

# ESTATES & PROBATE NEWSLETTER

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## VIEW FROM THE CHAIR BY PETER T. MOTT

Ever since the 2001 tax act was passed, we anticipated that some day we would have a CLE program on a more "permanent" change to the estate tax law. Little did we think that it would take until December 2010 until we knew what that more permanent approach would look like. Even so, the new tax act is in force until the end of 2012 and then we will see what happens next. At our February open meeting, Carolyn Reers moderated a panel comprised of Rich Marone, Heather Rhodes, Bryon Harmon, and Dan Daniels concerning planning issues with the new law. We will have a similar program at the CBA Annual Meeting in June, focusing in particular on the new concept of "portability" of the estate tax exemption. Undoubtedly, there will be more such programs to come as we all become better acquainted with the new law and as we face further changes, such as the possible reduction of the Connecticut estate tax exemption per the Governor's budget proposal.

There has also been a lot of discussion about what does this mean for the future of the estate planning practice when only a very small percentage of the population will be concerned about the federal estate tax. This alarm has been sounded before in our profession and perhaps I take a more sanguine view than others, but I believe that there will be ample demand for our services. In fact, I believe that it will cause all of us to really focus on what I think the trusts and estates bar does at its best, which is to counsel families regarding the basic issues of

how they wish to dispose of their property, who they wish to have make decisions for them during incapacity or at time of death, and in general how best to leave their legacy with or without tax considerations. We will continue to sponsor CLE programs in that vein.

This will be the last column that I will submit as Chair of the Section as John Ivimey will take over for me at the conclusion of our 2010-2011 year. It has been a privilege to serve as the Chair these past two years and I look forward to continuing my involvement. As evidenced by our many meetings, contributions to this newsletter, and significant use of the list serve, this remains a most collegial group of lawyers and I hope and expect that it will always remain so.

# THE ABC'S OF SNT'S: UNDERSTANDING SELF FUNDED SPECIAL NEEDS TRUSTS

by

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Estate planning for a family member with disabilities or special needs can be challenging, especially if this family member relies on government benefits such as income from Social Security<sup>1</sup> or medical coverage through Medicare or Medicaid.<sup>2</sup>

There is a common misunderstanding that a family member who is reliant on government benefits must be disinherited in order to preserve these important benefits. Furthermore, another misconception is that in order to qualify for certain benefits this family member must be forever in a state of impoverishment.

But in 1993, Congress amended the Social Security Act<sup>3</sup> and exempted certain types of trusts, but only for persons with disabilities, referred to as "beneficiaries" in this article. These trusts are called special needs or supplemental needs trusts, hereinafter referred to as "SNTs" and the resources in these trusts are not counted toward the income or asset limitations of certain government benefit programs.

This article will primarily describe the different types of SNTs under this Act and under what circumstances these SNTs will be useful. We have included a section on Third Party

SNTs, but these are not the focus of this article. We have also included hypothetical case studies for both the Self-Funded and Third Party funded SNTs.

## Self-Funded or Payback SNTs

First, the self-funded or payback SNT is known by its federal statutory designation, (d)(4)(A), (B)<sup>4</sup>, or (C). These designations come from the federal statutory authority at 42 U.S.C. § 1396p(d)(4).

All of these SNTs are designed as a means of protecting the SNT beneficiary's assets and income, as well as his or her eligibility for government benefits. The money or other property in these SNTs is deemed non-countable or unavailable to the beneficiary of the SNT for Medicaid<sup>5</sup> and Supplemental Security Income "SSI" purposes as well as for some other programs.<sup>6</sup> In addition, the transfer of the money or other property to the SNT is deemed a non-penalty transfer for Medicaid.<sup>7</sup>

The Federal Statutory authority for these SNTs is listed below.

### A. d(4)(A) Trust (42 U.S.C. § 1396p(d)(4)(A)):

- (i) A trust containing the asset of an individual<sup>8</sup>

under age 65;<sup>9</sup>

- (ii) who is disabled (as defined in section 1382c(a)(3) of this title),<sup>10</sup> and which is;

- (iii) established for the benefit of such individual by a parent, grandparent, legal guardian of the individual,<sup>11</sup> or a court;

- (iv) if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

**B. d(4)(C) Trust (42 U.S.C. § 1396p(d)(4)(C)):** A trust containing the asset of an individual<sup>12</sup> who is disabled (as defined in section 1382(c)(a)(3) of this title) that meets the following conditions:

- (i) The trust is established<sup>13</sup> and managed by a non-profit association.<sup>14</sup>

- (ii) A separate account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds the trust pools these accounts.

