



NAELATM News

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Ruth A. Phelps, CELA
NAELA President
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- Adding Veterans Benefits to Your Practice
- 10 Tips in Administering a SNT
- Update on the Estate Tax

Our Members, Our Clients

Ruth Phelps, CELA



I have spoken about our NAELA members, who are most important to NAELA. Most important to our members is our clients. Our members worry that a client will never walk through the door. They don't know if they will be able to help the client who does walk through the door. You, our members, do

not know what the problem is that will face you tomorrow when you meet with that new client. This is where NAELA can be helpful. The broad umbrella of Elder Law and Special Needs Law covers a myriad of topics. But our clients have one goal in mind when they come to us — getting help. It may be with a Medicaid application. It may be with how to save the family farm. It may be with how to handle grandmother's affairs now that she is in the moderate stages of Alzheimer's. It may be to help a person whose child has been diagnosed with schizophrenia. NAELA's goal is to provide that help through:

- Educational opportunities like the Annual Meeting, the Fall Institute, Telephonics, and the Online Education Library
- Interaction with other Elder and Special Needs Law attorneys through NAELA Chapters, Sections, and Listserv
- Informative publications like *NAELA News*, *NAELA Journal*, and the weekly *NAELA e-Bulletin*

Elder and Special Needs Law have been called a cross between the law and social work. We not only advise our clients on what the law is, but we hold their hands and counsel them through the process. For example, we give them tips on choosing a nursing home, we give them tips on finding a group home.

Elizabeth, 47, contacted me because her mother collapsed in the kitchen and died suddenly. Her mother had been living at home and taking care of Elizabeth's sister Kathy, who is developmentally disabled. Kathy had been placed in a skilled nursing facility after the father died. He was the "ill spouse," not his wife. He was 10 years older than his wife, and so was expected to die first. But that's not what happened.

Kathy could not live on her own. She had never lived on her own. Her parents had never sought assistance or skills

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training for her through programs for people with developmental disabilities.

When her mother died, Elizabeth was living in the State of Washington. She packed up her apartment, quit her job and moved to Southern California to live in the family home and take care of her sister. Now, three years later, she is still in California. Her life is still on hold. However, her sister is now in a group home, and adapting to life without her mother. Their father died 18 months after her mother.

It is the natural progression in life that children grow up, and leave home. Some fail to launch, and don't leave home until their thirties. Some come home with children, some with spouses, some with children and spouses. The launch into the world is a life event. It can be traumatic, both for the parents and children. Sometimes it is harder on the parents, who aren't rejoicing about being empty nesters. It took my husband and me at least 20 seconds to adjust.

So what do we tell our clients who have adult children still at home?

I emphasize that it is the natural order of things for children to leave home. It happens at some point in the child's life — either voluntarily, or sometimes involuntarily, when both parents have died. The adjustment is a big one. So I try to help my clients make that adjustment. I emphasize that no matter what living arrangement the

child moves to, whether a college dormitory, an apartment or a group home, it is important for the parent to be able to oversee this transition. The parent needs to know that the new living arrangement is a good fit. If it is not, the parent can make other arrangements, that will be a better fit. This helps the child adjust to the new environment, the new roommates, and the new location. If no plans have been made by the parent, it's much harder for the child to make that transition when the parent dies, as at that point in time it is abrupt, it is sudden, and it is unexpected. The parent is not available to give the child any emotional support or direction in making the transition. Sometimes, years of anger come to the surface, from another family member, further complicating the situation.

So what can NAELA do for our members in these and other circumstances?

NAELA provides educational opportunities for us to learn more about all of the different areas of Elder and Special Needs Law. How do you recognize a tax issue? How do you know that the Medicaid advice you give won't result in a denial of VA benefits? How do you distinguish between SSI and SSDI? Come to NAELA and learn.

If you are setting up your practice and need a client intake form, come to your fellow NAELA members for help.

How do you help a client whose mother is living in Virginia when you are in Florida? Or in New Mexico? Come to NAELA and meet your fellow practitioners across the country, people to whom you can entrust the well being of your

Clients are the life blood of our practices. We need to take the best care of them that we possibly can. Come to NAELA and learn how. ■

Your NAELA Staff



NAELA staff members can help you with any questions you might have about your NAELA membership, events, publications, public policy,

etc. Here's a brief summary of who to contact, but know that any staff member can assist you with your questions or get your call or e-mail to the right person for a prompt response.

