CTNAELA

The Connecticut Chapter of the National Academy of Elder Law Attorneys

PRACTICE UPDATE

Spring 2020

President's Message

by Attorney Edward G. Lang

In her recent book Elderhood, author Louise Aronson comments that "we're all headed toward old age. Improving our own elderhood means challenging the societal prejudices and misconceptions that relegate the elderly to the sidelines of the American life. That not only means changing how we talk about the elderly but educating ourselves about their varied and unique medical needs. If we can do this, we'll be well on our way toward enjoying an elderhood characterized by joy and fulfillment".

As elder law attorneys, we bring to our practice a holistic approach to legal advice, taking into consideration the key issues facing seniors: housing, financial well-being, health and long-term care, autonomy and quality of life. We bring to our practice a knowledge of the issues facing seniors that allow us and our staffs to ignore the myths relating to aging and the competence of seniors. We empathize with and understand the real-life problems of people as they age and we utilize the resources of geriatric care managers, psychologists, social workers and other elder care professionals who may be able to assist our clients. Active members of CTNAELA play a significant role in enhancing the lives of our clients and the Connecticut elder community.

The Executive Director of NAELA recently wrote that "when I first joined NAELA I was taken with the Academy's culture. I was told that with NAELA, you would experience a collegiality and camaraderie that couldn't be found in other attorney associations, and that this culture formed the foundation of the organization. Over the years, that's proven to be true. Even more so, the NAELA culture has been a driving force in the success of both practitioners and the profession as a whole". This statement is equally true for CTNAELA.

For the many attorneys who support CTNAELA, their involvement is driven by a belief in our mission and recognition that helping NAELA and CTNAELA achieve its objectives helps them achieve their objectives personally and professionally. To become a part of the NAELA culture, you need to become engaged.

The Program committee of CTNAELA works diligently to create interesting and innovative programs that satisfy the educational needs of our members while also providing CLE credits.

The Publications committee creates thoughtful and helpful Practice Updates. The committee members continually work to provide pertinent commentary and/or practical instructional support as part of their publications.

The Website committee has created a useful and practical website that provides case law, UPM citations, fillable DSS forms, practice updates as well as a list of CTNAELA members.

(continued on back cover)

FEATURES IN THIS EDITION:

When the AG Says "You Must Use Our Form SNT" 2
Practitioner's Corner: Laws, Rules and Practical Realities 4
MCLE Ethics Opinion No. 21: Ethics/Professionalism Requirement 5
The VA Pension Rule Changes: What You Need to Know 6
CTNAELA Membership Opportunities 9
CMS Pushes Forward on Harmful Waivers Despite Losses 10
The SECURE Act Changes Retirement Rules 11

When the AG Says "You Must Use Our Form SNT"

by Attorney Lisa Nachmias Davis

Since 1993, federal law has allowed attorneys to assist disabled clients by helping the clients' own assets to be transferred to a "special needs trust" that can benefit them while not disqualifying them from Medicaid, or by helping elderly applicants for Medicaid make similar transfers for the benefit of disabled children or other disabled individuals. The Department of Social Services and the Attorney General's office has resisted these trusts from the very beginning, most recently insisting that some practitioners use a "state form" created by the Department on penalty of loss of benefits. This article reviews the federal and state requirements for these trusts, the arguments made by the state, and the counter-arguments that should help practitioners to fight off this type of agency overreach.

Since 1993 (or for SSI, 2000), federal law provides that a disabled person under sixty-five can transfer assets to a so-called self-settled "d4a" trust (special needs trust), without the transfer being considered disqualifying and without the assets subsequently counting as resources for purposes of qualifying for asset-limited federal benefit programs such as SSI or Medicaid. 42 U.S.C. sec. 1396p(c)(2)(B) (Medicaid – transfers), 42 U.S.C. sec. 1396p(d)(4)(A) (Medicaid – resources), 42 U.SC. sec. 1382b(c)(1)(C)(ii)(III), (IV) and 1382(c)(1)(B)(i) (SSI – transfers), 42 U.S.C. sec. 1382b(c)(1)(B)(1), (e)(5)(SSI – resources).

Originally there was some question about whether Connecticut residents could avail themselves of this law, since the federal statute at the time required such trusts to be "established" by "parent, grandparent, guardian or court." A person subject to a conservatorship of the estate could only transfer assets by act of the conservator. In Connecticut, the term "guardian" applies only to the fiduciary of an intellectually disabled individual and "guardians" of adults have no power over their assets. Moreover, the probate court is a court of limited jurisdiction and it was not clear that a probate court could "establish" a trust. Fortunately, in 1999, the Connecticut Supreme Court clarified matters by ruling, in *Saunders v. Commissioner,* 247 Conn. 686 (1999), that it was within a conservator's powers to "manage" a conserved person's assets, to establish and transfer assets to such trusts in order that the person would qualify for benefits.

While the *Saunders* decision was being argued, the legislature amended Conn. Gen. Stat. Sec. 45a-655e to provide explicit authorization for conservators to establish and fund trusts. Public Act 98-232 Sec. 2. The legislation did not include any specific requirements for such trusts, other than stating that such a conservator-established trust is subject to the continuing jurisdiction of the probate court. Conn. Gen. Stat. 45a-655(e). The only requirement was that the trust qualify under 42 U.S.C. sec. 1396p(d)(4). Id. This statute has never been revised and there are no additional statutory requirements for such trusts.

After the *Saunders* case and the change to 45a-655e, DSS amended the DSS Uniform Policy Manual to conform to the law. The provisions adopted have been substantially the same since first made. The provisions of the Department of Social Services Uniform Policy Manual, which if validly promulgated in conformity with the provisions of the Administrative Procedures Act, are treated as valid regulations of the Department of Social Services; *Richards v. Commissioner of Income Maintenance*, 214 Conn. 601 (1990); Conn. Gen. Stat. sec. 17b-3; and as a general principle of administrative law, validly adopted regulations have the "force of law" and are binding upon the agency that issues them. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). The UPM only includes the following requirements for such a trust:

6. The Department does not consider the following types of trusts in determining the individual's eligibility for Medicaid:
   a. a trust containing the assets of an individual under age 65 who is disabled, according to criteria under the SSI program, if:
      (1) the trust is established for the benefit of such individual by his or her parent, grandparent, or legal guardian, or by a court acting in accordance with the authority of state law; and
      (2) under the terms of the trust, the state will receive all amounts remaining in the trust upon the death of the individual, up to an amount equal to the total amount of Medicaid benefits paid on behalf of the individual.