- (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

In addition to the requirements of 42 U.S.C. § 1396p(d)(4)(C), the Centers for Medicare and Medicaid Services "CMS" sent out a Regional Bulletin to Region I on May 12, 2008, which stated

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that transfers by individuals age 65+ "may" incur a penalty. Although the CMS used the word "may," the State has implemented new requirements for a Pooled SNT for individuals age 65+. The State is now requiring that individuals with disabilities age 65+ who transfer funds into Pooled SNTs prove that the transfers were not penalty transfers. The beneficiaries must demonstrate they will receive or are expected to receive fair value for their transfers. The State requires the following, as set out in Information Bulletin No. 09-02:

- First, if the beneficiary transfers less than \$340 monthly into the Pooled SNT, there is no penalty as this amount represents less than a one (1) day penalty in 2011.
- Second, if the beneficiary transfers or assigns \$340 or more monthly into the Pooled SNT, he or she must expend the excess, in its entirety, within six months to avoid a penalty. The beneficiary must indicate how the funds will be used. He or she must have a definite plan,<sup>15</sup> which must be approved by the Department of Social Services, and the beneficiary must receive fair value for these transferred funds.

- Finally, if the beneficiary transfers an asset (generally a one-time transfer of a larger amount) into a Pooled SNT with the intent of expending the asset during his or her lifetime, the Department of Social Services will not impose a penalty. Again, the beneficiary must have a definite plan approved by the Department regarding how he or she will use the asset, and the beneficiary must receive fair value for it. Part of the plan must include a time frame, so that the Department of Social Services can determine, based on the beneficiary's life expectancy, whether the plan is actuarially sound.

### Self-Funded SNT Hypothetical Case Studies

**Over Asset (d)(4)(A):** Client is a 35 year old male who was injured in a work related accident. He is wheelchair bound. He is currently receiving 40 hours a week of homemaker services and home health care under the Connecticut Personal Care Assistance Waiver Program, which is a Medicaid program with an asset limit of \$1,600 and a monthly income limit of \$2,022. His personal injury lawsuit was just settled and his net award is \$500,000. Not taking into account Workers Compensation and Medicare issues<sup>16</sup> including conditional pay-

ments, he could have a parent establish a Self Funded d(4)(A) SNT and place the \$500,000 into the SNT.

There would be no penalty transfer and no lapse in his benefits coverage.

### **Pooled SNT (d)(4)(C):**

Client is an 85 year old male living at home. He is currently on the Connecticut Home Care Waiver Program for Elders, which has an asset limit of \$1,600 and a monthly income limit of \$2,022. He gets approximately 72 hours of assistance a week through the program, which includes companion care, homemaker services, and home health aides. This Medicaid program also covers co-pays, deductibles, and prescription drugs. He was just approved for the Veteran's Aid and Attendance Pension, which will bring his income over the \$2,022 limit by \$1,000.

The client could create a Self-Funded d(4)(C) Pooled SNT and place his excess income into the SNT on a monthly basis. He would place the excess \$1,000 into the trust monthly and have the trustee pay out approximately \$900 monthly towards any unreimbursed medical expenses, additional caregiver services, and other living expenses such as his mortgage (if any), property taxes, utilities, etc. He would remain on his benefits without any lapse in

coverage.

### Third Party Special Needs Trusts

A Third Party SNT is an SNT established by a third party, with assets of a third party, but for the benefit of a person with disabilities, often a child. This is not a payback trust. There is no federal statutory authority governing Third Party SNTs. Authority must be found by looking at the case law,<sup>17</sup> state statutes,<sup>18</sup> and the POMS manual.<sup>19</sup> The Third Party SNT can be a testamentary or an inter vivos revocable or irrevocable trust. This SNT must contain specific language that funds are to supplement, not supplant, government benefits. Careful drafting is essential so that the result is achieved of preserving government benefits while having funds for supplemental purposes.

There is no requirement for a payback provision for Medicaid, as with the Self-Funded SNT. Thus, the Settlor dictates the residuary beneficiaries of the SNT corpus. The money or other property in these SNTs is deemed non-countable or unavailable to the beneficiary of the SNT for Medicaid and SSI purposes as well as for some other programs.

The attorney for the proposed trustee is not required to obtain the State's approval prior to executing these

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SNTs, but once the beneficiary is receiving government benefits and the SNT is funded, the State must be notified of the SNT and will scrutinize it to ensure it is in compliance with applicable Connecticut law.

