ELDER LAW DEVELOPMENTS

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BY

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Randall K. Craig is a sole practitioner whose areas of practice emphasize elder law, wills, trusts, estates, estate planning and taxation. Mr. Craig served as an adjunct professor for several years in the University of Evansville College of Alternative Programs, having taught in the areas of estate planning, income taxation and real estate, and a licensing course for real estate salespersons. He has also taught a course on the law pertaining to savings accounts sponsored by the Indiana Savings and Loan League. Mr. Craig is co-author with Amelia E. Pohl of ***A Will is Not Enough in Indiana*** (Eagle Publishing Company of Boca, 2004), and ***Guiding Those Left Behind in Indiana*** (Eagle Publishing Company of Boca 2006). He was the subject of an article in the April 2001 issue of the *National Law Journal* "Elderly and Disabled Find Hero in Indiana Solo." Mr. Craig is a charter member (and the only Indiana member) of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys ("CAP") which is open by invitation only to preeminent elder law attorneys. He has been a featured speaker on Elder Law developments at the Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum each year since 2013.

EDUCATION

1972 – Indiana University – B.S. degree, with distinction
1975 – Indiana University School of Law – Doctor of Jurisprudence, cum laude

ADMISSION TO PRACTICE

1975 – State of Indiana
1975 – United States Tax Court

PROFESSIONAL ASSOCIATIONS

Certified as an Elder Law Attorney by the National Elder Law Foundation (one of the first 55 attorneys in the United States to be so certified)

Board Certified Indiana Trust and Estate Lawyer by the Trust and Estate Specialty Board of the Indiana State Bar Association (Charter class)

National Academy of Elder Law Attorneys – member of special interest groups on trusts and tax

Indiana State Bar Association – member of sections on taxation, corporate and real property, probate and trust law, and elder law

Evansville Bar Association (Probate, Elder Law and Guardianship Section as well as the Chair in 2005, and member of the Board of Directors from 2007 to 2009)

Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (Charter Member)

Certified Geriatric Service Provider by The National Association for Geriatric Service Providers & Educators

Accredited to practice before the U.S. Department of Veterans Affairs

Evansville Estate and Financial Planning Council (member of Board of Directors from 2003 to 2010 and a former President)

Christian Legal Society

International Honor Society Beta Gamma Sigma

CIVIC ACTIVITIES

American Baptist East Church, Evansville, Indiana – Member and current chair of Board of Trustees

Southwestern Indiana Regional Council on Aging, Inc. (SWIRCA & More) – former President and current Director Emeritus

Board of Directors of Sonlight Ministries of Evansville, Indiana, Inc.

Vanderburgh County Council on Aging, Inc. – former President and member of the Board of Directors

HONORS

Martindale-Hubbell Bar Registry of Preeminent Lawyers

Named a Sagamore of the Wabash by the Governor of Indiana (2002)

Named an Indiana Super Lawyer by Law and Politics and the publishers of the Indianapolis Monthly 2007-2013, 2016

Selected for inclusion in The Best Lawyers in America every year since 2009, and named as the Best Lawyers' 2017 Evansville Trust and Estates "Lawyer of the Year"

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ELDER LAW DEVELOPMENTS

TABLE OF CONTENTS

1.	Proposed Changes To The VA Pension Rules	Page 1
2.	Developments Concerning ABLE Accounts	Page 23
3.	Housing Programs and Special Needs Trusts	Page 29
4.	In the Matter of the Guardianship of Natalie N. Stant Adult, Jeffrey Stant v. William Stant and Natalie Stant, 2016 Ind. App. LEXIS 2	Page 30
5.	*Jackson v. Indiana Adult Protective Services*, 2016 Ind. App. LEXIS 77 (Court of Appeals Case No. 18A02-1508-MI-1075)	Page 33
6.	*Stephanie A. Schrage v. The Audrey R. Seberger Living Trust, et al.*, 2016 Ind. App. LEXIS 63 (Court of Appeals of Indiana, No. 45A04-1506-TR-686)	Page 36
7.	Irrevocable Income-Only Trust Developments in the Context of Asset Protection	Page 37
8.	Statutory Developments	Page 48
9.	Chart summarizing various types of trusts and probable VA and Medicaid impact	Exhibit "A"
10.	Status of ABLE Program Implementation	Exhibit "B"
11.	Letter to the Secretary of HUD dated January 6, 2016	Exhibit "C"
12.	IHCPPM § 2615.75.10 - Medicaid Trust Rules	Exhibit "D"
13.	Quick Reference Guide - Income and Assets for VA Financial Assessment	Exhibit "E"

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ELDER LAW DEVELOPMENTS

I. Proposed Changes To The VA Pension Rules.

A. The aid and attendance allowance provides benefits for war era veterans and their surviving spouses who require the regular attendance of another person to assist in at least two of the daily activities of living such as eating, bathing, dressing and undressing, transferring, and the needs of nature.

1. The VA pension program is a non-service connected pension which is means-tested and requires meeting the following requirements:

   a. The veteran must be age 65 or older, or permanently and totally disabled for a reason not due to the veteran's own willful misconduct;

   b. There is no age requirement for a surviving spouse to qualify for a widow's pension;

   c. The veteran must have been discharged from service under conditions other than dishonorable;

   d. Certain service requirements must have been met:

      (1) The majority of applicants for this pension benefit entered active duty prior to September 7, 1980;

      (2) The result of this is that the veteran must have served at least 90 days of active military service, one day of which was during wartime;

   e. Net worth must not be excessive; and

   f. Countable family income must be below a yearly limit.

These materials will not address "compensation," i.e., the disability compensation to which a veteran may be entitled if the veteran obtained an injury or disease while on

active duty, if the injury was a result of service or was exacerbated by service (see 38 U.S.C. § 101(13); 38 C.F.R. § 3.4). Entitlement to service-connected pension is not barred by the veteran's employment and not affected by earned or unearned income or the value of the veteran's net worth, and the disability compensation is tax-free.

2. The reference to "Aid and Attendance" is in fact a misnomer, since "Aid and Attendance" and "House Bound" are actually additional monetary allowances provided with the pension if the recipient of pension moneys needs the regular aid and attendance of another person or is considered house bound.

    a. Aid and Attendance assistance allowances are also available for service-connected disabilities ("disability compensation") and to a spouse of a service-connected disabled veteran, and an Aid and Attendance allowance is also available to a surviving spouse of a veteran if the surviving spouse is receiving DIC ("Dependents Indemnity Compensation").

    b. There are numerous monetary levels of Aid and Attendance or House Bound allowances available with non-service connected and service-connected disability programs for veterans or their surviving spouses.

    c. There are, essentially, three types of special monthly pension to offset the cost of necessary health care:

        (1) Low income pension (this is the VAs equivalent of SSI - the claimant must meet all of the applicable criteria and have limited income and assets).

        (2) House Bound - available to a veteran or widow(er) of a veteran who is determined to be disabled and is essentially confined to the home);

see 38 U.S.C. § 1502(c) (this requires a single permanent disability rated as 100 percent under the VA schedule and confined to the dwelling, or a 100 percent disability with another 60 percent disability, regardless of whether or not the person is confined to the dwelling).

(3) Aid and Attendance - available to a veteran or widow(er) of a veteran who is blind, living in a nursing home, or needs regular assistance with at least two activities of daily living (walking, bathing, dressing, incontinence care, or eating), or needs regular supervision due to cognitive decline.

3. Pension is based on a maximum yearly income amount called the "Maximum Annual Pension Rate" (MAPR).

   a. The claimant (including both the husband and wife that constitutes a household) must be making less than this amount in order to qualify for the benefit.

   b. The benefit is the difference between this MAPR and the combined gross household income reduced for medical costs and adjusted by a five percent deductible.

   c. This adjusted income is called the "Income for VA Purposes" (IVAP).

   d. If the veteran or spouse has a need for the aid and attendance of another person, then the MAPR is higher.

   e. If the veteran has no need of the aid and attendance of another person, the veteran's income must be very small in order to meet the income test.

4. Benefit Table.

2015 Maximum Annual Pension Rates (MAPR)
Effective December 1, 2014 - 1.7% Annual Increase

If you are a veteran...	Annual	Monthly
Without Spouse or Child	$12,868	$1,072
No dependents, medical expenses must exceed 5% of MAPR	$ 643	$ 54
With One Dependent	$16,851	$1,404
With dependents, medical expenses must exceed 5% of MAPR	$ 842	$ 70
Housebound Without Dependents	$15,725	$1,310
Housebound With One Dependent	$19,710	$1,642
A&A Without Dependents	$21,466	$1,788
A&A With One Dependent	$25,448	$2,120
Two Vets Married to Each Other	$16,851	$1,404
Two Vets Married to Each Other One H/B	$19,710	$1,642
Two Vets Married to Each Other Both H/B	$22,566	$1,880
Two Vets Married to Each Other One A/A	$25,448	$2,120
Two Vets Married to Each Other One A/A One H/B	$28,300	$2,358
Two Vets Married to Each Other Both A/A	$34,050	$2,837
Add for Mexican Border Period or WW1 to any category above	$ 2,923	$ 243
Add for Each Additional Child to any category above	$ 2,198	$ 183

a. The VA pays the difference between the recipient's countable income, less allowable deductions, and the applicable limit.

b. The amount might be referred to as the applicable monthly pension allowance.

5. The net worth limit (or the combined net worth limit in the case of a veteran with a spouse) has always been very difficult to quantify.

a. No precise figure exists other than that a formal administrative review is undertaken if the beneficiary has a net worth of $80,000 or more.

(1) There is no specific amount in the regulations.

(2) The veteran's household needs for maintenance are analyzed and weighed against the assets that can be readily converted to cash, and consideration is given to whether the income from that cash will cover the difference in the household income and the cost of medical care over the care recipient's remaining life span.

(3) However, this rule is only a suggestion and the final decision is left to the rating representative.

(4) Consequently, the decision has often been subjective, and in some cases a benefit award has been denied for assets around the $20,000 level, or even less.

(5) Some representatives believe that a reasonable rule of thumb is about $40,000 for a couple and about $20,000 for a single individual.

b. The market value of all real and personal property is taken into account (reduced by any mortgages or other encumbrances, and excluding the value of the single family dwelling unit), and excluding the value of personal effects suitable to and consistent with the veteran's reasonable mode of life.

c. Certain educational expenses and compensatory settlement payments are also excluded.

d. Disclaimers of potential income and transfers of property to a relative in the veteran's household are not recognized as reducing the value of the veteran's assets.

e. Net worth is evaluated based on the liquidity of the property, the veteran's medical needs and life expectancy, and certain needs of family members. 38 C.F.R. §§ 3.274-3.276.

6. The veteran's income currently must be less than the maximum applicable pension rate.

a. Income includes payment of any kind from any source, whether recurring or infrequent.

(1) Receipt of a gift of stock would be considered income.

(2) Winnings from gambling, an inheritance, or receipt of a gift of property would be considered income.

(3) Withdrawals from IRAs, 401(k)s and other retirement accounts are considered income, while the funds left in the IRA or other retirement account is considered an asset.

(4) Social Security income and Social Security Disability income are considered income; income from VA compensation, even though it is exempt from income taxes, is considered income for pension purposes, as is income from DIC.

(5) Generally, income that is not consumed and carried over to the next month becomes an asset.

b. Gross income is considered before any deductions for taxes, business losses, etc.

c. Workers Compensation awards and similar payments are considered income, but adjustment may be made for medical, legal and other expenses incident to the injury or collection of payment.

d. Excluded are SSI, welfare payments, contributed maintenance, the VA pension itself, reimbursement for casualty loss, or profit from the sale of property, amounts in joint bank accounts acquired upon the death of the other joint owner, minimal earnings of a child, hardship exclusion from a child's income, payments under a Domestic Volunteer Service Act program like Foster Grandparents or the Retired Senior Volunteer Program, payments under a Department of Defense survivor benefit annuity, cash surrender value of life insurance, and certain compensatory settlement payments.

e. Accrued interest received on the redemption of United States Savings Bonds is treated as profit on sale and not as income.

f. The sale of property through a private installment contract where the contract is owned by the veteran or a surviving spouse is neither income nor an asset until the principal amount of the loan has been repaid. This is one way in the past that applicants may have been able to convert assets into non-countable assets in order to qualify for the VA pension.

7. A veteran who has no spouse or child and who receives VA domiciliary or nursing home care for more than three months receives a reduced pension of no more than $90 per month. The veteran is not liable to repay amounts received by virtue of the VA's failure to reduce the pension, provided the veteran did not conceal information.

B. The Veterans Administration (VA) published comprehensive proposed new rules on January 23, 2015 that will (i) establish a new "bright line" net worth limit, (ii) establish a three year "look-back" on transfers of "covered assets" and impose penalties for such transfers, and (iii) revise the rules governing deductibles and unreimbursed medical expenses and income exclusions.

1. The changes are comprehensive and address net worth, asset transfers, medical expenses and income and deductions.

2. The net worth limit will equal the maximum community spouse resource allowance under Medicaid on the effective date of the final rule (currently $119,220).

3. The net worth limit will increase by the same percentage as the cost-of-living increase for Social Security benefits.

4. The VA's Notice of Proposed Rule (NOPR) is available at *https://federalregister.gov/a/2015-00297*.

C. Specific changes.

1. Annual income will be added to a claimant's net worth, which is a change from existing law.

a. If the net worth limit is $119,220, the surviving spouse's annual income is $7,000, and her total assets equal $117,000, adding the spouse's annual

income to her assets produces a net worth of $124,000 which exceeds the net worth limitation.

b. A veteran's assets are defined to include the assets of the veteran as well as the assets of his or her spouse, while a surviving spouse's assets include only the assets of the surviving spouse.

c. Unlike other federal means-based programs (the SSI and Medicaid programs, for example), VA regulations did not previously prescribe clear net worth limits for pension entitlement - the proposed rules will change this by establishing a "bright line" net worth limit.

2. Ways of decreasing net worth:

a. The assets may decrease in value.

b. Annual income may decrease.

c. Both may decrease.

3. Assets decrease permissibly when a veteran, surviving spouse, child or someone acting in their behalf spends their assets on basic living expenses such as food, shelter, clothing, health care, or education or vocational rehabilitation.

a. Allowable deductions from income will be applied first to decrease annual income.

(1) Unreimbursed medical expenses are deducted in calculating the veteran's countable income.

(2) Veterans who would not have previously qualified may become eligible if they incur increased medical, assisted living, and other health care expenses.

(3) Deductible expenses may include home care, medications, health insurance premiums, assisted living payments, and adult daycare and similar facilities.

b. If there are additional expenses that are appropriate to deduct from income, those expenses are permissible reductions in the value of assets.

c. Current regulations do not define or describe what the VA considers to be a medical expense, which would be an allowable deduction from the claimant's countable income to decrease the claimant's income, thereby increasing the claimant's benefit entitlement rate.

(1) The Proposed Rule would define and clarify what the VA considers to be a deductible medical expense.

(2) It provides definitions for several terms, including activities of daily living (ADLs) and incidental activities of daily living (IADLs).

d. "Custodial care" means regular assistance with two or more ADLs or assistance because a person with a mental disorder is unsafe if left alone due to the mental disorder.

e. The new rules would provide that, generally, payments to facilities such as independent living facilities are not medical expenses, nor are payments for assistance with IADLs; however, there would be exceptions for disabled individuals who require health care services or custodial care.

f. There would be a limit on the hourly payment rate that may be deducted for in-home attendance.

4. Exclusions from the definition of "assets."

a. The primary residence remains excluded, and if sold, the proceeds will not count if used to purchase another residence within the same calendar year.

b. In recent years the VA has taken a position that if the home is not being occupied by the veteran or the veteran's spouse, it is no longer an exempt asset.

c. The same net worth limit applies when a surviving spouse is seeking pension benefits.

d. Mortgages on the primary residence will not reduce the value of other assets.

e. Personal effects both suitable to and consistent with a reasonable mode of life will be excluded from total asset value.

5. Asset transfers and penalty periods.

a. These are set out at Proposed Rule 38 C.F.R. §3.276.

b. Only the transfer of "covered" assets will be penalized.

(1) A "covered" asset is defined as an asset that "was part of a claimant's net worth, was transferred for less than fair market value, and if not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit...".

(2) Therefore, only the amount transferred in excess of the net worth limitation will be subject to a penalty.

(3) The penalty would not be based on the entire amount transferred, but only on the portion that would have caused the net worth to exceed the eligibility limit.

(a) This means that some transfers may not create any penalty at all.

(b) A smaller covered asset amount would result in a shorter penalty period.

c. A transfer for less than fair market value includes the sale, gift or exchange of an asset for less than the fair market value, or the transfer to a trust or purchase of any financial instrument that reduces net worth, including the purchase of an annuity.

6. The look-back period for all transfers is 36 months preceding the date the VA receives an original pension claim or a new pension claim after a period of non-entitlement.

a. There is a presumption that an asset transfer made during the 36 month look-back period was for the purpose of decreasing net worth in order to qualify for a VA pension benefit.

b. There is an exception for a transfer by a veteran, the veteran's spouse, or the surviving spouse of a veteran to a trust established for the benefit of a child if (i) the VA has rated the child incapable of self-support pursuant to 38 C.F.R. §3.36, and (ii) there is no circumstance where the trust assets can benefit the veteran, the veteran's spouse or the veteran's surviving spouse.