Uniform Policy Manual Section 4030.80.D.6 (resources); identical language in Uniform Policy Manual Section 3029.11.D.1 (transfers).

(Note that the UPM no longer conforms to federal law, since the Twenty-First Century Cures Act, P.L. 114-255, section 5007 (incorporating the "Special Needs Trust Fairness Act) effective December 13, 2016 amended 42 U.S.C. sec. 1396p(d)(4)(A) to permit an individual to establish the trust without a conservator, parent, or guardian doing so. Federal interpretations of 42 U.S.C. sec. 1396p(d)(4)(A) have also clarified that where more than one state has provided Medicaid, the repayments must be pro rata; State Medicaid Manual sec. 3259.7; and that although repayment can be made after payment of taxes and administrative expenses, repayment must be made before payment of funeral expenses; Social Security Emergency Notice EM-01085, promulgated November 12, 2001.)

In short, there is no basis under either state or federal law for the Department of Social Services to deny eligibility or impose a transfer penalty because a trust that meets the requirements of 42 U.S.C. sec. 1396p(d)(4)(A) does not meet some other, internal requirement created by the Commissioner of Social Services.

Notwithstanding, it is standard operating procedure for the Department of Social Services to: (1) threaten to deny eligibility if a trust does not meet its additional requirements or use a "state form", and (2) object to, and threaten to appeal from, any probate court order approving a trust that does not meet its additional requirements. On what basis?

The Department might make the following arguments to support its actions:

(1) Conn. Gen. Stat. Sec. 17b-82 provides that no "person being supported wholly or in part under the provisions of the state supplement program, medical assistance program, temporary family assistance program or state-administered general assistance program or any beneficiary under such provisions or any legally liable relative of such beneficiary" may "sell, assign, transfer, encumber or otherwise dispose of any property without the consent of the commissioner."

(2) Under federal law, the state's Medicaid agency has the "sole authority" to decide the eligibility of individuals for Medicaid. 42 U.S.C. sec. 1396a(a)(5)(requiring that states have a "single agency" to determine eligibility).

There are powerful counter-arguments to each of these points made by the Department.

First, on the "consent of commissioner" argument — the Connecticut Supreme Court neatly dispensed with this argument, by stating in footnote 18 of *Department of Social Services v. Saunders*, 247 Conn. 686 (1999):

> 18. We do not believe that the legislature intended § 17b-85 to be read as the department suggests, that is, to require, in all circumstances, the approval of the commissioner of social services of any sale, assignment, transfer or encumbrance of the assets of a person receiving state financial assistance. Such an interpretation essentially would allow the commissioner of social services to veto arbitrarily any transaction it chooses to veto. With regard to the present case, this reading of the statute would render virtually meaningless the authority to manage a ward's estate expressly granted to the Probate Court in § 45a-655 (a). We do not believe that the legislature intended to create such an inconsistency.
>
> The court's decision in *Saunders* is also supported in the decision of *Valliere v. Commissioner*, 328 Conn. 294 (2018) in which the Court rejected the state's "sole authority" argument and suggested that if the result of its decision was inequitable, there was a legislative remedy.

What other arguments might the state make that would be specific to the particular trust?

(1) The state may reject a trust that gives a trustee "absolute" discretion, arguing that this makes the trustee's actions unreviewable. Of course, this is nonsense; the recent enactment of the Connecticut Uniform Trust Code clarifies that trustee discretion is always reviewable with respect to "bad faith." It is settled law that a trustee's exercise of discretion is always reviewable for bad faith. E.g., George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 560 (rev. 2d ed. 1980).

(2) The state may reject a trust on the basis that some small provision of the trust could be stretched to allow some benefit to the trustee, e.g., if there is no provision prohibiting the trust from making payments that would satisfy a legal obligation of support. Of course, Conn. Gen. Stat. sec. 45a-487 explicitly overrides any such interpretation, providing that no trustee has the authority to satisfy the trustee's legal obligation of support unless the trust document specifically refers to 45a-487. To the extent that some other trustee might be seen to have that power — to satisfy someone else's legal obligation of support — presumably the trust language stating that it is for the "sole benefit" of the beneficiary would prevent a trustee from doing so and would override such an interpretation.

(3) The state may object to the trust on the basis that on the beneficiary's death the trust principal can be distributed to a remainder beneficiary after repaying the Medicaid obligation despite a liability for repayment of state assistance under some other, state-funded program. But the UPM does not include any such provision. The state might argue that general principles of fraudulent conveyance law should apply — but these laws do not prevent someone from arranging his or her plans to defeat the claims of creditors against his or her estate at death. In fact, *Greenwich Trust Co. v. Tyson*, 129 Conn. 211 (1942) merely holds that the individual cannot create a self-settled trust to defeat the claims of creditors during lifetime, or rather, that a trust that purports to do so is subject to the creditors' claims, not that the trust is invalid in and of itself. (The CT Uniform Trust Code, eff. 1/1/20, will actually permit self-settled asset protection trusts in Connecticut, but only for claims arising after the establishment of the trust.) But in general, while the state's concern is certainly a valid one, nothing in federal Medicaid law permits the state to respond to such concerns by denying Medicaid eligibility. The state would not claim that an individual whose estate would be subject to claims for costs of incarceration or state supplement could be denied MEDICAID if transferring all his or her assets to a spouse – so what's the difference? As the court notes in the *Valliere* decision, if this is an issue, there is a legislative remedy.

(4) The state might object to a trust that has an early termination clause which might defeat the state's right to payback. Indeed, Social Security regulations have clarified that a payback clause is only permitted if it provides for full reimbursement of Medicaid on termination. SSA Programs Operations Manual System SI 01120.199 F.1. (To the extent that Connecticut's 1972 Medical Assistance Plan did not provide otherwise, Connecticut is required to have rules no more restrictive than Social Security law. 42 U.S.C. sec. 1396a(a)(10)(C)(i), (r)(2)(B); see *Simonsen v. Bremby*, No. 16-204-cv (2d Cir. 2017)).

Denial of benefits on the basis of concerns that are not based in federal Medicaid law violate federal Medicaid law.

> "[A] state medicaid agency may not add eligibility criteria not expressly authorized by federal law. *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *Van Lare v. Hurley*, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975); *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970). Regulations issued by the secretary of health and human services prohibit a state medicaid agency from imposing eligibility requirements on medicaid applicants that are more restrictive than those imposed on SSI applicants. 42 C.F.R. § 435.401(c). *Probate of Marcus*, 199 Conn. 524, 534 (1986). (The only exceptions would apply to those more restrictive criteria that were included in the state's Medicaid plan in effect in 1972; see 42 C.F.R. sec. 435.121.)

