Elder Law Journal of Wisconsin

Fall 2016
State Bar of Wisconsin
Elder Law Section
Vol. No. 26 Issue No. 3

In this issue …

Editor's Column: Is Elder Law Really the "Hot" New Practice Area?

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Each February for the past three years, the *Wisconsin Lawyer* magazine has dedicated its issue to "What's Hot, What's Not" in the legal field. As an attorney two years out of law school in 2014 trying to sell elder law as a legitimate focus to the firm I was working for at the time, I felt vindicated when the February 2014 and 2015 issues cited elder law as a practice area to watch in Wisconsin and as a practice area that was "getting hot" nationally. Now, according to an updated version of that same issue, 2016 is apparently the year that elder law in Wisconsin and nationwide has become a "hot" practice area. (Not "red-hot" as of yet, but apparently a big deal all the same, according to what I read.)

This has caused me to pause and take stock of the direction elder law is taking, what makes it a "hot" practice area, and what my role is as a (relatively) young practitioner joining the larger field of elder law attorneys.

It's an intimidating thought, trying to shove myself into the same category as attorneys who are either at the top of our field currently or who have recently retired, and who have fought the good battle for years or even decades. You know who they are. Or, very likely, you are one of them, since the elder law section is packed with them. The attorneys who've seen a LOT of changes in the demographics of our population, in the programs available to serve those populations, in the political landscape, in the economic conditions of our state and country, in our health care system, and in medical advances and technology. These elder law attorneys have dealt with these changes, both good and bad, and figured out ways to maximize the situation for their clients, all before elder law was officially a "hot" practice area.

So, what does it mean to now look forward to future decades as an elder law attorney in a "hot" practice area, a time during which most of my mentors will retire? It's easiest for me to start from my own personal experiences with elder law and extrapolate from there.

Here's what I know so far:

- First, when you are an elder law attorney, and moreover the only attorney in your family as far as you trace, you become a very popular person at very uncomfortable times. This happened to me recently with the death of my grandfather. During the normal stages of grieving, you may (and will) field every question from the casually-mentioned-in-passing, "The farm was protected, right?" to the completely out-of-left-field "What should we do with the money grandpa won at the weekly drawing at the local bar?" (which he somehow managed to win despite having died several weeks prior). My family treated me like a genius for being able to help with what turned out to be relatively basic questions for an elder law attorney.

- Second, when you are an elder law attorney (and still the only attorney in your family), you can become a very *un*popular person at very uncomfortable times. This happened to me recently with loved ones transitioning from the house they were *never going to leave ever* into an assisted living facility and qualifying for Medicaid. I wisely kept out of the whole situation, right up until I was asked, "This is all fine, right?" and found out that the planning technique recommended to them (not by an elder law attorney) was going to result in both a substantial divestment penalty.

So, if I think about what the practice of elder law is going to look like in the coming years based on what I have seen already, I suspect there will be a couple of universal truths regardless of who becomes president, regardless of what the next state budget throws at us, regardless of when that long-awaited cure to Alzheimer's finally arrives.

And those two truths are as follows.

First, as elder law attorneys we will often get to play the hero, for example when we are able to explain to clients that their homes or farms are indeed protected, or when we get them qualified for Medicaid and they get to stay at the nice facility near their kids that lets them keep their dog. Second, as elder law attorneys we will often play the role of villain when we have to explain to clients why "helping out" the down-on-her-luck child is considered a divestment, or how it is really too late to protect the family cottage two months before qualifying for Medicaid.

I'm not sure either of these two truths will prove to make elder law the "hot" or "trendy" area of law to pursue right out of law school. If anything, these illustrate that elder law isn't really all that glamorous. I doubt elder law attorneys will ever be showcased in prime time legal dramas.

Yet, the dual role we play on almost a daily basis, the bearers of both good and bad news in critical situations, does make elder law one of the most important practice areas there is (in my biased opinion), one which will only continue to grow over time. Perhaps that is what makes elder law a "hot" practice area.

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Benefits 101: Sources of Social Security Income

By Kate Schilling, Greater Wisconsin Agency on Aging Resources, Inc., Madison

Editor's note: The purpose of this column is to provide helpful basic information on the various public benefits that Elder Law attorneys work with on a regular basis. This issue's column focuses exclusively on health insurance benefits for which clients may be eligible.

Oftentimes clients are confused about the types of income they receive from Social Security. It is essential that attorneys definitively determine which benefits the client receives so that appropriate planning can be done. The following is a general explanation of Social Security income benefits that pertain to older adults.

Social Security Retirement Income

General Rules

Social Security Retirement Income is available to adults who have worked and paid into FICA taxes for at least ten years and earn 40 credits. The amount of a person's benefit depends on how much that person earned during his or her working career – higher lifetime earnings will result in higher benefits. The maximum monthly benefit amount is $2,639.

The amount of a person's Social Security Retirement benefit also depends on when the person elects to start receiving benefits. People can start drawing retirement income benefits as early as age 62; however, this will permanently reduce the person's monthly benefit by approximately 25 percent. Currently, the full retirement age for Social Security benefits is 66. For people born after 1954, the age of full retirement increases, and eventually goes up to 67 years of age.

