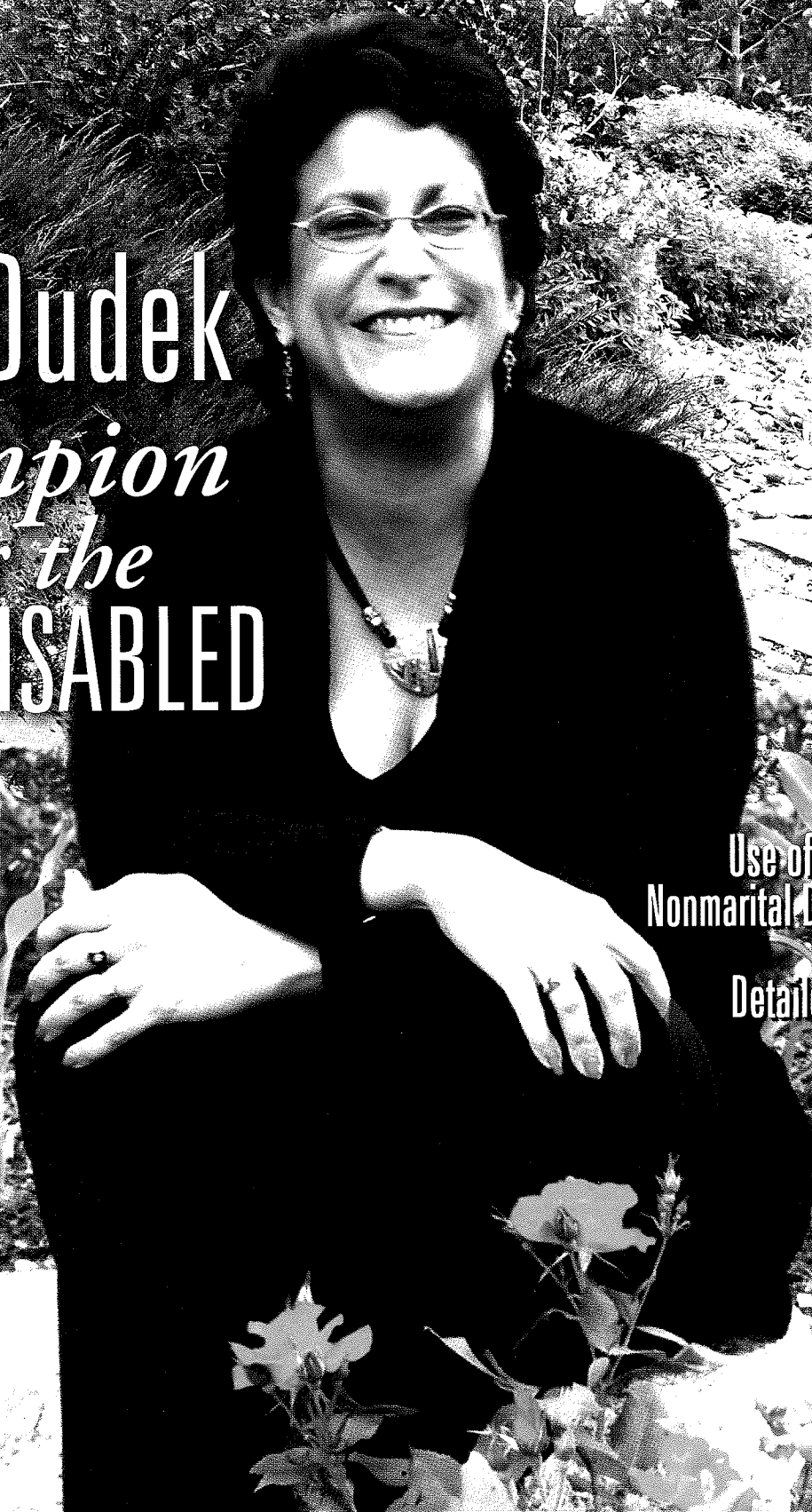




# NAELA<sup>TM</sup> News

National Academy of Elder Law Attorneys • Volume 19 • Issue 3 • 2007

## Pattie Dudek *Champion* for the DISABLED



Also Inside:  
Use of Pooled Trusts for  
Nonmarital Domestic Partners  
Detailed Trust Checklist  
NAELA in Hawaii



