

ELDER & DISABILITY LAW NEWS

LEGAL INFORMATION FOR OLDER AND DISABLED MAINERS AND THEIR ADVISORS

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MISSION

The mission of Skelton Law Offices, LLC, is to provide legal services of the highest quality, professionally, efficiently and compassionately, with the goal of preserving the independence, the dignity, and the emotional and financial security of older and disabled Mainers.



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WHY YOU NEED AN ESTATE PLAN WHEN YOUR LOVED ONE IS DISABLED

Too many people interpret the phrase “estate planning” as something required only of the wealthy. In fact, estate planning is for all of us.

Estate planning is especially vital for those with loved ones who are disabled and depend on government benefits. This includes parents and grandparents of children with special needs and spouses and relatives of older individuals residing in nursing homes and assisted living facilities. Failure to plan comes at a very high cost for the disabled individual who may lose critically necessary public benefits if there is no estate plan.

Unfortunately, a poorly designed plan is as disadvantageous to a disabled person as failure to plan. In December of 2003, the North Dakota Supreme Court held that a developmentally disabled grandchild was ineligible for Medicaid assistance because the inheritance left to him by his grandparent went into a support trust rather than a special needs trust. The child’s parent sought to correct the problem by creating a special needs trust and transferring the assets to the new trust. The Court held that the assets were nonetheless available to the grandchild thereby rendering him ineligible for his government benefits. *Linser v. Office of Attorney General* (N.D. No. 20030184, Dec. 19, 2003).

Closer to home, the Maine Supreme Judicial Court sanctioned a Maine attorney who failed to include a special needs trust in the estate plan of a client. *Board of Overseers v. Brown*, BAR-01-06, October 25, 2002. The will prepared by the attorney bequeathed a portion of the decedent’s estate to her sister who had been financially eligible for Medicaid nursing home benefits until the receipt of the inheritance. A special needs trust would have maximized the inheritance, allowing the sister to remain eligible for Medicaid eligibility and yet have access, through a trustee, to the inheritance for goods and services to improve the quality of her life.

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What Professional Advisors Should Know About Trusts for the Disabled Under 42 U.S.C. § 1396P(D)(4)(A)

1. Why Does 42 U.S.C. § 1396p(d)(4)(A) Matter to My Disabled Clients?

Many disabled individuals are dependent on public benefits like Supplemental Security Income ("SSI") and MaineCare (Maine Medicaid). Those benefits are means-tested, that is, only available to individuals with very limited assets. If an individual who is dependent on public benefits like these receives a personal injury recovery, an inheritance, or other assets, those resources will disqualify the individual from government assistance until the assets are spent down.

Congress addressed this problem in the Omnibus Budget Reconciliation Act of 1993 when it enacted 42 U.S.C. § 1396p(d)(4)(A). The Act permits the creation of a self-settled trust for a disabled individual under age 65 to hold assets that would otherwise disqualify the disabled individual for public benefits.

2. When Should a (d)(4)(A) Trust Be Considered?

The advantages of a (d)(4)(A) trust are only available to a disabled individual. An individual is generally considered to be disabled if he or she "is unable to engage in any substantial gainful activity" by reason of a medically determinable physical or mental impairment that is expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months. Children under the age of 18 are considered to be disabled if they suffer from a physical or mental impairment of comparable duration and severity.

If your client is not disabled or is not expected to need significant additional medical care, then he or she may not benefit from a (d)(4)(A) trust. If you are unsure whether a (d)(4)(A) trust or another special needs trust can help your clients call Skelton Law Offices, LLC. We'll send you our Questionnaire for Suitability of Special Needs Trust and schedule a telephone conference to explain whether a trust can help.

3. When is the Best Time to Create a (d)(4)(A) Trust?

If the (d)(4)(A) trust is to be funded with the disabled individual's own assets - presumably before the beneficiary applies for government assistance - create the trust as soon

as possible to avoid further spenddown of the assets destined for the trust. For the same reason, a trust to hold an inheritance should be created at or before the time the disabled individual becomes legally entitled to the funds.

For personal injury recoveries, make the decision about the suitability of a (d)(4)(A) trust before the settlement or judgment. The best approach is to obtain court approval to implement and fund the trust at the same time the settlement or judgment is being finalized. This avoids the risk of ineligibility for SSI and MaineCare while waiting for the trust to be formed.