7. There is a ten year limit on the penalty imposed.

a. To calculate the penalty, the maximum annual pension rate will be used for veterans and surviving spouses who apply.

b. A single veteran would use the aid & attendance allowance amount with no dependants; a married veteran would use the aid & attendance allowance with one dependant; and a surviving spouse would use the aid & attendance allowance amount for a surviving spouse taken from the Death Pension Table.

c. The monthly rate is figured by dividing the maximum annual amount by 12 and rounding down to the nearest whole dollar.

   (1) The formula is similar to that used by the SSI program.

   (2) The pension rate used is referred to as the "maximum annual pension rate" (MAPR), under 38 U.S.C. 1521(d), 1541(d) or 1542 that is in effect as of the date of the pension claim. The penalty is rounded down to the nearest whole dollar.

   (3) The MAPRs are located on the VA's website at *http://www.benefits.va.gov/pension/*.

d. The penalty begins the first day of the month following the transfer.

e. If more than one transfer is made, the penalty begins the first day of the month following the last transfer.

   (1) The penalty will be recalculated if all of the covered assets are returned before the date of the claim or within 30 days after the date of the claim.

   (2) Once calculated, the penalty would be fixed, and return of the covered assets after the 30 day period would not shorten the penalty period.

D. There is very little guidance available from the VA regarding the effect of certain trusts on pension benefits.

1. Office of General Counsel Opinion 33-97.

   a. This opinion clearly states that a transfer to a trust, where the terms of the trust provide for the grantor's support, will cause the trust assets to be counted in the net worth calculation.

   b. In this case, the surviving spouse established an irrevocable trust naming her child as the trustee. The terms of the trust provided in part that "some or all of the income and principal of the trust fund may be paid by the trustee to or for the benefit of only the surviving spouse's "special needs...".

   c. This trust was essentially a self-settled special needs trust, which would likewise not be effective for Medicaid eligibility purposes either unless structured to fall within one of the "safe harbor" rules.

   d. However, a testamentary SNT per OGC 72-90 should be effective except to the extent the trust assets are actually distributed or made available to the veteran.

   e. This opinion stated that the VA should include all of the trust assets in determining net worth if the trust assets are available for use for the claimant's support. In this case, because the trust permits the use of trust assets for the surviving spouse's benefit, all trust assets are deemed to be available and countable in determining net worth.

2. Office of General Counsel Opinion 73-91.

a. This is one of the few favorable OGC opinions related to trusts established by a veteran claimant. While receiving benefits, the veteran received a payout of $80,000 from a life insurance policy of which he was the beneficiary, and also inherited some stock.

b. The veteran proposed to create an irrevocable trust of which the veteran was the trustee and his grandchildren were proposed beneficiaries.

c. Although the inheritance counted as income to the veteran, once the assets were transferred to the trust, the trust corpus was not part of the veteran's countable net worth.

d. Specifically, this opinion determined that assets transferred to an irrevocable trust for the benefit of the veteran's grandchildren, where the veteran is the trustee and has retained no right or interest in the property or the income and cannot exert control over these assets for the veteran's own benefit, would not be counted in determining the veteran's net worth for pension purposes. Further, trust income would not be considered income of the veteran.

e. There must be an "...actual relinquishment of rights in the property and income from the property."

f. The facts provided to the General Counsel's office did not state whether the veteran's grandchildren lived with him – a fact noted by General Counsel as one that may have caused a different outcome. Because a transfer to a relative residing in the same household is disregarded, the outcome would likely be different if the beneficiaries of the trust resided with the veteran.

g. This kind of an irrevocable trust established for the benefit of a third party would likewise not affect the Medicaid eligibility of the grantor, although the establishment of the trust and the transfer of assets within five years of the date of the Medicaid application would be penalized, which would result in the Medicaid program not paying for the nursing home care or the otherwise covered waivered services during the applicable Medicaid penalty period. However, the grantor should not be the trustee.

h. The establishment of such a trust would now be subject to a penalty for VA pension qualification purposes.

3. Office of General Counsel Opinion 72-90.

a. In this case the veteran-claimant was the beneficiary of a testamentary trust. The trust provided that the trustee could distribute funds for the veteran's comfort, but not as a substitute for support and maintenance to which veteran was entitled from other sources.

b. The opinion recognized that the veteran did not hold legal title to or control of the trust property. Thus, only the portion of the trust property, including trust-related income, that has actually been made available for the veteran's use, is, at the time of its allocation, countable for purposes of the income and net-worth provisions in determining pension benefits.

c. Thus, a properly drafted, fully-discretionary third party trust, of which the veteran is a beneficiary, should not affect pension qualification until such time as trust assets have been distributed or made available to the veteran.

d. In the context of Medicaid, all trusts must be examined, including testamentary trusts, to determine whether or not the assets will be deemed to be "available" to the beneficiary.

4. The following would appear to represent a general summary of the current VA trust rules:

   a. A trust established by a third party which provides for the veteran's support, whether established by the veteran's spouse or another third party, would be treated as a resource per OGC Opinion 33-97.

   b. A special needs trust established by a third party, except perhaps the veteran's spouse, should not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran.

   c. A revocable trust would disqualify the veteran because the assets would be deemed to be available.

   d. An irrevocable trust established by the veteran or the veteran's spouse, if either of them is a beneficiary, would cause the trust assets to be deemed to be available to the veteran because there would not have been an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91, and would also presumably be subject to a transfer penalty.

   e. A third-party *inter vivos* trust, unless established by the veteran's spouse, should not be treated as a resource except to the extent that the assets are available for the veteran's support, unless assets are actually distributed to or made available to the veteran, per OGC Opinion 72-90.

E. Common planning strategies for VA pension qualification prior to the proposed changes to the VA pension rules included the following:

1. Gifts were commonly made to reduce "excessive" net worth to someone who did not reside with the veteran or the spouse.

2. Immediate single premium annuities were frequently purchased to convert the assets into an income stream having no value for the purpose of calculating net worth.

   a. It was the VA's general unwritten policy to treat the income from single premium annuities as income for VA purposes.

   b. More recently, the VA has taken the position that certain annuities have cash value and have attributed value to such annuities.

3. Transfers to irrevocable trusts were used, which as outlined above, were frequently problematic:

   a. As a general rule, neither the veteran claimant nor his or her spouse may be an income or principal beneficiary of any self-settled trust for VA pension qualification purposes. There must be an "...actual relinquishment of rights in the property and income from the property."

   b. A transferee would occasionally make a "gift-back" of the income from transferred sources, which if it occurred, would cause the income to be countable under 38 C.F.R. 3.271.

   c. If the trust is a "grantor trust" under IRC § 671 through § 678, problems can result because of the matching of income process undertaken by the VA.

(1) Since December 2012, the VA no longer requires eligibility verification reports, and instead now coordinates with the IRS and the SSA to verify continued eligibility for pension benefits.

(2) The VA will most likely assume that income from a "grantor trust" is the veteran's (or the surviving spouse's) income which may terminate or compromise pension benefits as a result.

d. The use of a trust protector can be very helpful for VA pension planning and for other asset protection planning purposes to cure what might otherwise be a defective or faulty arrangement.

4. The major problem created by VA qualification planning in the past was that assets were frequently transferred and then rendered unavailable when Medicaid eligibility became an issue.

a. Although transfers were not penalizable for the purpose of VA qualification, when Medicaid eligibility later became important, those transfers rendered the applicant ineligible for Medicaid if the transfer occurred within the applicable look-back period, which currently is five years.

b. In addition, many of the so-called "financial advisors" involved in this planning utilized either immediate-payment or deferred annuities as a way to "invest" the funds, involving annuity payments or annuity access to the donees of the funds that were transferred in order to qualify for the VA pension benefit.

(1) The annuity would incur commissions that generate fees for the financial facilitator, but the use of an annuity was wholly unnecessary

and did not create any positive benefit in conjunction with the VA qualification plan.

(2) Further, when the parent later required Medicaid, the funds might not be available, or penalties would be incurred when it was necessary to liquidate the annuitized payments and receive the payment based on present value.

c. The plan that I found to be most effective, although complex, involved a transfer by the veteran to the children or to certain family members, who would then establish a separate, third-party trust utilizing the transferred assets.

(1) The trust would be an irrevocable trust established by and for the benefit of the children.

(2) Generally, only income could be distributed to the children, and even then usually only to the extent of the income tax liability incurred by the children. The trust was, essentially, a holding vehicle designed to preserve the assets should they be needed if Medicaid qualification later became an issue.

(3) Limited distributions for the benefit of the parent would be allowed based on entirely discretionary restrictive criteria.

(4) Distributions would generally be in the form of payments made for the benefit of the parent rather than directly to the parent.

