

The Trust SIG News

National Academy of Elder Law Attorneys • 1604 N. Country Club Road • Tucson, Arizona 85716 • 520/881-4005 • FAX 520/325-7925 • www.naela.org

A Message from the Chair

by Patricia E.K. Dudek, Esq.

Let me start off by thanking Reginald Turnbull for his wonderful leadership of the Trust SIG. I am personally thankful for all his efforts on behalf of the SIG and appreciate Reg's willingness to remain a member of the Steering Committee.

Second, let me apologize for the newsletter's tardiness. Due to circumstances beyond my control, I was unable to draft my comments timely, which held up the printing. It will not happen again! However, you will be happy to know that it was well worth the wait. Kevin Urbatsch's (from the Dale Law Firm) article on the use of special needs trusts in combination with HUD Section 8 benefits is a topic near and dear to my heart—so enjoy it!

Lastly, let me end by encouraging all of you SIG members out there to get involved. If you come across an interesting trust issue or article, please forward it on. Involvement in the Trust SIG is a great way to support other NAELA members and to learn and/or teach about a particular area of interest. There are lots of opportunities for involvement. If you have questions about what you can do, please call me at 248-645-9400.

Keep up the good work!

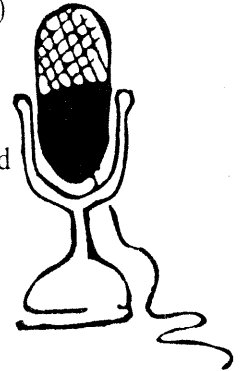
Trust SIG Presence at NAELA Symposium 2004 Hilton Head Island, SC

The Trust SIG through its Steering Committee, is preparing a presentation on "Planning and Representing Persons with Special Needs and Public Benefits" by a panel of NAELA Trust SIG members representing three or four states around the country. The panel will discuss innovative administration of special needs trusts in advocating for and securing services for persons with developmental disabilities and mental illness.

With the ever-increasing pinch of national and statewide budget deficits and as the dollars available in the Public Mental Health System shrink, the special needs trust is becoming an invaluable advocacy tool for people with special needs. The focus of the panel discussion will be on

the partnership trustees (and the attorneys) of special needs trusts can create with the public mental health system(s). These partnerships insure quality services for persons with developmental disabilities and mental illness that promote maximum independence and self-determination.

This presentation looks to go beyond the technical aspects of administering special needs trusts and delve into the details of the interrelationship between trustees, the beneficiaries and the public mental health system.



Fall 2003: Contents

Page 2:

Special Needs Trusts and Section 8 Housing
by Kevin Urbatsch, Esq.

Page 3:

Public Policy Announcement

Page 4:

Trust SIG Institute Activities

Trust SIG Listserv Up and Running

Want to find out more about a particular subject? Want to discuss one of the articles you read in the Trust SIG News? Need advice on how to handle a matter? Now you can get all the answers you need using the Trust SIG Listserv! Unless you have unsubscribed, all Trust SIG members have access to the listserv at trustsig@naela.com. Take full advantage of this great member resource. Don't miss out any longer on a great tool to advance your practice!

Special Needs Trusts and Section 8 Housing: Stretching Out the Dollars for Housing

By Kevin Urbatsch, Esq.

The most challenging obstacle for many individuals with disabilities is to find a safe, clean, and affordable place to live. Currently, many individuals with disabilities rely on Supplemental Security Income (SSI), Section 8 housing vouchers,¹ distributions from a Special Needs Trust (SNT), or a combination of these options to pay for their housing needs. Section 8 vouchers and SNTs are often necessary to assist with housing costs because SSI alone is usually insufficient.

A recent study found, that people who are dependent on the SSI program to meet their housing needs were priced out of every housing market area in the United States.² Of the nation's 2,702 market areas, there was not a single area where modestly priced rents for efficiency or one-bedroom units were affordable for a disabled person dependent on SSI benefits. Specifically, the average rent for a modest one-bedroom rental unit in the United States was equal to 105 percent of the SSI benefit amount.³

This article will discuss the ramifications to Section 8 eligibility for someone who is also the beneficiary of SNT. There are two main issues when an individual is eligible for Section 8 and is also the beneficiary of an SNT. The first issue concerns the effect on Section 8 benefits if the recipient establishes a SNT with their own assets. The second issue concerns the effect on Section 8 benefits when distributions are made from a SNT.

There are two basic types of SNTs: The Payback (or (d)(4)(A)) SNT which is created using the beneficiary's own assets and the Third Party SNT, which is created using the assets of anyone but the beneficiary.

