

**Elder Law Hot Topics, Tips and Tunes**  
**WSBA Elder Law Summer Social, August 2013.**

**Dick Sayre: Special Needs Trusts Hot Topics & Tips**

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**I. Sole Benefit Test – Family Travel and Caregivers**

- A. Travel with Beneficiary - get approval first and be careful. One caregiver to Wally World is likely fine. Five is not.
- B. SSA is considering medical care provided by family members to benefit the FAMILY member NOT the beneficiary, so violative of the sole benefit use of the trust. They want a family caregiver to provide medical care, and to have medical training if they are doing to. A mom, acting as a mom but providing care will likely be challenged UNLESS the mom is also an RN and the care is medically necessary. You can prepare for a challenge by having the parent be at least COPEs certified. Better if a CNA, RN, etc. I encourage parents to go to community college or a trade school and get a degree or certificate for the care they are providing.
  - a. FOCUS must be laser like on the Beneficiary. Payments to anyone else will be considered to violate the sole benefit test, and they are particularly concerned about trusts paying parents (handsomely) to provide care when the parent is not qualified, so (in their perception) is benefitting from the child's trust. