



Elder Law Newsletter

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Trusts provide safety net for disabled

By Donna Meyer

A person with a disability often requires financial assistance from the government to pay for his or her long-term special needs. Public assistance provides for basic food, clothing, and shelter—but little else. A “special needs trust” can provide the means for purchases other than the basics.

Special needs trusts allow the beneficiary to maintain needs-based public assistance and at the same time receive some benefit from the trust estate by making the trust assets available to the beneficiary only for things which Medicaid and SSI do not provide. For example, a trust can pay for telephone service, transportation expenses, cable TV service, computer hardware, and software, Internet services, education, recreation, vacations, and health care expenses not covered by Medicaid. Such a trust can be funded with the disabled person’s own assets or with those of a third party, such as a parent or grandparent.

Special rules govern special needs trusts funded with the beneficiary’s own assets. These are called “Medicaid payback trusts.” The key elements of a Medicaid payback trust are as follows:

- (a) the trust is created by a parent, grandparent, conservator, or court;
- (b) the individual is under 65;
- (c) the trust is created for the benefit of a person who is disabled as defined in the Social Security Act;
- (d) any remaining trust balance at the death of the life beneficiary is paid to the state agency to the extent Medicaid assistance has been provided.

These four elements need not be met by a special needs trust created by a third party and funded with a third party’s funds, such as a special needs trust created by a parent in a will.

Recent developments & practice tips

Public benefits law is a moving target, and the law changes often, as do the policy interpretations of those laws. There are some things you need to keep in mind when executing a special needs trust.

- A discretionary support trust is one in which distributions can be made for basic needs, such as food, clothing, and shelter, and the trustee has the sole discretion to determine whether a distribution should be made. The Social Security Administration in our region will not treat a discretionary support trust as an available resource as long as the beneficiary cannot compel a distribution. Oregon’s state Medicaid agency is now developing a policy on this. It is safer to use a special needs trust standard.
- It is acceptable to name a class of remainder beneficiaries (“intestate heirs,” for

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Special needs trusts *Continued from Page 1*

example) rather than a named individual to receive the trust balance after the state Medicaid agency in a Medicaid payback trust.

- It is now allowable to pay for "reasonable administrative costs" after the death of a lifetime beneficiary in a Medicaid payback trust. However, payment of funeral expenses or other expenses of the beneficiary is not allowed.
- At this time, Social Security in our region has been accepting Medicaid payback trusts established by nominal parent or grandparent grantors without requiring some other legal authority. However, a cautious approach is to have the beneficiary execute a limited power of attorney that gives the parent or grandparent the authority to create the trust.
- Generally, SSI benefits will be reduced in cases where the individual is not paying the full cost for his or her food, clothing, and shelter.
- Restaurant meals or food purchased in connection with a vacation will be treated the same as other food paid for by a trust, and will reduce the beneficiary's SSI.
- It may be advisable to write the trust to allow distributions for the purchase of a home and for its maintenance, but the practitioner should be extremely cautious in advising clients about these options.
- If a disabled individual is unable to travel alone, the trust can pay for the travel costs for a companion to accompany him or her, even though the companion may be a relative or friend of the beneficiary.
- It is also possible to extend the term of the trust established for a child beyond the age of majority in certain circumstances.
- Finally, the key to a successful trust is a well-educated trustee. Elder law attorneys should alert the trustee to obtain all necessary information in order to comply with the complicated rules.

For a more extensive discussion of special needs trusts, please consult the OSB CLE *Problem Prevention in Elder Law* "Special Needs Trusts: Recent Changes and Common Conundrums," October 26, 2001.

The author thanks Karen Adams for her assistance in writing this article.



Donna Meyer, JD, has practiced law in Oregon for more than 25 years. She is a partner with the firm of Fitzwater & Meyer. She has served as Chair of the Elder Law Section's Executive Committee.

Recent articles on trusts

The Elder Law Section's Cynthia Barrett has authored "Distribution Standard for the Special and Supplemental Needs Trust" in the Summer, 2001 (Vol. 14, No. 3) *NAELA Quarterly*, the journal of the National Academy of Elder Law Attorneys.

Also included in the issue are articles about administration and taxation of special needs trusts as well as an article on "The Dark Side of Pooled Trusts."