The following paragraphs will describe the different effects of the different types of SNTs on the Section 8 recipient.

What is Section 8 Housing?

The federal Section 8 program began in 1975 as a way to assist people

with disabilities, the elderly, and low-income individuals to rent decent, safe, and affordable housing in the community. Through this program, individuals and families receive a "voucher" also referred to as a "subsidy" that can be used to supplement the rental cost for housing of their choice, as long as the rental unit meets the Section 8 program requirements. These subsidies are intended to provide long-term and permanent housing solutions.

The Section 8 subsidy, which is based on the cost of moderately priced rental housing in the particular community, is provided by a local Public Housing Agency (PHA) under a contract with the U.S. Department of Housing and Urban Development (HUD). Under Section 8, a household pays a portion of the monthly housing cost, which is based on the adjusted income of the household, with the remainder of the housing cost being paid for by the Section 8 voucher.

How Much Rent Does a Disabled Tenant Pay Under Section 8?

The amount of rent the Section 8 recipient must pay is typically 30 to 40% of his or her monthly-adjusted income, with a minimum of \$25 per month. Typically, the Section 8 recipient will pay 30% of their monthly-adjusted income for his or her share of the rent. To determine the monthly-adjusted income amount, the PHAs conduct a thorough examination of the household's income, including any assets, and calculate an annual adjusted income for that household. The adjustments to the income derive from HUD program regulations, which specify the types and amounts of income and deductions to be included in the calculation of annual and adjusted income. The Section 8 household's share of the rent is called the "total tenant payment."

Section 8 has its own rules on how assets are treated and what counts as income, which differ from other

governmental agencies like Social Security or the Internal Revenue Service. The pertinent rules come from HUD and are contained in a Guidebook No. 7420.10G entitled the "Voucher Program Guidebook, Housing Choice," available on the HUD website (herein referred to as the "Guidebook").

What Happens When a SNT Trustee Makes Distributions for the Benefit of a Section 8 Beneficiary?

If income or principal is regularly distributed from a Payback or Third Party SNT, it will count as income to the Section 8 beneficiary, unless a specific exclusion applies. (Guidebook, Chapter 5, Exhibit 5-2). If there is no income distributed from the trust, (i.e. it is reinvested in trust assets) then nothing is counted as income. Recurring distributions from a SNT for the benefit of a Section 8 tenant are specifically included in income. (Guidebook, Chapter 5, Exhibit 5-2, Income Inclusions, (7)). There are numerous categories of distributions which are specifically excluded from being treated as Annual Income to the Section 8 recipient. (Guidebook, Exhibit 5-2, Income Exclusions). These include distributions that are temporary, nonrecurring, or sporadic income including gifts. (Guidebook, Chapter 5, Exhibit 5-2, Income Exclusions, (9)).

Example:

Mark Schwartz' parents established a SNT for his benefit in their estate plan. Mark is a Section 8 recipient and his parents have died. The Trustee of the SNT made a one-time payment for a Las Vegas vacation for Mark and is paying Mark's monthly electric bill of \$100. There are no other distributions currently being made from the Trust. The existence of the Trust itself will not render Mark ineligible for Section 8 benefits nor will it cause any reduction of his Section 8 voucher. The payment of the trip to Las Vegas will not be counted against Mark because it is not

(continued on page 3)

a regularly recurring payment.

However, the \$100 a month will be added to Mark's adjusted monthly income and will increase the amount of money he will have to pay for his monthly rent as it is a regularly recurring payment from the trust. In practical terms, Mark will have to pay around \$30 a month for his share of the rent since his monthly adjusted income has increased by \$100 and he is required to pay 30% of his adjusted monthly income towards rent. The HUD formulas are a little more complicated than this, but these figures are close approximations.

What Happens to Section 8 Benefits When a Payback SNT is Established With an Inheritance or Litigation Proceeds?

Generally, lump sum amounts received by a Section 8 recipient, such as inheritances, insurance settlements, or proceeds from the sale of property are considered assets, not income. (Guidebook, Chapter 5, Exhibit 5-2, Income Exclusions, (3)). The receipt of these types of assets alone should not interfere with public benefits. However, if the Section 8 recipient transfers them to a SNT, then there are consequences. When a Section 8 recipient transfers his or her own assets into a SNT then the creation of that SNT will be treated under the Section 8 rules concerning a transfer of assets for less than fair market value. (Guidebook, Chapter 5 Exhibit 5-3). The result is that income will be imputed against the Section 8 recipient at the HUD-determined passbook rate for two years following the transfer of funds into an SNT. (Guidebook, Chapter 5, Exhibit 5-3, Assets Include (11)).