A person can continue working and not start drawing on Social Security Retirement benefits until age 70. This will cause a person's benefit amount to increase 8 percent for each year beyond full retirement age the person waits. However, there is no benefit to waiting beyond age 70, so a person age 70 or older should always elect to take their retirement income benefits.

People who are still working at age 62 are typically discouraged from taking early retirement benefits due to the Social Security early retirement earnings limit. That is, if a person takes early retirement benefits (any time before age 66 or 67, depending on the person's year of birth), and earns more than $15,720 per year in earned income, his or her Social Security benefit will be reduced $1 for every $2 the person earned from employment. During the calendar year in which a person turns full retirement age, the earnings limit increases to $41,880. After earned income of $41,880, Social Security retirement benefits are reduced $1 for every $3 in earnings. Once a person reaches full retirement age, there is no earnings limit or reduction in benefits for earned income.

Spousal Retirement Benefits

People are eligible for retirement benefits off a current or former spouse if they meet certain criteria. Spouses are eligible for half of a worker’s Social Security Retirement benefit. In order to qualify for spousal benefits, a person must be currently married to the worker, divorced from the worker after a marriage lasting at least 10 years, or widowed.

If a spouse is currently married to the worker, then both the worker and the spouse must be at least age 62, and the worker must be collecting a Social Security benefit in order for the spouse to be able to collect off the worker’s record.

If a person is divorced, but was married for at least 10 years, spousal retirement benefits are still available. For the divorced spouse situation, the worker need *not* be collecting Social Security benefits in order for the former spouse to qualify for benefits on the worker’s record. Both the worker and the former spouse must be age 62 before benefits can be paid out. If a divorced spouse remarries prior to age 60, the right for that newly remarried person to collect a spousal benefit from their former spouse ceases; unless that second marriage ultimately ends in divorce, death, or annulment. If a person is entitled to a spousal benefit and their ex-spouse is the one who remarries, there is no effect on the non-remarrying spouse’s ability to collect the spousal benefit.

Spousal benefits are subject to the same aforementioned earnings limit, as well as the 25 percent reduction for benefits paid out prior to full retirement age. A spouse is entitled to either his or her own retirement income benefit or the half spousal benefit, but not both. Social Security should automatically give the spouse the larger of the two benefits.

It is important to know that spousal benefits do not reduce the worker’s benefit at all, regardless of whether it is a current or former spouse. Spousal benefits are an additional benefit paid out by Social Security. It is possible that a worker could have both a current spouse and a divorced spouse collecting benefits off the worker’s record at the same time, neither of which would affect the worker’s benefit.

Widow and Widower Benefits

Widow benefits are available starting at age 60 or older (age 50 and older if the widow is disabled). Benefits taken at age 60 will be reduced, similarly to how early retirement benefits are reduced. If a widow waits until his or her full retirement age to collect, then there is no reduction. The widow is entitled to the full amount the worker would have been entitled to (not half like spousal benefit). A widow who remarries prior to his or her 60th birthday is not eligible for widow benefits under Social Security.

Death Benefit
When a worker receiving or eligible for Social Security Retirement benefits passes away, Social Security pays a one-time death benefit of $255. Most funeral homes help families notify Social Security when a loved one passes away.

Disabled Adult Child Benefit
A spouse is not the only person who can collect a benefit on a retired worker. If a worker retires and has a child with a disability who has been disabled since before age 22, that child may also receive Disabled Adult Child (DAC) benefits when the worker retires or dies. The benefit is paid on the record of the parent, so the parent must have worked enough to qualify for retirement benefits. It is not necessary that the child ever worked himself or herself. However, if the adult child is working, this could prevent him or her from qualifying for benefits if that work is considered "substantial," i.e., the child earns more than $1,130 per month currently. Additionally, if a disabled adult child gets married, this could cause the benefit to end. An adult child who qualifies for SSI or SSDI (both discussed below) can also qualify for the DAC benefit. In that case, it would be important to determine which program offers the highest benefit.

Social Security Disability Insurance (SSDI)
Social Security pays benefits to people who cannot work due to a severe medical condition.

Regardless of whether a person meets a definition of disability under veteran's benefits, long-term disability benefits through employment, or according to their doctor, a separate disability determination must be made in order for the person to qualify for SSDI benefits. In Wisconsin, disability determinations for SSDI, SSI, and Medicaid are done through the Disability Determination Bureau (DDB) in Madison.

The process of applying and getting approval for a disability can take between three to eight months to be determined. If approved, benefits are retroactive to the date of the application (and in some cases, even prior to that).

There is a five-step sequential process to determine if a person is disabled under SSDI:
1. Is the person earning income from work at or above substantial gainful activity ($1,130/month)?
2. Is the medical condition severe?
    a. Condition must be expected to last at least 12 months or result in death.
3. Does the medical condition meet a listing?
    a. SSA has an online list of conditions that are deemed to be sufficiently disabling by definition.
4. Is the person able to do work that he or she had previously done?
5. Can the person do *any* type of work?
    a. Education, age, skills, and past work experience are all considered.

In order to qualify for SSDI benefits, a person must have earned a certain number of work quarters of credit over their lifetime, and a certain percentage of those work quarters must be in recent years (those years leading up to the onset of disability and SSDI application). For example, a person that becomes disabled at age 61 would need to have worked and paid into

Social Security for at least 10 years (to earn 40 work quarters of credit) and have worked five out of the past 10 years leading up to the SSDI application.