Changes in rules for income cap trusts

Effective April 1, 2001, administrative costs of an income cap trust were clarified in the Oregon Administrative Rules. Allowable trustee fees are not to exceed \$50 per month, except fees up to \$150 per month may be authorized if there is a professional trustee or an unusual circumstance that makes \$50 limit inadequate. A reserve is allowed for administrative fees and costs of the trust, including bank service charges, copy charges, postage, accounting and tax preparation fees, future legal expenses, and income taxes attributable to trust income. The reserve is limited to \$50 per month unless there are unusual circumstances that make \$50 limit inadequate. Conservatorship and guardianship fees and costs are allowed. (OAR 461.145.0540, Section 10 c.)

Also of note

Since July 1, 2000, Medicare and private insurance premiums for the community spouse can be deducted from a Medicaid recipient's income. (OAR 461.160.0620, Section 8)

Income cap trusts: one size does not fit all

By Karen Adams

The income cap trust is an important tool for the elder law attorney, and one that deserves more attention than it sometimes gets.

With the cost of nursing home care running around \$4,000 per month, a person may need long-term care, but lack the assets or income for it. The obvious place to turn is the state Medicaid program. However, in Oregon, an "income cap" rule says anyone with monthly income over a certain amount (currently \$1,635) is considered ineligible for Medicaid, even if he or she is eligible in all other respects. To solve this dilemma, the state allows an irrevocable living trust called an "income cap trust" to be established for the benefit of the Medicaid applicant. Elder law attorneys are frequently asked to draw up such trusts.

When setting up an income cap trust, keep in mind that one size does not fit all. Individual trusts themselves do have much in common, because the clients who need them all have the same problem. Their gross income exceeds the Medicaid income cap amount, and without an income cap trust they will not be eligible for the Medicaid program. Unlike most trusts lawyers write, however, the trust document itself requires little work to suit it to an individual client. You can download the trust form from the Seniors and Persons with Disabilities Services Web site at www.sdsd.hr.state.or.us. However, if you simply plug in the effective dates and the client and trustee names, you are not doing the entire job.

Although each client may have the same basic income cap problem to solve before he or she qualifies for Medicaid benefits, each one comes with an individual set of circumstances. Some clients may have monthly income of \$1,636, others as much as \$3,000. Some clients apply for assistance in community-based care, others apply to live in a nursing home. Some clients may have a spouse at home they need to support, others may not. Some clients may still have taxes withheld from their income, others may not. Also, some clients may have health insurance premiums, or medical bills yet to be reimbursed by a health insurance provider, and others may not.

Distribution plan important

The Schedule B, or Distribution Plan, is the aspect of the trust most individual to a

client. A distribution plan is a schedule of monthly payments made by the trustee on behalf of the Medicaid recipient. The allowable payments are those distributions specifically authorized by the Federal government and the State of Oregon, including but not limited to a personal spending allowance for the Medicaid recipient, support to the spouse at home, health insurance premiums, taxes, medical expenses recently incurred and not yet paid, and payments toward an irrevocable burial plan.

There are many variables. It is important to ask the right questions and to know the rules that apply. For example, be certain that you know in which type of facility the trust beneficiary will be living. The personal needs allowance and room and board amounts are different for community-based care as opposed to nursing homes. If the Medicaid applicant has a spouse at home, calculate the community spouse income allowance and allow for the correct amount (remember that your calculation will differ if the applicant resides at home with his or her spouse). Be sure to ask whether any medical bills remain unpaid and negotiate with the caseworker assigned by SPDS to handle your client's Medicaid application to allow unpaid bills as a distribution. Check to see whether the client has a burial plan; he may not volunteer the information.

Determining the distribution categories and calculating the amounts to allow for each of them is the most important service provided by an elder law attorney who prepares a Medicaid Income Cap Trust and distribution plan. The Medicaid caseworker is not responsible for this task. It is the lawyer's duty. If an attorney treats the income cap trust as "one size fits all," he or she not only does a disservice to the client, but loses credibility with the Medicaid caseworkers.

Be prepared to guide trustee

Also important is educating the trustee. The trustee is most often a family member who is dealing with a very difficult transition in a loved one's life. He or she is under an incredible amount of stress, and needs your help in understanding the confusing income cap trust distribution scheme. Write a detailed letter that describes exactly what the trustee should do in the first month.

Karen Adams, an associate with Fitzwater & Meyer in Clackamas, focuses her practice on Medicaid and estate planning.