### Third Party SNT Hypothetical Case Studies

**Testamentary Third Party SNT:** Client has a 19 year old child with down syndrome. Child is high functioning but still lives at home with Client and is in need of supervision. The Child receives benefits from the Connecticut Department of Developmental Services under the Medicaid Waiver and a monthly SSI check. The Client wants to ensure that the Child will remain in the community once he passes away, but he is not currently in a financial position to transfer money to an SNT. The Client can establish a Third Party Testamentary Special Needs Trust in his Will, and upon his death, his probate estate and a life insurance policy will fund the SNT. The assets in the trust will not be considered assets of the child and will not affect her Medicaid or her SSI benefits. The State will not be the remainder beneficiary upon the Child's death.

**Intervivos Third Party SNT:** Client has a 30 year old child with schizophrenia who has been determined disabled and is on SSI. Client is 65 years old and in good health. Client is doing long term care planning for himself. He executes

an irrevocable intervivos Third Party SNT and transfers money directly to the SNT while he is living. The SNT will not be considered an asset of his child's, and the State will not be the remainder beneficiary.

### Selecting a Trustee

The trustee's job is a very important one because the trustee will be responsible for ensuring that the beneficiary retains government benefits and that the funds in the trust are used only to supplement those benefits. Under no circumstances can the beneficiary be a trustee as this would allow the assets to be considered available for purposes of government benefits.

The Settlor can be the trustee. For example, a parent could establish an SNT and also be the trustee. However, rarely is a parent or family member conversant on the complexities of SNTs. We have frequently found putting a family member in charge of a beneficiary's money causes considerable family strife, especially when utilizing a self-funded SNT. It is often better for the family member to stay in the position of being a family member and not be the one who refuses the distributions from the trust.

A better choice is a trustee who is familiar with various income and asset rules for government benefits programs. Many bank trust departments are not versed in these programs and are not willing to handle administration of SNTs.

However, attorneys or non-profit trustees focusing on SNT administration can be utilized. We recommend if a family member is chosen as a trustee that a special needs attorney be retained for advice.

### Other Issues

**Disclosure.** For both d(4)(A) and d(4)(C) SNTs, if the beneficiary has received or is currently receiving benefits, the SNT must be disclosed to and approved by the Connecticut Department of Social Services Office of Legal Counsel and Administrative Appeals for Medicaid and the Social Security Administration for SSI recipients. There are specific rules set forth for the timing of these disclosures.

**Recovery/Liens.** For both (d)(4)(A) and (d)(4)(C) SNTs, there may be lien or recovery issues, which are outside the scope of this article.

**Distributions.** An SNT trustee typically has sole, absolute and uncontrolled discretion regarding any distribution from the SNT to the primary beneficiary. However, the assets in the self-funded SNT must be used for the sole benefit of the beneficiary. They can be used for such things as supplemental therapy, field trips, vacations, or dental care not covered by Medicaid. However, the assets are not to be used for items

which are covered by benefits. For example, Medicaid covers prescription drugs; therefore the trustee should not use SNT assets for this purpose.

The trustee can consult with the beneficiary and the family or friends of the beneficiary to help determine what distributions are needed. Goods and services can be paid with SNT funds, but under most circumstances money should not be given directly to the beneficiary. Usually, this would violate the terms of the SNT document and jeopardize the beneficiary's benefits. There are exceptions, but obtaining counsel familiar with these rules is critical.

A thorough knowledge of the distributions rules for each benefit program for which the beneficiary is eligible and receiving benefits is mandatory to ensure that distributions from the SNT do not interfere with benefits. For example, if a beneficiary on SSI receives payments from the SNT for housing or food, the SSI monthly amount will be reduced.

**Taxation.** Self-Funded SNTs are Grantor<sup>20</sup> trusts and taxed to the beneficiary; the Social Security number of the beneficiary can be used or an EIN may

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be obtained. Depending on whether a Third Party Special Needs SNT is revocable or irrevocable, an EIN might also be needed.

**Accountings.** If the probate court is used to establish the SNT, continuing probate court supervision will be required.<sup>21</sup>

### Conclusion

Self-Funded and Third Party SNTs are valuable tools to help persons with disabilities of any age significantly increase the quality of their lives and often allow them to remain in the community living as independently as possible. This article presents the fundamentals of Special Needs Trusts and planning. There are many other factors to consider when using Special Needs Trusts. Consultation with an attorney who is familiar with this area, before attempting disability planning for your clients, is well worth the investment.

<sup>1</sup>Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq. For Supplemental Security Income "SSI", the benefit Maximum for an individual living alone in 2011 is \$674/month and the asset limit is \$2,000. In general, income offsets SSI dollar for dollar.