A person is *not* eligible for SSDI benefits off a spouse’s work history. However, a spouse may be eligible for derivative benefits if the spouse is caring for a disabled child or a child under the age of 16.

The amount of the monthly SSDI benefit varies by person, and is dependent on the person’s work earnings. A person’s SSDI benefit is equal to the amount the person would receive from Social Security at full retirement age. For example, let’s say a person’s benefit at full retirement age is $1,500. If a person elected to take early retirement benefits at age 62, his monthly benefit would be permanently reduced by 25 percent, and would be $1,125 per month. However, if that person was disabled and qualified for SSDI at age 62, he would be entitled to $1,500 per month.

There is a five-month waiting for SSDI benefits after the person’s disability onset date, meaning that a person is not eligible for SSDI cash benefits until the sixth month. After 24 months of SSDI payments, a person is eligible for Medicare.

Supplemental Security Income (SSI)
Supplemental Security Income is needs-based income for older adults or people with disabilities. A person must be at least age 65 or have a disability determination from the DDB in order to qualify for SSI. Strict income and asset limits apply. The asset limit for SSI is $2,000 for a single person or $3,000 for a married couple. Just like Medicaid, SSI does not count a person’s home, car, or burial assets.

SSI brings a person’s income up to $733 per month. It doesn’t give the person a benefit of $733, but rather supplements their income to bring them up to $733. A person with no other income could receive the entire $733 in SSI. Or a person could receive just $1 of SSI income per month. Any variation in between is also possible.

SSI allows for income disregards. The first $20 of a person’s income is always disregarded. In order to encourage employment, SSI also disregards the first $65 and half of the remaining amount of work earnings.

If a person qualifies for even $1 of federal SSI, then that person automatically qualifies for Wisconsin’s State SSI Supplement. For the state supplement, everyone receives the same amount – either $83.78 for a single person, or $132.05 for an eligible couple.

For example, Edna has $500 per month of income from Social Security Retirement, and is age 65. Assuming she has countable assets under $2,000, she will qualify for SSI. We subtract the $20 disregard and get $480 of countable income. It would take $253 to bring her up to $733 per month, so she is eligible for $253 in federal SSI. Since she is eligible for at least $1 in federal SSI, she automatically receives the state SSI supplement of $83.78. This will bring Edna’s monthly income up to $836.78.

Everyone who receives the SSI state supplement also automatically receives Medicaid. People on SSI who are also on Medicare will also automatically receive a Medicare subsidy which pays their Medicare Part A, B, and D premiums.

SSI-E

If a person on SSI needs at least 40 hours of long-term support services in the home every month, that person may be eligible for SSI-E. This is an additional monthly income benefit. Instead of the $83.78 per month for the state supplement, this person would receive $179.77 per month (an additional $95.99). This would bring the person's monthly income to $932.77 per month.

More information

For more information about these benefit programs, refer to the Social Security Program Operations Manual System.

Clients can also be referred to the local Aging and Disability Resource Center to be screened for benefits or meet with a benefit specialist.

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Case Law Update
The Intersection of Special Needs Trusts and Federal Housing Benefits: *DeCambre v. Brookline Housing Authority*

By Collin M. Ritzinger, Hill Glowacki LLP, Madison

DeCambre v. Brookline Housing Authority (Nos. 15 -1458, 15 -1515, (1st Cir. June 14, 2016)) is a case involving the intersection of special needs trusts and federal housing benefits.

The federal district court case has been previously reported on within this journal, but since then has been appealed and ruled on in the First Circuit Court of Appeals. The specific issue before the First Circuit Court of Appeals was whether some or all distributions from a self-settled special needs trust funded solely with lump-sum settlement proceeds from a personal injury lawsuit should be counted as income for a beneficiary's federal housing benefits. The district court decision favored the Brookline Housing Authority (BHA); the Court of Appeals reversed in favor of *DeCambre*.

As background, Kimberly DeCambre is a disabled person who suffers from significant disabilities stemming from kidney disease. At the beginning of this controversy she was receiving Supplemental Security Income, Medicaid, food stamps, and fuel assistance benefits, as well as a Section 8 housing voucher.

DeCambre is the beneficiary of a standalone special needs trust under 42 U.S.C. § 1396p(d)(4)(A) created by Massachusetts court order in June 2010. This trust was funded completely from the proceeds of lump sums settlements from personal injury and property damage lawsuits. According to expense charts submitted by DeCambre, her trust had been used to pay for administrative trustee fees, cellphone bills and expenses, cable television bills, internet bills, veterinary care for cats, dental costs, medical costs, and travel expenses. She also used her trust to purchase a vehicle, pay for car insurance, and to pay for landline phone bills. These distributions were made from the principal of the trust. The trust had generated no substantial earnings or other income.

