some may have enough receptive language development to understand simple commands.⁵

[B] Asperger's Disorder

Asperger's disorder is also known as Asperger's syndrome. According to Dr. Uta Frith,

In Asperger's Disorder, affected individuals are characterized by social isolation and eccentric behavior in childhood. There are

[Next page is 1-11.]

⁵ <www.angelman.org>.



"What will happen to our son or daughter when we are no longer here?" *Special Needs Trusts* provides parents with an answer."

ROSLYN BRILLIANT, FORMER EXECUTIVE DIRECTOR, DISABLED AND ALONE/LIFE SERVICES FOR THE HANDICAPPED, INC.

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Special Needs Trusts

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- Create a long-term trust
- Provide for loved ones with disabilities
- Safeguard government benefits

Attorneys Stephen Elias
& Kevin Urbatsch



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