

EMPOWERING FAMILIES: PROPOSING LEGISLATIVE ENHANCEMENT FOR THIRD-PARTY SPECIAL NEEDS TRUSTS IN TEXAS

*Melanie Gatica**

ABSTRACT

The demand for special needs trusts (SNTs) continues to grow, and third-party SNTs are among the most used. As the need for these trusts grows, the governing statutes need to evolve with them. The current statutory language underserves beneficiaries and does not align with settlors' intent. There should be stricter language to protect beneficiaries from mismanagement on behalf of trustees. These beneficiaries depend heavily on the trust assets and government assistance to maintain their livelihood and receive medical care. Therefore, statutory protections should be enacted to safeguard against abusive trustees and insufficiently drafted trust instruments.

This Comment proposes that practitioners should encourage the use of stricter language in third-party SNTs to better protect beneficiaries. A third-party SNT is an effective tool that facilitates proper distribution to a beneficiary with a disability and maintains their quality of life. Further, this Comment is the first to propose detailed statutory language to fill current gaps in the Texas Trust Code. Simultaneously, practitioners should draft SNTs that provide flexibility in distributions that correlate to beneficiaries' progressing disabilities and strictly protect their assets from mismanagement and abuse.

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* Staff Editor, Texas Tech Estate Planning and Community Property Journal; J.D. Candidate, Texas Tech School of Law, 2026; Bachelor of Arts, Government, University of Texas at Austin, 2023. I would like to thank Professor Arrington for her guidance. Also, I would like to thank Joshua Mendez and Caden Jackson for their editorial support and guidance. Lastly, I would like to thank my family and friends for their encouragement throughout the writing process.

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I. INTRODUCTION

Marie is a young woman with cerebral palsy.¹ She relies on Social Security Disability Insurance (SSDI) and Medicaid to cover her expenses, which include daily living, personal care services, and regular medical treatments.² Marie's parents established a third-party special needs trust (SNT) because they were concerned for her well-being for the remainder of her life.³ The parents funded the trust with their assets to supplement Marie's government benefits without jeopardizing her eligibility.⁴ They designated Marie's aunt, Grace, as the trustee in the case of the parents' death.⁵ Unfortunately, the provisions in the trust instrument lacked protections for the beneficiary, causing Marie's quality of life to suffer.⁶

1. Author's original hypothetical.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

The trust instrument granted Grace the authority to make distributions, but the language did not describe limitations regarding the use of funds to avoid negatively impacting Marie's benefits.⁷ It stated that the trustee may make distributions for any purpose that benefits Marie and maintains her quality of life throughout the progression of her disability.⁸ This language is highly discretionary and does not include any safeguards to protect Marie because the trust does not outline non-need based expenses that could affect her government benefit eligibility.⁹

Moreover, no provisions required Grace to hold funds in different accounts.¹⁰ A common safeguard against losing eligibility for government benefits is to separate trust funds from personal assets because it avoids Medicaid asset counting.¹¹ As for Grace's qualifications, the instrument does not require Grace to receive education or professional advice on special-needs estate planning to ensure Marie is protected from ineligibility.¹² This allows Grace to make decisions about assets she does not understand and for a disability she is not informed on.¹³

Initially, the trust operated well and upheld the parents' intent.¹⁴ For example, Grace used some trust funds to purchase a wheelchair and a handicap-accessible vehicle for Marie.¹⁵ However, the parents unexpectedly passed away, leaving Grace to manage the finances for the benefit of Marie.¹⁶

As time went on, personal assets and trust assets were distributed from the same account, which allowed Grace to inflate Marie's income.¹⁷ Then, Grace started misappropriating trust funds for her own benefit and reporting it as unearned income.¹⁸ By neglecting Marie's essential needs, Grace violated her fiduciary duty as a trustee, and it caused long-term harm to the beneficiary.¹⁹

7. *Id.*

8. *Id.*; see Betsy Simmons Hannibal, *Sample Special Needs Trusts*, NOLO (Feb. 15, 2024), <https://www.nolo.com/legal-encyclopedia/sample-special-needs-trusts.html> [https://perma.cc/83AG-MG5S].

9. Author's original hypothetical.

10. *Id.*

11. *Setting Up A Trust to Protect Assets From Medicaid*, HAILEY-PETTY L. FIRM, PLLC (Jan. 11, 2024), <https://haileypettylaw.com/setting-up-a-trust-to-protect-assets-from-medicaid/#:~:text=typically%2C%20an%20Irrevocable%20Trust%20is,towards%20your%20personal%20asset%20limit> [https://perma.cc/C94G-9FRZ].

12. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest*, 114 YALE L.J. 929, 935–37 (2005) (describing how the trustees must administer the trust solely for the best interest of the beneficiary because it is fundamental to their duty of loyalty).

13. Author's original hypothetical.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Langbein, *supra* note 12, at 947.

Failing to keep accurate records and improperly reporting trust disbursements when filing Medicaid and SSDI records resulted in a termination of government benefits.²⁰ If it is determined that the assets or income of the individual exceed the required minimums, then the Medicaid and SSDI office can reduce or terminate all supplemental benefits.²¹

As a result, Marie found herself in a dire situation.²² The medications, treatments, and funds for daily expenses she relied on were no longer covered.²³ As the beneficiary of an SNT, Marie did not have a voice in how the trust was managed or how funds were distributed, which caused her to feel abandoned and helpless.²⁴ Without proper protection, the government benefits she desperately needed were terminated, causing her to face significant setbacks in her health and quality of life.²⁵

As illustrated above, stricter trust language for third-party SNTs would prevent abuse and mismanagement, resulting in better protection of the beneficiary and their quality of life.²⁶ Because the trust instrument governs over statutory language, it is paramount that practitioners include protections for the beneficiary.²⁷ However, state statutory language supplements trust language and influences practitioner's drafting decisions.²⁸ Thus, protective statutory language would impact estate planners by encouraging them to include language requiring a trustee to follow narrower guidelines.²⁹

This Comment proposes that the Texas Trust Code should encourage the use of stricter language in third-party SNTs that better protect the beneficiary.³⁰ A third-party SNT is an effective tool that facilitates proper distributions to a beneficiary with a disability and maintains their quality of life.³¹ Further, this Comment is the first to propose detailed statutory language to fill the current gaps in the Texas Trust Code.³² Also, practitioners should draft SNTs that provide distribution flexibility.³³ Distributions should

20. *Id.*

21. *See generally Reasons a Trustee Cannot Provide Beneficiaries Money Directly from Their Special Needs Trust*, CPT INST. (Aug. 17, 2016), <https://www.cptinstitute.org/reasons-a-trustee-cannot-provide-beneficiaries-money-directly-from-their-special-needs-trust/> ("If the trustee gives money directly to a beneficiary the SSA considers this to be unearned income and will reduce the beneficiary's benefits dollar-by-dollar.") [<https://perma.cc/JAP3-VG38>].

22. Author's original hypothetical.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. TEX. PROP. CODE ANN. § 112.053.

28. Author's original thought.

29. *Id.*

30. *See discussion infra* Section III.E.

31. *Administering a Special Needs Trust*, SPECIAL NEEDS ALL. 1, 4 (2017), <https://www.bowdoin.edu/alumni-families/pdf/special-needs-trust.pdf> [<https://perma.cc/52A9-8Z24>].

32. *Id.*

33. *See discussion infra* Sections III.A, E.

correlate to the beneficiary's progressing disability and strictly protect them from mismanagement and abuse.³⁴

This Comment establishes a clear framework for protecting the beneficiaries of a third-party SNT from a reduction in government benefits or ineligibility due to mismanagement of the trust.³⁵ Section II.A provides an overview of third-party SNTs and discusses the eligibility and maintenance of government benefits, and the fiduciary duty requirements of the third-party SNT.³⁶ Section II.B outlines federal and state statutes governing SNTs.³⁷ Section II.C provides background on judicial interpretations of current government benefit requirements for SNTs while addressing how the current language leads to abuse and mismanagement to the beneficiary's detriment.³⁸

Section III.A proposes a statutory framework to supplement the current Trust Code in Texas.³⁹ It outlines amendments to the income distribution requirement, proposes mandatory payback provisions for third-party trusts, and provides additional fiduciary duties to trustees of SNTs.⁴⁰ Section III.B argues how the proposed statutory language should fill the gaps in Texas's Trust Code to better protect the beneficiary.⁴¹

Further, Section III.C explains how the current language negatively impacts family planning, arguing that the proposed language would better align with the settlor's intent and provide the trustee with clear guidelines on managing an SNT.⁴² Section III.D explains how mandatory payback provisions and strict income distribution requirements would tailor the trust to the beneficiary, better serving their long-term needs.⁴³ Section III.E advocates for additional CLE hours for practitioners specializing in SNTs because of the evolving needs of individuals with disabilities and the changing statutory framework.⁴⁴

34. Author's original thought.

35. See discussion *infra* Sections III.B.1–3.

36. See discussion *infra* Section II.A.

37. See discussion *infra* Section II.B.

38. See discussion *infra* Section II.C.

39. See discussion *infra* Section III.A.

40. See discussion *infra* Section III.A.

41. See discussion *infra* Section III.B.

42. See discussion *infra* Section III.C.

43. See discussion *infra* Section III.D.

44. See discussion *infra* Section III.E.

II. BACKGROUND

A. Overview of Third-Party SNTs

A trust is an instrument a settlor creates in which the title to property is split into legal title and equitable title.⁴⁵ Usually, a person (or institution) holds legal title to the property for the benefit of a beneficiary—who holds equitable title.⁴⁶ The trustee, who holds legal title, manages the trust for the beneficiary's benefit according to state statutes and the trust's language.⁴⁷ In an SNT, the beneficiary typically has a long-term disability or a disability that requires intensive medical care.⁴⁸ The settlor creates a trust to provide for the needs of the beneficiary's disability for their lifetime.⁴⁹ An SNT has no specific age requirements for the beneficiary and does not require Medicaid reimbursement when the beneficiary dies.⁵⁰

An attorney establishes a third-party SNT when they set up a trust with assets from a third-party instead of the individual with the disability.⁵¹ An example of this is when a parent or guardian uses their assets to fund a trust for their child with a long-term disability that requires extensive medical assistance.⁵² Because the trust uses funds from a third-party, the beneficiary preserves their eligibility for Medicaid, SSDI, and other government benefits.⁵³ These benefits are essential in supplementing the beneficiary's income because most trusts cannot cover all of the beneficiary's expenses for their disability.⁵⁴ Contrary to other SNTs, this type of trust allows a parent or

45. *Definition of a trust*, IRS, <https://www.irs.gov/charities-non-profits/definition-of-a-trust> (last visited Nov. 14, 2024) (stating “a trust is a relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another.”) [<https://perma.cc/8L7X-VX6X>].