Example:

Tony Fritz is a competent disabled individual who receives Section 8. His father left him \$100,000, which he disposed of by having his mother create a SNT. No distributions were made from the trust. The trust produced income of \$8,000 in 2002, which was reinvested into the trust. Section 8 will not count the \$8,000 as Annual Income

because nothing was distributed from the trust. Section 8 also will not count the cash value of the trust (\$100,000) as a current asset.

Instead, since Mr. Fritz disposed of this asset for less than fair market value, Section 8 will count the asset by imputing income at 2% for a period of two years. This means that for two years after establishment of the SNT, Mr. Fritz must count as income \$2,000 per year or \$167/month. Mr. Fritz would be required to pay an approximately \$50.10 more for his 30% share of Section 8 housing for the two-year period. This assumes the HUD-determined passbook rate is 2%.

Another issue that may arise is if the lump sum inclusion of assets is a litigation settlement that includes a portion for lost wages. When a Payback SNT is established from settlement proceeds it is not included as income unless the settlement has a portion for payments in lieu of earnings. (Guidebook, Chapter 5, Exhibit 5-2, Income Inclusions (1) and (5); Income Exclusions, (3)).

Example:

Julie Daniels, a long time Section 8 recipient, was injured in a car accident. She received a settlement of \$300,000 to compensate her for her personal injuries and an additional \$5,000 to compensate her for 12 months of past wage loss. A Payback SNT, funded with all the settlement proceeds, was established for Julie's benefit. Julie will have to pay around \$275 more per month for her share of the total tenant payment. First, she must count the \$5,000 as income (pro-rated over the 12 month period) as it is payment in lieu of earnings for an additional monthly payment of \$125. She also must include the \$300,000 under the transfer of assets for less than fair market rules. This means that she must add around \$150/month. This portion is calculated as follows: $(\$300,000 \text{ (settlement)} / 2\% \text{ (HUD-determined passbook rate)} / 12 \text{ (monthly rate)} / .30 \text{ (tenant portion of payment)})$ and an additional \$125/month.

What Happens When a Payback SNT is Established and Recurring Gifts Are Made From the SNT?

If a SNT is established and

recurring distributions are made from it for non-exempt items, then in addition to the deemed income at 2%, the actual income distributed from the SNT is also counted as Annual Income. Therefore, for a two-year period, Section 8 will consider this asset for purpose of deemed income computation and, in addition, count as actual income the amount distributed from the SNT.

Following the two-year period, Section 8 will count only the actual income distributed from the trust to the recipient. (Guidebook, Chapter 5, Exhibit 5-2, Income Inclusions, (7) and Exhibit 5-3, Assets Include (11)).

Example:

Mitsie O'Brien is a disabled, competent individual living on Section 8 housing who received an inheritance of \$100,000 from her father. Ms. O'Brien's mother, pursuant to a power of attorney places the entire amount into a SNT pursuant to 42 U.S.C. 1396p(d)(4)(A), which Ms. O'Brien's children are Trustees (the children do not live with Ms. O'Brien). Count \$100,000 as an asset for two years, because it is an asset disposed of for less than fair market value. The deemed income from this \$100,000 will be \$167 per month (currently 2%) for the two years after it is established. In addition, if the Trustee distributes \$250 a month from the SNT during those two years to pay Ms. O'Brien's transportation costs. The \$250 will be counted as Annual Income as a recurring gift.

(continued on page 4)

Public Policy Liaison Announcement

Learn what is going on in your state and elsewhere regarding Medicaid developments and issues! NAELA's Public Policy Committee has set up a clearinghouse for members on the NAELA website, Our Gov section in the members-only area.

Public Policy State Liaisons have reported, on a monthly basis, current situations, serious national concerns and significant developments. Check it out today!

The result is an increase in Ms. O'Brien share of payment of Section 8 housing of around \$125.10 per month (\$250 recurring payment plus \$167 deemed income equals \$417 of additional monthly income of which 30% is used to pay her share of rent).

Conclusion

Used together, Section 8 and SNTs are effective means of stretching out the dollars for a disabled individual's housing. Without understanding these important benefits and how they work together, it is possible for the practitioner to lose a very valuable housing benefit and needlessly cause the elimination or improper reduction of Section 8 benefits.