Moreover, denial of approval for an individual to transfer assets to a trust where federal Medicaid law clearly permits such a transfer is tantamount to an inchoate lien on the individual's property, and liens on a Medicaid recipient's property are strictly prohibited by Medicaid law except in the very narrow circumstance of (1) so-called "TEFRA" liens on the real estate of a person who enters a nursing home for a long-term stay or (2) liens for the state's claim on recovery of proceeds of litigation or other third-party liability for medical expenses. *Wos v. E. M. A.*, 568 U.S. 627 (2013). Federal law on this issue preempts any Connecticut statutes to the contrary, such as Conn. Gen. Stat. sec. 17b-79 and certainly 17b-85. See, for example, *State v. Murtha*, 179 Conn. 463 (1980).

Practitioners should resist the efforts of the State to impose requirements on special needs trusts that exceed the requirements of state and federal law. There is a long track record of success for lawyers fighting overreach by the Department of Social Services. ■

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PRACTITIONERS CORNER:

Laws, Rules and Practical Realities

by Attorney Howard M. Gould

The statute providing for the right to dispose of one's property at death could not be clearer:

Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will. CGS 45a-250.

Every practitioner knows the elements of "sound mind" as they relate to testamentary capacity. A testator must have an appreciation of the nature and extent of one's property, know the natural objects of one's bounty, and have a general understanding of the plan of disposition set forth in the proposed will.

We also know that the statutory requirements constitute a rather low bar. Our case law provides that even a person who suffers "insane delusions" may execute a will, as long as the standard for capacity is met on the day of the will signing.

We often deal with clients whose testamentary wishes appear ill-considered. We have all encountered parents who have had a falling out with one of their children and wish to remove that child as a beneficiary. The client's reasons may appear suspect or petty, but that alone is hardly a basis for challenging testamentary capacity. Individuals have the right to make poor choices.

Our office has a large family (divorce) practice. We once represented a husband who wished to disinherit his wife, to the extent possible, because he believed she was having an affair. A will was executed on the basis of that unsubstantiated belief. This was hardly a unique circumstance.

Recently a more difficult situation arose. A widower in his 80's called to set up an estate planning appointment. I had known the client for many years. Unfortunately, since the death of his wife, he has been confined to an assisted living facility and seemed quite lonely. The client was not particularly close to his children, who live out of state, but was not estranged from them either. As part of the conversation, the client spoke in glowing terms of his health care aide and mentioned that he wanted to do something to recognize her service. I was troubled. I was acquainted with the aide from prior visits with the client and had no reason to think there was anything inappropriate about the relationship. Still, the client appeared reliant on the aide for companionship and was clearly infatuated with her. Finally— and there is no other way to say this — the health aide was a young woman who bore a strong resemblance to tennis star/celebrity Maria Sharapova.

It was hard not to feel that this situation deserved a higher degree of scrutiny than the unhappy husband who wished to disinherit his wife or the angry parent who sought to delete one of his children from his estate plan. The question to be asked is on what principled basis an attorney might inject himself into the substance of a plan of distribution in a will.

Rule 1.14 of the Rules of Professional Responsibility offers some guidance in dealing with "impaired" clients. The Rule also states that when a client is unable to make adequately considered decisions, is likely to suffer substantial physical or financial harm and cannot adequately act in their own interest, a lawyer may take actions which would otherwise be barred by traditional limits in the conduct of their profession.

The protective steps authorized under the Rule are exceedingly broad. If the lawyer finds the requisite circumstances exist, he may make disclosures of confidential information even if the client directs otherwise. He may obtain information from third parties. In dealing with the widower/client discussed above, one possibility would have been to contact the assisted living facility to learn a bit more about his condition and the nature of his relationship with the aide. I could have also checked with his doctor with whom I had a good relationship to ensure that he had the requisite capacity to make a will and that I was not missing anything.

In reviewing the Official Comments to Rule 1.14, I was also concerned to find that the substance of the proposed estate planning may be a factor in determining a client's capacity. Was I to determine what amount of a gift was "normal" and what amount was an indicator of impairment?

In the instance described above, I did none of the things authorized by Rule 1.14. I'll tell you how the matter was resolved in a moment.

It is a simple fact that as one moves through their 70's into their 80's some level of cognitive impairment is virtually inevitable. Physical changes such as loss of hearing are common. Certain aspects of memory also decrease. This, when added to the other challenges of aging, may lessen the ability of the elderly to make the "well-considered" decision described in Rule 1.14.

Still, it seems unfair to have a separate legal standard for elderly clients. Even if they are at risk in some areas, they may have greater life experience or wisdom than might a younger client. Younger clients may have equally concerning conditions of their own. Would we challenge the wishes of an alcoholic client to make an unusual bequest, assuming that client was sober on the day of the office appointment? How about the client who has what we politely call "anger management issues?" Is a charitable bequest to the detriment of family really an indicator of impairment? If so, is it a greater concern if the client is elderly? Those looking for guidance are referred to the Official Commentary to Rule 1.14: "The lawyer's position in such cases is an unavoidably difficult one."

On a practical level, I believe there are numerous approaches which can be useful. The drafter of a legal document is more than a scrivener. It is entirely appropriate to ask for the client's rationale in deciding. I have often asked a client if I could comment on the consequences of their plan of distribution and have rarely been told that comment is unwelcome. That is part of the lawyer's job.

In a marginal situation, a lawyer should be perfectly comfortable scheduling an additional conference to ensure that a client's wishes are clear and well-founded. It is also possible, within reason, to delay the signing of the final documents if a client appears under unusual stress. I have had occasion to include another attorney from our firm to sit in at a will conference, thereby obtaining an independent view of the client's decision-making process and capacity. The American Bar Association /American Psychological Association published a booklet called "Assessment of Older Adults with

(continued on page 5)

From the Commission on Minimum Continuing Legal Education (MCLE):

Opinion 21, November 6, 2019 Ethics/Professionalism Requirement

The Commission on Minimum Continuing Legal Education (Commission) received several requests for guidance on the types of courses that qualify for the two hour "ethics/professionalism" requirement in Practice Book §2-27A(b)(2). The opinion of the Commission is first, that "ethics" means legal ethics. Educational activities regarding fields of ethics other than legal ethics do not qualify towards the "ethics/professionalism" requirement of the MCLE rule. Second, it is the Commission's opinion that "ethics/professionalism" activities must be provided by approved deliverers of CLE and consistent with the content requirements found in Practice Book §2-27A(b)(2) and §2-27A(c)(6). Finally, the two hour "ethics/professionalism" requirement should be fulfilled by courses or portions of courses that are designed to maintain the integrity of the bar by ensuring that attorneys act with the highest degree of ethical and professional conduct.