<sup>2</sup>Title XIX of the Social Security Act; 42 U.S.C. § 1396 et seq. Depending on the program, asset limits are generally \$1,600 and income limits

for homecare programs are generally \$2,022 per month in 2011. Benefits available to recipients can be significant, including up to 24-hour home care for recipients with brain injuries and up to 72 hours a week for seniors in the community.

<sup>3</sup>Omnibus Budget Reconciliation Act of 1993 "OBRA '93."

<sup>4</sup>42 U.S.C. § 1396p(d)(4)(B) allows for an "income only" SNT, often referred to as a "Miller Trust"; see *Miller v. Ibarra*, 746 F.Supp. 19 (D.Colo. 1990). Miller Trusts are commonly used in "income cap" states, but are not permitted in Connecticut, as Connecticut is a "medically needy" state and does not recognize Miller Trusts.

<sup>5</sup>See the DSS Uniform Policy Manual "UPM" 4030.80

<sup>6</sup>This article discusses only the protection of assets and income for Medicaid (T-19) Programs and Supplemental Security Income (SSI). There are many programs that treat assets in a Special Needs Trust differently, such as state supplemental programs, cash assistance, and HUD.

<sup>7</sup>See UPM 3029.10 & UPM 3029.11.

<sup>8</sup>i.e. self-funded, typically from savings, a personal injury settlement, inheritance, or divorce.

<sup>9</sup>The Health Care Financing Administration (HCFA) has interpreted the provision: "the Trust beneficiary is under age 65 when the Trust is created" to permit the SNT to continue to be non-countable for Medicaid eligibility purposes even after the individual attains age 65, provided the SNT was created and funded while the beneficiary was still under that age limit. HCFA Transmittal #64 (12/31/94).

<sup>10</sup>The individual must be considered disabled according to criteria under the Federal Supplemental Security Income (SSI) program. Individuals receiving SSI or Social Security Disability Insurance (SSDI) would qualify. However, if the individual does not receive SSI or SSDI, the State of Connecticut has an equivalent method for finding this person disabled. (See the W-300 series of forms from DSS.)

<sup>11</sup>A Voluntary or Involuntary Conservator of Estate is commonly used to establish and fund a SNT for an individual with no parent or grandparent. (See C.G.S. 45a.655(e)). See also, *Department Of Social Services v. Saunders, Conservatrix*, 247 Conn. 686 (1999).

<sup>12</sup>Of any age.

<sup>13</sup>Can be established by a parent, grandparent, legal guardian, court or by the individual himself.

<sup>14</sup>PLAN of Connecticut, a not-for-profit trust organization, has the only Connecticut Pooled Trust, which has authority under C.G.S. §36a-386. For more information, please visit [www.PLANofCT.org](http://www.PLANofCT.org).

<sup>15</sup>Although the Information Bulletin 09-02 is silent on the format of the plan or for what expenses the distributions from the PLAN Pooled SNT can be used, there have been instances when the Department of Social Services Regional offices have required a standard of "extra ordinary" needs and have questioned plans that have monthly budgets for food and shelter costs or have costs for permanent nursing home residents.

<sup>16</sup>Using Medicare Set-Aside Arrangements and Medicare Set-Aside Special Needs Trusts are commonly used for complying with the Medicare Secondary Payer Act for those types of claims.

<sup>17</sup>*Corcoran v. Department of Social Services*, 271 Conn. 679 (2004); *Zeoli v. Commissioner of Social Services*, 179 Conn. 83, 425 A.2d 553 (1979); *Kolodney v. Kolodney*, 6 Conn. App. 118 (1986); *Bridgport v. Reilly*, 133 Conn. 31, 47 A.2d 865 (1946).

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<sup>18</sup> C.G.S. 17b-261(c) defines an available asset as one that is actually available to the applicant or one that the applicant has the legal right, authority or power to obtain or to have applied for the applicant's general or medical support.

<sup>19</sup> A Special Needs Trust must comply with the Program Operations Manual System (POMS) § SI 01120.200 *et seq.*, which is a Social Security Administration publication.

<sup>20</sup> See IRC 674 and 675.

<sup>21</sup> See C.G.S. 45a-177.

## USE OF DISCLAIMERS TO SOLVE FUNDING PROBLEMS IN VOLATILE ECONOMIC TIMES

MICHAEL J. REARDON, ESQ.

