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Legal Service Plan

# PREVENTIVE LAW GUIDE

*A newsletter designed to help guide you through the legality of reality*

**Issue 94**
**September 2014**

## Protecting the disabled beneficiary

*By Candace Dellacona, Esq.*

Since the beginning of time, parents have always worried about whether their children are happy. Parents also want to make sure their children will be kind, successful and independent. This worry, however, can be amplified when it comes to parents of a disabled child.

Depending on the disability, many parents recognize that their child may have financial, educational and emotional needs that exceed those of most children. Some disabilities even require the assistance of government agencies for proper care, treatment and financial assistance.

This type of assistance – although helpful and necessary – is often accompanied by rules that are hard to comply with and navigate. Thankfully, there are dedicated teachers, health care providers and social workers in the community that assist families in ensuring that their disabled child receives any services to which he or she may be entitled.

The financial aspect of this is usually managed by the parents during their lives: If their child has a need, the parents fund the need. If the need is too expensive, the government will generally fund the need.

The concern arises when the parents face the reality that one day they will likely become elderly or infirmed and eventually pass away. The question that keeps many parents awake at night is: *How will the disabled child navigate this system and continue to qualify for government benefits without his or her family's resources?*

The good news is that despite the only historical option, which was to disinherit the disabled child entirely, New York state makes it possible for loved ones to leave assets to a disabled child or disabled adult in a trust that will not negatively impact his or her government benefits.

The most common of these trusts is referred to as a Supplemental Needs Trust (SNT); these can be established by a disabled person with his or her own funds, or by a parent, grandparent, loved one of the disabled person, or the court system.

Whether an SNT is created by the disabled person or a loved one, the disabled individual must meet the Social Security Administration's definition of "disabled" – which is an individual having a permanent impairment, either physical, mental or both. Once disability has been established, the next issue is which type of SNT is most appropriate in this particular circumstance.

In order to determine who should establish the trust, the first question is: *Who is the true owner of the assets?* Are the assets owned by the disabled individual via a medical malpractice settlement or an inheritance? If so, the Trust established is referred to as "self-settled"; these trusts are often referred to "Special Needs Trusts."

The purpose of the SNT in this case is to protect the funds in the trust for the use of a disabled person, and pay for additional living expenses that government benefits do not cover – while allowing the disabled individual to continue to receive their government benefits.

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# Estate re-planning after divorce or judicial separation

*By Alison Leigh Epilone, Esq.*

The divorce (or separation) process can often be a painstaking and heart-wrenching event in a person's life. Understandably, persons involved in divorce litigation are so emotionally entrenched in these proceedings that when the matter comes to a conclusion (either by settlement or the decision of a court), the newly divorced or separated individual shies away from any additional legal obligations or responsibilities.

Prior to the 2008 amendment, the main effect that a divorce had on a person's estate was that the disposition(s) under the will to the former spouse was automatically revoked.

The divorce, however, did not affect the former spouse's survivor rights to items such as Totten Trusts, life insurance policies, pension/annuities, or joint tenancies. The 2008 amendment included these dispositions and has also applied this section to judicially separated individuals.

**Often, the newly divorced fail to "re-plan" their estate as a divorced or separated individual. And what many individuals may not know is that the Estates, Powers and Trusts Law § 5-1.4 was amended in 2008.**

Accordingly, upon a divorce or judicial separation, the dispositions or beneficiary designations that will be automatically revoked include, but are not limited to: dispositions under a will, Totten Trusts, life insurance policies, lifetime revocable trusts, joint tenancies (a tenancy in common will then be created), powers of attorney, health care proxies, pension/retirement benefits, or bank accounts in trust form.

So what does this amendment mean for a newly divorced or separated individual? The easy answer is that estate "re-planning" is a necessity. As a newly divorced or separated person, you want to ensure that your assets will be distributed in accordance with your wishes upon your death.

Therefore, as soon as you receive notice from the Court or your attorney that your Judgment of Divorce or Judgment of Separation has been entered with your local county clerk, you should make an appointment with your estate planning attorney to update your will, health care proxy, living will, power of attorney, and other related documents.

However, when meeting with your estate planning attorney, you want to ensure that you are also complying with the terms of your Stipulation of Settlement, Separation Agreement, Judgment of Divorce, and/or Judgment of Separation.

What this means is that you must designate (or re-designate) your former spouse as the beneficiary on your life insurance policy if you are required to maintain a policy for the benefit of your former spouse or children with your former spouse as trustee. This requirement also rings true for your pension and/or retirement benefits.

The designation of your former spouse as a beneficiary on your pension and/or retirement benefits, however, is likely done pursuant to a Domestic Relations Order if same was agreed to in your final Agreement or required by the Court. Make sure to consult with your matrimonial attorney with regard to the survivor benefits required on your pension and/or retirement plans.

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***Preventive Law Guide*** is published three times annually by the Legal Service Plan Administrator in cooperation with the National Legal Office of Feldman, Kramer & Monaco, P.C., 330 Vanderbilt Motor Parkway, Hauppauge, NY 11788. Unless otherwise noted, articles are authored by attorneys in the National Legal Office.