46. *Id.* (stating equitable title is assigning the beneficial use of the property to the “equitable” titleholder, and legal title is when the legal power over the property is given to the “legal” titleholder).

47. *Id.*

48. *Your Special Needs Trust (“SNT”) Defined*, SPECIAL NEEDS ALL. (Jan. 2013), <https://www.specialneedsalliance.org/the-voice/your-special-needs-trust-snt-defined-2/> (“A special needs trust (SNT) is a trust that will preserve the beneficiary’s eligibility for needs-based government benefits such as Medicaid and Supplemental Security Income (SSI). Because the beneficiary does not own the assets in the trust, he or she can remain eligible for benefit programs that have an asset limit.”) [<https://perma.cc/FP2Q-R3MJ>].

49. *An Introduction to Special Needs Trusts: How They Work and Why People with Disabilities Need Them*, DISABILITY RTS. 1, 1–4 (2015), <https://adanc.org/wp-content/uploads/2018/08/Special-Needs-Trusts.pdf> [<https://perma.cc/67G8-Z9D6>].

50. *Id.*

51. *3RD Party Special Needs Trust*, CPT INST., <https://www.cptinstitute.org/third-party-snt/#:~:text=Third%2DParty%20Special%20Needs%20Trusts,into%20a%20Third%2DParty%20Trust> (last visited Oct. 29, 2024) (“Third-Party Special Needs Trusts are established using assets from someone other than the individual living with disabilities. Typically established by a loved one . . . specifically designating funds to be placed into a Third-Party Trust. It preserves eligibility for Medicaid and/or SSI.”) [<https://perma.cc/q8jm-2751>].

52. Author’s original thought.

53. *Id.*

54. *See generally Special Needs Trusts*, CPT INST. (Apr. 10, 2023), <https://www.cptinstitute.org/special-needs-trust/> (discussing the general characteristics and the administration of special needs trusts) [<https://perma.cc/SK56-HFP5>].

guardian to designate a third-party, typically a family member, as the trustee to manage the trust through specific trust language.⁵⁵

The specific language for the trustee designation that attorneys use includes “funds for [client name] are to be placed into a Third-Party SNT for the benefit of [client name] with . . . [institution] to preserve his/her ongoing eligibility for means-tested government benefits.”⁵⁶ This language splits the interest into legal and equitable interests and designates the individuals in whom the settlor wants to vest those interests.⁵⁷

To preserve the beneficiary’s government benefits, the trust should be written to include three main provisions: (1) all approved asset disbursements must be for the primary benefit of the beneficiary, (2) disbursements must be payable to the designated third-party trustee, and (3) all disbursement requirements should be recorded through a receipt and invoice process.⁵⁸ The second provision is essential because if the disbursement is paid directly to the beneficiary then the money will be considered unearned income, thus, reducing their government benefits on a dollar-for-dollar basis.⁵⁹ Although the trust instrument requires the inclusion of many provisions, some of the detailed provisions are optional for a drafting attorney to include.⁶⁰ Thus, the mismanagement of third-party SNTs occurs and the beneficiary is at risk of losing their benefits, which causes their funding for medical treatments to suffer.⁶¹

1. *Qualifying Individuals for SNTs and Government Benefits*

To qualify for government benefits as an individual with a disability, personal income and assets must meet the minimum requirements.⁶² However, some individuals automatically qualify if their disability requires intensive, around-the-clock care.⁶³ The most common government benefits include SSDI and Medicaid.⁶⁴ These are considered entitlement benefits, which means they are counted for eligibility purposes.⁶⁵ The assets obtained under an SNT are not counted for eligibility purposes, specifically third-party SNTs, because the assets do not belong to the disabled person.⁶⁶ Therefore,

55. 3RD Party Special Needs Trust, *supra* note 51.

56. *Id.*

57. Katherine B. McCoy, *The Growing Need for Third-Party Special Needs Trust Reform*, 65 CASE W. RESRV. L. REV. 461, 463 (2014).

58. POMS SI 01120.203(B)(1)(e); 3RD Party Special Needs Trust, *supra* note 51.

59. POMS SI 01120.203(B)(1)(e); 3RD Party Special Needs Trust, *supra* note 51.

60. TEX. PROP. CODE ANN. § 112.001.

61. POMS SI 01120.203(B)(1)(e); 3RD Party Special Needs Trust, *supra* note 51.

62. Fay Blix, *The World of Special Need Trusts*, 50-NOV ORANGE CNTY. LAW. 10, 11–15 (Nov. 2008).

63. *Id.*

64. McCoy, *supra* note 57, at 468.

65. Blix, *supra* note 62.

66. *Id.*

the management and recording of both the trust assets and government benefits requires the trustee to make this critical distinction.⁶⁷

Most government benefits are needs-based programs meant to supplement the income of low-income individuals.⁶⁸ This means an individual who meets the minimum income requirement typically qualifies for assistance.⁶⁹ An individual's income is evaluated as earned, unearned, and in-kind to determine eligibility.⁷⁰ Improper distributions of trust income can cause the beneficiary to be disqualified from government assistance.⁷¹ A trustee paying the beneficiary distributions directly, could be counted as unearned income.⁷² If the trustee purchases the beneficiary's living expenses (housing and food), it could be counted as in-kind income.⁷³ Both of these situations could reduce or terminate the beneficiary's eligibility.⁷⁴

There are no specific qualifications for a beneficiary of a third-party SNT because establishing the trust depends on the settlor and their assets.⁷⁵ However, the typical beneficiary of a third-party SNT is an individual with a disability who is unable to work, cannot care for themselves, and requires intensive care.⁷⁶ The third-party SNT is meant to supplement the government benefits because government assistance likely does not cover all of the beneficiary's needs.⁷⁷ A common issue arises when a person receives an inheritance and then falls outside the eligibility requirements for government assistance.⁷⁸ A third-party SNT should prevent this problem to an extent.⁷⁹ However, trustees must be aware of the proper recording process for government benefits, which can cause eligibility problems.⁸⁰

2. Maintaining Government Benefit Eligibility

Qualifying for government benefits in conjunction with the trust assets and maintaining eligibility are two different issues.⁸¹ To maintain eligibility, the beneficiary must continue to qualify for the needs-based government assistance, and the trustee must manage the assets following the SNT's

67. McCoy, *supra* note 57, at 468.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Linda M. Anderson, *Special Need Trusts: Practical Tips for Avoiding Common Pitfalls*, 74 PA. BAR ASS'N Q. 169, 170-72 (Nov. 2003).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

instructions and state law.⁸² Because the trustee holds legal title but is not the person with a long-term disability, the assets are not included in the benefit eligibility requirements.⁸³

Therefore, if the trustee fails to uphold their obligation and the asset distribution is done incorrectly, the beneficiary's health and financial situation no longer qualify.⁸⁴ In effect, the beneficiary will be disqualified from their government benefits.⁸⁵

In Texas, the average monthly SSDI payment, with Medicaid coverage, is \$1,702 per month, and the maximum payment is \$3,822 per month.⁸⁶ An individual's loss of government assistance would be a significant financial change, showing the importance of maintaining eligibility.⁸⁷

To maintain a successful third-party SNT, the trustee should keep the trust assets unavailable to the beneficiary.⁸⁸ Because available assets are considered when determining SSDI and Medicaid eligibility, the trustee must ensure the beneficiary has no control over the trust's administration.⁸⁹

Strict guidelines govern how a trustee can use the money and assets in the SNT.⁹⁰ For example, current rules state that for a beneficiary who qualifies and receives SSDI benefits, the money from those government benefits must be used before any other trust assets.⁹¹ This requirement gives the beneficiary some asset protection.⁹² However, third-party SNTs are not within the expressed exceptions that give the beneficiary asset protection, so the third-party is held directly responsible for the mismanagement of the trust by the trustee.⁹³ By placing liability on the individual establishing or managing the trust, the beneficiary receives implied protection because the managing person is held accountable.⁹⁴

82. *Id.*

83. *An Introduction to Special Needs Trusts: How They Work and Why People with Disabilities Need Them*, *supra* note 49, at 1–4.

84. *Id.*

85. Anderson, *supra* note 75, at 170–72.

86. Jackie Jakab, *How Much Does Disability Pay in Texas?*, ATTICUS (Mar. 28, 2024), <https://www.atticus.com/advice/texas-disability-benefits/how-much-are-disability-benefits-in-texas> (describing how “[i]n addition to monthly payments, the federal government provides health care coverage. SSDI benefits include Medicare coverage, and SSI beneficiaries can get Medicaid.”) [<https://perma.cc/7SHJ-P2MB>].

87. *Id.*

88. McCoy, *supra* note 57, at 470.

89. *Id.* at 469.

90. *Id.*

91. *Id.*

92. Kimberly Hegwood, *What Is a Special Needs Trust Under Texas Law?*, YOUR LEGACY LEGAL CARE (Dec. 15, 2021), <https://www.yourlegacylegalcare.com/post/what-is-a-special-needs-trust-under-texas-law> [<https://perma.cc/JZ4F-28DP>]; see generally *F-6700, Exception Trusts*, TEX. HEALTH & HUM. SERV. (Dec. 1, 2009), <https://www.hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook/f-6700-exception-trusts> (outlining the governing provisions of disability eligibility) [<https://perma.cc/UD9L-HRYD>].