The Elder Law section of the Oregon State Bar held a CLE seminar on October 26, 2001, called "Problem Prevention in Elder Law." The income cap trust information found in the CLE material contains detailed explanations of the distribution plan categories, as well as advice from the field provided by the Medicaid caseworkers.

Rules get tougher for grandparents' visitation and custody

By Douglas A. McKean



Doug McKean, a Deputy Legislative Counsel, advises the Legislative Assembly and drafts legislation concerning family law.

Under legislation adopted by the Oregon legislature in 2001, the rules have changed for grandparents who seek court-ordered visitation with or custody of their grandchildren.

The Troxel case and the legislature's Response

The legislation, which took effect on July 31, 2001, was enacted in response to the United States Supreme Court decision in *Troxel v. Granville*.¹ A plurality of the court held that a Washington visitation statute was unconstitutionally applied. The court reviewed its previous holdings that parents have a liberty interest in the care, custody, and control of their children. Because the Washington statute allowed any person to seek visitation and gave no "special weight" to the decision of the fit custodial parent to limit the visitation of the child's grandparents, the court held that the statute unconstitutionally infringed on the parent's right to determine the child's best interest.

The Oregon legislature, concerned about the constitutionality of Oregon's visitation statutes following *Troxel*, repealed ORS 109.121 and 109.123 (Oregon's grandparent visitation statutes) and amended ORS 109.119.² Grandparents seeking visitation or custody must now petition or intervene under ORS 109.119. The new law applies to petitions for visitation or custody filed before, on, or after July 31, 2001.

Requirements for visitation

Under the new rules in ORS 109.119 (3), to obtain visitation with a child, a grandparent must have a "child-parent relationship" or an "ongoing personal relationship" with the child. "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under ORS 109.119, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter, and incidental necessities and provided the child with necessary care, education, and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, inter-

play, and mutuality, which fulfilled the child's psychological needs for a parent as well as the child's physical needs. ORS 109.119 (8)(a). "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay, and mutuality. ORS 109.119 (8)(e).

In addition, the grandparent must rebut a presumption that the legal parent acts in the best interest of the child. If the grandparent has a child-parent relationship, the rebuttal must be by a preponderance of the evidence. If the grandparent has an ongoing personal relationship, the rebuttal must be by clear and convincing evidence.

Finally, the grandparent must present evidence that visitation with the grandparent is in the best interest of the child.

What the court considers for visitation

In deciding whether the grandparent has rebutted the presumption and whether to award visitation to the grandparent over the objection of the legal parent, the court may consider whether:

- the grandparent is or recently has been the child's primary caretaker;
- circumstances detrimental to the child exist if relief is denied;
- the legal parent has fostered, encouraged, or consented to the relationship between the child and the grandparent;
- granting relief would not substantially interfere with the custodial relationship; and
- the legal parent has unreasonably denied or limited contact between the child and the grandparent. ORS 109.119 (4)(a).

Requirements for custody

Just as they did before the 2001 change in the law, grandparents who seek custody, guardianship, or other rights must petition the court or intervene under ORS 109.119 (3). A grandparent must now:

- (1) have a child-parent relationship with the child;
- (2) rebut by a preponderance of the evi-

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Grandparents' visitation

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dence the presumption that the legal parent acts in the best interest of the child; and

- (3) present evidence that custody, guardianship, or other rights with the grandparent are in the best interest of the child.

What the court considers for custody

In deciding whether the grandparent has rebutted the presumption and whether to award custody, guardianship, or other rights to the grandparent over the objection of the legal parent, the court may consider whether:

- the legal parent is unwilling or unable to care adequately for the child;
- the grandparent is or recently has been the child's primary caretaker;
- circumstances detrimental to the child exist if relief is denied;
- the legal parent has fostered, encouraged,

- or consented to the relationship between the child and the grandparent; and
- the legal parent has unreasonably denied or limited contact between the child and the grandparent. ORS 109.119 (4)(b).

Need help?

Members of the Family Law Section of the Oregon State Bar followed the development of this legislation. They may give you practical guidance on the effects of the new rules.

Footnotes

- 1 *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct 2054, 147 L.Ed2d 49 (2000).
- 2 Chapter 873, Oregon Laws 2001 (House Bill 2427), effective July 31, 2001, can be viewed in either HTML format or Acrobat PDF format at: www.leg.state.or.us/bills-set.htm.