Ethics/Professionalism may include courses or a segment within a course discussing:

(1) The Rules of Professional Conduct in any jurisdiction, and the rules of practice concerning attorneys as set forth in Chapter 2 of the Connecticut Practice Book.

(2) The professional obligations of lawyers to clients, the judicial system, third parties, the public, or other lawyers.

(3) Trust account administration and law office management and practice.

(4) Legal malpractice prevention.

(5) Work/life balance activities, including mental health and wellness and substance abuse control.

(6) Bias/diversity/inclusion.

Practice Book §2-27A(a) provides that the "ethics and professionalism components may be integrated with other courses," which means that the ethics/professionalism content may be contained within a separate course on another topic, provided the total minimum of two hours of ethics/professionalism instruction time are met over the calendar year. ■

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Laws, Rules and Practical Realities

(continued from page 4)

Diminished Capacity: A Handbook for Lawyers" which can be easily located on the internet. It contains helpful criteria to observe when dealing with potentially impaired clients, as well as practical tips for dealing with such persons.

In the most serious situation, a lawyer could ask for permission to contact a client's physician to better understand the nature of a client's impairment. The lawyer could threaten to withdraw from the project if such consent were not given.

These suggestions do not involve the enhanced protective measures of Rule 1.14. The protective steps seem more appropriate for emergency situations or for a client who is under a legal disability. It is hard to imagine a circumstance in the will drafting context which would justify a lawyer abandoning traditional roles of confidentiality and conducting an independent inquiry.

In my experience, a lawyer can resolve the vast majority of troublesome situations by using the standard tools of the trade. A generalized notion that the core elements of the attorney-client relationship should be construed more liberally for elderly clients may be understandable, but it is misguided. However hard it may be to accept, an elderly client who meets the standards of testamentary capacity has the same right to make a foolish decision as a younger client.

About that client with the health care aide — for two days before the meeting I considered my options. The client had become a friend over the years, and I truly wanted to meet my professional responsibilities. (This is how I learned of the ABA/APA Handbook referenced above.) The client arrived, and it wasn't long before the subject of the aide arose. He told me it was important to recognize her extraordinary efforts. I was stunned to learn that the gift he had in mind was a silk scarf. What the client wanted to know was if I could ask one of our staff members to make an appropriate purchase. (He was lucid enough to know that I wasn't qualified for the task.)

We managed to accomplish that without further investigation into either statutory law or the Rules of Professional Responsibility. ■

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The VA Pension Rules: What You Need to Know[i]

by Attorney Rebecca A. Hajosy

On September 18, 2018 the final amendments to 38 CFR Part 3 (Net Worth, Asset Transfers and Income Exclusions for Needs-Based Benefits) were enacted by VA Regulation VA-2015-VBA-0003, effective October 18, 2018[ii]. The stated purpose of these new regulations was to "ensure the integrity of the VA's needs-based benefit programs and the consistent adjudication of pension and parents' dependency and indemnity compensation claims", as well as to implement recent statutory changes and to respond to recent recommendations made by the Government Accountability Office.

This article will review the major changes and set forth potential planning options.

Pension Refresher:

The Pension provides a monthly income benefit payment to certain wartime veterans and their surviving spouses. There is a service requirement, a disability requirement and a financial requirement.

The monthly benefit amount is based on the level of the pension (basic pension or basic pension with the added increased pension), marital status and whether or not the benefit is for the veteran or the surviving spouse of the veteran. The housebound and aid & attendance pensions are added onto (increase) the basic pension. The monthly benefit is between $768 and $2,266 monthly depending on a claimant's particular situation.

Only the basic pension is included as income for Medicaid eligibility[iii].

MAJOR CHANGES:

The major changes implemented by the new regulations establish (1) a bright-line Net Worth Limit, (2) a 36-month Look-Back and Penalty. There are other changes, but those smaller changes are not discussed in this article.

NET WORTH LIMIT (Asset Limit)[iv]

Under the old rules, the asset limit was around $80,000 with no official asset cap. The asset limit was determined by looking at a combination of total household assets, total household gross income, total household unreimbursed medical expenses (UME) and the life expectancy of the claimant.

Under the new rule (38 CFR 3.274), the current asset limit is $129,094 (as of December 1, 2019). It is tied to the Social Security Cost of Living Adjustment and thus will increase when there are COLA increases/adjustments.

The asset limit includes both the applicant's assets AND annual income and also includes the assets and income of the spouse (38 CFR 3.23(d)(1) and (4)).

Example:
Claimant and spouse have $60,000 in income and $75,000 in assets. The claimant's net worth is $135,000, which is over the $129,094 net worth limit.

Exclusions and Deductions from Net Worth:

Certain income, assets and expenses can be excluded or deducted from the claimant's net worth for eligibility purposes.

a. Primary residence[v] (38 CFR § 3.275(b)): The value of a claimant's primary residence (single-family unit) (up to 2 acres-unless additional acreage is not marketable) is not part of the claimant's net worth. If the primary residence is sold after entitlement, the net proceeds are treated as an asset except to the extent the proceeds are used to purchase another residence within the same calendar year.

There is no need to be residing in the primary residence. It is ok if the claimant is living in a nursing home, care facility other than a nursing home, or the home of a family member for health care or custodial care. The primary residence will still be excluded.

Thus, in theory, the claimant does not ever have to have lived in the house. Is there a planning option with this? It is speculated that under this provision, a claimant could spend down their net worth by buying a house that is their "primary residence", regardless of whether or not they ever lived in it. To date, the author has not read of this theory being tested and approved, but it is just a matter of time before it is tried.

b. Car and Tangible Personal Property (38 CFR 3.275(b)(2)): The regulation states the "Value of personal effects suitable to and consistent with a reasonable mode of life, such as appliances and family transportation vehicles" are excluded.

Thus, tangible personal property is excluded. However, if there were an excess of expensive or high value tangible personal property, there might be an argument that some of the value of that tangible personal property should be included in the net worth, as it is above and beyond that needed for a reasonable mode of life.