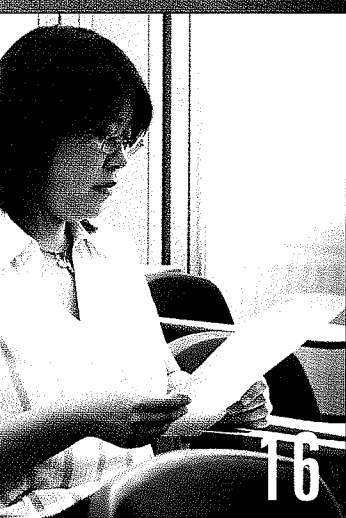
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# Use of Pooled Trusts for Nonmarital Domestic Partners

For a heterosexual couple, spousal impoverishment protections, under the 42 U.S.C. 1396r-5 (community spouse resource and minimum monthly maintenance needs allowances) protect the community spouse from becoming impoverished. These same protections do not exist for unmarried domestic partners. This has forced members of the lesbian, gay, bisexual and transgender (LGBT) community into many undesirable situations and limited planning options, particularly in the arena of government benefits planning when one partner suffers from a disability. A Pooled Trust (PT) can provide some relief for a disabled partner in the LGBT community.

PTs are authorized by Subsection (d)(4)(C) of 42 U.S.C. 1396p. PTs are trusts set up by a non-profit organization for the purposes of distributing and overseeing funds to be used to assist disabled beneficiaries of the trust. PTs are useful to the LGBT community because the (d)(4)(C) statute which creates them does not offer any special status for heterosexual marriages.

PTs are also useful to the LGBT community in how they may be disbursed after the death of the beneficiary. When the beneficiary of the trust account passes away, the portion of funds left in the trust account may be used to benefit persons with disabilities who are similarly situated to the decedent beneficiary. This means that the funds may be used in any way that will benefit those persons, not only directly, but also indirectly, by financing civil rights litigation that affects the rights of those persons, or supporting advocacy works for their benefit. Once any payback provision has been fulfilled, the remaining funds may be designated by the PT grantor to be used in a specific way (to help people with HIV, people with dementia etc.), or may be used for the benefit of a specific individual with a disability (a loved one, or family member of the original grantor).

PTs are special needs trusts created for the purpose of assisting persons with disabilities who are beneficiaries

of the trust to improve their quality of life and care. To ensure that the funds do not disqualify the beneficiary from obtaining needs-based government benefits, the trust should not be used to fulfill basic needs, such as paying for food and shelter, these things should be paid for with the government benefits. A PT can only be established by a non-profit organization. The sub-accounts of a PT must be set up for the benefit of persons with a disability who are current or prospective recipients of SSDI, Medicaid or SSI. A person is considered to have a disability "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" 42 U.S.C. 1382c(a)(3). Under this

definition, a person with HIV or AIDS may qualify as a person with a disability. To qualify, they must additionally have a condition listed in §14.08 of the Social Security Administration Blue Book (SSA Pub. No. 64-039). It can be found at <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>.

There are two types of sub-accounts within a PT. It is how the trust is funded and what happens to the funds after the death of the beneficiary that distinguishes the two. The first type of PT is a first-party trust which is funded by the beneficiary's own finances. A first-party or self-funded trust allows for payback provisions to apply after the death of the beneficiary. This means that the trust will have to pay back the State with any remaining funds for the government benefits provided to the beneficiary while he or she was alive. If any money remains in the sub-account, the charity that is operating the trust and/or acting as trustee has the first right to retain

remaining funds before the State receives any payback. The funds retained by the charity are often used to assist other beneficiaries of the PT, or to pay for the costs of maintaining the trust. Once all payback provisions have been fulfilled, then what is left over, if anything, will be distributed to the

**When the beneficiary of the trust account passes away, the portion of funds left in the trust account may be used to benefit persons with disabilities who are similarly situated to the decedent beneficiary. This means that the funds may be used in any way that will benefit those persons, not only directly, but also indirectly, by financing civil rights litigation that affects the rights of those persons, or supporting advocacy works for their benefit.**

Andrea M. Anderson  
Sanford J. Mall, JD, CELA

designated beneficiary. The beneficiary may designate that the remainder be distributed in any way he or she chooses, including giving it to specific individuals or groups.