Disclaimers are often used to eliminate estate or gift transfer taxes on what would otherwise be considered taxable transfers. If a donee of a testamentary or inter vivos transfer makes a qualified disclaimer, the disclaimant is not treated as the transferor of the property for federal transfer tax purposes, and the disclaimer relates back to the effective date of the original transfer of the disclaimed interest. The disclaimed property interest is treated as if it had never been transferred to the disclaimant; instead, the disclaimed property is treated as if passed from the original transferor of the interest (the testator, trust settlor, or other transferor) to the resulting taker of the property as a result of the disclaimer under the transferor's will, trust, other instrument, or state law.

Post-1977 disclaimers (those

most frequently encountered in our practices now) are governed by IRC Section 2518. Pre-1977 disclaimers were governed by a smattering of references in various IRC sections and related regulations, rather than one IRC section. For Connecticut state law purposes, disclaimers are governed primarily by CGS Sections 45a-579 and 45a-583. Thorough reading of these statutes before making any decisions regarding a disclaimer is a must.

A qualified disclaimer under IRC Section 2518 and accompanying regulations requires the following:

1. The disclaimer must be in writing signed by the disclaimant and describing the interest disclaimed;
2. The disclaimer must be delivered to the transferor of the interest, the

transferor's legal representative, or the holder of legal title to the disclaimed property, not later than nine months after the later of 1) the date on which the transfer creating the interest is made or 2) the date on which the disclaimant turns twenty-one;

3. The disclaimant must not have accepted the property interest or any benefit from it;
4. The disclaimed property must pass as a result of the disclaimer without any direction by the disclaimant to either 1) the disclaimant's spouse, or 2) a person other than the disclaimant; and
5. The disclaimer must be valid under applicable state law.

The purposes of disclaimers may be varied: to alter the terms of the dispositive testamentary or non-testamentary plan, to cure problems in certain types of trusts, to disclaim transfers from decedents dying in 2010 to take advantage of the generation-skipping tax rate on direct skips (such as transfers to grandchildren) of zero, to fund a credit shelter trust in a disclaimer trust plan, or to fund a credit shelter trust with retirement plan assets. These are some of the most common reasons disclaimers are used.

Under IRC Section 2518(c) (1), an undivided portion of an interest in property may be disclaimed. This can be done by disclaiming a fraction or percentage of an interest in property. It is this section that presents a planning opportunity, in

## USE OF DISCLAIMERS TO SOLVE FUNDING PROBLEMS IN VOLATILE ECONOMIC TIMES

addition to those enumerated above, that may be of important use in turbulent economic times.

Stock markets have seen periods of tremendous upheaval and fluctuation in the past 25 years, twice in the past dozen years. This means that practitioners can often be faced with the case of a decedent dying on a date where estate asset values are high but dramatically lower six months later. Depending on the type of funding formula used in the estate plan - and many formulas are not the ones we would like to see in the documents - the effects can be devastating and could possibly wipe out a credit shelter trust, leaving all assets to a marital trust, or outright to the surviving spouse, to be taxed at the survivor's death. The entire credit shelter amount could be wasted (leaving aside the discussion of portability of the deceased spousal unused exclusion amount for another day). And depending on the terms of the credit shelter trust, the intended disposition of the property could be substantially altered by having all assets be used to satisfy the marital gift, which raises numerous fiduciary issues as well. This would be the case with a pecuniary marital disposition funded using date of distribution values, where the residue over the pecuniary amount passes to the credit shelter trust; the pecuniary marital amount has to be funded without regard to the subsequent depreciation of the assets, and all the decrease in value reduces the credit shelter trust.

To rectify this situation, and to enable the estate to re-value the assets on the date six months after the decedent's death and restore the funding of the credit shelter trust, the executor has to create a tax in the estate that can be reduced by using alternate valuation under IRC Section 2032. The surviving spouse can create the tax by disclaiming

a fraction of the assets passing outright to her, or to the marital trust for her benefit, that would then, as a result of the disclaimer, pass to the credit shelter trust by the governing will's or trust's terms. (Remember: a surviving spouse can disclaim assets that pass to a trust in which the surviving spouse has an interest, unlike other disclaimants).

The disclaimer by the surviving spouse of a portion of the assets that would otherwise qualify for the marital deduction will necessarily, in a formula plan, create an estate tax. In addition, if the disclaimed amount of the marital deduction or outright marital gift is expressed as a fraction or percentage, the calculated amount of the estate tax will necessarily be reduced if the value of the assets in the estate have fallen - the tax on a percentage or fraction of a lower number will always be lower, to state the obvious.