# Consumer Alert: Beware of phone scammers

*By Anita Y. Aginian, Esq.*


All too frequently, we hear about scam artists calling individuals at home trying to swindle money and/or personal information. Often in these situations, a caller will state to the target that a debt is owed to a collection agency.

The person taking the call is told that unless money is sent immediately, the police will be on their way to make an arrest. The victim – who is under duress in these cases most of the time – will provide bank information to make a settlement payment on a debt not really owed.

The target in this situation is normally unaware of the fact that it is generally NOT a crime to owe money. Therefore, the police would not come to the home of the target to make an arrest.

Under other circumstances, the target is called and told by someone identifying himself as an agent of the Internal Revenue Service that money is owed. Fearing some tax consequences, the target will again supply financial information. Too often, the target/victim will be told to send money through a wire transfer. Keep in mind that the IRS does not call a taxpayer out of the blue.

There seems to be a rise of calls from these scammers to seniors recently. Seniors are often targeted for a variety of scams because these low-risk crimes are usually not reported. These crimes become an embarrassment to the victim, especially for those who feel some cognitive loss and do not want to appear vulnerable.

Retirees are prime targets for these types of crimes because they have retirement savings and equity in their homes. They are also more likely to use landline phones, making it easier to find them through phone lists that are sold.

Another frequent scam that targets all ages is phone lottery scams. In these situations, the caller informs the target he has won an international lottery and that an administrative fee must be sent prior to receiving winnings.

In other circumstances, a check is sent to a target that is tied to a foreign lottery with a phone number provided to verify the claim. The victim deposits the check and must send funds to the scammer to administer the winnings. The checks turn out to be fraudulent, and the target must then deal with the bank that took the deposit in the first place by replenishing the funds.

Another type of fraud that has become prevalent recently is imposter fraud. In these instances, a criminal will pose as a law enforcement official – threatening arrests if funds are not paid.

At other times, scammers will pose as relatives to scam targets out of money. The criminal may say he is being arrested and needs money for attorney fees and/or bail; he may also say he's out of the country and lost his identification and wallet. There is usually a bad connection on the call so the target cannot be sure of the voice of the relative.

Don't fall victim to these scams! The best strategy is to simply hang up the phone if a call like this comes through. And make sure to look out for loved ones that could be more vulnerable to these types of crimes.

**Estate re-planning...**
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Some newly divorced or separated individuals want their former spouses to remain as their designated beneficiaries, executors of their estate, health care proxy, etc. This is permitted as long as you "re-designate" your former spouse in newly executed legal documents with the bank, life insurance companies, etc. Accordingly, if this is your desire, estate "re-planning" is still required.

In summary, it's important to contact your estate attorney immediately upon your divorce or separation for estate "re-planning" to ensure that your assets are protected and distributed pursuant to your wishes. If you have any questions about this topic, please contact me at 631-231-1450, ext. 205 or *aepilone@fkmlaw.com*.

**Sources:**
1. New York Estates, Powers and Trusts Law § 5-1.4
2. McKinney's Practice Commentaries to EPTL § 5-1.4
3. McKinney's Legislative History to EPTL § 5-1.4

## Protecting the disabled beneficiary
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One of the negative features of self-settled SNTs is they are required to state that if there are assets left in the trust after the disabled individual dies, the government agencies that provided care during his or her life will be reimbursed.

This requirement is commonly referred to as a "payback provision." In addition, it should be noted that any self-settled SNTs must be established before the disabled person reaches 65 years old.

The second type of SNT is funded with assets that do not belong to the disabled individual; this type of SNT is referred to as a "third-party" because it is created by someone other than the disabled person or their spouse.

Feldman, Kramer & Monaco commonly drafts estate planning documents containing SNTs for parents and grandparents of disabled children for the reason stated above. These parents/grandparents simply do not wish to disinherit their disabled child or grandchild but understand that government benefits have restrictions with regard to assets held in the disabled individual's name.

*Continued below*

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## Protecting the disabled...
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Similar to self-settled SNTs, third-party SNTs allow the disabled person to qualify for government benefits because the funds in the SNT are not considered an "available asset" to the disabled individual.

The main distinction between the third-party SNT and self-settled SNT, aside from the assets with which they are funded, is the pay-back provision. As noted earlier, self-settled SNTs require that there be a payback provision for any government agency that provided the disabled person care during his life; this is not the case with a third-party SNT.

A third-party SNT can direct where any remaining assets should go upon the passing of the disabled person; the remaining assets can even revert back to the parent's or grandparent's estate for distribution to other family members.

SNTs can be an integral part of any family's estate plan when it comes to ensuring the security of a disabled loved one. If you have a disabled child or loved one whom you wish to consider in your estate plan, it is important to speak with a disability planning or elder law attorney to ensure the SNT is drafted with care and by a professional with a keen understanding of public benefits.