It is not yet known whether the regulation language means a claimant can have more than one vehicle, but the assumption, based on the wording of the regulation, would be yes, the claimant could own more than one vehicle.

c. Unreimbursed Medical Expenses (UME) (38 CFR 3.272 & 3.278): Unreimbursed medical expenses are deductible from annual income to the extent that they exceed 5 percent of the applicable MAPR (maximum annual pension rate): for a veteran: currently $13,752/$1,146 (5%=$687), for a married veteran: currently $18,008/$1,500 (5%=$900) and for a surviving spouse: currently $9,224/$768 (5%=$461).

This was always the case, but now these same unreimbursed medical expenses reduce the income for the net worth limit as well. Unfortunately, if medical expenses exceed income, they will not reduce the amount of assets for the net worth calculation. And, if these expenses are used to decrease the income for the net worth calculation, they cannot also be used to reduce income for the income limit[vi].

d. Mortgage (38 CFR 3.275(a)): The amount owing on a mortgage on any property that is not the primary residence is deducted. You cannot deduct the mortgage on the primary residence.

e. Other Deductions: Other deductions such as radiation exposure compensation, income tax refunds, and other statutory exclusions (see 38 CFR 3.279) are not included in the net worth calculation. There are a lot of them. Most won't apply to your clients[vii].

Net Worth Calculation Example:
Presume the net worth limit is $129,094 and the maximum annual pension rate (MAPR) is $18,008. The claimant and spouse have assets of $125,000 and annual income of $50,000. Their net worth is $175,000 which is over the asset limit.

However, the claimant is a patient in a nursing home and pays annual unreimbursed nursing home fees of $75,000. Since reasonably predictable unreimbursed medical expenses are deductible from annual income under 38 CFR § 3.272, to the extent that they exceed 5 percent of the applicable MAPR (in this case, $900), $74,100 is deducted from the net worth, which decreases annual income to zero. The claimant's net worth is now $125,000 and is below the limit.

Net Worth Reverification:

Once the claimant is approved, the VA will only look at the net worth at the end of each calendar year. Thus, if the claimant goes over the asset limit during the year, for any reason, including selling a house, as long as the claimant is spent down by the end of the year, the claimant remains eligible for the entire year[viii].

Look-Back and Penalty

The new regulations implement a look-back of 36 months from the date the VA receives an original pension claim or a new pension claim after a period of non-entitlement.

There is no penalty on transfers prior to October 18th, 2018, even if the claimant has not applied. A penalty is assessed only on the transfer of assets over the asset limit. The assets over the net worth limit are called "Covered Assets". In addition, an asset has to be part of the claimant's "net worth" (38 CFR 3.276) to be counted as a penalty transfer[ix].

The penalty is calculated by taking the total covered asset amount (amount over the net worth limit) and dividing it by the monthly penalty rate (which is the MAPR for a veteran in need of aid and attendance with one dependent /12). Rounding down, the current monthly penalty rate is $2,266. The monthly penalty rate is the same for a single veteran, married veteran or surviving spouse.

No penalty can exceed five years. (38 CFR § 3.276(e)) and begins the first day of the month that follows the date of the transfer.

Examples:

(1) Assets were $150,000 and $50,000 was transferred. There is a $20,906 penalty, not a $50,000 penalty ($150,000-$129,094) as the penalty is only on the "covered assets" that were transferred.

(2) Assets were $100,000 and $25,000 was gifted. There is no penalty period because the net worth limit is $127,061 and total assets were under that amount so no transfer of "covered assets".

(3) Claimant applies with a net worth of $129,094. However, he transferred $10,000 of assets. His total covered asset amount is $10,000. The monthly penalty rate is $2,266. $10,000/$2,266 = 4.4 months of penalty.

Return of the Half a Loaf:

Under the current regulations, the penalty starts the month after the month of transfer and thus, we can return to the half a loaf planning popular prior to the DRA. This strategy involved calculating out the amount needed to cover expenses during a penalty period and transferring/gifting the excess.

If the penalty period will be longer than 36 months, 3-year planning should be done.

Half a Loaf Calculation

1. Total Assets: Calculate total assets.
2. Total Monthly Net Income: Calculate total monthly net income.
3. Net Worth & Retained Assets: Calculate the net worth (income-UMEs (-5% deduction) + assets)=$129,094. This is the amount the VA will allow you to retain in assets. You can also do it in reverse: $129,094 – applicable income = retained asset limit.
4. Monthly Expenses: Calculate the total monthly living expenses (including UMEs)
5. Shortfall/Burn Rate: Subtract the net income from the total monthly living expenses. This is the shortfall or burn rate of assets each month.
6. Excess Assets: Determine the excess assets over the retained asset limit. Total Assets-retained asset Limit.
7. Penalty Period: Take the excess asset amount and divide it by the penalty divisor plus the burn rate/short fall ($2,266 + shortfall). This number is the penalty period.
8. Gift Amount: Take the penalty period and times it by the penalty divisor (currently $2,266). This is the amount to gift. And the remainder is the amount of the excess assets to retain.
9. To confirm your calculation: Take the retained excess amount and divide it by your shortfall/burn rate. That number should equal the penalty period.
10. Add the retained excess amount to the retained asset amount and that is the total amount you are keeping.
11. To confirm once again, take the total amount keeping and the total amount gifted and that should equal your total assets.

Final Calculation: If the penalty period exceeds 36 months, retain enough assets to cover your shortfall for 36 months, gift the rest and apply in month 37. If the penalty period is less than 36 months, do the half a loaf.

Example of Half a Loaf Calculation

- Claimant has $150,000 in excess assets and $5,000/month in total living expenses. Income is $2,000/month.
- Shortfall (burn rate): $3,000/month
- Penalty divisor is $2,266
- Penalty period = $150,000/($3,000+$2,266) = 28.48 months (This is step #6 of the calculation.)
- Gift Amount: 28.48 x $2,266 = $64,535.68
- Retained Excess Amount: $150,000 – $64,535.68 = $85,464.32 (sanity check $85,464.32/$3,000 = 28.48 months)

(continued on page 8)

VA Treatment of Certain Types of Transfers and Asset Ownership

Annuities. Under the old rules, a claimant could purchase an annuity to reduce assets as there was no look-back and thus no penalty on transfers. Under the new regulations, the purchase of an annuity is a penalty transfer. Under 38 CFR 3.276(a)(ii)-a transfer for less than FMV includes purchasing assets that reduce net worth, unless you can liquidate them, in which case they are part of your net worth. An annuity would still be an exempt asset, if done properly, but would be a penalty transfer. Thus, a claimant could still purchase an annuity, but it would need to be done 3 years prior to application (outside the look-back) so it was not a penalty transfer.