93. *Id.*

94. *What is a special needs trust?*, FID., <https://www.fidelity.com/learning-center/life-events/what->

As for the trust funds, third-party SNTs help the beneficiary maintain eligibility by paying expenses directly.⁹⁵ This allows the beneficiary to maintain the minimum requirements and receive supplemental funds because the trust assets are not recorded as unearned income.⁹⁶ For a beneficiary with a progressive disability, which requires long-term intensive medical treatments, two sources of funds to help pay expenses protect the beneficiary's quality of life.⁹⁷

A third-party SNT vests a significant amount of discretion in the trustee to make decisions about the distributions of trust assets.⁹⁸ Therefore, drafting language can subject the trustee to liability or grant the trustee authority that a third-party SNT should not grant.⁹⁹

Generally, when the instrument states that “[the beneficiary] has the right, authority, or power to [sell or] liquidate the property [in the trust],” it causes problems with maintaining eligibility.¹⁰⁰ Drafters should avoid this language because it affords the beneficiary too much discretion, and it could cause problems for SSDI and Medicaid eligibility.¹⁰¹

Maintaining eligibility relies heavily on the trustee complying with the statutory language and the drafted instrument.¹⁰² Thus, the two must provide detailed instructions on how the trust should be managed to protect the beneficiary from ineligibility.¹⁰³

3. *Fiduciary Duty of the Designated Trustee*

For an SNT, the trustee must uphold their fiduciary duty to the beneficiary.¹⁰⁴ When making a distribution from the trust, like transferring assets or income, the trustee must (1) make allowable distributions under the trust terms, (2) distribute payments to the beneficiary in a way that does not compromise the beneficiary's benefits, (3) understand how to distribute trust funds to expenses that are not covered by the SSDI and Medicaid benefit, and

is-special-needs-trust (last visited Mar. 11, 2025) [<https://perma.cc/3GCR-4U9W>].

95. *Id.*

96. *Id.*

97. Amber K. Quintal, *Planning for Individuals with Disabilities: Special Needs Trusts*, 22 AM. L. INST. CLE THE PRAC. TAX LAW. 17, 17 (2008).

98. *Id.* at 18–19.

99. *Id.*

100. McCoy, *supra* note 57, at 471.

101. *Id.*

102. *Id.*; Quintal, *supra* note 97, at 19.

103. McCoy, *supra* note 57, at 471.

104. *Responsibilities of a Special Needs Trust Trustee*, SPECIAL NEEDS ANSWERS (Nov. 29, 2023), <https://specialneedsanswers.com/the-top-five-responsibilities-of-a-trustee-of-a-special-needs-trust-15720> [<https://perma.cc/4T9N-6LWJ>].

(4) distribute funds directly to the beneficiary.¹⁰⁵ In addition, the trustee is also responsible for managing the investments of trust property.¹⁰⁶

Among the essential duties of the trustee is fulfilling their fiduciary responsibilities.¹⁰⁷ For an SNT, a trustee is responsible for a beneficiary's subsequent care and funds, which are highly dependent on the trustee, affording them a lot of discretion.¹⁰⁸ For a third-party SNT, the beneficiary needs the ability to advocate for proper distributions because of their lack of control over the trust assets.¹⁰⁹ Therefore, claiming a breach of fiduciary duty is difficult because the trustee is afforded absolute discretion.¹¹⁰ When a trustee has absolute discretion, courts are less likely to rule against their decisions if the trustee can provide any rationale for the improper distribution.¹¹¹ In addition to weak standing, the beneficiary could suffer a loss in government benefits for any ruling on a breach of fiduciary duty because it is evidence of improper recording of assets to the government.¹¹²

As a trustee, it is essential to balance the needs of the beneficiary and the requirements of the trust because the beneficiary's expenses and medical needs may evolve.¹¹³ To account for this evolution, the trust instrument should incorporate guidelines for the trustee that provides for the possibility that the beneficiary may have an increase in need for additional income.¹¹⁴ However, many of the disabilities seen in beneficiaries of third-party SNTs are challenging to account for, thus, state statutory governance of trusts should also provide protections for the beneficiary and any distribution changes at the trustee's discretion.¹¹⁵

B. Legislation Governing SNTs

Federal legislation governs a limited scope of third-party SNTs, which causes several problems.¹¹⁶ The following provisions are legislative gaps regarding third-party SNTs.¹¹⁷

105. *Id.*

106. *Responsibilities of a Special Needs Trust Trustee*, *supra* note 104.

107. *Id.*

108. *Id.*

109. *Id.*

110. Quintal, *supra* note 97, at 19.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Thomas D. Begley, Jr., *Top Ten Mistakes in Drafting Special Needs Trust*, BEGLEY L. GRP., <https://www.begleylawgroup.com/2015/04/top-ten-mistakes-in-drafting-special-needs-trusts/> (last visited Mar. 11, 2025) [<https://perma.cc/9KR7-383G>].

First, the Omnibus Budget Reconciliation Act of 1993 (OBRA) does not include payback provisions for third-party SNTs.¹¹⁸ This statute accounts for first-party SNTs.¹¹⁹ However, third-party SNTs are governed by the Program Operating Manual System of the Social Security Administration (POMS).¹²⁰ Currently, no “mandatory payback provisions” are included in POMS.¹²¹ A payback provision requires the trustee to reimburse the government for benefits received after the beneficiary dies with any residual trust assets.¹²² In Texas, the payback provision requires the trustee to pay the remaining assets to the state for Medicaid benefits received by the beneficiary.¹²³ It also only covers first-party and pooled trusts.¹²⁴

Second, no statutes require mandatory income distributions that follow benefit eligibility requirements.¹²⁵ Third-party SNTs give the trustee discretion over distributing income and assets to the beneficiary.¹²⁶ Mandatory income distribution requirements would remove discretion from the trustee and reduce mismanagement and abuse.¹²⁷

Third, there are no qualification requirements for a non-professional trustee.¹²⁸ Typically, the non-professional trustee designated in the trust is a family member.¹²⁹ Unlike a professional trustee who understands public benefits laws and has no conflicts of interest, a non-professional typically does not know how trust distributions work and has conflicts of interest concerning the beneficiary.¹³⁰ These characteristics in a trustee lead to mismanagement and abuse.¹³¹

118. *Id.*

119. *Id.*

120. *Id.*

121. *Payback Provision*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/payback_provision (last visited Mar. 11, 2025) [<https://perma.cc/2WYY-4MN5>].

122. Begley, *supra* note 117.

123. *Special Needs Trusts in Texas: Ensuring Care for Vulnerable Beneficiaries*, S. TEX. FAM. LAW (Sept. 17, 2024), <https://www.lldheard.com/special-needs-trusts-in-texas-ensuring-care-for-vulnerable-beneficiaries/> [<https://perma.cc/ANN2-H3FM>].

124. *Id.*

125. See David F. Johnson, *Trust Distributions in Texas Part I*, WINSTEAD P.C. 1, 42, <https://m.winstead.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRVPMQiLsSw4JC03D/document.name=/Trust%20Distribution%20Article%20Part%20One.pdf> (last visited Mar. 11, 2025) [<https://perma.cc/9N73-WX2P>].

126. Begley, *supra* note 117.

127. *Id.*

128. Michael B. Cohen, *What Fee is “Reasonable” for a Non-Professional Trustee Under Texas Law?*, DALL. ELDER LAW. (Jan. 26, 2025, 4:50 AM), <https://dallaselderlawyer.com/what-fee-is-reasonable-for-a-non-professional-trustee-under-texas-law/> [<https://perma.cc/24GR-B9FE>].

129. Begley, *supra* note 117.

130. *Id.*

131. *Id.*

1. *The Omnibus Budget and Reconciliation Act of 1993*

The OBRA provides social-security requirements and regulatory provisions for SNTs.¹³² However, the Social Security Act (the Act) only covers exceptions for first-party and pooled trusts.¹³³ According to the Act, funds covered by SNTs would be considered earned income when assessing eligibility for government benefits.¹³⁴ Beneficiaries of SNTs advocated for the Act because it codified two types of trusts as exceptions to the earned income requirement: self-settled and pooled trusts.¹³⁵ Only these types of SNTs allowed beneficiaries to supplement their income with additional assets without losing their government benefits.¹³⁶

The requirements for third-party SNTs for a disabled person are listed under the social-security regulation POMS, which sets out specific qualifications and provisions that govern these trusts and enable individuals to maintain their eligibility.¹³⁷ However, it fails to cover Medicaid and other government benefits.¹³⁸ It also does not cover how an individual can maintain coverage or eligibility within their state.¹³⁹

Third-party SNTs are governed by state law: either in the state indicated in the trust instrument or the state where the trust was established.¹⁴⁰ For pooled and self-settled trusts, federal legislation governs payback provisions.¹⁴¹ Because third-party SNTs fall outside OBRA exceptions, these mandatory payback provisions do not apply.¹⁴² Some proponents of this gap argue that it allows the beneficiary's assets to be used for the benefit of other family members once the beneficiary dies.¹⁴³ However, if the state does not have a vested interest and the trust assets are leftover when the beneficiary dies, it leaves much room for mismanagement and abuse.¹⁴⁴ Because the assets are accessible by other beneficiaries when family members are

132. See generally Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 27, 37–38 (2016) (providing a general summary of the legislation's effects).

133. *Id.*; *Program Operations Manual Sys. (POMS)*, SOCIAL SEC. ADMIN. (May 6, 2024), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203> [<https://perma.cc/5QAP-N2UB>].

134. O'Brien, *supra* note 132, at 38–39.

135. *Id.*

136. McCoy, *supra* note 57, at 464–66.

137. *Program Operations Manual Sys. (POMS)*, *supra* note 133.

138. *Id.*

139. *Id.*

140. See Ward L. Thomas & Leonard J. Henzke, *Trust: Common Law and IRC 501(c)(3) and 4947, EXEMPT ORGS.—TECH. INSTRUCTION PROGRAM FOR FY 2003 1, 10* (2003), <https://www.irs.gov/pub/irs-tege/eotopica03.pdf> [<https://perma.cc/M7HG-QKWA>]; O'Brien, *supra* note 132, at 38–39.

141. 42 U.S.C. §§ 1396p(d)(4)(A), (C); Theodore Z. Wyman, J.D., *Litigation of Special Need Trusts*, 162 AM. JUR. TRIALS 385, 389 (2019).

142. *Id.*

143. 42 U.S.C. §§ 1396p(d)(4)(A), (C).