The fraction or percentage disclaimed can be very small, as long as there is a tax created. And even if certain assets were to be revalued on audit, such as a closely held business interest, a small fraction or percentage - say 1% - of even a \$1 million dollar increase is only \$10,000 and the tax on that is even smaller, so the risk of creating a large tax bill can be minimized. As long as the decrease in value of the other assets, such as stocks in a falling market, more than offsets any other increase in value, the plan will work well.

In summary, the disclaimer of assets otherwise qualifying for the marital deduction creates an estate tax, enabling the estate to use alternate valuation because the estate tax created is reduced via alternate valuation. If the amount of the pecuniary marital gift

or marital trust is then re-determined at a lower amount, the credit shelter is restored using the alternate valuation date values. The marital trust should probably then be funded quickly after the disclaimer, and the balance of the assets placed in the credit shelter trust, to avoid the impact of any further fall in asset values. If assets depreciate after funding both trusts, at least the depreciation is borne pro rata by the two funded trusts, rather than by the residuary credit shelter trust.

## QUALIFIED DISCLAIMERS BY BENEFICIARIES OF DECEDENTS DYING IN 2010

### THERE'S STILL TIME. MAYBE

Bryon W. Harmon  
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It is axiomatic that a qualified disclaimer can be a helpful post-mortem device which allows beneficiaries (or heirs-at-law in the case of intestacy) to refuse to accept an interest in property passing from a decedent. If a disclaimer meets the requirements of applicable federal and state law, disclaimers can successfully accomplish a transfer of property while avoiding adverse transfer tax consequences.

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("TRA 2010") enacted last December created an interesting potential disclaimer opportunity for beneficiaries of 2010 decedents. Even now, as long as sixteen months since the interest was created as a result of a decedent's 2010 death, an interest in property may be renounced as a qualified disclaimer.

Qualified disclaimers provide a significant transfer tax benefit because the disclaimed property is treated, for federal gift, estate, and generation-skipping transfer tax purposes, as passing directly from the transferor, not from the disclaimant, to the person entitled to receive the

property as a result of the disclaimer. Thus, the disclaimant is not treated as having made a gift. Treas. Reg. Section 25.2518-1(b). The disclaimer, therefore, avoids the federal and state gift tax consequences that would have occurred had the beneficiary accepted the property from the decedent's estate and then given that property to the recipient.

Ordinarily, both Internal Revenue Code Section 2518 and Connecticut General Statutes Sections 45a-579 and 45a-583 require that, to be treated as qualified, disclaimers must, among other things, be made within nine months from the date of death (in the case of property passing from a decedent). (The rules pertaining to property passing from a donor by gift during life are governed by C.G.S. Section 45a-583 and are not addressed here.) More specifically, Treas.Reg. Section 25.2518-2(c)(1) provides that the written disclaimer must be delivered no later than the date which is nine months after the date on which the transfer creating the interest in the disclaimant is made. Similarly, C.G.S. Sections 45a-579

and 45a-583 require that a disclaimer of an interest passing as a result of the death of a decedent be made, in writing, within nine months of the decedent's death.

Under TRA 2010, however, the period for making any disclaimer under Section 2518(b) with respect to property passing from a decedent who died after December 31, 2009, but, before December 17, 2010, is extended to September 17, 2011. Section 301(d)(1)(C) of TRA 2010 effectively stays the start of the nine-month disclaimer period until December 17, 2010, the date of enactment of TRA 2010. The extension of the disclaimer period creates an anomaly: a beneficiary of property passing from a decedent dying on January 1, 2010 has just over twenty months in which to make a qualified disclaimer, while a beneficiary of property passing from a decedent dying on January 1, 2011 has only the traditional nine-month period. Chalk it up to yet another consequence of what some commentators have called "congressional malpractice."

The extended disclaimer period provided by TRA 2010 together with other provisions of TRA 2010 present some unique opportunities

for beneficiaries of 2010 estates. For example, TRA 2010 provides that a 0% tax rate applies to 2010 decedent's estates for generation-skipping transfer tax purposes. Therefore, in a situation where property passes to a child from a 2010 estate and where a grandchild is the contingent beneficiary, a disclaimer by the child may pass the property transfer tax free to the grandchild because of the 0% tax rate on 2010 direct skip transfers. In a typical year, such a disclaimer may have resulted in a generation-skipping transfer tax if the disclaimed property exceeded the exemption amount. Thus, TRA 2010 provides an opportunity to pass property to later generations without generation-skipping transfer tax, and the extended period in which to make a disclaimer provides planners and their clients more time to contemplate and take advantage of such opportunities.