(5) The trust, even though irrevocable, would be a "grantor" trust for income tax purposes and the income would be taxable to the children;

the trust would contemplate using the trust funds to pay the children's applicable portion of the tax or to reimburse the children for the taxes incurred.

(6) The trust would include an "escape clause" so that the trust could be undone if it became necessary to do so and found to be in the parent's best interest or if required to assure qualification for Medicaid or other public benefits.

(a) The assets would all be retained and would be traceable.

(b) If the trust was undone, there would be a "gift-back" of the trust assets, thus eliminating the Medicaid penalty, or at least a substantial part of it.

(c) The funds could then be used in the appropriate way, utilizing an appropriate Medicaid qualification strategy, to qualify the parent for Medicaid.

(d) If the trust was established more than five years prior to the Medicaid application, then the transfer would not need to be disclosed.

(e) One issue to be considered is the potential capital gain impact resulting from the transfer of appreciated assets; the donor's basis would become the tax basis of the donee for the purpose of determining capital gain, which would result in potentially taxable capital gain upon the subsequent sale of the gifted property.

(7) This type of plan is complex, but the cost of implementing it is probably less in most instances than even the commission that would be earned from the sale of a typical $100,000 annuity!

F. Summary.

1. The proposed new rules will clarify some issues that currently lead to inconsistent decisions.

2. The rules should reduce claim discretion that often results in unequal treatment.

a. However, the transfer restrictions and resulting penalties will create significant impediments and complexity in regard to filing, processing and qualification.

b. The proposed rules pertaining to annuities and trusts that "would not be in the claimant's financial interest but for the claimant's attempt to qualify..." are vague and potentially problematic.

c. A transfer to an irrevocable income-only trust ("IIOT") would not only be penalizable, but even under the VAs interpretation of existing rules, because the veteran-claimant and/or his or her spouse would be an income beneficiary of the self-settled IIOT, the trust assets would still be treated as available because there was not an "...actual relinquishment of rights in the property and income from the property."

d. For similar reasons, a self-settled "safe harbor" special needs trust would likewise probably be treated as available even if the transfer was not treated as penalizable, which it probably would be unless created by a third party.

e. Veterans will probably need more assistance and pre-eligibility planning in order to qualify for the VA pension.

3. A chart summarizing the various types of trusts and the probable VA and Medicaid impact is attached as Exhibit "A".

II. Developments Concerning ABLE Accounts.

A. Passage by the United States Congress of the Achieving a Better Life Experience Act of 2015 (the "ABLE Act") was covered in detail at the 37th Annual Judge Robert H. Staton Indiana Law Update.

1. The ABLE Act took effect at the beginning of 2015.

2. It allows each State to establish and operate an ABLE program.

3. The purpose of the ABLE Act was to allow contributions to be made to an ABLE account that was established for the purpose of meeting the qualified disability expenses of the disabled beneficiary.

4. For further information concerning the ABLE Act, refer to my Elder Law Developments materials presented at the 37th Annual Judge Robert H. Staton Indiana Law Update, or consult my website, www.rkcraiglaw.com.

B. SSI issues POMS section for ABLE accounts.

1. The Social Security Administration issued recently a new Program Operations Manual System (POMS) section governing treatment of ABLE accounts for Supplemental Security Income (SSI) beneficiaries.

2. For a summary of the POMS Section SI 01130.740, see http://policy.ssa.gov/poms.nsf/lnx/0501130740.

a. Contributions to an ABLE account do not count as the account owner's income.

b. If the account owner funds his own ABLE account, the receipt of the funds used to establish the account is considered income. Distributions from an ABLE account for non-housing-related qualified disability expenses are not counted as income and are excluded from the beneficiary's resource calculation if they are retained for a period following the distribution. The POMS includes examples and lists of qualified disability expenses and housing-related expenses.

c. The funds in an account above $100,000 count toward an SSI beneficiary's resource limit.

(1) If a beneficiary's non-ABLE resources are less than $2,000, and the additional money from the over-funded ABLE account brings the beneficiary over the SSI $2,000 resource limit, then the beneficiary will fall into a special period of SSI suspension, during which the beneficiary will not receive an SSI cash benefit but will not lose Medicaid benefits.

(2) Normal SSI benefits will be reinstated as soon as the beneficiary's excess ABLE funds combined with his or her other funds do not exceed the $2,000 SSI limit.

C. IRS relaxes requirements for tax-favored ABLE accounts.

1. The IRS has relaxed the requirements set out in recently-issued proposed regulations in several areas.

2. Summary of Notice 2015-81, 2015-49 IRB, IR 2015-130 issued November 20, 2015:

a. Categorization of distributions is not required, i.e., ABLE programs are not required to include safeguards to determine which distributions are qualified disability expenses, nor are they required to specifically identify those used for housing expenses.

(1) Commentators noted that the proposed regulations would be unduly burdensome and that the eventual use of a distribution may not be known at the time that it is made.

(2) Identification of housing expenses is relevant only to determine eligibility for SSI and has no relevance for federal income tax purposes.

(3) The designated beneficiaries must still catagorize distributions to determine their federal income tax obligation, i.e., distributions for "qualified disability expenses" as not taxable, while other expenses may be partially taxable.

b. Contributors' TINs are not required.

(1) ABLE programs will not be required to request the TINs of contributors if the program has a system in place to reject contributions that exceed the annual contribution limits.

(2) If an excess contribution is deposited to a designated beneficiary's ABLE account, the program must request the contributor's TIN (total contributions from all contributors in the aggregate cannot exceed $14,000 per year).

(3) Commentators have noted that the regulation's proposed requirement would be burdensome because it is likely that contributions will come from various sources and will be made in various ways [payroll deduction, check, debit, automated clearing house (ACH) transfers, etc.], making it difficult to obtain the TIN of a contributor.

(4) Commentators have stated that some contributors, especially those making small gifts, may be reluctant to make a contribution if a TIN is required.

c. Disability diagnosis certification permitted.

(1) The Notice provides that a certification, under penalty of perjury, that the individual (or the individual's agent under a power of attorney or a parent or legal guardian of the individual) has the signed physician's diagnosis, and that the signed physician's diagnosis will be retained and provided to the ABLE program or the IRS upon request, is adequate to satisfy the IRS in regard to the Internal Revenue Code's certification requirements.

(2) A designated beneficiary can open an ABLE account by certifying, under penalty of perjury, that they meet the qualification standard, including their receipt of a signed physician's diagnosis if necessary, and that they will retain the diagnosis and provide it to the program or the IRS upon request.

(3) Eligible individuals with disabilities will not need to provide the written diagnosis when opening the ABLE account, and ABLE

programs will not need to receive, retain, or evaluate detailed medical records.

(a) States and potential qualified ABLE program administrators had expressed concerns about the responsibilities and potential liabilities for receiving and safeguarding medical information contained in a signed diagnosis.

(b) Commentators have been concerned that qualified ABLE programs would incur unmanageable costs and burdens in trying to comply with applicable laws imposing system and other requirements on those in possession of medical records.

(c) In the Notice, the IRS stated that if a certification used to open a qualified ABLE account before the issuance of the final regulations is consistent with Notice 2015-81, but does not contain other information required by the final regulations, the account will not lose its qualification as an ABLE account solely for that reason.

D. Indiana adopts ABLE account enabling legislation.

1. Senate Enrolled Act No. 11 was enacted effective July 1, 2016 to establish an ABLE board and to implement a "qualified ABLE program" in the State of Indiana.

a. A "qualified ABLE program" is defined in IC 12-11-14-7.

b. A "qualified disability expense" is defined in IC 12-11-14-8.

2. IC 12-11-14-9 establishes the ABLE authority as a body corporate and politic, which is not an agency of the State, as an instrumentality of the State performing essential governmental functions.

   a. Pursuant to subsection (c), the authority is authorized to establish a qualified ABLE program.

   b. Pursuant to IC 12-11-14-11(b), the board has the powers necessary or appropriate to develop and implement a qualified ABLE program, which shall include all powers necessary and appropriate in order to accomplish the stated purposes.

   c. In general, the qualified ABLE program must meet the requirements of Section 529A of the Internal Revenue Code.

   d. Although funds held in an ABLE account are exempt from creditors and are not liable to attachment, levy, garnishment, etc., the state of residency of a designated beneficiary is a creditor of the account in the event of the death of the designated beneficiary.

3. Attached as Exhibit "B" is a synopsis of the ABLE legislation that has been introduced or signed into law in the various states.

   a. Some states will not be offering ABLE accounts, but anyone can deposit funds in ABLE accounts authorized in any other state.

   b. The state residency requirement was subsequently amended to allow qualified individuals to open an account in a state which may launch its program sooner rather then to need to wait for the home state to establish an ABLE program.

c. The goal is to increase competition in the marketplace in the manner of Section 529 college savings plans, to allow a wider array of available options so that potential beneficiaries can find the ABLE plan that best suits their needs.