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A Mentor to the Next Generation of Elder and Special Needs Law Attorneys

Ruth Phelps, CELA

By *Stu Zimring, Esq.*

A number of years ago, Ruth and I were involved in a very nasty contested conservatorship proceeding. It had literally gotten physical with one contesting party assaulting one of the attorneys (not Ruth or myself) outside the courtroom at one point. Ruth represented the private professional fiduciaries who had been appointed temporary Conservators and I was Court appointed counsel for “Mom,” the proposed Conservatee. One of the combatant children, as part of their strategy sought to have me removed as Counsel for Mom based on the fact that I was “biased.” Their strongest allegations of “bias” focused on the fact that Ruth and I (and our respective spouses) “socialized,” and further, belonged, and were active in the same professional association — NAELA.

The Judge, reviewing the pleadings looked up from the Bench and asked Counsel, “That’s it?” Counsel replied very sincerely “Yes, your Honor.” and the judge shook his head and said, “Counsel, I don’t think that shows bias; I think it shows good taste on Mr. Zimring’s part. Petition denied.” As a result, I can now say that I have a judicial determination (upheld on Appeal as a matter of fact), that being Ruth’s friend evidences good taste.

Not that one needs to have such ratification to know that being associated with Ruth is a good thing. Anyone

Stuart D. Zimring, N. Hollywood, Calif., is a NAELA Past President and Fellow.

who spends any time at all with Ruth, in almost any context quickly picks up the fact that this is one very special woman.

Slicing Through Complex Issues

Anyone who has worked with Ruth or heard her speak on Elder Law issues, Special Needs Trusts or practice management won’t be surprised to know that she received her undergraduate degree in Mathematics (from Immaculate Heart College in Los Angeles) or that she holds an LLM in Taxation from Loyola Law School, Los Angeles, the same institution from which she received her JD. Her ability to slice through a complex issue, to simplify it and make it understandable to even those of us who have trouble balancing our checkbooks, evidences her mastery of problem solving. She brings this skill not only to financial type issues but to personal issues involving her clients as well. Add to this an unflappability that enables her to “keep her cool” in the most stressful of situations, and you have all the ingredients necessary for a first rate Elder Law Attorney.

In addition to her multiple academic degrees, Ruth is a CELA, a member of CAP and is certified as a specialist in estate planning, probate and trust law by the Board of Legal Specialization of the State Bar of California, and a Fellow of ACTEC.

I literally cannot remember when Ruth and I first connected, but it is fair to say that for several decades (at least)

One of Ruth’s best qualities is her desire to share: to mentor the next generation of Elder and Special Needs Law attorneys and to share with the Bar at large her love of the field.

she and her husband, Ed, were my two top “go to” Elder Law attorneys in the Los Angeles area when I needed, for whatever reason, to involve other counsel in a matter. She is always accessible, always eager to help and (most comforting) always there with a solution.

While she and Ed were building their practice in Pasadena, Calif., they managed to find time to raise two wonderful sons (both Eagle Scouts) and travel extensively, often with their extended family. In between (maybe between two and four in the morning) Ruth reads. What does she read? From what I gather, almost anything — she buys paperbacks by the pound (literally) over e-bay and then inhales them, regardless of genre.

Sharing and Mentoring

One of Ruth’s best qualities is her desire to share: to mentor the next generation of Elder and Special Needs Law attorneys and to share with the Bar at large her love of the field. There are so many continuing education programs in which she’s participated that I’ve lost count, and whether I’m in the audience or participating with her, it’s always informative and I always learn something. Notwithstanding all of her other commitments, she teaches Elder Law as an adjunct Professor at her Alma Mater, Loyola Law School, and co-authored several chapters in the new two-volume work on Special Needs Trusts published by California Continuing Education of the Bar.



Ruth Phelps, CELA, is NAELA's President, 2010–2011.

A Career of Service

And her skill, energy, and intelligence have not gone unnoticed by the Bar and others. She has served on the Executive Committee of the Trusts and Estates Section of the State Bar of California, is a member of the Board of Advisors of Loyola Law School, Los Angeles, and is named a Southern California “Super Lawyer” for 2010. Her lecturing and writing efforts on behalf of the California Continuing Education of the Bar resulted in her being named a Spirit of CEB recipient in 2007.