Supplemental Security Income (SSI) Benefit Standards	Eligible individual \$545/month
	Eligible couple \$817/month
Medicaid (Oregon)	Asset limit for Medicaid recipient \$2,000
	Burial account limit \$1,500
	Personal needs allowance in nursing home \$30/month
	Room & board rate for community-based care facilities \$456.70/month
	OSIP Maintenance Standard for person receiving in-home services \$546.70
	Long term care income cap \$1,635/month
	Community spouse minimum resource standard \$17,856
	Community spouse maximum resource standard \$89,280
	Community spouse minimum monthly maintenance needs allowance \$1,452/month
	Excess shelter allowance Amount above \$436/month
	Food stamp utility allowance used to figure excess shelter allowance \$246/month
	Average private pay rate for calculating ineligibility for applications made after October 1, 2000 \$3,750/month
Medicare	Hospital deductible per illness spell \$812
	Skilled nursing facility co-insurance for days 21-100 . \$101.50/day
	Part B premium \$54/month
	Part B deductible \$100/year

Important elder law numbers

January 1, 2002

Resources for elder law attorneys

Events

Health Action 2002 Conference

January 17-19, 2002
Renaissance Mayflower Hotel
Washington, D.C.
Contact Dottie Shanks of Families USA at
202.628.3030 or dshanks@familiesusa.org

2002 NAELA UnProgram

February 01-03, 2002
The UnProgram provides members the
opportunity to spend time with one another
and brainstorm about issues affecting their
practices in an unstructured setting, focus-
ing on small group discussions.
Embassy Suites Outdoor World
Dallas, Texas
Contact Jenifer Mowery at 520.881.4005
ext.114 or jmowery@naela.com

A 2001 Update: Health Care Fraud

February 5, 2002
12:00 - 4:00 p.m.
Gus J. Solomon Courthouse
Portland
Information: Oregon Law Institute
Phone: 503.243.3326; 800.222.8213
E-mail: oli@lclark.edu

Winter Estate Planning Practice Update

February 21, 2002
12:00 - 4:00 p.m.
Gus J. Solomon Courthouse
Portland
Information: Oregon Law Institute
Phone: 503.243.3326; 800.222.8213
E-mail: oli@lclark.edu

Crossing the Great Divide

**2002 Joint Conference of National Council
on the Aging & American Society on Aging**
April 4-7, 2002
Denver, Colorado
Phone: 800-537-9728
Web site: <http://www.agingconference.org>

2002 NAELA Symposium

April 17-21, 2002
The latest information on elder law topics
from tax issues, estate planning, Medicaid,
and Medicare to practice management.

Hyatt Regency Baltimore
Baltimore MD
Contact Jenifer Mowery at 520.881.4005 ext
114 or jmowery@naela.com

Eighth International Conference on Alzheimer's Disease and Related Disorders

July 20-25, 2002
Stockholm, Sweden
Hosted by the Alzheimer's Association
Web site: [http://www.alz.org/international-
conference/respite.htm](http://www.alz.org/international-conference/respite.htm)
E-mail: internationalconference@alz.org

Elder Law Section CLE

Friday October 11, 2002
Oregon Convention Center
Portland

International Conference on Family Caregiving

Oct 12-14, 2002
Washington, DC
National Alliance for Caregiving
Phone: 800.537.9728
Web site: <http://www.caregiving.org>
Email: info@asaging.org

2002 NAELA Institute

November 14-17, 2002
Hyatt Regency Albuquerque
Albuquerque NM
Contact Jenifer Mowery at 520.881.4005 ext
114 or jmowery@naela.com

Elder Law Section Executive Committee Meetings

Lake Oswego OSB Center
2:00 p.m.-5:00 p.m. on the following days:
Jan. 18, 2002 March 8, 2002
April 19, 2002 July 12, 2002
Sept. 13, 2002 Nov. 8, 2002

Monthly Elder Law Discussion Groups

Elder Law I meets second Thursday
Lloyd Center Tower, NE Portland
Elder Law II meets first Thursday
Legal Aid Services, Downtown Portland
Details: Ann Stacey 503.224.4086

Elder law Internet discussion list

To subscribe, send a message to: lyris@lists.law.stetson.edu
Leave the subject line blank, and do not include a signature block. The body of the message
should be: Subscribe orellder your first name your last name

Send messages to: orelder@lists.law.stetson.edu

Web sites you can use

Often we need to find and use certain documents or specific forms quickly. Other times, we need to explore an area in which we don't often practice. In this column, I thought I would identify some useful form resources for elder law practitioners and discuss how you can use these forms on your computer.