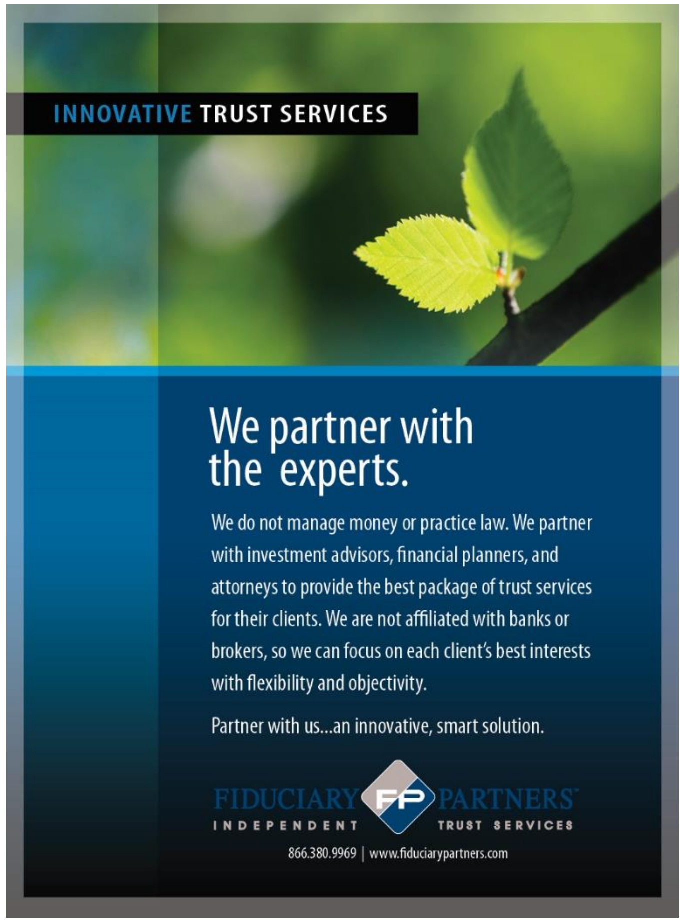
As of Dec. 1, 2012, DeCambre still had a Section 8 housing voucher. At that time, her fair market or contract monthly rent totaled $1,595. DeCambre’s monthly liability for rent was $312 while she simultaneously received $1,283 in housing assistance. As part of her annual review for her Section 8 housing voucher, DeCambre reported distributions from her trust to the Brookline Housing Authority (BHA) on her Application for Continued Occupancy. The BHA rejected her claim that some distributions could be exempted from her income as exempt medical expenses and correspondingly raised her monthly rental liability to $435.

In the fall of 2013, DeCambre again self-reported her income for her annual recertification. This time she reported $2,004 from food stamps, $9,748.68 from Social Security benefits, $200 from her son’s earnings, and $445 from ABCD Fuel Assistance for a total yearly income of $12,397.68. The BHA determined from submitted income tax returns that DeCambre’s trust made approximately $200,000 in distributions between 2011 and 2013, and that DeCambre’s 2011 income tax return reported an income of $108,322. In turn, the BHA found her to be well above the $22,600 two-person household income limits, and sent DeCambre a letter stating that as of Feb. 1, 2014, she would no longer be eligible for housing assistance and would be liable for the full amount of her contract rent at $1,560.00 per month.

This letter propelled a series of litigation from DeCambre which ultimately led to federal district court. In district court, DeCambre argued that the source of the funds is excluded under 24 C.F.R § 5.609(c)(3) as a lump sum addition to family assets and placing these assets within a special needs trust does not change this categorization. DeCambre also argued that if the district court rejected this argument, it should nevertheless consider the distributions as income-exempt under 24 C.F.R § 5.609(c)(9) as “temporary, nonrecurring, and sporadic” payments.

DeCambre lost at the district court level. The district court agreed with DeCambre that her lump sum settlements were excluded from annual income calculations under 24 C.F.R § 5.609(c)(3). but found under § 5.609(b)(3) that annual income can include "interest, dividends, and other net income of any kind ... [w]here the family has net family assets in excess of $5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD." In the district court’s opinion, 24 C.F.R § 5.609(c)(3) did not preclude the BHA from finding income under 24 C.F.R § 5.609(b)(3) or elsewhere under 24 C.F.R. § 5.609, and pursuant to 24 C.F.R § 5.603(b) income distributed from an irrevocable trust should be counted toward annual income under 24 C.F.R § 5.609.

Next, the district court then decided which distributions from an irrevocable trust qualify as countable income under 24 C.F.R § 5.609. The district court relied on an advisory HUD letter written by one of HUD's regional offices, particularly the BHA's interpretation of it that any distribution from a special needs trust should be considered income under 24 C.F.R. § 5.609 unless otherwise exempted under 24 C.F.R. § 5.609(c). The court rejected the argument that these disbursements should be considered as exempt from annual income under 24 C.F.R. § 5.609(c)(9) as "temporary, nonrecurring, and sporadic" payments. Overall, the district court ruled that the BHA's decision to include DeCambre's trust distributions as income was reasonable.



Additionally, the district court rejected DeCambre's 1983 claim, ruling that the BHA's income determination was not arbitrary and capricious. Interestingly enough, the district court did note that trust distributions for cable television, travel, and telephone expenditures were "non-extravagant" under case law and should be excluded from annual income. The court also noted that distributions for vehicle, phone, and cat expenditures lacked analysis under the "the cost of medical expenses" exclusion, § 5.609(c)(4) and remanded the cases for such analysis by the BHA.