Bear in mind that there are several other elements mandated by Section 2518 to perfect a qualified disclaimer. Under Section 2518(b), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, provided: (1) the disclaimer is in writing; (2) the writing is received by the transferor of

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the interest, his legal representative, or the holder of legal title to the property, not later than the date which is nine months after the date on which the transfer creating the interest is made; (3) the person disclaiming the interest has not accepted the disclaimed interest or any of its benefits; (4) and as a result of the disclaimer, the interest passes without any direction on the part of the person making the disclaimer. I.R.C. Section 2518(b).

There are, however, two potential problems with meeting these requirements under the extended disclaimer period. The first is that, as a practical matter, it may be unlikely that the person disclaiming the interest has not accepted the interest disclaimed or any of its benefits, given that it was difficult to predict that such legislative grace would be forthcoming. Perhaps, though, in some cases the lack of acceptance may simply have been fortuitous. If a beneficiary did accept the property or any of its benefits, it appears that there is nothing that can be done to cure that acceptance, and so the extension may not be used. However, before giving up, be sure to study the exceptions to the acceptance rule. See Treas. Reg. § 25.2518-2(d).

The second problem is that to satisfy the requirements of section 2518(b), a dis-

claimer must be valid under applicable local law. Estate of Dancy v. Commissioner, 872 F.2d 84 (4th Cir. 1989). Otherwise, the disclaimer is not effective to pass title to the property to a person other than the disclaimant. Estate of Bennett v. Commissioner, 100 T.C. 42 (1993). As discussed previously, Connecticut law, like Internal Revenue Code Section 2518, requires that statutory disclaimers be made within nine months of the date of death in order to be effective. TRA 2010 does not and cannot change this requirement. Fortunately, there are two potential solutions to this problem.

Most promising, earlier this year the Estate and Probate Section of the Connecticut Bar Association submitted to the Connecticut General Assembly proposed amendments to the Connecticut disclaimer statute to coordinate with the extension of time for making a Qualified Disclaimer for federal estate tax purposes under TRA 2010. Adopting the CBA Section's proposal is clearly the best solution, and, with any luck, by the time this article is published, or shortly thereafter, the Connecticut General Assembly, having seen the wisdom of the proposed amendment, will have made it law. It is understandable, however, if practitioners are somewhat

hesitant to rely on an assumption that the legislature will take such action.

Internal Revenue Code Section 2518(c)(3) provides a potential solution for navigating around state statutes requiring a nine month limitation on disclaimers. Unfortunately, Section 2518(c)(3) probably does not provide a complete solution for Connecticut residents wishing to take advantage of the extended disclaimer period. Section 2518(c)(3) provides, in essence, that a transfer that does not qualify as a disclaimer under state law may still constitute a qualified disclaimer under federal law so long as the disclaimer operates as a valid transfer under state law to the persons who would have received the property had it been a qualified disclaimer under state law. Because Connecticut is one of the very few states with a gift tax, however, this section will not benefit Connecticut disclaimants to the same extent that it may help in states without a gift tax, like New York and Massachusetts.

Is there any hope, then, for a Connecticut beneficiary of an estate of a decedent dying in 2010 who wishes to take advantage of the extended disclaimer period under TRA 2010 if the Connecticut General Assembly fails to amend our disclaimer statute?

Connecticut General Statutes section 45a-581 provides that, notwithstanding the provisions of section 45a-579 and 45a-583, the Connecticut statutory disclaimer provisions, rights to disclaim under other statutes or common law shall not be abridged. This section preserves, therefore, the so-called Connecticut common law disclaimer. Traditionally all disclaimer or "renunciation" rights were prescribed by common law, and under the common law beneficiaries had a "reasonable time" period in which to disclaim. Not surprisingly what constituted a reasonable time was far from definite, and was interpreted on a case-by-case basis. States varied significantly in defining reasonableness: A period as short as four months has been held to be unreasonable (New Jersey), and as long as sixteen months reasonable (Missouri). Connecticut does not have case law on the definition of what is a reasonable period in which to disclaim. However, because the Connecticut common law disclaimer was not abrogated with the adoption of our modern statutes (45a-579 and 45a-583) in 1972, it is available for use. Accordingly, if you have a client scenario under which a beneficiary wishes to disclaim and the legislature does not amend the disclaimer statute, the Connecticut common law disclaimer may be the solution.

## SENIOR DRIVING - IT'S STOP & GO

BY VINCENT A. LIBERTI JR., LL.M.

AT WHAT AGE IS IT TIME TO HAND IN THE KEYS?