4. What Are The Legal Requirements for a (d)(4)(A) Trust?

The Social Security Administration publishes the Program Operations Manual (POMS) that contains an action chart to determine whether a trust is compliant with 42 U.S.C. § 1396p(d)(4)(A). If the trust fails any of the tests, the trust property will be considered countable resources to the disabled person, and his or her eligibility for means-tested government assistance will be jeopardized.

- a. Was the trust established for a disabled individual under age 65?
- b. Was the trust established with the assets of a disabled individual?
- c. Is the disabled individual the beneficiary of the trust?
- d. Did a parent, grandparent, legal guardian or court establish the trust?
- e. Does the trust provide that upon the death of a disabled individual any state will be reimbursed for medical assistance paid on his or her behalf?
- f. Does the trust meet the special needs trust exception to the extent that assets of the beneficiary were put in the trust prior to the beneficiary attaining age 65? Any assets placed in trust after the 65th birthday are not protected.
- g. Is the trust irrevocable?

The most common reason for the SSA to declare a trust invalid under (d)(4)(A) is the failure to comply with state trust laws regarding irrevocability. And, in addition to the factors listed above, individual states often impose additional requirements to qualify the trust property as non-countable assets under that state's Medicaid program.

Therefore, it is essential that an experienced attorney who is well-acquainted with these local idiosyncrasies create the (d)(4)(A) trust.

5. Who Should Serve as the Trustee of a (d)(4)(A) Trust?

While the trustee may be a family member (but should not be a parent of a minor child), if the value of the trust property is \$50,000 to \$100,000 or more, consider the benefits of a professional trustee with one or more family members serving as co-trustees or as advisors. Banks have traditionally served as professional trustees, but other professionals also serve in this capacity, including CPA firms and brokerage firms. In certain cases, Skelton Law Offices, LLC, agrees to serve as trustee for (d)(4)(A) trusts.

6. What Can the (d)(4)(A) Trust Provide?

Generally speaking, the trustee of a (d)(4)(A) trust is authorized to spend trust principal and income for goods and services not otherwise provided through government assistance. For example, the trustee may be authorized to purchase more sophisticated medical or diagnostic treatment not generally considered to be "medically necessary" or to provide for private, rehabilitative care and recreation and items such as electric wheelchairs and mobility aids.

Since 42 U.S.C. § 1396p(d)(4)(A) exempts the trust funds from consideration as countable resources of the disabled beneficiary, arguably no limitation on trust distribution standards is required. This offers a potential for abuse if trust funds are spent for lavish homes and extravagant vacations. Regulations refer to such trusts as "special needs trusts," suggesting that distributions to provide for primary care may result in loss of the federal exclusion. Moreover, without supplemental or special needs limitations in the trust document, the relevant agencies may rule that the trustee's decision not to pay for support or medical needs when the trust permits such expenditures constitutes an abuse of discretion or a breach of fiduciary duty.

To date, there is limited case law to assist in determining the breadth of standards governing the distribution of (d)(4)(A) trusts. The better practice, where possible (and this may create tension with parents of disabled children), is to use reasonably well-defined supplemental needs or special needs trust provisions, such as limiting distributions to more sophisticated medical and diagnostic treatment, therapy, rehabilitation and mobility aids, private care providers, dental care, recreation, transportation, periodic outings and entertainment, etc. Presumably, the state may retain a cause of action against the trustee if no portion of the trust remains at the death

of the disabled individual and the trustee has improperly spent trust funds.

7. Should the (d)(4)(A) Trust Hold Assets from a Third Party?

The assets of a third party should never be added to a (d)(4)(A) trust. If a relative or friend wants to make a gift to a disabled individual, and the gift or inheritance is directed to a (d)(4)(A) trust, any assets remaining in the trust on the death of the disabled beneficiary will be available and must be used to reimburse any state that provided medical assistance to the disabled beneficiary. Use a third party trust instead as there are no payback requirements.

8. Who Should Draft the (d)(4)(A) Trust?

Planning for disabled individuals requires knowledge and understanding of fiduciary law, trust law, public benefits law and regulations, and tax law. This practice area requires experience and is not forms-driven. The (d)(4)(A) trust must conform to federal and state law and be customized to meet the current and anticipated future needs of the disabled beneficiary. The attorney who creates the trust should communicate with the relevant government agencies, particularly reporting the creation and funding of the (d)(4)(A) trust to the SSA and to the Maine Department of Human Services. The attorney should also advise on the selection and education of the trustees of the (d)(4)(A) trust.