Multiple Account Holders: Only the proportional share of a jointly held asset is calculated in the net worth. This was already the case and was often used by practitioners as it lowered the net worth for VA pension purposes but did not divest the claimant of assets or cause a penalty transfer for Medicaid purposes. However, under the new rules, although the VA is still only counting the proportional share of the asset, it appears as though the VA is going to count the addition of names to an account as a penalty transfer[x]. If that is the case, there is still the opportunity to do some 3-year planning by preemptively adding names to accounts or doing so as part of a half a loaf planning strategy.

Trusts: Under the old rules, since there was no look-back, setting up a trust for the benefit of another and transferring assets into that trust would not trigger a penalty and would move the assets out of the claimant's name for eligibility purposes. Under the new regulations, any transfers to trusts, for the benefit of others, are penalty transfers. Under 38 CFR 3.276(a)(ii)-a transfer for less than FMV includes purchasing assets that reduce net worth, unless you can liquidate them, in which case they are part of your net worth. Trusts are still an option, but only in combination with a 3-year or half a loaf plan. Look to General Counsel Opinions for guidance on the proper way to establish trusts for this purpose as they can be tricky[xi].

Planning Options Going Forward

Lowering Net Worth

a. Traditional Spend Down (§ 3.274(f)(1)): "A Veteran, surviving spouse, …may decrease assets by spending them on any item or service for which fair market value is received… The expenses must be those of the veteran, surviving spouse, or child, or a relative of the veteran, surviving spouse, or child. The relative must be a member or constructive member of the veteran's, surviving spouse's, or child's household."

Is there a planning opportunity with transfers to a relative? Maybe, if you are brave enough to try this one, please let everyone know how it turns out.

b. House Purchase/Transfer:
   1. The claimant could purchase a house, possibly even if the claimant is already in a facility. Then, if needed, sell the house after pension approval and use any amount over the net worth limit to spend down and/or gift the net worth amount as there is no penalty to gift the net worth amount.
   2. The claimant could transfer the house, at any time, as it is not part of the net worth definition. (This is speculative – be leery about this strategy until this is tried.)

3-Year Planning-all of this planning requires making the transfer and waiting 3 years or doing a half a loaf plan

a. Transfers Outright or in Trust (Gifting and waiting 3 years)
b. Annuity Purchase
c. Adding Names to Accounts
d. Wait out Penalty Period/Partial Gift Back (no care needed). This is basically the same as half a loaf, but without a short fall.
e. Half a Loaf Planning

New Application Process

The process for applying for benefits is the same. However, there are some updates to form 21P-527EZ-Veteran Application & form 21P-534EZ Surviving Spouse Application. In addition, there is a new form 21P-0969. This form is required if the claimant or spouse is receiving any income besides SS income, has more than $10,000 in assets or made any transfers within the last 3 years. Currently there is no requirement to provide 3 years of records, but it is anticipated that will eventually be implemented.

Summary

The addition of a bright-line asset limit, 3-year look-back period and a penalty have changed the VA pension landscape, precluding many veterans from accessing this benefit. However, with proper planning, the VA pension is still a great benefit and tool for our clients. ■

Attorney Hajosy's firm is Hajosy Law, LLC, located in West Hartford.

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[i] This Article was originally written in April 2019. The author has updated the figures to represent the new updated income, asset, benefit and MAPR rates, but did not update the article to represent any updates with planning techniques since the original April 2019 date. Therefore, it is strongly advised that you research any proposed techniques to ensure they are viable.

[ii] These amendments were first proposed in January 23, 2015.

[iii] Connecticut Substitute Senate Bill No. 391 was approved June 15, 2012 (Public Act 12-208). It excludes the aid & attendance pension from being considered income for Medicaid eligibility purposes. It was the intent of the bill to exempt all levels of the VA pension. However, due to the wording in the bill, the Connecticut Department of Social Services has interpreted the bill to only exclude the increased pension portion (housebound and aid & attendance) and not the basic pension amount. Thus, Connecticut includes the basic pension amount as income for Medicaid eligibility purposes. There is a yearly effort by CT-NAELA to have this policy changed at the legislative level to reflect the original intent of the bill. To date, this initiative has been unsuccessful.

[iv] 38 CFR 3.274(b)(1) defines Net worth. "Net worth means the sum of a claimant's or beneficiary's assets and annual income." 38 CFR 3.275(a) further defines assets: "(1) Assets. The term *"assets"* means the fair market value of all property that an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section…"

(continued on page 9)

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[v]38 CFR 3.275(b) Exclusions from assets. "Assets do not include the following: (1) Primary residence. The value of a claimant's primary residence, including the residential lot area, in which the claimant has an ownership interest. VA recognizes one primary residence per claimant. If the residence is sold after pension entitlement is established, any net proceeds from the sale is an asset except to the extent the proceeds are used to purchase another residence within the same calendar year as the year in which the sale occurred. (ii) Although rental income counts as annual income…, VA will not include a claimant's primary residence as an asset even if the claimant resides in any of the following…(A) nursing home or medical foster home; (B) care facility other than a nursing home; or (C) the home of a family member for health care or custodial care."

[vi]38 CFR 3.272 states: (1) *Veteran's income.* Unreimbursed medical expenses will be excluded when all of the following requirements are met: (i) They were or will be paid by a veteran or spouse for medical expenses of the veteran, spouse, children, parents and other relatives for whom there is a moral or legal obligation of support; (ii) They were or will be incurred on behalf of a person who is a member or a constructive member of the veteran's or spouse's household; and (iii) **They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the veteran (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound)** as in effect during the 12-month annualization period in which the medical expenses were paid. Medical expenses cannot be deducted for both decreasing asset limit, by decreasing the claimant's income, and also used to decrease income for the income limit.

[vii]38 CFR 3.279 includes crime victim compensation, chapter 18 benefits, flood mitigation activities, Indian tribal judgment fund distributions, Nazi persecution payments, and more.

[viii]38 CFR 3.274(h): When an increase in a beneficiary's or dependent child's net worth results in a pension reduction or discontinuance because net worth exceeds the limit, the effective date of reduction or discontinuance is the last day of the calendar year in which net worth exceeds the limit. (2) if net worth decreases to the limit or below the limit before the effective date provided in paragraph (h)(1) of this section, VA will not reduce or discontinue the pension award on the basis of excessive net worth.

[ix]It does not appear that the house is included in the definition of net worth at this time, so technically there would not be a penalty on the transfer of the primary residence. However, as of the time of the writing of this Article, the author knows of no attempts to try this technique.