DeCambre appealed her case to the Federal First Circuit Court of Appeals, seeking relief under Section 1983 and alleging violations of the Housing Act. The appellate court rejected the BHA's initial arguments that DeCambre could not seek relief for her 1983 claim. The court then turned its attention toward the issue of whether the BHA misapplied HUD regulations by including some or all of the distributed trust principal toward DeCambre's income.

In defense of its actions, the BHA posed three arguments as to why the principal of the trust lost its exclusionary treatment when distributed.

First, the BHA argued that the statement "[a]ny income distributed from [an irrevocable] trust fund shall be counted when determining annual income" under section 5.609(b)(2) means that "any disbursement," regardless of whether a disbursement from income or principal, should be counted toward DeCambre's annual income determination.

The court rejected this position. In doing so, the court first noted that the BHA contradicted its own position when it excluded some of DeCambre's distributions for medical expenses yet refused to acknowledge an ability to exclude certain expenditures. Secondly, the court did not simply defer to the BHA's interpretation of the HUD advisory letter, and found that. the letter stated "not all distributions from a[n] SNT should be counted toward [a Section 8] applicant's annual income." Furthermore, the reference to "income distributed from the trust fund" in 24 C.F.R. § 5.603(b) was simply an explanation on how to treat a trust as a net family asset and how income could not be counted until it left the control of the trust.

The BHA argued that these sources expressly define a distinct definition of income from trusts. The court determined, however, that if a distinct definition for income from a trust was intended, it would be found under the definitions of annual income and not "as a caveat appended to a provision ostensibly aimed at explaining how irrevocable trusts fit into the definition of net family assets." The court also cited the amici submitted by the National Academy of Elder Law Attorneys, Inc., the Special Needs Alliance, Inc., and the National Housing Law Project as helpful in reading 24 C.F.R. § 5.603(b). This is noteworthy because the amici make the argument that a distinct definition of income for trust distributions is essentially forcing an asset test on to a benefit which should only have an income test. This explanation added clarity to the court's discussion on the public policy behind these regulations.

Second, the appellate court then rejected the BHA's claim that because the settlement proceeds were paid directly to the trust instead of directly to DeCambre, the settlement never became (or lost its classification as) excluded lump-sum additions to family assets. The court again analyzed the language of 24 C.F.R. § 5.603(b) and the HUD advisory letter. Again, both sources of authority include language stating how to appropriately treat assets and income when the tenant's control and enjoyment is delayed. This implies that assets can regain their exempt status once returned back to the tenant, including trust principal in the form of excluded lump-sum additions to family assets which are distributed from the trust.

Finally, the court then considered the BHA's third argument that even if the transfer of excluded assets into a trust does not convert all disbursements of such assets into income, income distributed from the trust can still lose its otherwise income-exempt status. The court rejected this argument as well. It specifically found no plain reading of the regulations that supports treating distributions from irrevocable trusts differently from other assets with delayed control and enjoyment for the beneficiary. There was no reading of the regulations which would support the interpretation that all expenditures made from any reservoir of assets would be considered countable income. In fact, such interpretations would be superseded by other regulations, some of which were also analogous to lump-sum settlements held by an irrevocable trust. For example, 24 C.F.R. § 5.603(b)(3) provides that reimbursement of business or professional assets will not be income against the tenant. The court also noted that not only does the HUD advisory letter does not expressly acknowledge this issue, but it provides no rationale for classifying distributions from settlement proceeds differently from irrevocable trusts. Further, the BHA is not the proper authority to be afforded deference in interpreting this purely legal issue.

In conclusion, the court ruled that the BHA had improperly counted the distributions from the principal of DeCambre's self-funded special needs trust funded purely with settlement funds. It also reversed the district court’s ruling favoring the BHA on DeCambre’s Section 1983 claim brought under the Housing Act. The court did not determine what specific distributions should or should not be included in her annual income, instead remanding the issues back to the district court.

Note: It is the author’s understanding that since the release of the Federal First Circuit Court of Appeal’s decision, a petition for certiorari has been filed with the United States Supreme Court. At this moment, it is uncertain whether certiorari will be granted. It has, however, also been rumored that the United States Supreme Court may try solicit HUD’s more direct participation in the controversy, such as requesting that HUD submit an amicus brief.

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Elder Law Practice Tips:
A Self-settled Special Needs Trust and Last-Minute Medicaid Planning

By Iris M. Christenson, Christenson & Johnson, LLC, Fitchburg

Editor’s note: The purpose of this column is to provide helpful basic information for the new Elder Law practitioner on a variety of topics. The author of this column and the editor welcome suggestions for topics that would be of interest to the Elder Law practitioner as well as volunteers for future submissions.

A self-settled special needs trust (SNT), also called a “first party trust” or a “payback trust” can be used to hasten the start date for Medicaid eligibility or allow a person with a disability to maintain Medicaid (MA) eligibility if income or assets exceed the eligibility limits. You may want to consider using this type of trust for a single person of any age who has excess income and/or assets and will need to qualify for Medicaid. The transfer of income and/or assets to this type of trust is not considered a divestment and will not result in a penalty period if the trust is established for the sole benefit of the disabled individual. Assets held in this type of trust are considered exempt assets according to 42 U.S.C. § 1396p(d)(4)(A) and (C) if the trust is properly drafted and meets all of the criteria for this type of trust.