In 1997, there were 18 million drivers age 70 or older. In 2010, over 20 million drivers are age 70 or older. With the wave of baby boomers becoming seniors, the Government Accountability Office projects the number of drivers age 65 or older to be 57 million by the year 2030. Many of these drivers fell in love with the evolution of private, affordable transportation and the freedom it offered on the open road in their favorite automobile. Asking these seniors to hand in their keys and sell their car is taking away that quintessential American freedom they have enjoyed for over half a century. It may seem like the beginning of the end for them. Some may become aggressive at the suggestion; others may become isolated after relinquishing their keys. For their children or those caring for them, the issue is difficult as well. Should they mention handing over the keys, risk an argument and lose their parent's trust? Or, should they wait until their parent has an accident? Often it brings to the forefront the child's challenge of having to start being the caregiver to the parent. With guidance and support, the senior will hopefully come to appreciate his or her decreased abilities and the need for help to assess his or her driving.

This July, Massachusetts

amended Chapter 90, §8 of its General Laws, requiring drivers 75 years or older to renew their drivers licenses in person and to take a vision test. Efforts to add cognitive testing failed. Chapter 90, §22I(b) of Massachusetts' General Laws also permits a health care provider or law enforcement officer to report to the registrar that he believes an operator is "not physically or medically capable of safely operating a motor vehicle or has cognitive or functional impairment that will affect that person's ability to safely operate a motor vehicle". Connecticut's effort to curb dangerous senior drivers is contained in Connecticut General Statutes (CGS) §14-46a-f. It states that any physician, physician assistant or licensed advanced practice registered nurse may report in writing to the Department of Motor Vehicles (DMV) any person with a chronic health problem, which in his or her judgment will significantly affect the person's ability to safely operate a motor vehicle. The provider reports the name, age and address of the patient. The statute also allows the physician, physician assistant or licensed advanced practice registered nurse to report to the DMV patients who have recurrent periods of unconsciousness uncontrolled by medical treatment. An optometrist may report the

same regarding a person's vision problems. In such cases the DMV Commissioner may require the senior driver to personally demonstrate or otherwise establish that the senior is a "proper person to operate a motor vehicle." The Commissioner may require a medical authority he designates to sign a certificate of the senior's condition. The Commissioner also has the authority to suspend the senior's driving license for a limited or unlimited purpose or just not renew the license. The reports will be kept confidential. Both the Massachusetts and the Connecticut laws exonerate the reporter from civil liability.

Arguments pro and con abound regarding new laws for senior drivers. Will the new laws help? Will a senior suffering dementia, impaired driving abilities (such as hearing, vision and reflex abilities) or just plain stubbornness, really obey the law anyway? Is it unlawful profiling that targets seniors for extra driving tests, and additional expenses? And, how can a law really determine who is a bad driver? Many officials agree that a driver's self-regulation and family involvement have greater impact than laws and regulations.

So, what is a lawyer representing loved ones caring for a senior to do? Perhaps en-

couraging family members to privately discuss driving concerns with the senior's physician, physician assistant, licensed advanced practice registered nurse or optometrist might be the easiest course of action. Without a medical directive containing the proper Health Insurance Portability and Accountability Act (a/k/a HIPAA) waiver, however, the doctor may not discuss the parent's medical condition. A lawyer should encourage his senior clients to execute an Advance Health-Care Directive (CGS §19a-575a) or at least a separate Appointment of Health-Care Representative (CGS §19a-577). Even without an Appointment of Health-Care Representative, a doctor most likely will listen to family members concerned about a parent's driving and act accordingly. Note, however, that the Connecticut law permits but does not mandate the report.

What is a lawyer representing a senior to do? Age alone is not what matters. Ability is what matters. Unfortunately, we all get old. But the impairments to our driving abilities do not happen overnight. They gradually decline over time, often unnoticed or fully

## SENIOR DRIVING - IT'S STOP & GO

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appreciated. How then do we advise our senior clients to determine if their impairments have risen to the level of being unsafe behind the wheel? When in doubt encourage them to seek help. Give the client information on comprehensive tests of one's driving ability so the senior can make the informed, correct decision.

To understand more, The Hartford has published A Guide to Driving Wellness publication. It can be downloaded from the internet at: [www.safedrivingforalifetime.com](http://www.safedrivingforalifetime.com).

Under "Driving Wellness" choose "You and Your Car: A Guide to Driving Wellness." In addition, there are programs that conduct driving and evaluation tests for eye and motor coordination. For example, Easter Seals has a program as does the Masonic Home in Wallingford. The Maclean Home in Simsbury and Associated Neurologists in Danbury have tests as well.

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## ESTATE & PROBATE NEWSLETTER

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