144. *Id.*

designated as trustees, payback provisions protect against self-dealing or skimming throughout the beneficiary's life.¹⁴⁵

2. Summary of Key Texas Provisions

Texas law governing third-party SNTs includes statutes relating to the creation, management, and eligibility of government benefits.¹⁴⁶ The Texas Trust Code provisions ensure trusts align with the settlor's intent and that the beneficiaries receive their benefits.¹⁴⁷ Although many provisions govern trusts, third-party SNTs highlight the gaps in the current legislation because no specific provisions govern these specialty trusts, causing loopholes to be used for self-dealing.¹⁴⁸

The Texas Trust Code outlines an exhaustive list of powers granted to the trustee; however, the settlor can add or revoke most powers listed by express language in the trust instrument.¹⁴⁹ The standard of care for a trustee is codified in the Texas Trust Code, which states that a trustee has an absolute duty to distribute trust assets appropriately.¹⁵⁰ The distribution standard is a strict standard in which the trustee can be liable for distributions made if a mistake resulted from the trustee's action, even if the distributions were made in good faith and with reasonable care.¹⁵¹ For SNTs, unless the trust instrument states otherwise, the Texas Trust Code offers distribution options for the trustee to make that benefit and comply with the trust instrument.¹⁵² In most cases, making distributions directly for the beneficiary's expenses is better because the distribution is less likely to be counted as unearned income, which can affect their benefits.¹⁵³

Moreover, the Texas Administrative Code establishes how the trust should operate for Medicaid under the Act.¹⁵⁴ The Texas Administrative Code outlines how income distributions should be paid for eligibility purposes.¹⁵⁵ It also describes the adoption assistance benefits available for children with special needs including Medicaid health coverage, monthly payments, and reimbursement for nonrecurring expenses.¹⁵⁶

145. See Wyman, *supra* note 141.

146. See *id.*

147. TEXAS PROP. CODE ANN. §§ 113.002-.028.

148. *Id.*

149. *Id.*

150. TEX. PROP. CODE ANN. § 114.004.

151. *Id.*

152. *Id.* § 113.021(a); Quintal, *supra* note 97, at 17.

153. Quintal, *supra* note 97, at 17.

154. 1 TEX. ADMIN. CODE § 358.339(c) (1993) (Tex. Health & Human Serv. Comm'n, Treatment of Trusts on and after August 11, 1993).

155. *Id.*

156. 40 TEX. ADMIN. CODE § 700.802 (2001) (Dep't of Fam. & Protective Serv., What is adoption assistance?).

Texas also does not enforce a notice requirement if the trustee adjusts its power and discretion over the trust.¹⁵⁷ There is a strict standard of compliance with distributions.¹⁵⁸ However, an expansion of the trustee's power does not include the requirement to notify the incapacitated beneficiary of changes.¹⁵⁹

In Texas, the SNT legislation is structured to ensure quality of life for beneficiaries with long-term care requirements.¹⁶⁰ The Texas Health Services and Safety provisions directly mirror the federal regulations of SNTs, barring slight differences in asset assignment.¹⁶¹ However, the same gaps in state regulation need to be filled.¹⁶² The trusts cannot heavily supplement living expenses and medical costs because it would violate the safeguard against reducing government benefits.¹⁶³

In Texas, the Property Code governs the formation of trusts, how to maintain them, and state compliance requirements.¹⁶⁴ It also includes provisions for beneficiaries with disabilities; however, similar to the federal requirement, it fails to include specific provisions governing third-party SNTs.¹⁶⁵

The state-regulated SNTs are "trusts established with the assets . . . of a person . . .," whereas third-party SNTs are established with the assets of another for the benefit of the disabled person.¹⁶⁶ The F-6700 Trust Exception provisions list the mandatory payback provisions for these trusts, but third-party SNTs don't fall within these exceptions.¹⁶⁷ The state's compulsory payback provisions require it to be the residuary of the beneficiary's SNT.¹⁶⁸ These payback provisions allow any residual assets to be paid to the state corresponding to the Medicaid benefits the beneficiary received in their lifetime.¹⁶⁹ The funds come from the following places: qualifying income trust (QIT), SNT, pooled trust or irrevocable annuity, and any settlement funds received from a court.¹⁷⁰

157. *Id.*

158. *Id.*

159. *Id.*

160. *Special Needs Trusts in Texas: Ensuring Care for Vulnerable Beneficiaries*, *supra* note 123.

161. Kemp C. Scales & Linda M. Anderson, *Special Needs Trusts: Practical Tips for Avoiding Common Pitfalls*, 74 PA. B. ASS'N Q. 169, 170 (2003).

162. *Medicaid for the Elderly and People with Disabilities Handbook F-6700, Exception Trusts*, TEX. HEALTH & HUM. SERVS. (Dec. 1, 2009), <https://www.hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook/f-6700-exception-trusts> [<https://perma.cc/K8WH-M3D2>].

163. *See Special Needs Trusts in Texas: Ensuring Care for Vulnerable Beneficiaries*, *supra* note 123.

164. TEX. PROP. CODE ANN. §§ 111–117; Scales & Anderson, *supra* note 161, at 170.

165. TEX. PROP. CODE ANN. §§ 142.005, 142.007.

166. *See Medicaid for the Elderly and People with Disabilities Handbook F-6700, Exception Trusts*, *supra* note 162.

167. *See id.*

168. *Id.*

169. *Id.*

170. *Id.*

Texas income distribution requirements state that “[a]ny distribution paid directly from a trust to the individual or a third-party for the benefit of the individual is unearned income to the individual in the month of receipt”¹⁷¹ A payment for the benefit of the individual that is ordinarily counted as income is recorded under the trust provision, unless other supplementary accounts cover the expenses for the beneficiary’s medical costs.¹⁷²

The state’s provisions established requirements for income distribution in terms of income versus unearned income.¹⁷³ These categorical distinctions allow the beneficiary to receive government benefits and trust income distributions.¹⁷⁴ However, the state’s provisions allocate how the income is distributed and classified for an unspecified individual, either the trustee or the beneficiary if it complies with the trust.¹⁷⁵

Moreover, no mandatory provisions or systematic checks force the trustee to comply.¹⁷⁶ The trust is allowed discretion on how to allocate income distributions, which leaves opportunities for the beneficiary to face abuse.¹⁷⁷

In addition to income distribution requirements, Texas’s mandatory payback provisions require that “[t]he trust must include a provision that the state is designated as the residuary beneficiary to receive, at the person’s death, funds remaining in the trust equal to the total amount of Medicaid paid on their behalf.”¹⁷⁸ The trust exception remains in place after the beneficiary reaches age sixty-five as long as they meet the disability requirements of their government benefits.¹⁷⁹

The provision explains how to designate the income distribution to maintain eligibility for government benefits.¹⁸⁰ However, it fails to include enforceable provisions against the trust to prevent mismanagement of trust assets.¹⁸¹ Third-party SNTs allocate discretion to the trustee and establishes the beneficiary’s dependence on them, which should be acknowledged in

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Financial Abuse and Special Needs Trusts – July 2019*, VISTA POINTS (July 2019), <https://vistapoints.org/financial-abuse-and-special-needs-trusts-july-2019/> [<https://perma.cc/BAR3-49TT>].

177. *Id.*

178. *Form H1210, Subrogation (Trust/Annuities/Court Settlements)*, TEX. HEALTH & HUM. SERVS. (Feb. 2018), <https://www.hhs.texas.gov/regulations/forms/1000-1999/form-h1210-subrogation-trustannuitiescourt-settlements> [<https://perma.cc/8HAT-7K3Z>]; see *Medicaid for the Elderly and People with Disabilities Handbook F-6700, Exception Trusts*, *supra* note 162.

179. See *Medicaid for the Elderly and People with Disabilities Handbook F-6700, Exception Trusts*, *supra* note 162.

180. *Id.*

181. Author’s original thought.

provisions that govern the state and federal benefits the beneficiary relies heavily on.¹⁸²

C. Case Law on the Abuse of SNTs and Maintaining Eligibility

The purpose of a third-party SNT is to provide a beneficiary with a disability supplemental fund without disqualifying them from government benefits.¹⁸³ When SNTs are abused or mismanaged, courts interpret the jurisdictional trust code and the provisions in the trust instrument to determine whether an abuse has occurred.¹⁸⁴ According to state statute, the court of jurisdiction for trust contests is typically a probate court.¹⁸⁵ These courts have the authority to administer judgments on the management of trusts and estates, guardianship, and abuse of fiduciary duty.¹⁸⁶ The existing gaps in legislation are supplemented with the judicial decisions in cases about abusing the fiduciary duty of an SNT.¹⁸⁷ The following cases discuss common issues involved in SNTs, including the trustee's fiduciary duty and improper distributions of trust funds.¹⁸⁸

In *Lewis v. Alexander*, a class action was brought because the state Medicaid eligibility requirements conflicted with federal requirements, thus causing mismanagement of the SNT.¹⁸⁹ This caused the beneficiary to suffer a reduction in funds for their disability and led to legal action against the trustee.¹⁹⁰ The court held that the additional requirements imposed by the state were invalid because only the federal mandates governed pooled trusts under 42 U.S.C. § 1396p(d)(4).¹⁹¹ However, third-party SNTs falls outside the exception; therefore, states may impose additional requirements for third-party SNTs.¹⁹² The provisions proposed in the case were (1) that expenditures must be "reasonably related" to the beneficiary's needs, (2) a definition of special needs that limits permissible disbursements related to the treatment of the disability, and (3) an age restriction.¹⁹³ Provisions like these would be permissible for states to adopt if limited to third-party SNTs.¹⁹⁴

182. *Id.*

183. *Id.*

184. *Id.*

185. Thomas & Henzke, *supra* note 140, at 4.

186. *Id.*

187. Author's original thought.

188. *Id.*

189. *Lewis v. Alexander*, 685 F.3d 325, 328–30 (3d Cir. 2012).

190. *Id.*

191. *Id.*

192. *Id.* at 330.

193. *Id.* at 329.

194. *Id.*

Similarly, in *Lewis v. Rendell*, beneficiaries brought a class action for improper eligibility criteria for SNTs concerning government benefits.¹⁹⁵ The court discussed how Pennsylvania's statutory provisions improperly determined Medicaid eligibility with SNTs.¹⁹⁶ The provision was later overruled as unconstitutional in *Lewis v. Alexander*; however, the discussion on the need for gap-filler legislation and the mismanagement of SNTs directly correlates to the gaps in the Texas legislation concerning third-party SNTs.¹⁹⁷ The case illustrates the need for reform of SNTs, specifically for state provisions that better protect the beneficiary.¹⁹⁸

Moreover, the *Center for Special Needs Trust Administration, Inc. v. Olson* case highlights the different regulations between pooled and third-party trusts.¹⁹⁹ In this case, the beneficiary obtained reimbursement under the Medicaid provisions of the pooled trust, which does not cover third-party SNTs.²⁰⁰ The legislative distinction between SNTs is critical because it pertains to how the trustee can misappropriate trust funds and the available reimbursement options or re-eligibility for the beneficiary.²⁰¹

In comparison, in the *Simonson v. Bremby* case, the court used third-party trusts as available resources in determining the plaintiff's eligibility for Medicaid benefits and disqualifying transfers of assets.²⁰² This case discusses third-party SNTs, specifically the mismanagement and designation of trust assets.²⁰³ It emphasizes the gaps in legislation regulating the principal and trustee when delegating assets for the beneficiary's disability.²⁰⁴

III. ARGUMENT

A. Proposed Legislative Amendments to the Texas Trust Code

The following language is proposed statutory amendments to the Texas Trust Code.²⁰⁵ These amendments are drafted to protect beneficiaries of third-party SNTs.²⁰⁶ Protection ranges from maintaining government benefits

195. *Lewis v. Rendell*, 501 F. Supp. 2d 671, 671–73 (E.D. Pa. 2007).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Ctr. for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688, 688–93 (8th Cir. 2012).

200. *Id.*

201. *Richardson by Carlin v. Hamilton*, No. 2:17-CV-00134-JAW, 2018 WL 1077275, at *1 (D. Me. Feb. 27, 2018).

202. *Simonsen v. Bremby*, No. 15-CV-1399 (VAB), 2015 WL 9451031, at *1 (D. Conn. Dec. 23, 2015).

203. *Id.*

204. *Id.*

205. Author's original thought.

206. *Id.*

to providing strict standards on trust administration for trustees under their fiduciary capacity.²⁰⁷

Income Distribution Provisions

- (1) The income distribution of the trust assets must:
 - (a) comply with the pension, Social Security, or Medicaid benefit eligibility requirements, and assets must not be distributed directly to the beneficiary as unearned income; and
 - (b) distribute trust assets directly to the necessities of the beneficiary.
- (2) Compliance with state Program Operating Manual System of the Social Security Administration and Supplemental Security Income distributions include:
 - (a) filing the appropriate documents of record with the state and federal agencies in a manner that does not put the beneficiary's distributions at risk;
 - (b) the trustee must maintain awareness of the beneficiary's eligibility; and
 - (c) the trustee must provide the beneficiary with notice of any material changes to their eligibility.

Mandatory Payback Provisions

- (1) The mandatory payback provisions must state:
 - (a) when the person dies, the trust provides that the state will be reimbursed an amount equal to the amount the state paid through Medicaid. The state receives the remaining assets if that amount is greater than the entire trust. If the amount is less, the balance may go to other beneficiaries after the state is reimbursed.
- (2) Compliance with state Program Operating Manual System of the Social Security Administration payback provisions include:
 - (a) filing the appropriate documents of record with the state and federal agencies in a manner that does not put the beneficiary's distributions at risk;
 - (b) the trustee must maintain awareness of the beneficiary's eligibility; and
 - (c) the trustee must provide the beneficiary with notice of any material changes to their eligibility.

Fiduciary Duties Provisions

- (1) A special-needs fiduciary may exercise the power granted in the instrument and must comply with the distribution requirements; the following rules apply:
 - (a) be a third-party trust with defining language under Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. 32;
 - (b) contain payback provisions complying with reimbursement requirements of Medicaid law; and
 - (c) must evaluate the progression of the disability to determine subsequent distributions to the beneficiary's expenses.

207. *Id.*

- (i) Evaluations include medical documentation or conclusive recommendations made by a medical professional; and
- (ii) the progression of the disability may include further degeneration or rehabilitation. In exercising discretion, the trustee must comply with the intent of the trust instrument and state statutes, which standardizes provisions that protect the beneficiary with the disability.²⁰⁸

B. How the Proposed Language Fills the Gaps in State Legislation

Texas's SNT income distribution and payback provisions fail to prohibit fiduciary duty abuse by third-party trustees.²⁰⁹ The proposed legislation should include the following provisions: (1) mandatory distributions of income, (2) payback provisions, and (3) trustee qualification requirements.²¹⁰ Although these provisions would be tied to federal benefit requirement standards, the state should implement them to better protect beneficiaries of third-party SNTs from the harmful effects of mismanagement.²¹¹ Additional provisions safeguarding the beneficiary should be implemented as a public policy consideration.²¹² Adopting provisions that leave gaps concerning third-party SNTs promotes mismanagement and abuse because it fails to provide beneficiaries a voice regarding how their medical and living expenses are paid.²¹³

1. Mandatory Distribution of Income Requirements

The mandatory income distribution requirements ensures beneficiaries receive the appropriate funds for their expenses.²¹⁴ Beneficiaries of SNTs typically qualify for SSDI, which covers specific expenses.²¹⁵ However, beneficiaries of SNTs often have disabilities that require intensive care and medical treatments that are constantly evolving.²¹⁶ These provisions would prevent the trustee from mismanaging the trust by inappropriately retaining assets or income to the beneficiary's detriment.²¹⁷ As discussed in *Simonson v. Bremby*, the beneficiary's eligibility is directly tied to the trustee's distribution of income and assets within the trust.²¹⁸ Government assistance

208. *Id.*; see 26 TENN. PRAC. ELDER L. 18, 6 (2024 ed.); NEB. REV. STAT. 30–4513.

209. Jennifer Brannan, *Third-Party Special Needs Trust: Dead or Alive in a Uniform Trust Code World*, 16 TEX. WESLEYAN L. REV. 249, 250–51 (2010).

210. *Id.*

211. *Id.*

212. *Id.* at 250.

213. *Id.*

214. See Scales & Anderson, *supra* note 161, at 170.

215. *Id.* at 170–73.

216. *Id.* at 171.

217. Patricia Tobin, *20/20 Foresight: Planning Ahead for Special Needs Trusts*, 11 PROB. & PROP. 56, 56 (1997).

218. *Id.*

can be significantly reduced or the beneficiary could become ineligible if the income is distributed incorrectly.²¹⁹ Thus, introducing these provisions in the Texas legislature would grant the beneficiary more protection and remove the trustee's broad discretion under the trust.²²⁰

The language stating that "*trust assets must comply with the pension, Social Security, or Medicaid benefit eligibility requirements, and not distribute assets directly to the beneficiary as unearned income*" provides the trustee with direct guidance if the trust instrument fails to designate specific distributions.²²¹ Although some argue that the role of a trustee should offer the person some discretion and flexibility to fulfill their role as a fiduciary, flexibility is not always beneficial in the circumstances of SNTs.²²² Trustees should be able to use their discretion; however, when the beneficiary is highly dependent on their discretion, there should also be strict standards for the trustee to base their discretion on.²²³

For example, if a trustee makes an in-kind or maintenance distribution of any amount, the beneficiary's benefits can see a one-third reduction.²²⁴ The mandatory distribution requirements are a preventative measure to the drastic effects of these improper distributions.²²⁵

Including language such as "*the trustee must maintain awareness of the beneficiary's eligibility*" mandates the trustee to exercise a duty already outlined in the Trust Code.²²⁶ A more detailed provision directly protects the beneficiary's government benefits.²²⁷

To further protect the beneficiary, it is vital to include notice provisions, such as the "*trustee must provide the beneficiary with notice of any material changes to their eligibility.*"²²⁸ Notice provisions allow a beneficiary who heavily relies on the trustee to maintain awareness of how the trust assets are distributed and whether their medical coverage or daily expenses are at risk.²²⁹

219. See Scales & Anderson, *supra* note 161, at 170.

220. See Tobin, *supra* note 217, at 56.

221. See discussion *supra* Section III.A (quoting author's proposed legislation); author's original thought.

222. See discussion *supra* Section III.A; author's original thought.

223. See discussion *supra* Section III.A; author's original thought.

224. Supplemental Security Income (SSI) Living Arrangement, SOC. SEC. ADMIN. (2024), <https://www.ssa.gov/ssi/text-living-ussi.htm> [<https://perma.cc/Z27S-F5BK>].

225. *Id.*

226. See discussion *supra* Section III.A (quoting author's proposed legislation); author's original thought.

227. See discussion *supra* Section III.A; author's original thought.

228. See discussion *supra* Section III.A (quoting author's proposed legislation); author's original thought.

229. See discussion *supra* Section III.A; author's original thought.

2. Payback Provisions Requirements

Mandatory payback provisions mandate that the remaining assets within the trust are paid to the government for any government benefits received once the beneficiary dies.²³⁰ These provisions deter the misuse of trust assets because the state is listed as a remainder.²³¹ Thus, using the assets for personal gain or distributing them inappropriately backfires on the trust or beneficiary because the state has a vested interest in the SNT.²³²

Including language in the gap filler amendments, such as “*when the person dies, the state gets the remaining assets if that amount consumes the entire trust [and] if the amount is less, the balance may go to other beneficiaries after the state is reimbursed,*” prevents the misappropriation of trust assets.²³³ This language protects the beneficiary from the trustee skimming or redirecting assets for the remainder beneficiary because a state agency holds them accountable.²³⁴ In addition, provisions on how to comply with benefit eligibility in Sections (2) (a),(b), and (c) afford the beneficiary protection by imposing strict standards on the trustee regarding benefit eligibility compliance.²³⁵

3. Criteria for Trustee Qualification

Trustee qualification requirements are a practical consideration for change.²³⁶ These provisions would be included within the Fiduciary Duties Section of the Texas Property Code, which outlines the fiduciary responsibilities of someone administering a trust.²³⁷ In this Section, the state should adopt criteria or recommendations for trustee selection.²³⁸ Although the decision is delegated to the settlor, an exception should be made for SNTs.²³⁹

The beneficiaries in SNTs have a greater dependency on the trustee to manage the trust properly, and third-party SNTs use the assets of another person, which affords even more significant dependence on the beneficiary to the trustee.²⁴⁰ By requiring the trustee to “*evaluate the progression of the*

230. Quintal, *supra* note 97, at 19.

231. *Id.*

232. *Id.*

233. See discussion *supra* Section III.A (quoting author’s proposed legislation); Author’s original thought.

234. See discussion *supra* Section III.A; author’s original thought.

235. See discussion *supra* Section III.A; author’s original thought.

236. Stephen W. Dale, *Choosing the Ideal Trustee of Your Child’s Special Needs Trust*, THE SPECIAL NEEDS ALL. 1, 1, <https://www.wrightslaw.com/info/ideal.trustee.dale.pdf> (last visited Mar. 12, 2025) [<https://perma.cc/Y86F-KJ66>].

237. TEX. PROP. CODE ANN. § 116.004.

238. *Id.*

239. Author’s original thought.

240. See Dale, *supra* note 236.

disability to determine subsequent distributions to the beneficiaries' expenses," the trustee has notice of continuing duties throughout the trust administration.²⁴¹ A settlor typically establishes an SNT because the beneficiary's future needs cannot be accurately predicted.²⁴² Therefore, encouraging regular evaluations of the beneficiary's needs allows the trustee to make distributions that comply with their evolving needs.²⁴³ Enacting these provisions would minimize the risk of mismanagement or abuse by unqualified (family or friend) trustees.²⁴⁴

The previous provisions would significantly improve the current legislation.²⁴⁵ Many third-party SNTs fail to qualify for government benefits because of their complexity in drafting and administration.²⁴⁶ Therefore, advocating for change from a practical public policy standpoint would supplement the argument's discussion of practical implications.²⁴⁷

C. Correcting Provisions That Negatively Impact Family Planning

Third-party SNTs typically have beneficiaries with disabilities that cause them to be heavily dependent on someone else for their care.²⁴⁸ If the trust assets cannot fully support the beneficiary, they rely on Medicaid coverage.²⁴⁹ However, if the beneficiary qualifies for Medicaid, certain distributions, such as direct distributions, gifts, or inheritances, could disqualify them.²⁵⁰ Thus, without the assets of the third-party trust there are no other supplements to the beneficiary's income.²⁵¹

The purpose of third-party SNTs is to "mitigate [] the inadequacies of government benefit programs by covering non-medical needs of disabled dependents."²⁵² Government aid alone provides the individual with limited resources for necessities.²⁵³ Therefore, third-party SNTs help provide additional resources to the beneficiary to sustain their quality of life long-term.²⁵⁴

241. See discussion *supra* Section III.A (quoting author's proposed legislation); author's original thought.

242. See discussion *supra* Section III.A; author's original thought.

243. See discussion *supra* Section III.A; author's original thought.

244. Author's original thought.

245. *Id.*

246. See Dale, *supra* note 236.

247. *Id.*

248. McCoy, *supra* note 57, at 464–66.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 479 (quoting Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 94 n.15 (2000)).

253. See Dale, *supra* note 236.

254. *Id.*

1. Reducing Confusion and Enhancing Access to Benefits

Stricter distribution standards would encourage the trustee to make more informed distributions that overlap with Medicaid and Supplemental Security Income (SSI) without the high potential for the beneficiary to lose their eligibility or reduce their benefits.²⁵⁵ The proposed exception for mandatory income distributions includes calculating the proper trust distribution.²⁵⁶ The calculation includes how much in government benefits to withhold based on the trust assets available to the beneficiary.²⁵⁷ For example, if the beneficiary receives considerable monthly money for their specific medical needs, government aid should remain the same but continue to supplement their medical expenses.²⁵⁸

Benefits should be maintained because the distribution is calculated accordingly and paid directly to the expense.²⁵⁹ Because the purpose of the two income sources differs, one supplementing medical needs and daily essential expenditures and the other sustaining the beneficiary's quality of life, a reduction in benefits should not be a dollar-for-dollar calculation.²⁶⁰ For example, if Medicaid covers a beneficiary's medical expenses and the trust assets pay for transportation and housing for accessibility, there should not be a loss of benefits for improper distributions.²⁶¹

A change in the language for third-party SNTs would protect the beneficiary from potential misappropriation of funds by the trustee and from losing benefits or eligibility.²⁶² In protecting the beneficiary, the strict language would offer long-term stability in third-party SNTs because it would hold the trustee accountable for income distributions without punishing the beneficiary.²⁶³

2. Identifying Texas Provisions That Fail to Prohibit Abuse

When interpreting Texas law governing third-party SNTs, there are glaring issues concerning protective measures for beneficiaries.²⁶⁴ Many individuals in the United States have been diagnosed with long-term,

255. *Id.*

256. Quintal, *supra* note 97, at 19.

257. See McCoy, *supra* note 57, at 464–66.

258. *Id.*

259. *Id.*

260. *Your Special Needs Trust ("SNT") Defined*, *supra* note 48.

261. *Id.*

262. Stuart D. Simring, *Using Third Party SNTs in Estate Planning*, STENSON UNIV. COLL. OF L. 1, 30 (Oct. 22, 2010), <https://www.stetson.edu/law/conferences/homepages/media/snt-friday/document/usin-g-third-party-snts-stuart-d-zimring.pdf> [<https://perma.cc/23FW-CQ72>].

263. *Your Special Needs Trust ("SNT") Defined*, *supra* note 48.

264. *ABCD Fact Sheet on Special Needs Trusts*, ALL. FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES, <http://www.abcdnj.org/publications/medicaid/special-needs-trusts/> (last visited Mar. 12, 2025) [<https://perma.cc/ZV32-VM32>].

intensive care-requiring disabilities.²⁶⁵ These individuals should be afforded protections under the law to benefit from trusts established to care for them in conjunction with their government benefits.²⁶⁶ However, the current legislation must allow these individuals to maintain eligibility and receive appropriate funding for their required care and expenses.²⁶⁷

First, there needs to be mandatory distributions of income to ensure beneficiaries receive the necessary funds for living expenses, medical care, and general expenses the beneficiary's disability requires.²⁶⁸ These provisions also prevent the trustee from mismanaging or abusing trust assets by improperly retaining assets for individual benefit.²⁶⁹ In a third-party trust, the beneficiary does not have a lot of discretion over how the assets are distributed concerning their medical needs and living expenses.²⁷⁰

However, if legislation mandates income distributions, attorneys would be statutorily encouraged to include these provisions in the trust.²⁷¹ These provisions would institute parameters on how, when, and to what institutions the trust assets should be distributed.²⁷² Although a settlor and attorney cannot foresee all contingencies that may arise throughout the beneficiary's life, these provisions would limit the trustee's ability to abuse or mismanage the trust because they would be mandated to operate within the stated limits.²⁷³ These limits include conditions on how distributions should change if the beneficiary's medical needs increase or decrease or, in rare circumstances, if they would like to fund specialty treatments or new trials.²⁷⁴ As previously noted, there are many questions concerning the future needs of a beneficiary to a third-party SNT.²⁷⁵

Secondly, Texas does not have payback provision requirements for third-party SNTs, which reimburse the government upon the beneficiary's death.²⁷⁶ This provision is an essential fiduciary duty check because it prevents the misuse of trust assets for personal gain.²⁷⁷ If the trustee is responsible for paying assets to the government for benefits the beneficiary received during their lifetime then they are less likely to misappropriate large

265. *Id.*

266. *Id.*

267. 42 U.S.C. §1396 (2022).

268. *Id.*

269. Jennifer Field, *Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits*, 24 J. JUV. L. 79, 86 (2003).

270. *Id.*

271. *Id.*

272. Tobin, *supra* note 217, at 56.

273. *Id.*

274. *Id.*

275. *Id.*

276. Jeffrey R. Grimyer, *Missing the Forest for the Trees: Why Supplemental Needs Trusts Should Be Exempt from Medicaid Determinations*, 89 CHI.-KENT L. REV. 438, 442 (2014).

277. *Id.*

amounts of funds.²⁷⁸ However, if the remaining assets in the trust are distributed to living beneficiaries upon the trust beneficiary's death then it is more likely the trustee will retain assets and distribute minimal amounts because, as a family member and trustee (the typical designation), the trustee may be on the receiving end of those assets.²⁷⁹

Third, state law should impose trustee qualification requirements that establish standardized criteria for trustee selection.²⁸⁰ These provisions would minimize the risk of mismanagement or abuse by unqualified trustees.²⁸¹ The qualifications should include trust training, fiduciary knowledge, understanding of the beneficiary's disability, and educational background in law or medical judgment.²⁸² Training and fiduciary knowledge would better equip the trustee to make decisions on behalf of the beneficiary.²⁸³ Understanding the beneficiary's disability allows the trustee to make informed decisions if the beneficiary's disability either progresses or changes throughout their lifetime.²⁸⁴

D. Tailoring the Trust to Provide Protection and Benefit the Beneficiary

Third-party SNTs are established for the benefit of an individual beneficiary with a long-term intensive care disability and funded with assets of someone other than the beneficiary.²⁸⁵ There is a growing need for reform of SNTs in distinguishing between different types of special needs, and the required provisions are necessary to provide more than adequate support throughout the beneficiary's life.²⁸⁶

1. Statutory Language Should Align with the State's Objective

A key aspect of a third-party SNT is that it is funded by someone other than the beneficiary, such as a parent or grandparent, to provide additional support without impacting the their government benefits.²⁸⁷ Legislation should be structured to clearly define how trust funds can enhance the beneficiary's quality of life while not being considered personal assets, which could disqualify them from receiving necessary government assistance.²⁸⁸ Regulations should clearly outline the trustee's responsibilities

278. *Id.*

279. *Id.*

280. *Id.*

281. *Administering a Special Needs Trust*, *supra* note 31, at 13.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See Simring*, *supra* note 262, at 5.

286. *See id.*

287. *See Administering a Special Needs Trust*, *supra* note 31, at 8.

288. *See id.*

to ensure that distributions from the trust are made solely for the beneficiary's supplemental needs and not for basic living expenses covered by government programs.²⁸⁹

The Texas legislative amendments should clearly define allowable expenses and reimbursement provisions, and include flexibility for changing circumstances.²⁹⁰ First, the amendments should specify which costs can be paid from the trust funds, such as medical care and education, while excluding items considered as basic needs.²⁹¹ Second, the amendment should address potential scenarios where the beneficiary might need to reimburse Medicaid for expenses paid from the trust upon death, depending on the state regulations.²⁹² Third, the amendment should allow adjustments to the trust terms under specific situations, like significant changes in the beneficiary's medical needs or government benefit rule.²⁹³

The current language in the Texas Trust Code allows the trustee to act under vague, speculative language like "reasonable under the circumstance."²⁹⁴ Although this language is appropriate for most trust administrations, stricter language should govern acts of trustees for third-party SNTs.²⁹⁵ Because the beneficiaries of third-party SNTs are heavily reliant on the trustee without any access to the trust assets, protective provisions should be put in place for the benefit of the beneficiary.²⁹⁶

These provisions would better align Texas's governing legislation with the State's objectives.²⁹⁷ Texas has enacted reform in many other areas, like education, guardianship, and healthcare for children and adults with disabilities.²⁹⁸ Therefore, the legislation should continue to reflect the progressive, protective language trend.²⁹⁹

289. *See id.*

290. *See id.*

291. *See id.* at 8–11.

