



National Academy of
Elder Law Attorneys, Inc.

Trusts & Special Needs Trusts Section Newsletter

CHAIR RICHARD A. COURTNEY, CELA • FALL 2010

Message from the Chair

By Richard A. Courtney, CELA

TRUST MATTERS

In a recent essay sent to my e-mail list, I expressed my disappointment (despair?) at the antagonistic tone of public conversation lately — the “us vs. them” dynamic that seems particularly pervasive in politics these days.

And while it may not have a wide-reaching effect on this problem, I found a recent article to be a helpful statement on this topic. Dr. Eric Thomas Weber, Assistant Professor of Public Policy Leadership at the University of Mississippi, wrote the piece “Choosing Civility” in our state’s largest newspaper. He noted the current of incivility in America and set out Three Moral Tenets of Civility (along with examples of each).

“The first rule of civility calls for open and intelligent public debate by means of respectful communication. This rule is broken when people falsify information or inflame the public against understanding groups who disagree.... The second tenet of civility demands respect for fellow citizens — that we see them as stakeholders and sources of insight about what keeps democracy afloat. One way to break this second rule is to demonize opposition.... The third rule of civility calls for respect for public institutions. In the heat of the moment, it can be difficult to accept the slow bureaucratic processes of the courts, but public institutions do something very important when they slow us down.

They force us to wait, to allow anger to cool, and to let reason take over. Time and calmness are needed for intelligent thought and discussion.”¹

The word “trust” came to mind as I read this article. In order to find solutions to problems about which others have different ideas, we must trust that they have something useful to contribute. In short, we must trust *them* for collaboration to be effective. I believe that NAELA, including this Section, is founded on trust.

NAELA member attorneys contribute great amounts of time and experience to enhance the abilities of all members in serving clients. We trust other members to be willing to reciprocate to our contributions with information, forms, and ideas for drafting and advocacy on myriad issues. And fellow members have never disappointed me when I needed something to improve my practice and knowledge base. I hope you will contribute to the work of the Trusts & Special Needs Trusts Section when you can — with articles on trust issues or suggestions for telephonic or conference presentations. Let us know your ideas about ways to improve your practices. After all, Trusts Matter — and Trust Matters. ■

¹ Weber, *The Clarion-Ledger*, pp. 8B-9B (September 19, 2010).

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SECTION STEERING COMMITTEE

Planning Options with Retirement Benefits

By Ken Shulman

Retirement assets increasingly make up a significant portion of many individuals' wealth. If an account or plan beneficiary is receiving means-tested public benefits, the beneficiary's continued eligibility for benefits such as Supplemental Security Income (SSI) and Medicaid will be jeopardized. This article discusses the planning options available to retirement account owners, primarily parents, to shelter these assets for their children who receive means-tested public benefits.

With fewer employers offering a defined pension benefit (payments of a specific monthly sum to the retired worker), most retirement nest eggs now consist of 401(k) or 403(b) plans and IRAs. When passing these assets on to their children through their estate plans, parents and their lawyers must contend with the convergence of several competing interests, including public benefits issues, taxes and charitable intent.

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See http://www.forbes.com/2007/05/30/ira-disabilities-trusts-pf-estates-in_es_0530money_inl.html.

It is important to remember that retirement benefits are not controlled by your will. Rather, their disposition is controlled by the beneficiary form you filled out in association with the retirement plan. For example, if your will states that you leave all your assets to Neal, but your IRA beneficiary form names Emily as beneficiary, Emily will receive your retirement assets. We often see situations where parents have created wills and a special needs trust for their child with a disability but have neglected to revise their beneficiary designations so that the child's share goes to a special needs trust. It is not uncommon to see a situation where a parent has designated his spouse as primary beneficiary of his retirement plan and his three children as contingent beneficiaries. If one of those children is receiving public benefits, the parent has created a significant and unnecessary problem that can easily be avoided.

THE BASICS

- SSI and Medicaid have asset and income limitations. Leaving retirement funds directly to a person receiving these benefits will almost always disqualify the beneficiary from receiving SSI and Medicaid.
- Most retirement funds consist of tax deferred assets. Generally, the employee receives a deduction for contributions made to the retirement fund. However, when distributions are made from the funds, they are taxed at ordinary income tax rates.
- Roth IRAs consist of previously taxed assets, and distributions come out tax-free.
- The Internal Revenue Code requires mandatory distributions from retirement funds when the owner reaches 70½ years of age. A person can choose to begin receiving distributions without penalty at age 59½.
- When the owner of a retirement plan dies, special rules mandate at what rate an inherited retirement account must be paid out to the beneficiary. These complicated rules about inherited retirement

plans make planning with them particularly challenging when the beneficiary receives means tested public benefits. These include:

- Retirement funds left directly to an individual may be stretched out over the beneficiary's life expectancy to preserve some of the income tax benefits offered by the retirement account. This is attractive from an income tax perspective, but this is not an option for a beneficiary receiving means tested benefits because direct receipt of the funds will usually disqualify the person from receiving benefits.
- If retirement funds are left to a trust for the benefit of a beneficiary, the favorable tax treatment can be preserved if the trust provides that all of the retirement account's annual required minimum distribution is to be paid out to the beneficiary each year. Such a trust is sometimes referred to as a "conduit trust." Unfortunately, a conduit trust will not preserve eligibility for means tested benefits because of the mandatory distributions to the beneficiary.
- Because a special needs trust is a discretionary trust, not a conduit trust, another subset of rules applies, the most important of which is that the age of the oldest beneficiary, either the special needs beneficiary or any contingent beneficiary, will be the measuring life for determining the rate at which retirement funds must be distributed to the trust and, therefore, taxed. For instance, assume that Jack is the primary beneficiary of a special needs trust that is the beneficiary of an IRA from his deceased father. Also assume that Jack receives SSI and is 35 years old. The special needs trust provides that at Jack's death any remaining funds in the trust will go to his sister, Sarah, who is 52. The result is that Sarah's age will be the measuring age for determining at what rate the payments from the retirement account must be distributed to the special needs trust. Since Sarah is older than Jack, the IRA must be distributed over a shorter period of time

than if Jack's age was used to determine the distribution rate.

- Another important rule is that all beneficiaries of a trust that receives an inherited retirement account must be individuals in order for the trust to be entitled to receive funds from the retirement account on a stretched out basis. If any beneficiary is not an individual, then the retirement funds must be paid out within five years. Importantly, a charity is not an individual for retirement plan purposes. If Jack's special needs trust provided that at Jack's death any remaining funds would be distributed to United Cerebral Palsy instead of to his sister, the distributions from the retirement fund to the special needs trust would have to be made over a five year period rather than over Jack's life expectancy. Since parents often want the organization or organizations that cared for their child with a disability to receive the remaining funds in the special needs trust, this can be problematic.

SOLUTIONS

When applying these basic rules about retirement benefits to planning in the special needs area, there are several conclusions that we can draw. First and foremost, and worthy of repetition, do not name your

special needs child directly as a beneficiary of a retirement plan if your child may need SSI or Medicaid, or other benefits such as Section 8 assistance or food stamps. The distributions from the retirement account will either reduce the entitlements or eliminate them entirely. Instead, if you want your child to receive your retirement benefits, the named beneficiary on the account can be the special needs trust for your child. Even so, this trust should contain special provisions not typically found in special needs trusts to insure the most favorable stretch-out and tax treatment discussed above. Consultation with a qualified expert is critical.

Second, pay attention to the remainder beneficiaries in the special needs trust. In the example where Jack is 35 and his sister is 52, the funds will be distributed over the sister's life expectancy using the applicable IRS tables. This means that the funds will have to be taken out over a shorter period of time, thereby reducing the time during which the assets could continue to grow tax free. It also means that more income taxes may have to be paid by the special needs trust than if receipt of the retirement fund could be stretched out over a longer period. The result is even less favorable if a charity is named as the contingent beneficiary, which would require the funds to be distributed to the special needs trust within five years, resulting in large tax payments by the trust

and reduced opportunities for growth.

Third, given these complexities, parents should consider the possibility of leaving their retirement benefits to children without disabilities and leave other assets — cash, stocks, real estate, insurance, etc. — to the special needs trust. Leaving non-retirement assets to the special needs trust avoids the unsatisfactory consequences associated with the shorter pay-out required when the special needs trust names an older contingent beneficiary or where the parents would like to name a charity as a beneficiary of the trust. The retirement funds left to the children without disabilities can be stretched out to the extent permitted by law, and more of the favorable tax treatment and opportunities for tax deferred growth can be maintained. While Roth IRAs do have mandatory annual distributions, they are not taxable to the beneficiary. Accordingly, the Roth IRA may be a good choice for funding a special needs trust, especially if the IRA names other individuals relatively near in age to the child with disabilities as the successor or contingent beneficiaries.

In any case, consulting a special needs lawyer who understands special needs entitlements, estate and income taxes and the rules regarding distributions from retirement plans is crucial when planning for the proper disposition of retirement assets for children with disabilities. ■

What Does the New Health Care Reform Law Mean to Your Clients?

NAELA offers seven new brochures designed to help you explain what the new health care law means to them. Each brochure can be personalized with your contact information on the back panel.

- The CLASS Program
- Implementation Timeline
- Provisions for Long-Term Care at Home
- How Does Health Care Reform Affect Medicare?
- An Overview of Major Provisions
- Health Care Reform and People with Special Needs
- Nursing Home Improvement and Prevention of Elder Abuse

For more information, go to www.NAELA.org, or call 703-942-5711.



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Living Trust Scams — 12 Red Flags

Part 1

By H. Amos Goodall Jr., CELA

Living trust scams have reached epidemic proportions in the United States. Trusts are property management and distribution plans created by contracts by which a person (called the “Settlor”) directs someone (called the “Trustee”) to manage assets for the benefit of other persons (called the “Beneficiaries”).

Historically, a Settlor names a bank or some third party as Trustee to manage property for the benefit of another person, but there is no requirement that there be three different entities involved, and some estate planning advisers recommend that persons set up trusts which can be changed, with themselves as trustees and for their own benefit and for their heirs on their deaths, as a method of avoiding probate. This is called a revocable *inter vivos* trust, popularly a “Living Trust.”

The next 20 years will see the greatest private transfer of wealth in the recorded history of the world, as the estate plans (and non-plans) of persons raised during or in the aftermath of the Great Depression “mature.” The values of hard work and frugality have created middle class estates unimaginable in other times. Privately controlled tax deferred plans such as IRAs and 401(k)s have added many more dollars to the mix.

Now that time-share resort area sales and other schemes are tightly regulated, many hucksters are turning to the sale of living trusts, often playing on the false perception that traditional estate planning favors only lawyers and tax collectors. Moreover, if they can combine living trust packages with sales of questionable annuities or otherwise tie up the customers’ assets, these charlatans can siphon off most of peoples’ hard earned capital.

According to New York Attorney General Eliot Spitzer, “High pressure sales pitches for living trusts are surfacing ... across the country. Unscrupulous living trust sales people charge elderly consumers thousands of dollars for what amounts to a set of pre-printed legal forms. In many instances, because all seniors are sold the same package, the living trust itself may be ill-suited or even contrary to these consumers’ estate planning needs.”

Living trusts can be valuable estate

planning tools, especially where there is real estate owned in a state other than the client’s residence or in states with cumbersome probate procedures in families where there is no controversy among the generations. In other situations, such as states with more streamlined probate procedures where there is general agreement among the heirs, living trusts can actually have disadvantages over traditional wills for estate planning, although there may be other reasons to use living trusts.

It often takes detailed professional analysis to tell the difference. As California Attorney General Bill Lockyer wrote, “Planning an estate and choosing investments involve important legal, financial, and personal decisions. If estate planning documents are not properly prepared or executed they can cause lasting damage.”

Regardless of the merits of the debate, the same folks who sold uranium stocks and mink farm sales in the 1950s, swampland in the 1960s and time-shares and pyramid marketing plans more recently have moved into this field with a vengeance.

And why not? Slick sales teams can blow into town (or part of a city), sell a bunch of personalized binders with thick pages and big legal-sounding words and move on to the next town. The buyer will probably never find out that he or she has been sold something worthless; it’s their heirs who suffer. By that time, the buyer has died, and the villains are long gone to another town or another state or using another name to sell another scheme. Moreover, if these con artists can also sell investment plans to consumers, this allows them to control the money, such as a low grade annuity or a trust naming some secret affiliate as trustee without permitting modification of this assignment, they can control the buyer’s money forever, collecting fees and commissions until it is all gone.

According to the Federal Trade Commission, “[m]isinformation and misunderstanding about probate and estate taxes provide a ripe environment for scam artists to prey on older consumers’ fears that their estates will be eaten up by costs, and that distribution of their assets to loved ones

will be long delayed. Some unscrupulous businesses advertise seminars on living trusts or send postcards inviting consumers to call for in-home appointments, ostensibly to learn whether a living trust is right for them. A common practice is to greatly exaggerate the benefits of living trusts and falsely claim that locally-licensed attorneys will prepare the documents. In others, the offer of estate planning services is merely a ruse to gain access to consumers’ financial information and to sell the other financial products such as insurance annuities.”¹

In the author’s experience, the following characteristics are hallmarks of possible scams. Each of the following may have legitimate uses, but all should red raise flags to a consumer and suggest that the consumer run, not walk, to get a second opinion.

FIXED PRICE SERVICES

Often living trust packages are offered at a fixed price, usually around \$2,000 in central Pennsylvania. In Florida, a firm was prosecuted several years ago, and charged with using deception and scare tactics to market living trusts and related documents for a minimum cost of \$1,895, according to a press release from the office of the Attorney General.

Unfortunately, obtaining a folder (or even an expensive notebook) containing a legal document is not like buying a carton containing a dozen eggs. Estate planning is a professional service provided, not a product manufactured. Since each family’s estate planning needs are different, anyone who offers this complex service without first discussing the person’s needs should be viewed with suspicion.

According to testimony before the United States Senate, at least one traveling trust package sales company offered its agents 30 percent of the package price as sales commissions, even though the sales persons offered no professional services as part of the process.

1 Official Statement of the Federal Trade Commission on Living Trust Scams before the Special Committee on Aging of the United States Senate. July 11, 2000.

PERCENTAGE BASED SERVICES

Some charlatans charge for living trust packages based on the size of their buyer's assets. While it is usually true that larger estates will be more complicated and more expensive to set up than smaller estates, each case needs to be analyzed on its own merits. The estate of a widow with healthy children consisting of five \$100,000 certificates of deposit will not be five times more difficult to set up than the \$75,000 estate of a married couple with young or disabled children and assets in several different accounts including IRAs. If someone offers to sell a living trust package, with a published price based on the size of the estate without considering individual needs, it should be viewed with suspicion.

NO LOCAL OFFICE

Many trust schemers descend on a town, like snake oil salesmen of yesteryear, with newspaper, radio and television advertising, renting a local hall or suite in a local motel. Others go door to door in neighborhoods or make "cold" telephone calls seeking prospects. Living trusts are not new, and there is no part of the United States that does not have competent, professional estate planners. While seminars are legitimate ways

for professionals to disseminate information about their services, there is no reason to come from outside the area to do so. Having no local office prevents the consumer from investigating the character and reputation of the seller. In addition, estate planning is an ongoing endeavor, as a client's needs and plans change. Someone from a remote location will be unable to assist in making these changes and may not be able to be found at all if there are problems with the work.

BUNDLED SERVICES

According to the office of Idaho Attorney General Alan Lance, "Under the guise of gathering financial information to design the trust or to aid in funding the trust, most agents acquire lists of all assets owned by the consumer in the course of the sale right down to bank account numbers and interest rates on CDs. Insurance companies are conducting seminars around the country for their agents on how to use living trust sales as a prospecting tool for the more lucrative insurance and annuity sales."

Even some legitimate financial organizations are touting living trusts naming themselves or their captive trust companies as trustees in order to keep collecting high fees year after year. Therefore, if, during the

discussion of a living trust you are offered other services, be suspicious. Estate planning and investment counseling require different knowledge and skills, and if the two are not independent, there is always the danger that someone is being steered to the agency offering the biggest profit to the person making the recommendation rather than the best suited for the client's immediate needs.

HIDDEN, UNDISCLOSED PROFESSIONALS

Writing a living trust document for an individual in many states can constitute the performance of legal services. As a result, most living trust salespeople promise that an attorney reviews the documents. If they can't tell you who the attorney is or if the attorney's office is so far from your home that you cannot find out (without the salesman's help) whether the attorney actually exists and is reputable, you have no way to judge the quality of documents. You also cannot be sure that the plan actually meets your individual needs or if, even, the documents follow the legal requirements of the consumer's state.

EXTRAVAGANT PROMISES

According to both the Better Business Bureau and the Federal Trade Commission,

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“It’s not uncommon for the salesperson to exaggerate the benefits . . . of the living trust.”

The Consumer Law Organization summarized some of these false claims as “overstatement of the length and cost of probate, misrepresentation as to the tax advantages of living trusts, false claims that sales people are attorneys, misrepresentation as to what is required to establish a living trust, and false claims that creditors cannot go after properties in a living trust.”

A properly drafted and funded living trust generally does not reduce taxes to any greater extent than a properly drafted will. It is less clear whether a living trust may reduce the other expenses resulting from your death, and many independent advisers discount any substantial savings on completing the administration of a trust estate over a probate estate. You need to be clear on how these other expenses will figure in your case.

Finally, so long as there is complete agreement among heirs, most assets can be distributed as rapidly following the probate of a will as they can from a trust. These are all factors which can vary case by case and

you should speak with someone experienced in this area before retaining a professional to prepare your estate plan. A living trust will not save everyone money, and anyone who unconditionally promises that a living trust will save money should be viewed with suspicion.

None of these red flags alone mean that you’re being defrauded. But each one should cause you to take a closer look at the product you’re being sold.

In the spring 2011 issue of the newsletter, we will look at the next six red flags. ■

Articles published in this newsletter may be state-specific. While laws vary from state to state, we recognize that there may be valuable procedural information contained that would be helpful to members in other states.

Your NAELA Staff



NAELA staff members can help you with any questions you might have about your NAELA membership, events, publications, public policy, etc. Here’s a brief summary

of who to contact, but know that any staff member can assist you with your questions or get your call or e-mail to the right person for a prompt response.

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Implementing Trusts in Veteran Benefits Planning

By Randy E. Drewett, CELA

*"If you are confused, then you understand; If you think you understand, then you are confused."*¹

INTRODUCTION

Those of us who practice Elder Law often have our roots in either social services or estate planning. The same is true of attorneys who are now expanding their practice to include veterans benefits law.² Traditional estate planners usually emphasize the estate tax and asset protection implications of testamentary planning, often to the neglect of potentially disabled beneficiaries whose public benefits may be significantly negatively impacted by a direct bequest or even a bequest in the form of a support trust. While organizations like NAELA and Stetson University College of Law have brought the importance of Elder Law and disability planning to a position of increasing prominence, only a handful of attorneys are aware of what type of benefits are available to veterans and under what circumstances testamentary planning may cause a loss of benefits.

Until recently, much of the representation of veterans by attorneys has been done on a pro bono basis. Organizations including the National Veterans Legal Services Program (NLSP), The Veterans Consortium Pro Bono Program and National Organization of Veterans Advocates (NOVA) have undertaken the leadership role to represent, advocate and educate on behalf of our veterans. The absence of attorneys practicing in the area of veterans benefits law can be traced directly to the fact that lawyers cannot charge a fee for representing a veteran in applying for benefits.³

Indeed, to accept a fee at the wrong stage of a veteran's case is a federal criminal offense.⁴ While attorney representation rules have changed since the passage of some new laws by the 109th Congress in 2006 (effective on June 20, 2007), most attorneys — even Elder Law Attorneys — know little about veterans benefits law.

While Elder Law Attorneys always ask such questions as: "Are any of your children or grandchildren disabled or receiving SSI?" my experience has shown that few attorneys include similar questions regarding service as a veteran, potential service-related disabilities or receipt of veterans benefits. Becoming more knowledgeable in this field will not only help prevent potential loss of benefits by a beneficiary who is also a veteran, but may also open a new source of clients and the option to expand one's practice.

SPECIAL NEEDS TRUST PLANNING

Benefit programs for the elderly and disabled vary significantly, as do the tools which may be utilized to obtain eligibility. Attempting to use the wrong tool for a specific facts situation is like trying to fit a round hand grenade into a square hole: It won't work and will probably explode in the process.

Elder Law Attorneys use trusts as planning tools to assist the client in acquiring or maintaining public benefits which would otherwise be denied to the client if he or she owned - or could access - the assets outright, in the beneficiary's individual capacity. Trusts are used to define or limit both countable income and countable resources for public benefits eligibility. If an applicant receives too much income or owns assets of too much value, that individual will not qualify for the public benefit program.

As a general rule, disability planning with trusts applies only to "means tested" programs. In order to facilitate eligibility

for public benefits, trusts may be used to limit countable income or to limit countable resources. As described in more detail below, individuals who are aged, blind or disabled and who have few assets and low income may qualify for public benefits which they need but cannot afford. The primary benefit is health care, through Medicaid. SSI recipients also receive monetary benefits.

The trusts most often utilized by Elder Law Attorneys are referred to as "Special Needs Trusts."⁵ These trusts — which most of us call SNTs — are divided into two primary types: Self-settled or Third-party.

"Self-settled" trusts are trusts which are funded with the beneficiary's own property and are governed by specific statute.⁶ These trusts are often referred to as a "d4A trust." The d4A SNT must be created by a parent, grandparent, guardian or a court, but the property funded into the trust belongs to the beneficiary. An example would be a typical SSI case where an individual becomes totally incapacitated due to a medical mistake and a malpractice suit results in a substantial recovery. The money recovered belongs to the plaintiff individually. The fact situation may call for the creation of a SNT, and may be created by the court in which the suit is pending. The trust is funded with the recovery from the law suit which would otherwise belong to the beneficiary. Therefore, the trust is "self-settled" because the money belonging to the beneficiary has been used to fund a trust to benefit the owner of the assets conveyed into the trust.

"Third-party" trusts are trusts which are funded with property owned by someone other than the beneficiary. An everyday example is a parent who leaves assets to his child in trust under the terms of the parent's will. In this case, the money belongs to the parent. The parent has no obligation to leave the property to the child. The parent chooses to create a trust under his will. Therefore, the trust is 1) testamentary, 2) irrevocable and 3) third-party — funded with money belonging to the parent, not property belonging to the beneficiary.

1 Kenneth M. Carpenter, Esq., quote during presentation at 2006 NAELA Symposium, "Veteran's Services Available for the Elder or Disabled Client / Obtaining Income through the VA to Help Pay for Long-Term Care Expenses."

2 Veterans benefits law is codified in Title 38 of the United States Code (U.S.C.) and the applicable regulations are found in Title 38 of the Code of Federal Regulations (C.F.R.).

3 Under the Veterans Judicial Review Act of 1988, which created the court now known as

the Court of Appeals for Veterans Claims, a veteran could hire an attorney only after the first final Board of Veterans Appeals (BVA) decision, or for work in a court (most of the veteran's case is at the administrative level, rather than in a court).

4 38 U.S.C. §5905.

5 Some prefer to use the term "Supplemental Needs Trust."

6 42 U.S.C. §1396p(d)(4)(A).

Generally speaking, SNTs are used to be the recipient of assets to be managed for the benefit of an elderly or disabled individual in order to maintain the public benefits being received by that individual; when, but for the SNT, receipt of such assets would render the individual ineligible to receive the benefits.

SNT PLANNING TO MAINTAIN VETERAN BENEFITS

Elder Law Attorneys know from experience with Medicaid and SSI that an unplanned receipt of assets can have an adverse effect on the benefits being received which may disqualify the individual from public benefits eligibility. The same is true for a veteran receiving Pension benefits. For example, the receipt of an inheritance which increases the net worth of a veteran above the \$80,000 threshold will disqualify the veteran from receiving pension benefits in the same manner as it will disqualify the Medicaid or SSI recipient.

Since assets passing into a SNT are not considered as a "countable resource," just as we implement third-party SNTs in testamentary planning for testators with beneficiaries who are disabled, we should determine if any such beneficiaries are veterans whose circumstances indicate that the use of a SNT is appropriate to protect their current or future veterans benefits. Likewise,

personal injury attorneys contemplating a settlement should inquire not only as to the disability status of the plaintiff, but also as to the veteran status to determine if veteran Pension benefits might be available to the client.

While third party SNT planning for VA benefits planning is generally accepted, implementation of a self-settled SNT will likely be met with resistance by the VA.⁷ The SNT trustee cannot distribute cash⁸ to the veteran, but can pay some expenses and purchase goods and services that the veteran

7 There appears to be no consensus regarding how a self-settled SNT will be treated for the purposes of pension qualification. The VA clearly considers any resources funded into the claimant's d4A trust to be included in the veteran's net worth calculation. VAOPGPCPREC 33-97; VAOPGPCPREC 73-91; Barton F. Stichman and Ronald B. Abrams, Ed., *Veterans Benefits Manual* (NVLSP 2009), at 439. Barbara Isenhour takes the opposite view in the November 2007 issue of "The Voice" published by the Special Needs Alliance" where she states: "Whether the special needs trust is funded with assets from friends and family members or funded with your own assets, the special needs trust will protect your Pension benefits and protect the funds in the trust to supplement the Pension benefits." *The Voice*, Vol. 1, Issue 4 (Special Needs Alliance 2007).

8 Cash distributions offset Pension benefits dollar-for-dollar. *See* Isenhour, *supra*, at 1.

cannot otherwise afford on the statutory pension income. This might include the purchase of an exempt residence or vehicle.⁹ Utilizing a "support trust" in an effort to accomplish these planning goals will not work. Specific cases have held that assets administered in a support trust are countable as available for the support needs of the veteran. The attorney must be familiar with the difference between a SNT and a support trust.¹⁰

Finally, it is good planning to recommend that any client also inform other family members about the importance of SNT planning if they intend to name a disabled or veteran relative (such as a grandchild) as a potential beneficiary under their will or living trust.¹¹ ■

9 *Id.*

10 Randy Drewett, "The Anatomy of a Third-Party Special Needs Trust" (University of Texas CLE, Special Needs Trusts Course - May 2007) for a discussion of the differences between SNTs and the various types of traditional support trusts.

11 For more information on these and other veterans topics, visit the following websites: (1) National Organization of Veterans Advocates (www.vetadvocates.com); (2) National Veterans Legal Services Program (www.nvlsp.org); (3) Veterans Consortium Pro Bono Program (www.vetsprobono.org); and (4) The VA WARMS Manual (www.warms.vba.va.gov).

Call for Articles

The Trusts & Special Needs Trusts Section Steering Committee hopes you enjoyed this issue of the section's newsletter. Our goal is to continue providing articles of interest on current issues, and we would like to feature articles written by section members. The newsletter is published twice a year: in the fall and in the spring, and we need articles that are between 700 and 1500 words in length. If you have an article you would like to share with all of the section members, please send it to Richard A. Courtney (rcourtney@frascourtlaw.com) and Meredith Hansen (mhansen@naela.org).

A Good Half-Dozen Caregiving Provisions for Special Needs Trusts

By Richard A. Courtney, CELA

A primary purpose of both self-settled and third-party special needs trusts is to keep the trust assets and disbursements from disqualifying the disabled beneficiary for Medicaid and/or SSI benefits. However, another essential purpose is to provide effective management of the trust assets so as to best meet the needs of the beneficiary. The most effective trustee will be responsive to the needs of the beneficiary through communications with the beneficiary or beneficiary's responsible family members or caregivers, coupled with instructive guidance in the trust instrument. This article describes a half-dozen trust provisions that may help assure the trustee has sufficient authority to meet the on-going needs of a special needs trust beneficiary.

PERMITTING FAMILY MEMBERS OR OTHERS TO OCCUPY TRUST PROPERTY

The disabled beneficiary will often reside in the same household with other family members who provide assistance and daily services to the beneficiary. The trust may be the largest source of funds in the beneficiary's family, particularly if it is funded with a substantial gift, life insurance benefit or lawsuit settlement, and the trustee may determine that it is in the beneficiary's best interest to purchase an accessible home for the beneficiary. However, SSI and Medicaid law and policy require that, in order not to count as a resource of the beneficiary, the trust must be for the "sole benefit" of the beneficiary. Even so, it is advisable to give the trustee discretion to permit the beneficiary and other family members or caregivers to reside in property owned by the trust on such terms as the trustee deems proper, whether rent free or in consideration of payment of taxes, insurance and maintenance, or otherwise. This may ensure that the beneficiary continues to receive the care and support from family that will keep him/her as independent as possible in a private home. The specific terms of any such permitted living arrangement and payments from the other occupants is dependent on the particular circumstances and state Medicaid rules and must be customized for each situation.

AUTHORITY TO MAKE A DISQUALIFYING DISTRIBUTION

Both types of special needs trusts will give the trustee sole discretion to make distributions to meet needs of the beneficiary not covered by SSI and/or Medicaid. It may also be wise to include a power to make any discretionary distribution for the benefit of the beneficiary that may have the effect of reducing or terminating the beneficiary's governmental benefits if the trustee determines that it would be in the beneficiary's best interest to do so. Public benefit payments may be insufficient to fully meet a need of the beneficiary. For instance, the beneficiary's monthly SSI payment may be insufficient to pay the cost of adequate housing and food. The trustee may determine that, in order to meet such a need, the trust should pay the monthly rent, utilities and food costs for the beneficiary, even though this would reduce the beneficiary's SSI payment by one-third. Without such authority, the trustee may be reluctant to make such payments and the lifestyle of the beneficiary may suffer.

CONSULTATION WITH PROFESSIONAL ADVISORS

The trustee should be instructed to, at least annually, consult with legal counsel regarding the appropriate trust administration and public benefits rules that apply to the trust. Counsel should review the trust distributions and expenditures to assure that public benefits eligibility of the beneficiary is not jeopardized by the actions of a trustee who is not well-versed in such rules. This will allow quick correction of an inadvertent improper disbursement practice or other action by the trustee and will prevent the accumulation of a large demand for repayment of public benefits paid in error. The trustee should also be instructed to use resources of the trust estate to employ investment counsel to develop the most appropriate investment policy for the particular trust estate and on-going needs of the beneficiary. For instance, a beneficiary with high recurring medical expenses may be better served by investment of trust property in current income-producing securities, while a ben-

eficiary with a modest trust estate and long life expectancy may benefit for a longer term from investment in growth securities.

PERIODIC EVALUATION OF BENEFICIARY

The trustee should be directed to arrange for annual or more frequent evaluation of the beneficiary's living arrangement and social, recreational and medical needs. The trustee or its agent should visit the beneficiary at his/her residence to assess the treatment given to the beneficiary by caregivers and to assess needs that can be met from the trust. Such needs would include: physical condition; educational, residential, vocational and training opportunities; recreational, leisure and social needs; appropriateness of existing program services; and the availability of governmental financial assistance and private contractual benefit programs.

APPOINTMENT OF A TRUST ADVISOR

It is often a good idea to appoint a third-party Trust Advisor (or Trust Protector or Advisory Committee), particularly where the trustee is unrelated to the beneficiary and has little knowledge of the beneficiary's needs or is unsophisticated in the performance as a trustee. The Trust Advisor's function may be to (a) monitor the trustee's responsiveness and remove and replace a non-performing trustee; (b) determine the appropriateness of retaining or obtaining certain public benefits for the beneficiary and the effects of trust disbursements on such benefits; (c) amend the trust for purposes of complying with the original intent and with changing laws and rules pertaining to such trusts; and/or (d) review and approve investment policies proposed by the trustee. A Trust Advisor may be a single person or committee of persons who are intimately familiar with the beneficiary and his/her needs but who is not qualified to serve as trustee.

TRUST TERMINATION UPON CESSATION OF PUBLIC BENEFITS

The beneficiary of a special needs trust may become ineligible for SSI and/or Medicaid assistance as a result of improved health condition or obtaining a job or

income that exceeds the benefit program's income limit. In such a situation, maintaining the more restrictive "special needs" limitation on disbursements would no longer be beneficial for the beneficiary and would possibly deprive him/her from greater provision from the trust. For this reason, it may be advisable to include a provision authorizing the trustee to terminate the trust if such circumstances arise. This termination could be without any court approval in the case of a third-party trust. However, since the law governing a self-settled trust requires a Medicaid pay-back upon the death of the beneficiary and most state Medicaid agencies will attempt to assert such pay-back right upon earlier termination of the trust during the beneficiary's lifetime, caution may dictate that such provision permit such termination only upon court approval and after notice to Medicaid of such petition. Further, the 2009 amendment to SSI policies pertaining to self-settled special needs trusts at POMS SI 01120.199.F.1 states:

"For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted

from the resource counting rules at Section 1613(e) of the Act unless it satisfies either the requirements in Section 1917(d)(4)(A) or (C). Additionally, a trust must also satisfy the resource counting rules found at SI 01120.200D and SI 01110.100B to not be a countable resource. In order to meet those requirements, all of the following criteria must be met:

- Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
- Other than payment for those expenses listed in SI 01120.199D.3 in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., After reimbursement to the State(s), all remaining funds are

disbursed to the trust beneficiary); and

- The early termination clause gives the power to terminate to someone other than the trust beneficiary."

CONCLUSION

A customized and well-drafted special needs trust will provide funds that supplement the basic support and medical coverage furnished by the public benefit programs. These supplemental benefits are many, and a trustee that does not have experience with caring for a person with a disability similar to the beneficiary's will not likely be equipped to fully meet the various needs. Guidance to the trustee in the trust instrument, through provisions such as those described in this article, will more nearly enable the trustee to most effectively meet the needs of the beneficiary. ■

Meet a Member of the Trusts and Special Needs Trusts Section Steering Committee

Jack Longert

Madison, Wis

Jack Longert has been the Executive Director/President of the Wisconsin Pooled and Community Trust program (WisPACT, Inc.) since May, 2007. In his tenure, funded accounts have grown from 250 to almost 800, and approximately 1,200 beneficiaries have accounts in the program. During his stewardship, WisPACT has explored meaningful ways to provide an enhanced quality of life for its beneficiaries under appropriate state and federal authorities.

Prior to his service at WisPACT, Jack was as a staff attorney in four Legal Services/Legal Aid organizations in Wisconsin and North Dakota from 1978-2002, usually specializing in public benefits representation. He also taught as part of the clinical faculty at the University of Wisconsin Law School, working with second- and third-year students in representation of mental health patients and prison inmates having both civil and criminal legal issues. Between 2002-2007 he also managed the programs at and affiliated with the Madison, WI Men's Homeless Shelter.