9. Where Can Additional Information Be Found?

Several excellent elder law treatises include discussion of special needs trusts. Consult *Advising the Elderly or Disabled Client* by Lawrence A. Frolik and Melissa C. Brown and *Tax Planning for Family Wealth Transfers* by Howard Zaritsky, both published by RIA. See also *Representing the Elderly Client* by Thomas D. Begley, published by Panel Publishers. The ABA publishes *Third Party and Self-Created Trusts* by Clifton B. Kruse, Jr.

You might also consult www.specialneedsalliance.com, the Web site of the Special Needs Alliance, LLC, or the archives of *Elder Law News* published by Oast & Hook, PC, which can be found in the legal information section of www.oasthook.com.

Or register for the "What Every Lawyer Should Know About Special Needs Trusts for the Disabled" telephone seminar scheduled for May 26, 2004, and presented by the Maine State Bar Association. Call the MSBA at 207-622-7554 or register online at www.mainebar.org. Jane Skelton is the Chair of the program and will serve on its faculty.

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In both cases, the individuals creating their estate plans should have been advised to create special needs trusts. There are several types of special needs trusts, and this newsletter introduces three of them: the third party special needs trust, the (d)(4)(A) trust, and the (d)(4)(C) trust. The objective of all such trusts is to allow a disabled individual to become or remain eligible for need-based benefits like Medicaid and Supplemental Security Income (SSI).

A special needs trust maximizes all available resources for the benefit of the disabled individual. The government benefits are available for the individual's basic needs like food, clothing, shelter, and medical care. And assets in the special needs trust supplement – rather than supplant – the government benefits and provide goods and services to improve the quality of life for the disabled individual.

A special needs trust could provide funds for the purchase, maintenance, and insurance for a customized, accessible motor vehicle; for experimental or alternative therapies not covered by MaineCare (Maine Medicaid); for communication equipment and computers; for recreational activities, vacations, and hobbies; for education and occupational training; for companionship and pets; and for professional services, including services from a professional trustee, an accountant, or an attorney.

The type of trust that should have been created in the Linser matter would have been funded with the assets of the grandparent, not with the assets of the disabled grandchild. That type of trust is typically called a “third party” trust as opposed to a “self-settled trust.” It may be created during the life of the person creating the trust (called the Grantor or Settlor) or upon that person's death in his or her will. The assets of the person who created the trust are then held in the trust for the benefit of the individual with special needs (the Beneficiary). A special needs trust typically gives broad discretion over the administration of the trust to a Trustee, and the disabled individual cannot serve as the trustee.

The “third party” special needs trust is not subject to the very strict legal requirements that govern the creation of a self-settled trust (see the article “What Professional Advisors Should Know About Trusts for the Disabled Under 42 U.S.C. § 1396p(d)(4)(A)”), including the pay-back requirement. That is, if the disabled beneficiary should die before the assets of the special needs trust are exhausted, the remaining trust property can be distributed to other family members or to charity.

Those who have loved ones with disabilities deserve the peace of mind that comes from a good estate plan that can maximize the resources of the loved one with special needs and improve the quality of his or her life.

INTRODUCTION TO THE MAINE POOLED DISABILITY TRUST

The federal law and MaineCare rules that authorize (d)(4)(A) trusts also permit “(d)(4)(C)” or “pooled trusts.” Instead of holding the assets of a single disabled person, a pooled trust holds the resources of many disabled beneficiaries. The assets in the pooled trust are managed, administered and distributed by a non-profit association. Also, unlike individual (d)(4)(A) trusts that may be created only for those under age 65, pooled trusts may be for beneficiaries of any age and may be created by the beneficiary herself.

The first (d)(4)(C) in Maine came into existence in

2002. Each beneficiary of the Maine Pooled Disability Trust has his or her own sub-account. The Trustees of the trust meet once a month to make decisions about disbursements from the trust to a beneficiary.

Upon the death of beneficiary, 50% of the funds in the sub-account are retained in the trust for the benefit of other disabled individuals or charities. The other 50% is made available to reimburse the State of Maine or any other state for medical assistance paid on behalf of the deceased beneficiary. If any funds remain, those may be distributed to the beneficiary's heirs.

Skelton Law Offices, LLC, has recommended the Maine Pooled Disability Trust to several clients for whom a (d)(4)(C) trust is a more appropriate vehicle than the (d)(4)(A) trust to preserve a disabled individual's assets and his or her eligibility for public benefits.

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