The second type of sub-accounts within a PT is a third-party trust, which does not require the trust to refund the State for government benefits received by the beneficiary while he or she was alive. A third-party trust is funded with assets belonging to someone other than the beneficiary with special needs. Anyone may set up a sub-account in a PT for the beneficiary. The charity operating the PT may again have provisions allowing it to retain a portion of any remainder once the beneficiary has passed away. The funds remaining after the charity has received its portion will be distributed as instructed by the donor. The donor may instruct that the remainder be distributed in any way he or she chooses.

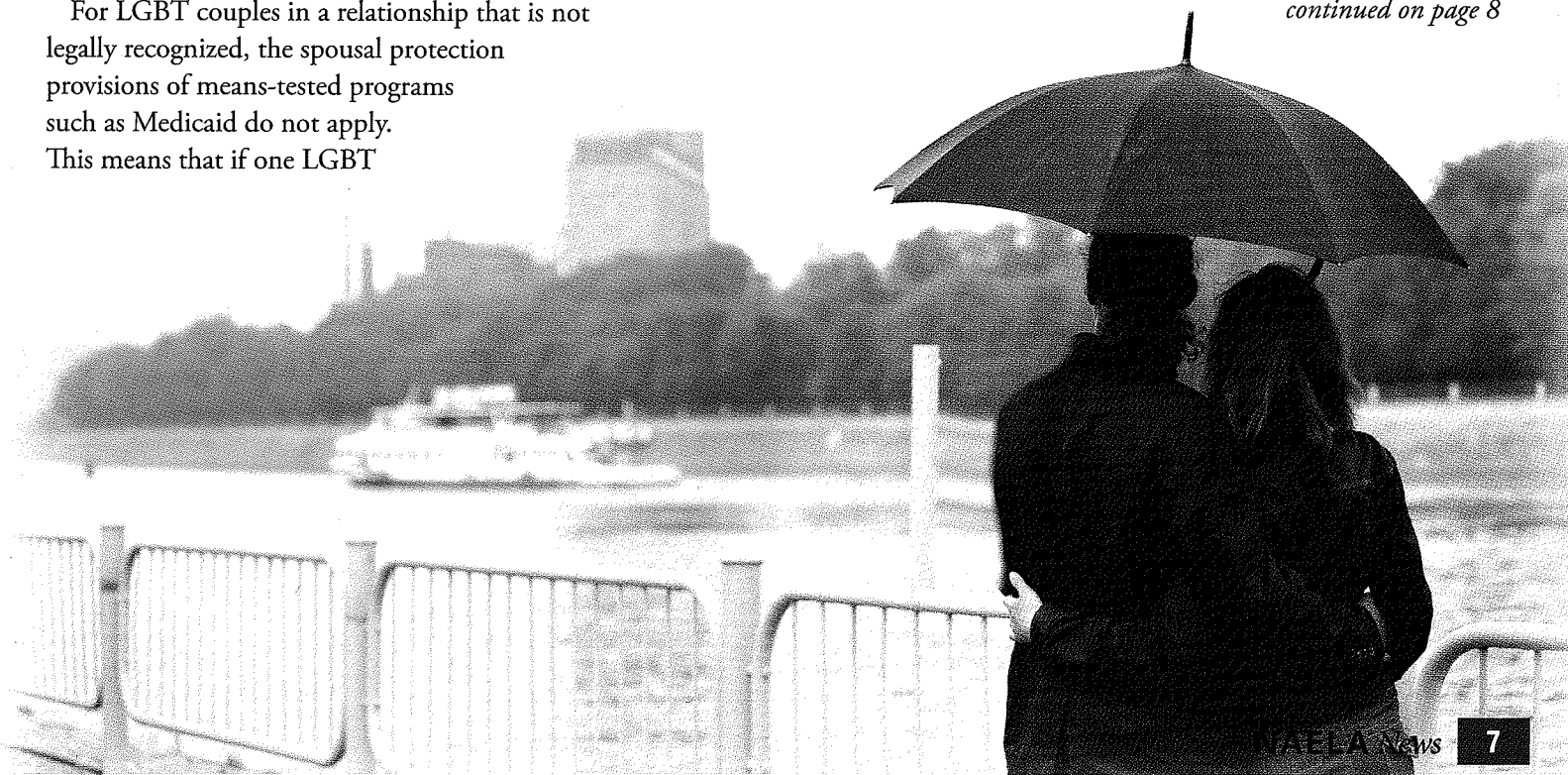
PTs can be used to benefit the LGBT community in multiple ways. The most obvious is that the trust can be used to benefit a lesbian, gay, bisexual or transgender person during his or her lifetime if they are disabled. A person with a disability from the LGBT community may set up a PT or a third person may set up the PT for him/her. During the lifetime of the beneficiary, the funds in the trust will be used for his or her benefit to provide care and financial support. It can help them secure Medicaid assistance for the home waiver and long term care programs.