But her true love (besides Ed and the boys) is NAELA. Since becoming a member back in 1990 (maybe '91, neither of us can remember), she’s been a Chair of the CELA Review Course and Fundamentals of Elder Law program for a number of years as well as being on the faculty of those programs, co-chaired an UnProgram, and served on a number of NAELA Committees (a few of which appointments she hasn’t forgiven me for, yet, but I remain hopeful). I think she’s particularly proud of having coined the slogan “4,000 in 2,000” for the membership drive that occurred when she was on the Membership Committee back in 1999. From there she moved onto the Board of Directors of NAELA and then to the Executive Committee.

However, all of this is preamble or preface to her new role, our incoming President. Given her background, interests, vitality and energy, I for one am looking forward to an exciting year for NAELA and I know Ruth is as well. Welcome Madame President! ■

10 TIPS

in Administering a Special Needs Trust

By Ruth Phelps, CELA

Turn these 10 tips into a helpful handout for your clients.

You have read them. You have drafted them. But now, the trustee of a special needs trust that you did not draft is sitting in your office, gazing at you expectantly.

“What is a proper distribution for a special needs trust?” she asks.

You sit silently, dumbstruck. What do you say? How do you condense all your special needs trust knowledge into a single, succinct sentence?

So, you fall back on a lawyer’s typical answer: “It depends.”

And it does depend on many factors. It depends on the trust language. It depends on the public benefits that this beneficiary is receiving. It depends on what other resources and income are available to the beneficiary. It depends on the beneficiary’s living situation.

So before you can answer that question, you need to gather information.

And you need to read the trust.

The purpose of this article is to give you some tips on how to administer a special needs trust (SNT). It may be helpful to summarize these tips into a two-page handout for your clients.

Ruth Phelps, CELA, Pasadena, Calif., is NAELA President and a NAELA Fellow.

1. Read the Trust

Is this a first-party SNT or a third-party SNT? If it is a first-party, it needs to contain a payback provision. If it is a third-party SNT, then it should not contain a payback provision. If it does (and I still recall the lawyer who told me he included a payback provision in every SNT he drafted, just in case one was required), consider whether the trust should be reformed to remove the payback provision.

What is the standard for distributions? Can the trustee make distributions which cause a reduction in the SSI benefit?

2. Who Is Your Client?

Whom do you represent? There are several parties involved with a trust: the settlor or grantor, the trustee, the beneficiary with a disability, possibly the beneficiary’s guardian or conservator, the remainder beneficiaries, and quite possibly your state’s Medicaid agency. Each party has a different interest and a different perspective. Be clear on whom you represent. Don’t let the parties think you represent “the family,” or “everyone.” If you represent more than one party, get written waivers of the potential conflict. Does the beneficiary have the capacity to waive the conflict?

As important as confirming whom you represent, is telling those parties whom you do not represent that you don’t represent them. You might want to have them sign a

written acknowledgment of that, so that it is clear to them. The State Bar rules in the state where I practice require a written retainer agreement where the fee will be over \$1,000. Be sure to comply with such a rule if your state has that same rule. Also, be clear on the capacity in which you represent a person — do you represent the person as a trustee, as a beneficiary, or as an individual, as an interested friend of the beneficiary?

The party that you represent may be without funds to pay you. A trustee may need court authority to pay your fees. You may need written consent of your client to accept payment from a non-client. If you represent the trustee, send him/her a letter summarizing his/her duties. Better informed people make better trustees.¹

Now that you have all of these issues resolved, the written conflicts waivers in place, clarity on how and when you will be paid, let's turn to the next issue.

3. Accountings

Must the trustee account to the beneficiary with a disability? To other remainder beneficiaries? To the court? In the state where I practice, a trustee must account annually for an irrevocable trust to all beneficiaries to whom the trustee can distribute income or principal.

If the beneficiary with a disability can't review the accountings, is there a safety net in place so that someone else oversees the acts of the trustee? Must a copy of the accounting be provided to your state Medicaid agency?

4. Bond

Must the trustee post a bond? If so, has the bond been posted in the proper amount?

The court rules in the State where I practice require that the bond cover all of the personal property, plus one year's income, plus a "reasonable amount for the cost of recovery to collect on the bond." Our court rules have set this as 10 percent of the first \$500,000, 12 percent of the next \$500,000, and two percent of the value over \$1 million. Thus, with trust assets and annual income of \$1.5 million, the trustee would have to post bond of \$1.5 million plus \$120,000 for the cost of recovery on the bond, for a total bond of \$1,620,000. The court has placed a duty on

¹ The author has a 21-page letter she sends to trustees. For a courtesy copy at no charge, e-mail her assistant Melinda Nazim at mnazim@elderlawyers.com.

the attorneys for trustees of SNTs to apply for that additional bond. Check your own state rules to see if there are any such requirements, because if the trustee fails to comply with those requirements, you may be liable for that omission.