If too much income is the issue standing in the way of MA eligibility (see MEH Appendix 39.4 Elderly, Blind and Disabled Assets and Income Table to determine the income limits), you should determine if some of the income could be assigned to a self-settled SNT. The first consideration is that the income limits vary depending on the type of program your client is considering, and the applicant may be eligible for deductions and allowances (see MEH Appendix 39.4 and MEH Chapter 24). Another key consideration is although there is no limit on the amount of income that can be assigned to the self-settled SNT, some income sources such as Social Security payments cannot be assigned to an SNT. However, you may be surprised to learn that other income sources, even some pension benefits, can be assigned to a self-settled SNT. Although a court order granting a guardian (or a conservator) the authority to assign the income may be required to effectuate the transfer, the time and effort involved is well worth it if the MA recipient retains or gains access to the full range of Medicaid services.

Assets and Limits
If too many assets are the issue, i.e., client's nonexempt assets are greater than $2,000.00, the self-settled SNT can be funded with those assets. Just like there is no limit on the amount of income that can be transferred, there is no limit on the amount of assets that can be transferred to the self-settled SNT. However, the trustee of the SNT you use may impose limits on the types of assets that are transferred into an SNT. For example, a trustee might not accept the transfer of real estate into an SNT if there are not sufficient other liquid assets being transferred to cover expenses like taxes and insurance.

Consider that even a very small trust can be helpful as a source of funds to pay expenses that are not covered by MA (private room differential fees, assistive devices, additional therapy sessions, travel expenses, car insurance, etc.) There are some limits on the types of expenses that can be paid from a self-settled SNT for a beneficiary who receives Social Security Income (SSI) benefits. However, the ability to pay expenses that are not covered by SSI and/or MA can substantially improve the beneficiary's quality of life.

Age Matters
The age of the MA applicant or recipient matters when you are deciding which type of self-settled SNT to use. If the beneficiary is younger than 65 and there is no possibility that additional income (other than an annuity stream that continues past age 65) or assets will be added to the trust after age 65, the trustee could be a family member, friend or a for-profit corporate trustee such as a bank trust department. This type of trust is often referred to as a "stand alone" SNT. On the other hand, if the MA applicant or recipient is 65 or older and/or the funds that will go into the self-settled SNT will be added after the person is 65 or older, a community pooled trust is the only option.

Both types of self-settled SNTs must meet the following conditions to qualify:

1. The individual is disabled.
2. The funds must be used for the sole benefit of the individual with disabilities.
3. The trust must be established by the appropriate person or entity as set forth in 42 U.S.C. § 1396p(d)(4)(A) and (C). If the trust is established by someone other than the individual, the person must have legal authority to act on behalf of the individual.
4. Payback provision. The trust must contain very specific language providing that to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will reimburse the state from such remaining amounts an amount equal to the total amount of medical assistance paid on behalf of the individual during his/her lifetime. You should refer to the Social Security Administration Program Operations Manual System (POMS)- SSI program manual) rules for the specific language and be aware that these rules do change periodically.

The beneficiary of the SNT must be considered disabled. If the beneficiary does not have a prior Social Security Administration disability determination (e.g., the determination that is required for SSI or SSDI), a formal disability determination must be obtained, even if the individual is over age 65 and qualifies for Medicaid based on age. The formal disability determination is performed by the State Disability Determination Bureau (DDB) and the forms that should be completed are the Medical Assistance Disability Application (MADA, Form F-10112) and the Authorization to Disclose Information to Disability Determination Bureau form (Form F-14014). These forms are submitted with the Medicaid Application. The case worker forwards the MADA form and the Authorization to Disclose Information form to the DDB. While the DDB is processing the Disability Application, a process that can take several months, the MA Application process continues and the assets in the self-settled SNT are considered unavailable. After the Disability Application is approved, the trust is exempt.

Who Can Establish a Self-Settled Special Needs Trust?

The answer to this question depends on when the trust is set up and funded (the beneficiary's age) and who will act as trustee. We have two types of self-settled special needs trusts, found at 42 U.S.C. § 1396p(d)(4)(A) and (C).

The (d)(4)(A) trust is a self-settled special needs trust that does <u>not</u> require a nonprofit trust administrator, which means you can have a private trustee such as a family member of the trust beneficiary However, the restriction on (d)(4)(A) trusts is that it can only be created by the beneficiary's parent, grandparent, guardian, or the court, not the beneficiary him or herself. Additionally, the (d)(4)(A) trust can only be created for an individual under age 65, and no funds (other than an annuity income stream that continues past age 65) may be added after the beneficiary reaches 65. Also, the (d)(4)(A) trusts require full payback for recoverable MA services received in any state. The balance remaining after the payback is completed, if any, is paid to the named contingent trust beneficiaries. Please note that the restriction on who may create the (d)(4)(A) trust may be removed as soon as proposed legislation called the Special Needs Trust Fairness Act has been enacted. This legislation (H.R. 670/S.349) has already been passed by the Senate. The Special Needs Trust Fairness Act would expand the list of persons who can establish the (d)(4)(A) SNT to include the individual.