III. Housing Programs and Special Needs Trusts.

A. The National Academy of Elder Law Attorneys ("NAELA"), together with other advocacy groups, has requested the Department of Housing and Urban Development (HUD) to clarify its policy after concern that some public housing authorities (PHAs) have interpreted HUD rules to require that all distributions from special needs trusts are income for HUD rental assistance programs.

1. The argument is that the HUD rules should specify that all distributions from SNTs should not be counted as income based on the applicable special needs trust law and policy.

2. The letter to the Secretary of HUD dated January 6, 2016 is attached as Exhibit "C".

B. Differences between HUD housing programs and Medicaid:

1. HUD housing programs are only income tested, while Medicaid is subject to both asset and income tests.

2. The argument is that by excluding assets placed in special needs trusts, Congress made Medicaid eligibility for persons with disabilities more like the HUD housing programs in that the existence of those assets would not be an impediment to eligibility.

3. NAELA argues that the goal has been to move away from institutional care and to allow people with disabilities to remain in their communities.

a. Those who have special needs trusts and benefit from SSI and/or Medicaid home and community-based services (HCBS) are also often beneficiaries of housing-based assistance.

b. Special needs trusts are consistent with the goals of community integration.

C. NAELA encouraged HUD to adopt this position as being consistent with its policy.

1. HUD policy, as set out in 24 C.F.R. § 5.609(c)(17), requires exclusion of income excluded by other public benefits programs. It excludes:

> "Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility for benefits under any program..."

2. The argument is that special needs trust income is excluded by Federal statute, 42 U.S.C. § 1396p(d)(4)(A) and (C), and should therefore be excluded from HUD's income test on that basis.

IV. In the Matter of the Guardianship of Natalie N. Stant Adult, Jeffrey Stant v. William Stant and Natalie Stant, 2016 Ind. App. LEXIS 2.

A. Natalie has four sons, William, Timothy, Louis, and Jeffrey.

1. William had been attorney-in-fact for Natalie since February 2011.

2. Natalie lived with William and his wife for over ten years.

3. In November 2012 Natalie was diagnosed with early Alzheimer's type dementia.

4. Jeffrey filed a petition for the appointment of a permanent guardian and William intervened.

5. Jeffrey sought information from William concerning Natalie's finances and eventually requested an accounting of Natalie's finances from William pursuant to IC 30-5-6-4.

a. Prior to July 1, 2012, IC 30-5-6-4 only required the attorney-in-fact to provide an accounting if (i) ordered by the Court, (ii) requested by the principal, (iii) requested by a guardian appointed by the principal, or (iv) requested by the personal representative of the estate or an heir or legatee following the death of the principal.

b. Effective July 1, 2012, IC 30-5-6-4(b) was amended to allow, among others, a child of the principal to request an accounting.

(1) However, subsection (c) of the statute was not similarly amended to add children of the principal to the list of those required to receive an accounting.

(2) Although a child could request an accounting under subsection (b), the attorney-in-fact was not required to deliver an accounting to the child.

(3) On July 1, 2014, subsection (c) was amended to require the attorney-in-fact to deliver an accounting, when requested, to a child of the principal.

6. William refused to deliver a copy of the accounting to Jeffrey.

7. In January 2015, Jeffrey filed his Mandamus Action pursuant to IC 30-5-6-4(h).

8. In February 2015, the Trial Court issued an order denying Jeffrey's Mandamus Action, finding that the statute only applied to powers of attorney created after July 1, 2012.

B. The Court of Appeals reversed and remanded.

1. It stated that the parties presented a question of statutory interpretation.

2. The statute was most recently amended as of July 1, 2014 and presently provides that a child of the principal may request and receive an accounting from the attorney-in-fact.

3. Jeffrey contended that because he was the child of the principal and because his request for the accounting occurred after the amendments to the statute that allow for a child to request and receive an accounting, the Trial Court incorrectly construed IC 30-5-6-4 to only apply to children requesting an accounting under a power of attorney created after July 1, 2012.

4. The Trial Court found that although Jeffrey was the child of the principal and requested an accounting from the attorney-in-fact, Jeffrey did not qualify to request and receive an accounting because the power of attorney was created prior to July 1, 2012.

5. The Court of Appeals, however, found that IC 30-5-6-4 was unambiguous, providing that the statute, as of July 1, 2014, allows a child of the principal to request an accounting, and if requested, the attorney-in-fact *shall* render and deliver the accounting to the child.

6. The Trial Court improperly read into the statute a requirement that the power of attorney, for which the accounting is requested, must have been created prior to the date when the statute was amended to allow children of the principal to request an accounting.

7. The Court of Appeals found no such limitation in the statute; nothing in the current language of the statute would limit the requirement of delivering an accounting

requested by a child of the principal to only apply to powers of attorney created after the amendment to the statute.

8. The effective date of a power of attorney is not relevant to who may make a request and receive an accounting, as only the class of persons who may request and receive an accounting has changed as a result of the statutory amendment.

    a. It is the "right" that applies prospectively, in that the child of the principal has only the statutory right to request an accounting on or after July 1, 2012, but not prior to that date.

    b. Consequently, it is the right that is subject to prospective application, not the date that the power of attorney was created.

V. *Jackson v. Indiana Adult Protective Services*, 2016 Ind. App. LEXIS 77 (Court of Appeals Case No. 18A02-1508-MI-1075).

A. As a result of an accident and numerous calls to the police and other irrational behavior, the Muncie Department of Police conducted a welfare check on Jackson.

1. Believing that she required a psychological evaluation, the police took her by ambulance to a hospital for psychiatric evaluation.

    a. An application for emergency detention of a mentally ill and dangerous person was filed stating that Jackson was gravely disabled and in need of immediate restraint because of increased confusion, poor tracking, substantial impairment in judgment and reasoning, etc.

    b. The Trial Court granted the application and Jackson was placed under a temporary ninety-day commitment.

    c. After being committed, APS was contacted for assistance in placing her in a nursing facility.

(1) A hearing was held and the Trial Court entered an order for emergency services.

(2) She was directed to be transported to a nursing home and she appealed.

d. The Court of Appeals reversed and remanded.

2. Although Jackson undoubtedly suffered from cognitive impairment due to dementia, she was found not to be dangerous and to function safely.

a. Before admitted for psychiatric examination, she purchased her own groceries, cooked her own meals, bathed, dressed herself, brushed her teeth, etc., without assistance.

b. IC 12-10-3-28 outlines the process for obtaining an emergency protective order.

(1) Adult Protective Services either directly or through the Prosecutor's Office in the county in which the alleged endangered adult resides may petition either the superior or circuit court of the county for an emergency protective order if (i) an alleged endangered adult does not or is unable to consent to the receipt of protective services arranged by the division or Adult Protective Services unit or withdraws consent previously given, and (ii) the endangered adult is involved in a life-threatening emergency.

(2) In this case the lower court's order placed Jackson in a nursing home until such time as she could be released by the court with a letter from

her physician stating she was able and ready for discharge into a less restrictive environment.

(3) The language in the court's order was at issue because the duration of the emergency services was indefinite.

(a) IC 12-10-3-28 provides that an emergency protective order may not remain in effect for more than ten days, or at most thirty days if APS can show that an extraordinary needs for services exists.

(b) The Court of Appeals found that APS did not present sufficient evidence that Jackson was involved in a life threatening emergency under IC 12-10-3-28.

(c) It remanded with instructions that the Delaware Circuit Court release Jackson from the nursing home and allow her to return to her home.

(4) It is interesting that in this case a part of the problem may have stemmed from her reaction to the police when the Muncie Police Department conducted a welfare check.

(a) She would not let the officers into her home because she did not know them; when asked to name the day, she responded that she did not have any need to keep track of the days; when asked to name the current mayor, she responded, "Who cares."; when asked to name the current president, she said

she thought it was Barrack Obama but was not sure if he was still President.

(b) IC 12-7-2-96 defines "gravely disabled" as a condition in which an individual, as a result of mental illness, is in danger of coming to harm because the individual has a substantial impairment or an obvious deterioration of that individual's judgment, reasoning or behavior that results in the individual's inability to function independently.

(c) The physician in this case felt that Jackson was gravely disabled under IC 12-7-2-96(2) because she had "poor short-term memory, poor insight and impaired judgment, and is unable to manage some personal needs such as driving a car, managing finances, and living safely at home."

(d) The court stated that there is no constitutional basis for confining a mentally ill person who is not dangerous and can live safely in freedom.

VI. *Stephanie A. Schrage v. The Audrey R. Seberger Living Trust, et al.*, 2016 Ind. App. LEXIS 63 (Court of Appeals of Indiana, No. 45A04-1506-TR-686).