5. Determine the Benefits that the Beneficiary of the SNT Receives

The beneficiary may be on Supplemental Security Income (SSI) and Medicaid, or may be on Social Security Disability Insurance (SSDI) and Medicare. He may live in Section 8 housing. He may receive VA compensation.

You will need to know how distributions from the trust will affect those benefits. This will be of vital importance to the trustee. But before you can advise the trustee, you need to know what the benefits are.

Remember, SNT distributions will not reduce SSDI benefits. Trust distributions may reduce SSI benefits. Trust distributions may increase the beneficiary's co-pay amount

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for Medicaid benefits. Additionally, trust distributions may affect the amount of the annual Medicare premium.

6. Determine Whether the Trustee Can Make Distributions That Will Reduce Benefits

In short, this means can the trustee make distributions that are considered in-kind support and maintenance, resulting in a reduction of the SSI benefit?

Remember that in-kind support and maintenance is payment for food, rent, mortgage payments, real property taxes, insurance, electricity, heating fuel, gas, water, garbage collection, and sewer charges.

Thus, if the trustee pays the beneficiary's electric bill, the beneficiary's monthly SSI check will be reduced by the amount of the electric bill, up to a maximum of one-third of the Federal Benefit Rate plus \$20 ($\$224.66 + \$20 = \244.66 in 2010).

You need to check carefully as to whether the trust allows the trustee to do that.

7. Income Taxes

Is this SNT a grantor trust? Is it a qualified disability trust, entitled to a personal exemption?² A qualified disability trust is not a grantor trust. Who will pay any income taxes? A detailed discussion of income taxation of a SNT is beyond the scope of this article but you need to be prepared to answer these questions.

8. Meet the Beneficiary and Set Up a Procedure for Distribution Requests

It has been said that a picture is worth a thousand words, and a meeting can be worth a thousand pictures. If you can, meet the beneficiary in his/her home setting, both with and without family members. Meet the beneficiary's pets. Meet the caregiver.

How will the beneficiary request distributions? Will the beneficiary fax the requests to the trustee? Call the trustee? Will the trustee visit the beneficiary periodically? Establish the method early on and stick with it.

9. Titling a Vehicle

The two most common requests to a SNT trustee are for a house and for a vehicle. Your trust may not have sufficient

assets to purchase a house or a condominium. However, most SNTs have sufficient assets to purchase a vehicle. There are several very basic questions you need to ask. They include:

- Who will drive the vehicle? Is the person licensed and insurable? Get a copy of the license. Make sure it is current.
- Does the vehicle need to be equipped for a wheelchair or otherwise converted?
- Is public transportation available instead? A vehicle can be very expensive to license, insure, and repair.
- How will the vehicle be registered? The vehicle is usually not registered in the name of the beneficiary or the trust. It may be registered in the name of the person who will be driving it, with the trustee of the SNT listed as the legal owner. This prevents the registered owner from selling or borrowing against the vehicle. The beneficiary may be a co-owner of the vehicle, but check the insurance requirements first.

Discuss with the trustee what will be his/her policy on replacing or repairing the vehicle if it is damaged in an accident or stolen. The trust should be billed for and pay for the insurance and license fees directly.

With a first-party SNT, the trustee often obtains court authority to buy the vehicle. When requesting court authority to buy the vehicle, also request authority for the trustee to pay for insurance, maintenance (including detailing the vehicle twice a year) and repairs, with the family of the beneficiary paying for gas. This can avoid the headache of a mileage log. If the family is of very modest means, obtain court permission for a monthly gas allowance.

10. Authorizations

Obtain authorizations from the trustee to speak to the central people involved in the case, including the beneficiary's doctors and therapists, and the authority to obtain the beneficiary's confidential records. Often times the trustee will be asked to pay for additional therapy not covered by Medicaid or Medicare. It is helpful if the trustee already has a signed authorization, authorizing the therapist to speak to the trustee. This allows the trustee to confirm that the services have in fact been delivered before paying for them.

Administering a special needs trust requires tact, patience, and attention to detail. It can be a very rewarding aspect of a Special Needs and Elder Law practice. Using the tips in this article as a checklist can provide structure to make for efficient trust administration. ■

² IRC 642(b)(2)(C)