[x]See the M21-1 Compensation and Pension Manual Rewrite

[xi]Under 38 CFR 3.276(b): as a general rule, property and income from a trust will not be countable as belonging to the claimant unless it is actually owned by the claimant, the claimant possesses such control over the property that the claimant may direct it to be used for the claimant's benefit; or funds have actually been allocated for the claimant's use. Look to General Counsel Opinions and VBA Opinions for guidance on trusts.

VAOGCPREC 72-90 and 64-91: The claimant must not hold legal title to or control of the trust property. Only such portion of the trust property made available for the claimant's use is countable for purposes of the income and net-worth provisions. Also see: VAOGCPREC 73-91. 15-92.

You cannot set-up self-settled SNT's (VAOPGCPREC 33-97)

Income Only Trusts are available assets. (Board of Vet. Appeals No. 16-02 867 (2/16/17) & 13-17 549 (6/5/17))

CMS Pushes Forward on Harmful Waivers Despite Losses

by Attorney David M. Goldfarb, Sr.

On March 14, 2017, Center for Medicare and Medicaid Services (CMS) Administrator Seema Verma and then Department of Health and Human Services (HHS) Secretary Tom Price started the great Section 1115 waiver war of the last several years. In a letter to the Governors, CMS and HHS committed to "ushering in a new era for the federal and state Medicaid partnership where states have more freedom to design programs…" Since then, HHS Secretaries have approved over a dozen waivers with restrictions on Medicaid eligibility.

Even the agency's latest loss on February 14th for approving a restrictive waiver in Arkansas in a Federal Court of Appeals doesn't appear to be stopping them. Just two weeks prior, CMS doubled-down by issuing waiver guidance that allows states to impose eligibility and benefit restrictions in exchange for limits on federal funds through "block grants" and "per-capita caps."

Elder Law and Section 1115 Waivers

Section 1115 of the Social Security Act allows the Secretary of HHS to waive many of the mandates of the Medicaid program for experimental purposes so long as it "is likely to assist in promoting the objectives" of the Medicaid statute.

A few waivers have impacted Medicaid long-term services and supports (LTSS) eligibility. Multiple states, including Florida, Iowa, and Arizona, received approval from the HHS Secretary to stop providing prior quarter coverage for LTSS. This provision had been waived before in the context of implementing managed care, but never on its own.

Most importantly, the HHS Secretary approved in December 2018 a modified version of Maine's request to impose a transfer penalty on any Medicaid compliant annuity purchased with a payout shorter than 80% of the life expectancy of the beneficiary. A month prior, Maine's Governor Paul LePage had lost re-election. Thankfully, the new Governor, Janet Mills, refused to sign off on the final waiver, and Maine never implemented these restrictions.

The Maine waiver was unprecedented in that it waived Section 1917 of the Social Security Act. NAELA is unaware of this being done before. Section 1917 contains most of the Medicaid law surrounding assets, from transfer penalties to promissory notes. The Administration's willingness to approve harmful re-writes of Section 1917 greatly concerns NAELA.

Litigation and NAELA Participation

Medicaid advocates struck back with the National Health Law Program pursuing litigation against the Administration for approving these waivers, starting with the one from Kentucky. In March 2019, a Federal District Court had overturned the Secretary's approval of the Kentucky waiver for the second time as well as one from Arkansas. Both waivers imposed restrictions on "able-bodied adults," such as work requirements.

NAELA joined an Amicus brief that provided the court with the perspective of individuals with disabilities and older adults. The brief included AARP, AARP Foundation, Justice in Aging, and the Disability Rights and Education Defense Fund (DREDF).

The Arkansas and Kentucky cases were appealed to the Court of Appeals for the D.C. Circuit simultaneously. The Kentucky case was dropped when the new Governor, who was elected in November 2019, announced that he would withdraw the waiver. Finally, in February 2020, the Court of Appeals upheld the District Court's decision, 3-0. Judge David Sentelle, an ardent conservative and mentor to Supreme Court Justice Neal Gorusch, wrote the opinion. That fact doesn't bode well for the Administration if it sought Supreme Court review.

The crux of these cases was how the HHS Secretary attempted to define the objectives of Medicaid. The Secretary argued initially that it could define the objective as "promoting health." Later waiver approvals also included concepts such as financial independence and fiscal sustainability.

Yet, the Section 1115 of the Social Security Act makes clear that Medicaid's primary objective is "furnishing medical assistance" that means providing coverage for health care (and long-term services and supports). Given that the Secretary failed to assess how the Arkansas waiver would impact coverage, and it did negatively impact coverage in Arkansas, the Secretary violated the Administrative Procedure Act's "arbitrary and capricious" standard.

Enter Phase 2: Block Grants by Waiver?

Undeterred, CMS issued guidance in January 2020 that would vastly expand the ability of states to limit access to and services covered by Medicaid in exchange for accepting a fixed amount of federal funds either as a lump-sum (block grant) or per beneficiary (per-capita cap). The waiver guidance only applies to eligibility pathways that do not require a disability to qualify for Medicaid, such as Medicaid expansion.

The State of Tennessee has already applied for such a waiver. Others states may follow, including Oklahoma and Alaska. The legality of these waivers seems doubtful given that the HHS Secretary would need to waive a provision of the statute not referenced in Section 1115 of the Social Security Act. Past lawsuits do not appear to be stopping the Administration; hopefully, future ones will. ■

Attorney Goldfarb is Director of Advocacy, National Academy of Elder Law Attorneys.

The SECURE Act Changes Retirement Rules

by Attorney Joseph A. Cipparone

On December 20, 2019, Congress passed, and the President signed an appropriations bill (Public Law No. 116-94) that contained the SECURE Act. The word SECURE is an acronym for "Setting Every Community Up for Retirement Enhancement." The Act fundamentally changes estate planning related to retirement accounts.

Contributing to a Traditional IRA, 401(k), 403(b) or 457 retirement plan allows you to save money for retirement without paying income taxes on the funds contributed or on the income generated by the account. You only pay income tax when you take distributions. Contributing to a Roth IRA or Roth 401(k) does not shield the contribution from income tax but allows the account to grow tax-free, and you do not pay any income tax upon receiving distributions. Federal law requires you to begin taking minimum distributions annually starting at retirement age for all retirement plans except Roth IRAs.