A. This case involved a number of issues, including the proper commencement of a proceeding to contest a trust and the persons entitled to notice. However, the issue to be explored in this presentation is the determination whether a particular beneficiary is entitled to receive a copy of the trust.

1. Audrey R. Seberger was the Settlor and initial Trustee of a trust which she executed in 1992. It was thereafter amended several times.

a. The Third Restatement superseded the original trust and restated the trust in its entirety.

b. It disinherited Jill R. Schrage and directed that she would receive a specific gift of $25,000.

2. Following Seberger's death, a Successor Trustee was appointed.

a. Schrage sent a letter to the Trustee requesting a copy of Seberger's will and Trust.

b. The Trustee provided Schrage with a Certification of Trust and a redacted copy of the Trust. The Trustee then filed a Petition for Instructions as to whether there was any obligation to provide a copy of the trust.

B. Schrage had filed a petition to compel the Trustee to deliver the trust.

1. The trial court denied Schrage's petition reasoning that IC 30-4-3-6(b)(8) is clear and unambiguous and only refers to income beneficiaries and remaindermen as being entitled to a copy of the trust.

2. It noted that Schrage was neither an income beneficiary nor a remainder beneficiary, but instead a specific distributee, and is not entitled to a complete copy of the trust.

3. The Court of Appeals affirmed finding the statute to be clear and unambiguous and leaving no room for judicial construction.

VII. Irrevocable Income-Only Trust Developments in the Context of Asset Protection.

A. *Ada Brown v. Indiana Family and Social Services Administration*, 2015 Ind. App. LEXIS 717 (Ind. Ct. App., No. 87A01-1501-PL-38, Nov. 18, 2015).

1. Ada and Roy Brown transferred their home to a trust in 2000 and shortly thereafter made the trust irrevocable.

a. Ten years later, and two years after Ada moved to a nursing home, the trust sold the home for $75,000.

b. In 2012 Ada applied for Medicaid benefits and submitted documentation that the house had sold for $75,000.

c. The Indiana Family and Social Services Administration ("FSSA") found Ada eligible for Medicaid benefits, but imposed a transfer penalty based on the sale of the home.

d. In calculating the penalty, the FSSA valued the home at $91,900, its assessed value for tax purposes.

e. Ada appealed the imposition of the penalty; the ALJ and the Trial Court affirmed, and Ada appealed.

2. The Court of Appeals reversed.

a. It held that the evidence showed that the proceeds from the sale of the house were properly placed back in the trust and that the fair market value of the house was $75,000.

b. The Court of Appeals reversed the imposition of the transfer penalty.

c. FSSA asked the Court of Appeals to remand the matter back to the agency for a redetermination of eligibility, to which the Court of Appeals declined because the issue was waived, i.e., the FSSA had found her to be eligible.

3. The Court of Appeals held that the State should not have imposed a transfer penalty because the evidence showed that the house sold for its fair market value.

a. The Court of Appeals gave a general summary of the history and chronology of the Medicaid program under 42 U.S.C. §1396 et seq.

b. In this case, the trust was established in 2000 and shortly thereafter it was made irrevocable, and the house was not sold until ten years later.

(1) The FSSA had found Ada eligible for Medicaid but had assessed a transfer penalty.

(a) Both the ALJ and the Trial Court affirmed that decision based on the notion that the transfer of the assets occurred when the house was sold in 2010, which was within the 60-month look-back period from the Medicaid application date.

(b) The FSSA admitted that not only the FSSA, but also the ALJ and the Trial Court, had erred and did not analyze this case properly under the applicable statutes and regulations.

(2) The FSSA nevertheless argued that Ada should be deemed to be ineligible at the time that she applied for Medicaid benefits because the trust held $75,000 that was available to her under the Medicaid trust regulations, or alternatively, that there should be a penalty, but a smaller one than the penalty imposed, because the house was sold for $75,000, which was $16,900 less than the $91,900 fair market value of the property according to the Warrick County Assessor's records.

(3) The Court of Appeals stated in *dicta* that the trust assets would be deemed available to Ada because she was able to benefit from the trust.

(a) However, since eligibility was never an issue at the agency level, or with the ALJ or the Trial Court, and instead since the transfer penalty was the issue, the court declined to overrule the eligibility determination of the FSSA.

(b) It should be noted that the court erroneously stated in its *dicta* that the funds were available to Ada, unless the trust terms were such that Ada would have been entitled to more than the income from the trust assets, which would be unusual for an income-only trust.

i) The actual terms of the trust were not fully disclosed by the Court of Appeals decision.

ii) In a typical income-only trust, only the income is available, and is actually paid out, which would be treated as income as received, but not as a resource affecting Medicaid eligibility unless the income has not been disposed of by the Medicaid recipient by the end of the month of receipt.

B. <u>*Nadeau v. Thorn*</u> (Mass. Super. Ct., No. 14-DV-02278C, Dec. 30, 2015).

1. A Massachusetts trial court ruled that a Medicaid applicant's irrevocable trust was an available asset because he retained the right to use and occupy the property that was placed in the trust.

a. In 2001, Lionel Nadeau and his wife created an irrevocable trust and transferred their house into the trust. The trust provided that the Nadeaus had

the right to use and occupy the house, which they did until Mr. Nadeau entered a nursing home. In 2014, Mr. Nadeau applied for Medicaid benefits. The state considered the trust a countable asset and denied benefits.

b. Mr. Nadeau appealed. The state affirmed the denial of benefits, ruling that the trust was an available asset because he was able to use the property in the trust during his lifetime. Mr. Nadeau appealed to the court, arguing that his home could not be considered available unless the trust gave him a right to some sort of payment.

2. The Massachusetts Superior Court affirmed, holding that the trust was an available asset.

a. The court ruled that while state regulations may require an asset in an irrevocable trust to be both available and payable, HCFA Transmittal 64 provides that payment may include non-cash disbursements, including the right to use and occupy real property.

b. Although this is a trial court decision, and not an Indiana decision, it may indicate the trend that is developing in the area of irrevocable trusts used for the purpose of asset protection.

3. This case arose out of an action for judicial review of a Medicaid decision.

a. The residence was transferred to the trust on the date that the trust was created.

b. The Nadeaus continued to live in the property for more than 13 years until Mr. Nadeau was admitted to a nursing facility on April 1 of 2014.

(1) MassHealth treated the residence as an available asset inside the trust based on its assessed value.

(2) Because the Nadeaus could use the property either to occupy or to rent and receive the income, the property was treated as "available" for MassHealth long-term care qualification purposes.

c. Under applicable Massachusetts law, property held in an irrevocable trust is a countable asset where it is "available according to the terms of the trust."

(1) The home was treated as "available" because the trust's express terms reserved their right to live there.

(2) Mr. Nadeau argued that the home should not be considered "available" unless there were circumstances that gave him the ability to receive some form of payment, such as from the proceeds of the sale.

(a) His argument was based on the "any circumstances" test described in 42 U.S.C. §1396p(d)(3)(B)(i), i.e., if there is any state of affairs at any time during the operation of the trust that would permit the trustee to distribute the trust assets to the grantor, those assets will count in calculating the grantor's Medicaid eligibility.

(b) The court relied on HCFA Transmittal 64 issued by the Health Care Financing Administration (HCFA) which defined "payment" broadly as: "any disbursal from the corpus of the trust or from income generated by the trust which benefits the

party receiving it. A payment may include cash, as well as non-cash or property disbursements, such as the right to use and occupy real property." Medicaid Manual HCFA Transmittal 64, § 3259.1(A)(8).

(3) The court held that Mr. Nadeau's right to use and occupy the home was a form of payment under HCFA Transmittal 64 and was a countable asset even if the applicable regulations required it to be both available and payable to him.

d. Various commentators have questioned the court's holding in *Nadeau*.

(1) The applicable portion of the Massachusetts Medicaid Regulations should not be read in isolation and should be read as a part of the regulations as a whole.

(2) In their entirety, the term "available" does not mean "physically available," but rather it refers to whether the trustee has discretion to distribute the trust principal under any circumstances to or on behalf of the applicant.

(a) Numerous decisions have confirmed that because the right of an applicant to use and occupy property owned by the trust does not translate into the ability of the trustee to distribute any legal interest in the property to the applicant, the right to use and occupy alone does not make an asset countable.

(b) Commentators have also suggested that the court erroneously referred to a case holding that the home was "available,"

when in fact the case was based on a number of factors, including a provision by which the trustee could terminate the trust and distribute the principal to the beneficiaries of the trust.