Documents in electronic format

If you have not yet worked with online forms or started to scan documents and use a form-filling program to finalize them, you may want to consider the possibilities of handling documents electronically.

Many scanners now come with scanning programs that include a "form filler." I use PaperPort Deluxe (www.scansoft.com). All you have to do is scan a document with blank lines or spaces in it and then "drag" the document to the form filler. You can then type in the information and store the document on disk or print it out. This is particularly useful when you need a lot of information or need to draft the form for a client's review. Since the form is stored electronically, it is very easy to revise it at will. No more white-out!

A more sophisticated system is offered by Adobe, with its program Acrobat (www.adobe.com/print/main.html). This program enables you to convert your own forms into electronic versions for e-mailing to your clients or posting on your Web site. The client can then fill out the forms on his or her computer.

An advantage of scanned forms is that you can store the forms on your computer for later use with a different client. Certain document management programs like TimeMatters (www.timematters.com) and Worldox (www.worldox.com) are also able to use and index the scanned forms, particularly those scanned into Acrobat.

Social Security forms

The Social Security Administration has a Web site that contains a variety of useful data for both practitioners and those with questions about their own Social Security accounts (www.ssa.gov). Further exploration of that site brings you to information useful for attorneys who represent clients before Social Security (www.ssa.gov/representation). The Program Operations Manual System (POMS) is also available on this site in a form that is indexed and shows the most

recent changes by date (policy.ssa.gov/poms.nsf/aboutpoms).

Charitable Gift and Estate Planning

OHSU provides a useful site if you are assisting clients in planning for charitable giving, either to OHSU or other charities (www.pgdc.net/OHSF/FY-index). To use this site fully, you need to register with them. Registration also gives you the option of receiving a weekly e-mail regarding some aspect of charitable giving, usually recent tax decisions.

Savings bonds

Thanks to the Bureau of the Public Debt, there is now an easy way to determine the value of savings bonds. This Web site offers a downloadable program you can install on your computer at www.publicdebt.treas.gov/sav/savwizar.htm/. It also offers a "Savings Bond Calculator" which you can use to create an inventory of savings bonds held, see what they are worth, and how much of their value is interest.

Tax forms

The IRS provides many of its forms online at www.irs.ustreas.gov/prod/forms_pubs-forms.html/. Some of these forms are designed to be filled out online. Others can be printed and filled out by hand or typewriter. This is also helpful if you need older or outdated forms since this site keeps historical forms available as well.

Other useful sites

The Immigration and Naturalization Service now has many of its forms online at www.ins.usdoj.gov/graphics/formsfee/index.htm/.

The Oregon Corporation Division has its forms (most can be filled out online and printed) at www.sos.state.or.us/corporation/bizreg/index.htm/.

Multnomah and some other county courts now have Web sites that can be accessed through the Oregon Judicial Department at www.ojd.state.or.us/. The supplemental local rules and some court calendars are located here, along with some court forms.

One of the best things about online forms is that these are usually the most up-to-date versions available. This is particularly true with government agencies. Government Web sites usually are the first to have the latest versions of forms.



By Susan Ford Burns, Portland



Presorted Standard
US Postage
PAID
Portland, Oregon
Permit No. 341

New officers take reins January 1

The Elder Law Section elected officers at its October 2001 annual meeting. They are (left to right) Jennifer Wright, Chair-elect, Jane Patterson, Treasurer, Wes Fitzwater, Secretary, and Tim Nay, Chair.

New at-large members of the Executive Committee are Leslie Kay, Shirley Bass, and Penny Davis, all from Portland, and Matt Mullaney, McMinnville.

Member News

Karen Adams has joined Fitzwater and Meyer as an associate. Before entering private practice, she clerked for the Honorable Elizabeth Welch, Chief Probate Judge for Multnomah County and the Honorable James R. Ellis, Presiding Judge for Multnomah County.

Cyrus W. Fields has joined Nay & Friedenberg. He was formerly with Reeves, Kahn, & Eder, a general litigation practice. In addition to his work in elder and estate law, he has extensive experience in copyrights, trademarks, and contracts for artists.

Ellyn R. Stier has relocated her office and is now at 5 Centerpointe Drive, Suite 400; Lake Oswego, OR 97035; phone: 503.620.1095.

Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Tim Nay, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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