292. *See id.* at 15.

293. *See id.*

294. Thomas M. Featherson, *The 21st Century Trust: An Evolving Concept*, 41st ANN. ADVANCED EST. PLAN. & PROB. COURSE 3, 13 (2017), <https://law.baylor.edu/sites/g/files/ecbvkj1546/files/2023-11/The%2021st%20Century%20Trust%20An%20Evolving%20Concept%20SBOT%20Houston.pdf> [<https://perma.cc/97QB-ZEMU>].

295. *See id.*

296. *See id.*

297. *See* Steven Aleman, *New school year, new school rules impacting students with disabilities*, DISABILITY RTS. TEX. (2024), <https://disabilityrightstx.org/en/2024/08/13/new-school-year-new-school-rules-impacting-students-with-disabilities/> [<https://perma.cc/RJ5B-K758>]; *see also*, *Medicaid for Children and Adults with Disabilities*, TEX. HEALTH & HUM. SERVS. (Mar. 12, 2025), <https://www.hhs.texas.gov/services/health/medicaid-chip/medicaid-chip-programs-services/programs-children-adults-disabilities/medicaid-children-adults-disabilities> [<https://perma.cc/K8WH-M3D2>]; *see Protecting the Elderly and Incapacitated*, TEX. GUARDIANSHIP REFORM 1, 2 (2019), https://www.txcourts.gov/media/1443314/texas-guardianship-reform_jan-2019.pdf [<https://perma.cc/B642-FCD2>].

298. *See Protecting the Elderly and Incapacitated*, *supra* note 297, at 2.

299. *See Medicaid for Children and Adults with Disabilities*, *supra* note 297.

2. Protective Language Ensures Access to Public Benefits

Public benefit eligibility law is evolving, which causes the legal planning for children and adults to more easily access benefits.³⁰⁰ SNTs are legal planning tools that aid estate planners with changes in public benefit eligibility.³⁰¹ To understand all of the potential benefits of SNTs, an estate planner must have knowledge of the many government benefit programs available to individuals with a disability.³⁰²

Extending the benefits of the trust assets may be appropriate when the beneficiary's needs go beyond essential medical care not covered by government benefits.³⁰³ However, the goal of the stricter protective language is not to preserve the funds indefinitely in addition to receiving public benefits for basic needs.³⁰⁴ Instead, careful planning allows trust assets to be invested to generate income that can be distributed over more extended periods of time.³⁰⁵ These long-term distribution plans provide coverage for the uncertain aspects of the individual's disability.³⁰⁶

In contrast, if improper planning occurs and SSDI and Medicaid benefits are revoked, the trust funds will have to cover basic needs, medical care, and living expenses.³⁰⁷ Typically, these assets are not meant to cover all of the beneficiary's needs but only supplement the benefits they already receive.³⁰⁸ Therefore, protective language and careful planning prevent the beneficiary from entering poverty status before regaining eligibility for government benefits.³⁰⁹

The restrictions around access to public benefits draw attention to the importance of protective language in third-party SNTs.³¹⁰ Children and adults should have access to proper healthcare and benefits to maintain their quality of life.³¹¹

The arguments against the change of the current payback provisions of third-party SNTs state that the lack of mandatory requirements benefit families with disabled and non-disabled children.³¹² If the mandatory

300. See Ruthann Lacey & Heather Nadler, *Special Needs Trusts*, 46 AM. BAR ASS'N 2, 247–50 (2012), <https://www.jstor.org/stable/23526329> [<https://perma.cc/UCX2-C3QT>].

301. See *id.* at 248.

302. See *id.* at 250.

303. See *id.* at 248–50.

304. *Id.*

305. *Id.*

306. *Id.*; see generally *Protecting the Elderly and Incapacitated*, *supra* note 297, at 2 (detailing the reforms taken).

307. See Lacey & Nadler, *supra* note 300, at 247.

308. See *id.* at 248.

309. See *id.* at 247.

310. *Id.*; see generally *Protecting the Elderly and Incapacitated*, *supra* note 297, at 7 (explaining the implantation of a program to deter guardianship abuse and fraud).

311. See Lacey & Nadler, *supra* note 300, at 248–50.

312. See Simring, *supra* note 262, at 249–50.

payback provisions were imposed, the remaining trust assets would reimburse the state for any government benefits provided at the beneficiary's death.³¹³ However, without mandatory payback provisions, the remaining beneficiaries (or children) would receive the remaining trust assets after the beneficiary dies.³¹⁴ This does not require the settlor to estimate the lifespan of the beneficiary and how much money to place in the trust because they know the remaining balance will go to their other heirs.³¹⁵

A cost-benefit analysis concludes that mandatory payback provisions increase the benefit and security of disabled beneficiaries of SNTs.³¹⁶ Although requiring mandatory payback provisions could potentially reduce the amount other beneficiaries of an estate receive after the current beneficiary dies, mandatory payback provisions protect the state's public assistance programs.³¹⁷ The state's public assistance programs are refunded with the remaining trust assets when the beneficiary dies, allowing the Medicaid programs to continue supplementing SNT beneficiaries.³¹⁸ Therefore, even though the other beneficiaries may suffer and the remaining trust assets will go to the state, the settlor established the trust to protect and benefit the person with a disability, thus relying on strong state public assistance to help maintain the quality of life for their loved one.³¹⁹

This counterargument advocates for benefits on behalf of unnamed beneficiaries and imposes an unexpressed intent on the settlor.³²⁰ The third-party SNT aims to provide a sustainable quality of life for a child with a disability.³²¹ Provisions should protect the beneficiary, not benefit other unnamed beneficiaries.³²² Moreover, if the settlor intended for the remaining beneficiaries to receive the trust assets after the beneficiary's death, then that can be expressed in the trust instrument or another trust for the remaining beneficiaries to be established.³²³

313. *Id.*

314. *Id.*

315. See Lacey & Nadler, *supra* note 300, at 247.

316. See generally *Payback Provision*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/payback_provision#:~:text=A%2 (last visited Mar. 12, 2025) (explaining how payback provisions work) [<https://perma.cc/8PFM-WML9>].

317. *Id.*

318. *Id.*

319. *Id.*

320. See Lacey & Nadler, *supra* note 300, at 247.

321. See *id.*

322. Gregory Wilcox, *Trust Protectors for Special Needs Trust*, SPECIAL NEEDS ALL. (Aug. 2017), <https://www.specialneedsalliance.org/the-voice/trust-protectors-for-special-needs-trusts/> [<https://perma.cc/T3MV-AXJU>].

323. *Id.*

E. Ramifications of Limited Trustee Language in the Trust Instrument

Under the rules of professional responsibility governing the practice of law in each state, an attorney should exercise competence and due diligence.³²⁴ For the specialized field of SNTs, it is pertinent that an attorney exercises their duties in drafting or administering the trust.³²⁵

Competency and due diligence in the SNT field include knowledge of public benefit programs that beneficiaries with disabilities will need.³²⁶ This includes Medicaid, SSI, and the Social Security Administration's POMS.³²⁷ An evolving understanding of these agencies is essential because of various regional changes and constant amendments.³²⁸ Competency also involves knowledge, to a certain degree, of the medical needs of the beneficiary of the trust.³²⁹ Because most beneficiaries of SNT have long-term disabilities, the chances of their medical needs changing (progressing or regressing) are likely.³³⁰

1. Specific Trust Language Practitioners Should Use

Practitioners commonly use language within SNTs that can be adverse to the beneficiary.³³¹ The following provision is a standard clause used in third-party SNTs to outline the discretions of the trustee.³³²

The Trustee may, in the Trustee's sole and absolute discretion, amend this Trust to conform with subsequent changes in federal or state law or regulations established thereunder . . . to better effect the [Trust's] purposes The Trustee shall disclose any Trust amendment with the [following] annual accounting. Further, the Trustee may petition . . . a court with jurisdiction over the Trust, or to a court . . . where the Beneficiary lives, or where the Trust has property, for authority to amend the trust to better effect the purposes of the Trust.³³³

Provisions similar to the one outlined above are opposed to the beneficiary.³³⁴ When the trustee can amend the trust with detrimental provisions, a family member is more likely to capitalize on this discretion when they could benefit

324. *Id.*

325. *See* Simring, *supra* note 262, at 12–16.

326. Kevin Urbatsch & Michele Fuller, *The Future of Planning for Persons with Disabilities: What Challenges Will Arise?*, 4 NAELA J. 189, 190–91 (2013).

327. *Id.*

328. *Id.* at 191.

329. *Id.*

330. *See* Simring, *supra* note 262, at 27–30.

331. *Id.* at 4–5.

332. *Id.* at 29.

333. *Id.* at 35.

334. *Id.* at 36.

from subsequent amendments.³³⁵ These provisions should be protected against because they could lead to abuse and mismanagement of the SNT or the beneficiary.³³⁶

The modified provisions should be vested in the trust with a clause outlining a supplementary caregiver or trust protector if the designated trustee is determined to have acted adversely to the beneficiary's interest.³³⁷ Sample language that would vest modification power in a trust protector and better protect the beneficiary against adverse actions by the trustee would be drafted as the following clause:

The Trust [Protector] shall have the power and authority, in its discretion, to determine and direct the Trustee concerning payments to be made to or for the benefit of the Beneficiary during his/her lifetime. Notwithstanding any provisions of this instrument to the contrary, payments by the Trustee to or for the benefit of the Beneficiary shall be made only upon direction of the Trust [Protector]. In all respects other than the discretion granted to the Trust [Protector] to direct payments to or for the benefit of the Beneficiary, the Trustee shall have all the rights, titles, interests, powers, duties, and discretions in connection with the administration and management of the Trust.³³⁸

The above provisions exemplify how an attorney can draft a third-party SNT to protect the beneficiary by guarding against the broad discretion given to the trustee.³³⁹ The beneficiary in an SNT has a disability, and clauses such as the one above allow for a trust protector to make decisions if the disability requirements change, new medical advancements emerge, or the expenses of the medical care change.³⁴⁰ Overall, attorneys should be mindful of the language in an SNT, implement proactive language written in favor of the beneficiary, and account for any changes that could occur in their disability.³⁴¹

The trust should not contain provisions that the trustee or trust protector may, in their sole and absolute discretion, distribute all or portions of trust assets for the benefit of the beneficiary.³⁴² Instead, the designated trustee must have the appropriate authority, based on the trust instrument and statutory language, to make such distributions directly to the beneficiary's expenses.³⁴³ If the trustee has a reasonable belief that the SNT is no longer in the best interest of the beneficiary (the disability has regressed and the

335. *Id.*

336. *Id.*

337. *Id.* at 37.