The (d)(4)(C) trust is a pooled special needs trust. WisPACT Trust I accounts and Life Navigators' Trust II accounts both meet the pooled trust criteria. WisPACT typically handles accounts for beneficiaries of any age, any type of disability, in any area of Wisconsin. Life Navigators typically handles accounts for beneficiaries of any age with a developmental disability in the southeastern counties of Wisconsin. A pooled self-settled SNT may be created by the beneficiaries themselves (or their financial agent with express authority), or, like a (d)(4)(A) trust, the beneficiary's parent, grandparent, guardian, or the court. There are no age restrictions with a (d)(4)(C) trust. Upon death, payback to the state is made and the remaining assets, if any, are paid to the trust remainder beneficiaries. In Wisconsin, if the full trust balance would otherwise go to pay back the state, then the trustee is authorized to retain the assets for the benefit of other disabled individuals who are pooled trust beneficiaries.

Summary

If your client is an adult single person with a disability and could benefit from obtaining or maintaining MA eligibility, the use of a self-settled SNT to hold excess income and/or assets should be a strategy you consider. The self-settled SNT can enhance the MA recipient's quality of life whether the MA recipient is applying for or already receiving MA card services, community waiver benefits, or nursing home MA benefits. The self-settled SNT can be established and funded just prior to the date you plan to seek MA eligibility, when most other types of planning are no longer feasible options. Remember, the funding of the trust will not result in a penalty period since the transfer is not considered a divestment and the trust itself is an exempt asset.

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Odds and Ends

Submitted by the Editor, Jessica A. Liebau, Wessels Law Office LLC, Mequon

Final Decision: County May Not Retroactively Change Snapshot Date in Community Waivers Application

On Sept. 15, 2016, the Deputy Secretary of the Wisconsin Department of Health Services issued MRA/173524, holding that Waukesha County applied an incorrect asset assessment date for Family Care services.

The married petitioner in this case requested Family Care benefits on Oct. 8, 2015, and submit an asset assessment accordingly. He already had a function screen completed two months earlier, on Aug. 4, 2015. On Oct. 26, the agency issued a Community Spouse Asset Share notice informing the petitioner that he would be eligible for benefits when the total combined countable assets of he and his spouse totaled no more than $100,501.44. The snapshot date noted in this notice was Oct. 23, but the parties agreed it should have read Oct. 8.

Petitioner then applied for Family Care benefits on Feb. 29, 2016. In response, the agency issued a new Community Spouse Asset Share informing the petitioner that total countable assets as of Aug. 4, 2015, the date of the functional screen, meant that the petitioner and his spouse could only have $76,670.17 in order to qualify for benefits. The Family Care application submitted by Petitioner met the countable asset limit of the Oct. 9 Asset Share notice, but not the asset limit as of Aug. 4 Asset Share notice, and therefore the application was denied. The Petitioner subsequently appealed.

At fair hearing, the agency asserted that due to MEH 18.4.2, effective June 15, 2015, the date the functional screen is completed is clearly the correct asset assessment date. The agency worker testified that she made an error when using the Oct. 9 date. Her statement was based on a written but unpublished CARES Information and Problem Resolution Center Q/A document received from an unnamed source that she asserted was released on Feb. 11, 2016, several months before the MEH update. However, as the Petitioner pointed out, this same agency worker successfully took the exact opposite position in a different fair hearing decision in 2015, FCP/162467.

In siding with the Petitioner in the Final Decision, the department agreed with the agency's previous argument and position that the correct asset assessment date was the first request for benefits on Oct. 8. In particular, the Deputy Secretary stated: "the agency must wait to implement changes to policy or practice until that change is formally published in the appropriate manual or handbook. Relying on a proposed change prior to publication is not allowed."

The department then issued a companion Final Decision, FCP/173457, which held that the petitioner should have been enrolled in Family Care as of Feb. 29, 2016. The decision noted that despite the policy of no retroactive Family Care enrollment, "enrollment as of the date established in correcting an agency error is necessary and appropriate."

Editor's Note: Full access to recent fair hearing decisions continues to be an ongoing issue. Therefore, if you have recently received a fair hearing decision that you are willing to share and believe would be of interest to the Elder Law Section, please consider contributing them to a future issue of the Elder Law Journal. Redacted decisions may be emailed directly to the editor.

Update on *Jimmo* Settlement

The Settlement Agreement in *Jimmo v. Sebelius* received considerable attention back in last 2012/early 2013 when it eliminated the "improvement standard" commonly used in Medicare coverage decisions. The Settlement Agreement in *Jimmo* that was entered Jan. 24, 2013 stated that an individual in a rehabilitation facility does not need to show continued improvement in order for Medicare to continue payment. The new standard for Medicare coverage became "when skilled nursing services are necessary to either maintain the patient's current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided." However, many elder law attorneys and patients alike have continued to be frustrated by the ongoing use of the "improvement standard" in denying Medicare coverage.

On March 1, 2016, Plaintiffs in the *Jimmo* case filed a Motion for Resolution of Noncompliance, asserting breach of the Settlement Agreement. In particular, Plaintiffs argued that the Secretary of Health and Human Services failed to make revisions to the Medicare Benefit Policy Manual (MBPM) or provide any educational information toward the new standard. Further, the Secretary failed to provide information on the new standard to the parties responsible for making the Medicare approval decisions. As a result, the old "improvement standard" continued to be used, contrary to court ordered settlement.