For LGBT couples in a relationship that is not legally recognized, the spousal protection provisions of means-tested programs such as Medicaid do not apply. This means that if one LGBT

partner is disabled and needs expensive care then all of assets of the partner with a disability must be spent down to the proper amount before he or she can qualify for the benefits, regardless of the needs of his/her partner. If the partner with a disability maintains most of the assets in his or her name, spending down the assets to qualify for government benefits will likely leave the able partner impoverished, or at the very least force him/her to live well below his/her usual level of comfort. The use of a PT may help alleviate some of the financial stress of this situation. If the partner with a disability establishes a sub-account within a PT, he or she may make a caregiver contract that will pay out a particular amount to the able partner each month for caregiver services. It is likely that the able partner will be the one providing many caregiver services. Therefore, by establishing a care contract, the able partner will receive some income without disqualifying the partner with a disability from receiving government benefits.

If the LGBT community member funded his/her own sub-account within the PT, then when he/she passes away the charity will retain its portion of any remainder and the payback provisions will kick-in when applicable. After the State has been paid back as the provisions require, the charity will distribute the remaining funds, if any, as designated by the decedent beneficiary. If the decedent beneficiary left the

*continued on page 8*



remaining funds in the trust, he or she may provide that the funds must be used to benefit persons in the LGBT community. This means the unused funds may be used to benefit specific persons or the LGBT community as a whole. To benefit the community as a whole the funds may be used toward various LGBT causes through donation to various charities. Certain charities litigate issues for the LGBT community and as such would be using the money to benefit "similarly situated persons". These advocacy charities include the American Civil Liberties Union, the National Center for Lesbian

Rights, the Center for Constitutional Rights, and many more.

In conclusion, PTs offer a largely untapped potential to be used for the benefit of the LGBT community. This resource should not go overlooked. In the right circumstances, a PT may help a LGBT couple survive financially if one partner becomes disabled. In other circumstances the remaining funds from a PT sub-account may provide a great benefit to the LGBT community as a whole or even to individual members of the community.

**SANFORD J. MALL, CELA** *Sanford is the founder and senior partner of Mall Malisow & Cooney, PC – The Holistic Estate & ElderCare Law Firm. The firm is located in Farmington Hills, Michigan with affiliate offices in Bloomfield Hills and Highland, all located in Oakland County. Mr. Mall is the Chairperson for the Elder Law & Disability Rights Section of the State Bar of Michigan and he is nationally Board Certified as an Elder Law Attorney by the National Elder Law Foundation. He was also listed in Worth Magazine as one of the Top 100 Lawyers in the country and one of only three so designated in the state of Michigan.*

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