(c) Commentators have also suggested that HCFA Transmittal 64 is clearly inconsistent with the plain language and purposes of the relevant statute.

i) 42 U.S.C. §1396p(d)(3)(B)(1) applies only when a payment could be made to an individual.

ii) The purpose of the applicable regulation is clear: if there are any circumstances under which the principal can be paid to the applicant, that money should be used to pay for the cost of nursing home care.

iii) The right to use and occupy property cannot accomplish this goal.

iv) Unlike a life estate interest, even if the real estate is sold, the holder of the use and occupancy right would be entitled to no portion of the proceeds.

v) There must be circumstances under which the principal can be paid to the applicant, and then used by the applicant to pay for care.

C. *Beware of Irrevocable Income-Only Trusts In Medicaid Planning*, Estate Planning, (May 2016, Vol. 43, No. 5).

1. This recent article analyzes a number of the Massachusetts fair hearing decisions and court cases pertaining to IIOTs.

2. The Massachusetts experience may represent a harbinger of a developing trend in the area of irrevocable trusts:

   a. The right to "use and occupy" real estate is increasingly being treated as tantamount to ownership; it would be better to establish a limited right in the nature of a lease through an occupancy agreement which is very clearly limited and which requires the occupant to pay, in lieu of rent, all expenses associated with the right of occupancy (taxes, insurance, routine maintenance and repairs, utilities, etc.).

   b. Trusts that permit termination under certain conditions and which would require that the property be distributed to the remainder beneficiaries rather than to the holder of the income interest would tend to substantiate the efficacy of the trust and the limited nature of the grantor's interest. It should be very clear that the "grantor" is not a beneficiary who will receive assets in the event of the termination of the trust and the distribution of trust assets.

   c. The trust should specifically prohibit the distribution of principal, and should probably not mandate that non-productive property be sold or otherwise converted to income-producing assets.

   d. The trust should probably not specifically refer to the possibility of making "loans" from the trust which might be used for the benefit of the grantor, but if in fact such transactions occur, they should be well documented. I have used IIOTs in many instances involving loans made to the grantor to make up

for an insufficiency in funds during the penalty period or to meet other needs of the incapacitated grantor.

e. If a power of appointment is used, which will apply in most instances, it should be a specifically limited power of appointment and not one which would appear in any way to unduly or inappropriately advantage the grantor or apply undue pressure to the trustee.

f. The right to remove the trustee should be limited to specifically-defined circumstances, i.e., misconduct, negligence, inconvenience of location, etc.

g. Steer clear of language commonly used in special needs trusts (e.g., that the trust is for the "sole benefit" of the grantor, or that the income can be used for "special needs" circumstances, etc.); income should always be distributed and under no circumstances accumulated, and under no circumstances should principal be distributed or available for distribution.

h. Rather than allowing the trustee to determine that which is principal and that which is income, it should be very specifically stated that capital gains and capital gain distributions will be treated as principal and not as income.

i. Principal should not be available for distribution or in fact distributed to anyone during the grantor's lifetime and until the termination of the trust.

D. Federal and Indiana rules regarding irrevocable trusts:

1. 42 U.S.C. § 1396p(d)(3)(B)(i) states:

> If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which,

payment to the individual could be made shall be considered resources available to the individual...

2. 42 U.S.C. § 1396p(d)(3)(B)(ii) states:

   Any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual...

3. The Indiana rules are set forth in the Indiana Health Care Program Policy Manual (IHCPPM) beginning at § 2615.75.10.

   a. If a trust is established so that neither the corpus nor the income can under any circumstances benefit the individual, then the trust corpus will not be treated as an available resource and will be treated as having been transferred when the trust was established or funded.

   b. The effect of an "income only" trust, where the individual cannot benefit from the corpus but will receive the income, is less clear from the language.

   c. CMS has affirmed that if no portion of the trust corpus can be distributed, the corpus will not be counted as a resource to the individual.

   d. Thus, no part of an "income only" trust should be counted as a resource, but instead the trust corpus will be treated as having been transferred when the trust was established.

   e. Actual payments to the Medicaid recipient **will** be counted as income in the Medicaid budgeting process.

4. A copy of IHCPPM § 2615.75.10 is attached as Exhibit "D".

5. Those portions of an irrevocable trust which can under some circumstances be used to benefit the individual are treated as an available resource unless and until they are transferred to a third party.

   a. Those portions of an irrevocable trust which cannot ever be used to benefit the individual will not be considered as an available resource but instead will be considered to have been transferred when the trust was established, or if later, the date upon which payment to the individual was foreclosed.

   b. The result of this is that a trust that is labeled as "irrevocable" does not by itself determine whether the assets in the trust are available and countable as a resource.

   c. One needs to review the language of the trust to see if there are any circumstances under which the grantor can receive a distribution from the assets.

   d. To the extent the answer is yes, the assets are available and countable as a resource.

VIII. Statutory Developments.

A. State Enrolled Act No. 221 Enacts a new chapter 4.1 called "Senior Savings Protection" to IC 23-19 to address the issue of financial exploitation.

   1. IC 23-19-4.1-1 defines "financial exploitation" as the wrongful or unauthorized taking, withholding, appropriation, or use of money, real property, or personal property of a financially endangered adult.

2. A "financially endangered adult" is an individual who is at least 65 years of age, or an individual at least 18 years of age and incapable by reason of mental illness, intellectual disability, dementia, or other physical or mental incapacity, of managing or directing the management of the individual's property.

3. If a "qualified individual" has reason to believe that financial exploitation of a financially endangered adult has occurred, has been attempted, or is being attempted, the qualified individual shall, as required by IC 12-10-3-9(a):

   a. Make a report to an entity listed in IC 12-10-3-10(a); and

   b. Notify the Securities Commissioner (the "Commissioner").

4. A "qualified individual" means an individual associated with a broker-dealer who serves in a supervisory, compliance, or legal capacity as part of the individual's job.

5. After a qualified individual makes a report and provides notification under subsection (a), the qualified individual may, to the extent permitted under federal law, notify any of the following concerning the qualified individual's belief:

   a. An immediate family member of the financially endangered adult;

   b. A legal guardian of the financially endangered adult;

   c. A conservator of the financially endangered adult;

   d. A trustee, co-trustee, or successor trustee of the account of the financially endangered adult;

   e. An agent under a power of attorney of the financially endangered adult;

   f. Any other person permitted under existing laws, rules, regulations, or customer agreement.

6. A qualified individual may refuse a request for disbursement of funds from an account owned by a financially endangered adult, or of which a financially endangered adult is a beneficiary or a beneficial owner, if the qualified individual has a reason to believe that the requested disbursement may result in financial exploitation of the financially endangered adult.

7. A broker-dealer or the qualified individual described in subsection (b) is not required to contact a party authorized to transact business on the account if the broker-dealer or qualified individual has reason to believe that the party has engaged in suspected or attempted financial exploitation of the financially endangered adult.

8. Unless a court or the Commissioner enters an order extending the refusal of disbursement or providing any other applicable protective relief, any refusal of disbursement expires upon the earlier of the following:

   a. The date that the qualified individual has reason to believe that the disbursement will not result in financial exploitation of the financially endangered adult; or

   b. fifteen (15) business days after the date of the initial refusal of disbursement.

   However, if a broker-dealer's internal review of the facts and circumstances supports the broker-dealer's reasonable belief that the financial exploitation of the financially endangered adult has occurred, is occurring, has been attempted, or will be attempted, the Commissioner shall extend the refusal of disbursement for an additional fifteen (15) business days after the expiration date that would otherwise apply under this subdivision.

9. A court with jurisdiction may enter an order that extends a refusal of disbursement, or provides for any other protective relief.

10. A broker-dealer or a qualified individual who in good faith complies with section 6 or section 7 of Chapter 4.1 is immune from any administrative or civil liability for actions taken in accordance with those sections.

    a. A broker-dealer or a qualified individual who in good faith releases or does not release copies of records under Chapter 9 of this section is immune from civil liability for release of such records or failing to release such records.

    b. Chapter 4.1 does not limit or otherwise impede the authority of the Commissioner to access or examine books and records of broker-dealers as otherwise provided by law.

    c. Not later than September 1, 2017, the Commissioner shall develop and make available on the Secretary of State's internet website information that includes training resources to assist broker-dealers and qualified individuals in the prevention and detection of financial exploitation of financially endangered adults.

B. Senate Enrolled Act No. 371 (SEA No. 371) makes several changes pertaining to the priority of certain relationships.

    1. IC 23-14-55-2 is amended to provide that a stepchild (or a majority of the surviving stepchildren if there shall be more than one) shall be included after the other designated people having priority, to authorize a cemetery to inter, entomb, or inurn the body or cremated remains of the deceased human being.