On Aug. 17, 2016, the U.S. District Court for the District of Vermont entered an Opinion and Order partially granting the Plaintiff's Motion. The court denied that the changes to the MBPM were insufficient. Even though the revisions were "not a model of clarity," the court determined that the revisions did not breach the settlement because they did not specifically include an improvement standard. However, the court did agree with the plaintiffs in regards to the deficiency of the educational campaign. Plaintiffs provided information that the effort to train stakeholders on the new standard was "minimal and inadequate." The court held that the Secretary "failed to fulfill the letter and spirit of the Settlement Agreement," and pointed in particular to situations where contractors responsible for enforcing the new standard asked specific questions and were provided with vague, nonresponsive, or inaccurate answers. As a result, the secretary was ordered to propose corrective action within 45 days of the Order.

Elder Law Mediation Training Provides Another Tool for Tough Client Situations

Note: This information was also distributed via the State Bar Elder Law elist on Aug. 23.

This year the Advanced Mediation Training in Elder Mediation will be held Nov. 3-5, 2016 at Mount Mary University in Milwaukee. This program is put on by the Winnebago Conflict Resolution Center.

- **What is Elder Mediation?**
  Elder Mediation is the fastest growing segment of dispute resolution in the nation. Elder mediation can take many forms, including residency conflicts, caregiving, safety, health, estate, finances, guardianship and more.

  Eder mediation protects the quality of life and personal integrity of the elderly. It engages specialized skills for multiparty resolution, appreciating family dynamics, determining capacity to mediate, recognizing potential for abuse, and identifying the risk for loss of benefits based on the outcome. This training will address all of these topics and more.

- **Who Can Take This Training?**
  This training is available to anyone interested in Elder Mediation! You do not need to have had a basic mediator training prior to taking this. However, if you are interested in offering elder mediation services, it is recommended that you have either previously taken a basic mediation skills training or register for one within six months of taking this Advanced Mediation Training.

Reserve your space in the class or ask questions. You can also contact Rachel Monaco-Wilcox.

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Looking to Get Involved? The Elder Law Section is Looking for You

Do you want to become more involved in Elder Law? The Elder Law Section is always looking for new people to become involved in the activities of the section. In addition to serving on the board of directors, there are numerous committees that allow section members to contribute to the success of the Elder Law Section. The program committee plans and presents continuing legal education programs and contributes to the Elder Law Journal. The legislative committee works with the section's lobbyist to review proposed legislation, make recommendations regarding changes, and communicate with lawmakers regarding issues impacting our clients. The nominating committee manages membership of the board by recommending members to fill vacant directorships and section members to fill future officer positions.

If you are interested in serving on the Elder Law Section board as a director, there are two options to pursue for you be considered. The first option is to contact any board member to express your interest in serving on the board. The second option requires a written nomination to be signed by five (5) members and submitted to the Secretary on or before Feb. 1. Section Bylaws require the nominating committee submit a name for each open directorship to the board secretary by no later than Feb. 1. If the number of nominees equals the number of open director positions, the nominees are presumed to be elected.

Board and committee service provides wonderful opportunities to serve the Elder Law Section, get to know fellow practitioners, and enhance your practice.

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Upcoming Seminars from State Bar of Wisconsin PINNACLE of Interest to Elder Law Attorneys

Legal Issues of the Aging – Available as Web Seminar in October, December, and January
Advise aging clients with confidence, prepare to handle digital property, protect client estates, consider ethical questions regarding elder law, and defend against Estate Recovery. Get the crucial updates you need to keep your practice on the cutting edge while earning 7.0 CLE and 1.0 EPR. Look for Legal Issues of the Aging in webcast replays on multiple dates in October, December, and January.

Save 20 Percent on *Advising Older Clients & Their Families* through Dec. 3.
Save 20 percent on *Advising Older Clients & Their Families* through Dec. 3. From asset protection to Social Security, this two-volume treatise covers everything the successful elder law attorney needs. Use **discount code S3363D** when ordering online or by calling (800) 728-7788.

Adult Guardian ad Litem Training 2016 and 2017
Whether you're a brand-new guardian ad litem or have been doing it for years, this annual training will equip you with crucial tools and updates to help you succeed in the year ahead.

- **2016: Webcast Replay is Dec. 13**
  The 2016 Adult Guardian ad Litem Training explores changes on the horizon so you'll be ahead of the curve when helping your clients. Learn about upcoming revisions to Wisconsin's long-term care system, the Chapter 55 integrated care mandate, and what the future holds for clients in the IRIS program.
- **2017: Save the Date, Watch for More Information about the May 11 Spring Training**
  If you have suggestions for topics or presenters, please contact Jessica Liebau.

Future Publication Schedule for the Elder Law Journal

The *Elder Law Journal* is published four times a year. Thinking of submitting an article? Contact the editor, Jessica Liebau, for guidelines on article submissions. The next deadline is Nov. 28, 2016.

Email the editor, Jessica A. Liebau.
Elder Law Journal of Wisconsin (ISSN 2163-968X) is published by the Elder Law Section of the State Bar of Wisconsin, 5302 Eastpark Blvd., Madison, WI, 53718-2101.
(800) 728-7788
Author Submission Policy

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