For further information on Section 8 & SNTs, see:

- www.achievingindependence.com/index.html
(Dale Law Firm website with information on SNTs & Public Benefits)

- www.hudclips.org/cgi/index.cgi
(HUD Guidebook, Regulations, and Related HUD materials)
- www.hudclips.org/sub_nonhud/cgi/hudclips_run.cgi?hudclips_run
(Guidebook 7420.10G)
- www.tacinc.org
(Advocacy Group who wrote "Section 8 Made Simple, 2nd Ed" and "Priced Out in 2002")

Endnotes

1. In 1975, when this housing assistance program was established, it was referred to as the "Section 8" program. In many communities, it is still referred to by this name. However, a federal housing law passed in 1998 gave the program a new name the Housing Choice Voucher Program (HCVP). Because it is more familiar, this article will use the term "Section 8" to refer to the new HCVP.
2. Used with permission of the Technical Assistance Collaborative, Inc., *PricedOut in 2002*, (May 2003), Ann O'Hara Emily Cooper found at <http://www.tacinc.org>
3. Id.

Trust SIG Institute Activities

The Trust SIG is pleased to announce that Richard A. Courtney, CELA, will be presenting a breakout session at the 2003 Institute, *Traversing the Trustee Terrain: Fiduciary Duties Revisited*. Join us for a comprehensive review of the fiduciary duties required of trustees and the attendant pitfalls, with emphasis on special needs and irrevocable trusts.

**Friday,
November 14, 2003
7:00 a.m. – 8:15 a.m.**

The Trust SIG will be hosting a lively networking round table discussion breakfast based on the following topics of interest: Self-settled SNTs, Structured Settlement Funding of SNTs, Third Party SNTs, Trust Administration/Fiduciary Issues, Revocable Trusts, Irrevocable Trusts and Pooled Trusts. At the end of the breakfast, a short re-cap of each topic. This is a "MUST" for those members interested in trust issues.



Take the
BULL
by the
HORNS
at the 2003 Institute

November 14-16 • Hyatt Regency Dallas

2003/2004 Trust SIG STEERING COMMITTEE

Patricia E.K. Dudek, Esq.
Beier Howlett, PC

200 E Long Lake Rd., Ste. 110
Bloomfield Hills, MI 48304
(248) 645-9400 / Fax: (248) 645-9344
pdudek@beierhowlett.com

Richard A. Courtney, CELA
Frascona Courtney, PLLC

6360 I-55 N, Ste. 150
Jackson, MS 39211
(601) 987-3000 (866) 353-3752
Fax: (601) 987-3001
rcourtney@frascourtlaw.com

Stephen W. Dale, Esq.

The Dale Law Firm
1901 Olympic Blvd., Ste. 230
Walnut Creek, CA 94596
(925) 280-0172 / Fax: (925) 280-0177
steve@dalelawfirm.com

H. Amos Goodall, Jr., CELA

Goodall & Yurchak, PC
328 S Atherton St.
State College, PA 16801
(814) 237-4100 / Fax: (814) 237-5601
centrelaw@aol.com

Sharon Kovaes Gruer, CELA

Sharon Kovaes Gruer, PC
1010 Northern Blvd., Ste. 302
Great Neck, NY 11021
(516) 487-5400 / Fax: (516) 466-3863
skgruerlaw@aol.com

Jo-Anne Herina Jeffreys, CELA

Attorney at Law
634 Hudson St.
Hoboken, NJ 07030
(201) 656-5033 / Fax: (201) 656-2445
jhjeffreys@aol.com

Elizabeth Luckenbach, Esq.

Beier Howlett, PC
200 E Long Lake Rd., Ste. 110
Bloomfield Hills, MI 48304
(248) 645-9400 / Fax: (248) 645-9344
eluckenbach@beierhowlett.com

Pi-Yi G. Mayo, CELA

Attorney at Law
5223 Garth Rd.
Baytown, TX 77521
(281) 421-5774 / Fax: (281) 421-1103
pi-yimayo@pi-yimayo.com

Raymond W. O'Neal, Sr., Esq.

Attorney & Counselor at Law
1130 Fidelity Plz.
211 S Main St.
Dayton, OH 45402
(937) 222-7773 / Fax: (937) 222-7747
rwoneal2@juno.com

Reginald H. Turnbull, CELA

Turnbull Law Office, PC
200 E High St.
Jefferson City, MO 65101
(573) 634-2910 / Fax: (573) 634-7418
ribull@aol.com