Prior to 2020, the law required minimum distributions to start at age 70½. You could not contribute to a retirement plan after reaching this retirement age. You had to work at least 1000 hours in a year to contribute to an employer's retirement plan. You could not take distributions from a retirement plan for the birth or adoption of a child without paying a 10% penalty and the income tax due. A business had to set up a retirement plan by December 31st for employees to make contributions during that year. If you died before retirement age and you named a person to receive your retirement plan, the designated beneficiary could take distributions over his or her life expectancy. The life expectancy period came from the IRS Uniform Lifetime Table for the employee ("the participant") and the participant's spouse or from the Single Lifetime Table for the participant's non-spouse beneficiaries. If you died after the required beginning date, your designated beneficiary could take distributions over your remaining "ghost" life expectancy under the Uniform Lifetime Table. These rules remained unchanged from 2001 to 2019.

Now, with the enactment of the SECURE Act, required minimum distributions don't have to start until age 72. For example, if you turn 70 in 2020, you do not have to take a required minimum distribution yet. You can now contribute to a retirement plan at any age. Congress recognized that people live much longer so making retirement contributions in your 70's could help you in your 90's.

Under the SECURE Act, you can now contribute to an employer's retirement plan as a part-time employee. If you only work 500 hours or more for 3 consecutive years, you can participate in an employer retirement plan. Employers also have more time to set up a retirement plan. An employer can now set up a retirement plan before its income tax return is due (including extensions).

If you need additional funds at the time of the birth or adoption of a child, you can now tap up to $5,000 of your retirement plan without incurring a penalty. You still must pay the income tax due on the distribution. You must tap the retirement plan within one year of the birth or adoption.

The end of the stretch IRA for non-spouse beneficiaries constitutes the greatest change for estate planning purposes. Except for eligible designated beneficiaries, the retirement plan custodian must distribute the entire retirement plan to a non-spouse beneficiary within 10 years of the participant's death. This may have a big impact on children who are in their prime earning years and don't yet need the additional income from an inherited retirement plan. A child may now have to take all the distributions during the child's prime working years, rather than stretching the payments out over the child's retirement years when the child is likely in a lower tax bracket. For instance, if a decedent had a $500,000 IRA at her death and she leaves it to her only child, the child must take the entire $500,000 within 10 years. The child will pay tax on the distribution(s) at the child's income tax rate. Thus, if a child is in the 24% income tax bracket, the child will pay $125,000 in income taxes.

Eligible designated beneficiaries include spouses, beneficiaries who are less than 10 years younger, children of the participant who have not reached age 18 and disabled or chronically ill beneficiaries. If you leave your retirement plan to your spouse, your spouse can still roll over an IRA to his or her own IRA and wait until he or she reaches age 72 to take distributions over his or her life expectancy. If you leave a retirement plan to your spouse in a trust that requires payment of the required minimum distribution, the trust does not have to begin making required minimum distributions until your spouse reaches age 72 and the distributions, thereafter, will be based on his or her life expectancy. When the spouse dies, however, the distributions to children must be paid over 10 years.

Beneficiaries who are less than 10 years younger than the participant continue to be able to take required minimum distribution over their life expectancy. For unmarried couples, it allows the survivor to use the retirement funds for the rest of his or her life.

Leaving a retirement plan to children under age 18 will not require distribution within 10 years if they are your children. Instead, the 10-year period will not start running until they reach age 18. If you leave a retirement plan to your grandchildren, however, your grandchild will receive the entire retirement account balance within 10 years. Let's say you have a grandson who is age 3. If you leave $50,000 of your IRA to your grandson, the probate court will have to appoint a guardian for your grandson and all the funds must come out by December 31st of the year he reaches age 13. Giving the retirement plan distribution in trust to your grandson will avoid the appointment of a guardian by a court, but it will not delay distribution of the entire amount to the Trustee by the time your grandson reaches age 13.

Leaving a retirement account to a disabled individual or a chronically ill individual will not require distribution of the account within 10 years. A beneficiary is disabled if the beneficiary cannot engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to end in death or be of indefinite duration. An individual is chronically ill if a licensed health care practitioner certifies that the individual (i) is unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days, or (ii) requires substantial supervision to protect such individual from threats to health and safety due to severe

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The SECURE Act Changes Retirement Rules

(continued from page 11)

cognitive impairment. The disabled or chronically ill beneficiary can receive required minimum distributions based on his or her life expectancy.

What about trusts for disabled or chronically ill individuals? If the disabled individual has a right to the participant's interest in the retirement plan, then the life expectancy method applies to the distributions to the disabled or chronically ill individual.

Given these new 10-year distribution rules for non-spouse beneficiaries who do not fit into one of the exceptions, you may have to consider some new strategies for estate planning with your retirement plans. Those strategies might include:

(1) **Converting your Traditional IRA or 401(k) to Roth IRA or Roth 401(k)**. You will have to pay the income tax, but it may be doable if your income bracket drops in retirement or you convert only a portion of the account to a Roth account each year;

(2) **Buying life insurance to pay the income tax that your child will bear**. Of course, you must be insurable, and the cost of the life insurance may be too great if you are over 70;

(3) **Leaving Your Retirement Plan to a Charitable Remainder Trust**. Your child could be the life beneficiary of the trust and anything left over goes to a charity you identify;

(4) **Leave more non-retirement assets to individuals and more of your retirement assets to charity**. Charities are not subject to income taxes. Thus, if you planned to leave some of your estate to charity, do it through your retirement plan. Your individual beneficiaries will not pay income taxes on the non-retirement assets they receive. Non-retirement assets receive a step-up in basis at death;

(5) **Communicate with your children about these new distribution rules for retirement plans**. Tell them to spread out the income taxes over 10 years by taking 10% distributions each year. Your children may also want to time distributions to coincide with years that they will have less income. ■

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President's Message

(continued from front cover)

The Public Policy committee members are actively involved with legislative committees, legislators, state agencies, lobbyists and interest groups to promote legislation that enhances the lives of our clients and in opposition to harmful changes in laws, policies, and procedures.

The Litigation committee seeks to initiate actions when necessary to challenge actions of state agencies, as a party to appropriate litigation, and to protect our ability to represent our clients.

The Mentor committee provides information, guidance, and training to those entering the field of Elder Law.

Opportunities exist to participate in our many activities, and we welcome you to join us as we continue to learn, grow, and contribute. A list of the Committees, Committee Chairs, and Committee members can be found on the CTNAELA Website www.ctnaela.org. Please contact me or a Committee Chair to join a committee or if you would like additional information. ■

Attorney Lang is a partner with the firm of Lang & Corona, PC, in Middlefield.

CTNAELA

The Connecticut Chapter of the
National Academy of Elder Law Attorneys