2. The individuals listed who have priority over the stepchildren are (i) an individual granted the authority in a funeral planning declaration, (ii) an individual granted authority in a power of attorney or health care power of attorney under IC 30-5-5-16, (iii) the spouse of the decedent, (iv) the decedent's surviving adult child (or the majority of the adult children if there is more than one), (v) the decedent's surviving parent or parents, (vi) the decedent's surviving sibling (or the majority of the surviving siblings if more than one), and (vii) the individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent, or, if more than one individual of the same degree of kinship is surviving, the majority of those who are of the same degree. Also added as the last person in the order of priority is the person appointed to administer the decedent's estate under IC 29-1.

   a. The same changes are made to IC 25-15-9-18 concerning the persons having the authority to designate the manner, type, and selection of the final disposition of human remains, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death.

   b. The same changes are also made in IC 29-2-19-17 concerning the right to control the disposition of the decedent's body, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death.

C. IC 29-3-5-5 is also amended by SEA No. 371 to list a standby guardian designated under IC 29-3-3-7 as the second person in the order of priority to be entitled to consideration for appointment as a guardian after the person designated in a durable power of attorney, which has the first degree of priority.

1. After amendment, the order of priority is now (i) a person designated in a power of attorney, (ii) a person designated as a standby guardian under IC 29-3-3-7, (iii) the spouse of an incapacitated person, (iv) an adult child of an incapacitated person, (v) a parent of an incapacitated person, or a person nominated by will of the deceased parent of an incapacitated person or by any writing signed by a parent of an incapacitated person and attested by at least two witnesses, (vi) any person related to an incapacitated person by blood or marriage with whom the incapacitated person has resided for more then six months before the filing of the petition, and (vii) a person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

2. Pursuant to IC 29-3-5-5(v), with respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person or minor, may pass over a person having priority and appoint a person having a lower priority or no priority at all.

D. IC 32-17.5-4-1 concerning a disclaimer is also amended by SEA No. 371 to provide that if a beneficiary of a transfer-on-death transfer [as defined in IC 32-17-14-3(16)], disclaims an interest in property, the disclaimant's interest in the property passes as follows: (i) in the case of an individual, as if the disclaimant had died immediately before the death of the owner; and in the case of a disclaimant who is not an individual, as if the disclaimant did not exist before the death of the owner.

TYPE OF TRUST	TESTAMENTARY SUPPORT	TESTAMENTARY SUPPLEMENTAL (SPECIAL) NEEDS	REVOCABLE INTERVIVOS	IRREVOCABLE INTERVIVOS	THIRD PARTY INTERVIVOS
WHO CREATES IT	Testator in a will (obviously not the beneficiary – a third party, such as a parent).	Testator in a will (obviously not the beneficiary – a third party, such as a parent).	Settlor who derives some benefit or retains control. May revoke trust.	Settlor who may or may not derive a benefit or retain control. May not revoke.	Created with third party's assets for benefit of the beneficiary.
WHAT IT DOES	Provides designated support to the beneficiary.	Provides only supplemental needs, not support, to beneficiary.	Holds assets received from the beneficiary/settlor. Used as directed in trust.	Cannot be revoked by settlor, may or may not provide benefit to settlor.	Provides a beneficiary with either support or other benefits at the direction of the trustee.
EFFECT ON MEDICAID ELIGIBILITY	Disqualifies beneficiary since trust provides support.	Beneficiary (including a spouse) qualifies for Medicaid unless benefits for spouse treated as a transfer due to failure to assert spousal election. Assets were not derived from beneficiary.	Disqualifies beneficiary - deemed an available asset.	Disqualifies settlor to extent settlor receives benefit; or if paid to another it is deemed a transfer of assets.	Support disqualifies beneficiary; trustee discretion may also disqualify.
EFFECT ON VA AID AND ATTENDANCE ELIGIBILITY	Disqualifies beneficiary since trust provides support per OGC Opinion 33-97.	Per OGC Opinion 72-90, arguably would not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran, however, this position is unsettled.	Disqualifies veteran beneficiary - deemed an available asset.	Disqualifies veteran beneficiary if the claimant and/or his or her spouse is either an income or a principal beneficiary because there was not an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91.	Unless established by the veteran's spouse, should not be treated as a resource except to the extent that assets are available for the veteran's support unless assets are actually distributed to or made available to the veteran per OGC Opinion 72-90.
EFFECT OF DISBURSEMENTS	Distributed income is income to beneficiary. Income or corpus used to support.	Distributed income attributed to beneficiary, but distributions used for non-support items.	Probably deemed a grantor trust, all income attributed to settlor.	If paid to or for benefit of settlor, deemed to be available. If paid to another even after initial look-back period, a transfer may be considered.	Disbursement, either mandatory or discretionary, likely to mean an available asset. Income distributed is income to beneficiary.
LOOK-BACK PERIOD FOR MEDICAID PURPOSES	N/A, beneficiary disqualified for Medicaid.	N/A, not created with beneficiary's assets.	60 months per OBRA 93 for transfers from trust to a third party. However, due to control by settlor it is always an available asset.	60 months per OBRA 93.	N/A - not assets of beneficiary.
ULTIMATE DISPOSITION OF CORPUS	As directed by the trust instrument.	As directed by the trust instrument.	As directed by trust instrument.	As directed by trust instrument.	As directed by trust instrument.

TYPE OF TRUST	THIRD PARTY INTERVIVOS SUPPLEMENTAL NEEDS	d(4)(A) DISABILITY TRUST UNDER OBRA 93	d(4)(B) QUALIFIED INCOME TRUST (MILLER OR "UTAH GAP" TRUST) UNDER OBRA 93	d(4)(C) NON-PROFIT ASSOCIATION TRUST UNDER OBRA 93	IRREVOCABLE INCOME ONLY TRUST (IIOT)
WHO CREATES IT	Created with third party's assets for benefit of the beneficiary by third party.	Parent, grandparent, legal guardian or court with assets of beneficiary who is under 65 years of age. May also be established by third party with third party's assets.	Anyone using beneficiary's income. In Colorado, the court, using beneficiary's income.	Parent, grandparent, legal guardian, court, or the beneficiary using beneficiary's assets. May also be established by third party with third party's assets.	Beneficiary or third party using assets of the creator.
WHAT IT DOES	Provides only supplemental needs, not support to beneficiary.	Shelters funds belonging to person with disability as long as trust used for supplemental needs and not support.	Receives beneficiary's income and pays for support up to income cap limit for Medicaid.	Shelters funds belonging to person who's disabled, as long as trust used for supplemental needs and not support.	Pays income only for use of beneficiary at a level that usually will not disqualify beneficiary for Medicaid.
EFFECT ON MEDICAID ELIGIBILITY	Beneficiary (other than spouse) qualifies, not an available asset, and funds not derived from beneficiary.	Beneficiary qualifies as soon as funds are in trust and not used for support.	Qualifies beneficiary for Medicaid who would otherwise be disqualified because of income above the cap.	Beneficiary qualifies as soon as funds are in trust and not used for support.	Theoretically, beneficiary is qualified since benefits (i.e., income) are made at a level that would not disqualify or would have only a minimal or immediate impact.
EFFECT ON VA AID AND ATTENDANCE ELIGIBILITY	Per OGC Opinion 72-90, should not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran.	Would most likely disqualify veteran if established by either the veteran or the veteran's spouse; should not affect VA pension qualification per OGC Opinion 72-90 if established by a third party except to the extent that trust assets are distributed or made available to the veteran.	Not utilized in the context of VA qualification.	Would most likely disqualify veteran if established by either the veteran or the veteran's spouse; should not affect VA pension qualification per OGC Opinion 72-90 if established by a third party except to the extent that trust assets are distributed or made available to the veteran.	Income to be taken into account if the veteran is the beneficiary; if the claimant and/or his or her spouse established the trust, trust assets would be deemed to be available to the beneficiary because there was not an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91.
EFFECT OF DISBURSEMENTS	Distributed income is income to beneficiary.	Income may be attributable to beneficiary. As long as used for supplemental needs, no disqualification for Medicaid.	Amount below the income cap is paid for beneficiary's support or other needs, excess may be retained in trust.	Income may be attributable to beneficiary. As long as used for supplemental needs, no disqualification for Medicaid.	Income attributable to beneficiary. Income paid subject to spend-down.
LOOK-BACK PERIOD FOR MEDICAID PURPOSES	N/A, not created with beneficiary's funds.	N/A - if proper disability trust there is no transfer penalty.	N/A - if proper income trust there is no transfer penalty.	N/A - if proper pooled trust there is no transfer penalty except possibly for transfers of the beneficiary's own assets who is 65 years of age or older.	60 months per OBRA 93 on any transfers of corpus to or from trust.
ULTIMATE DISPOSITION OF CORPUS	As directed by trust instrument.	Upon death of beneficiary, remainder must be available to state for reimbursement of medical assistance.	Upon death of beneficiary, remainder must be available to state for reimbursement of medical assistance.	Upon death of beneficiary state may seek reimbursement only if remainder does not stay in the trust for charity.	As directed by the trust instrument upon death of income beneficiary.

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