338. *Id.* at 39–40.

339. Wilcox, *supra* note 322.

340. *Id.*

341. *Id.*

342. Wyman, *supra* note 141, at 385.

343. *Id.*

beneficiary gains independence), then the trustee may, with a court order, direct the SNT assets to another discretionary trust or other legal instrument, for the benefit of the beneficiary.³⁴⁴ This provision in a trust would include language like:

Distributions: If the trust terminates due to the Beneficiary's death, the Trustee shall distribute any remaining principal and income to the state as reimbursement for the supplemental benefits received by the Beneficiary. If additional trust assets remain after reimbursement, they should be distributed among the settlor's surviving beneficiaries.

Termination: This Trust shall cease and terminate upon the first of the following to occur: depletion of its assets; the death of the Beneficiary; or the contribution of the Trust assets (or a portion thereof) to another legal instrument for the benefit of the beneficiary.

Benefit Ineligibility: Notwithstanding anything to the contrary contained in the other provisions of this Trust, in the event the Trustee's discretion over the Beneficiary has the effect of rendering the Beneficiary ineligible for Supplementary Security Income (SSI), Medi-Cal, subsidized housing, or other, similar governmental benefits, the Trustee must rectify ineligibility and prevent any ineligibility in the future.³⁴⁵

There are also ethical considerations to adopting provisions that protect beneficiaries.³⁴⁶ Protective language is necessary because these individuals exercise little control over the management of their medical care, government benefits, or daily expenses.³⁴⁷ The federal acts and state legislation governing third-party trusts would better align with the legislator's intent of protecting trust assets and providing estate planning for individuals with disabilities if there were protective provisions within the legislation.³⁴⁸ Adopting protective provisions promotes consistent regulation, which increases long-term economic benefits.³⁴⁹ If trustees, beneficiaries, and attorneys do not have to go to court due to mismanagement of trust or abuse, then it lowers the cost paid by states and individuals for trust contests due to gaps in legislation and allows for better resource allocation.³⁵⁰

344. *Id.*

345. *See* Wilcox, *supra* note 322.

346. Urbatsch & Fuller, *supra* note 326, at 190–91.

347. *Id.*

348. *Id.*

349. Wyman, *supra* note 141, at 385.

350. *Id.*

2. Recommendations for Improved Trust Administration

All states require continuing legal education (CLE) for licensed attorneys.³⁵¹ It has been a part of the practice of law for over forty-five years, and each state, and even some law firms, require a certain number of recorded hours.³⁵² The purpose of CLE is to make practitioners more competent in their respective fields and improve ethical compliance.³⁵³

In elder law, SNTs are vital to the field.³⁵⁴ Practicing attorneys must understand when an SNT is appropriate and adequately manage the trust for the clients.³⁵⁵ Recently, CLEs on SNTs have increased in the advocacy for change and explanation of how attorneys can avoid pitfalls.³⁵⁶ However, attorneys must continue to do their due diligence and stay informed on how to draft third-party trusts, administer them, and protect the beneficiary's supplemental benefits.³⁵⁷ In addition, the drafting attorney must also understand the tax implications of their established trust.³⁵⁸ The public benefits directly affect the filing of income, thus affecting the recording of tax statements by the beneficiary.³⁵⁹

Because these requirements and provisions constantly change, the attorney's competence and diligence are essential for drafting an SNT.³⁶⁰ Overall, ongoing legal education enables the attorney to stay informed about evolving laws and policies, thereby helping to protect the beneficiary from malpractice or poorly drafted trusts.³⁶¹ The proposed language caters to several public policy considerations in estate planning.³⁶²

First, discretionary powers are granted to a trustee and the trustee must act in good faith, for the trust's purpose, and in the beneficiary's best interest.³⁶³ The proposed language adopts stricter guidelines for trustee selection and education, which offers a defense against future abuse by ensuring the trustee understands their responsibility, the consequence of abuse, and the beneficiary's disability.³⁶⁴

351. *State CLE Requirements*, US LEGAL, <https://cle.uslegal.com/state-cle-requirements/> (last visited Feb. 24, 2025) [<https://perma.cc/966K-UFJE>].

352. *See id.*

353. Britt, *Why is Continuing Legal Education Important?*, DESTINATION CLES (May 6, 2022), <https://destinationcles.com/2022/05/06/why-is-continuing-legal-education-important/> [<https://perma.cc/QS42-AVY9>].

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *See* Tobin, *supra* note 217, at 56.

359. *See id.*

360. Keith A. Stevens, *Beyond the Basics of Special Needs Planning—Part 2: Recent Updates*, 46 EST. PLAN. 3, 3–8 (2019).

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

Second, the language embeds provisions in the trust instrument that give the trustee and beneficiary an accountability structure.³⁶⁵ The payback provision requirements protect against trust breaches by safeguarding the beneficiary's interests and maintaining their government benefits and support while providing state-imposed liability on the trustee for inadequate administration resulting in trust property damage.³⁶⁶

Third, self-dealing by the trustee is detrimental to the beneficiary's well-being because their quality of life depends on the trust's proper administration.³⁶⁷ The language requiring mandatory distributions would combat self-dealing by decreasing the potential for the trustee to exploit the trust for personal gain.³⁶⁸

SNT planning is an essential, but often overlooked, aspect of estate planning.³⁶⁹ As the need for future planning for children with disabilities rises, a correlative increase in the need for a structured code that protects the beneficiary occurs.³⁷⁰ An SNT aims to improve the quality of life for the individual with a disability by making assets available to distribute for their needs and benefits.³⁷¹ However, the current legislative code does nothing to protect these individuals if an available plan is lacking.³⁷² It is an estate planner's duty to present the options to the client and execute due diligence in establishing a plan tailor-made for the beneficiary's disability or other future needs.³⁷³

IV. CONCLUSION

In Texas, approximately 13% of children experience long-term disabilities, equating to about 1.2 million children and counting.³⁷⁴ As this number continues to grow, so too does the demand for SNTs, which are critical tools for ensuring financial security and protecting the eligibility of individuals with disabilities for government assistance programs.³⁷⁵ Among the different types of SNTs, third-party SNTs are particularly common due to their flexibility and effectiveness in managing assets to benefit a loved one

365. Bernard A. Krooks & Andrew H. Hook, *Special Needs Trusts: The Basics, The Benefits, and The Burdens*, 15 ALI-ABA EST. PLAN. COURSE MATERIALS J. 247, 247–51 (2009).

366. *Id.*

367. *Id.*

368. *See id.*

369. Ronnie E. Webb, *Special Needs Trust Planning*, 31 GPSOLO 34, 34 (2014).

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Overview of Children with Complex Medical Conditions*, TEX. HEALTH & HUM. SERVS. (2019), <https://www.txhealthsteps.com/static/courses/PPECC-CE-21/sections/section-1-2.html> [<https://perma.cc/93VC-8V3H>].

375. *Id.*

with special needs.³⁷⁶ However, as the number of individuals requiring such trusts increases, it is crucial for the governing statutes to evolve accordingly to meet the changing landscape and address the unique needs of beneficiaries.³⁷⁷

Currently, the statutory language surrounding third-party SNTs is inadequate and often fails to reflect the settlor's intent properly.³⁷⁸ The laws, as written, do not always provide the clarity and precision needed to ensure that these trusts operate as intended.³⁷⁹ In particular, the existing language is often vague, leaving room for potential misinterpretation and misuse.³⁸⁰ This gap in the legal framework can lead to situations where beneficiaries are vulnerable to mismanagement by trustees who may not fully understand or adhere to the specific requirements of the trust.³⁸¹

Given that beneficiaries of these trusts depend heavily on the trust assets for their day-to-day living and access to necessary medical care, it is imperative that the language governing these trusts be made more stringent.³⁸² Without more transparent statutory protections, trustees may inadvertently or intentionally misuse the assets, jeopardizing the financial stability and well-being of the beneficiary.³⁸³ Moreover, beneficiaries often rely on government assistance programs, such as Medicaid, which can be affected by improper distributions or mismanagement of trust funds.³⁸⁴ Thus, a misstep in the administration of an SNT can have far-reaching consequences, putting the assets and the beneficiary's access to essential services at risk.³⁸⁵

Legislative reforms that include stronger language and more robust safeguards must be introduced to address these challenges.³⁸⁶ Such reforms should focus on providing greater transparency, outlining clear fiduciary duties for trustees, and ensuring that trust documents are drafted in a way that leaves little room for ambiguity.³⁸⁷ Additionally, more stringent monitoring and enforcement mechanisms could be put in place to prevent abuse and to

376. *Id.*

377. *Id.*

378. *Id.*

379. *See Webb, supra* note 369.

380. *Id.*

381. *Id.*

382. *Id.*

383. *See How to Handle Misappropriation of Trust Funds by the Trustee: Common Trustee Embezzlement Scenarios*, KEYSTONE L. GRP., P.C., <https://keystone-law.com/misappropriation-of-trust-funds-by-the-trustee> (last updated Oct. 30, 2024) [<https://perma.cc/XP4N-HLYS>].

384. *See The Importance of a Special Needs Trust: Protecting Government Benefits for Beneficiaries: Safeguarding Public Benefits with a Special Needs Trust*, MASTERY LEGAL SOLS., PLLC (Dec. 6, 2024) <https://www.masterlylegal.com/the-importance-of-a-special-needs-trust-protecting-government-benefits-for-beneficiaries> [<https://perma.cc/XP4N-HLYS>].

385. *See generally* Simring, *supra* note 262, at 57 (describing the ways that drafting can impact a beneficiary).

386. *See Webb, supra* note 369.

387. Author's original thought.

guarantee that the settlor's intent is faithfully followed.³⁸⁸ In this way, the legal framework for third-party SNTs can be strengthened, providing a more secure future for individuals with disabilities and protecting their access to both private and public resources.³⁸⁹

By updating and refining these statutes, Texas can ensure that its growing population of individuals with long-term disabilities is supported in a manner that is both effective and respectful of their unique needs.³⁹⁰

388. *Id.*

389. *Id.*

390. *Id.*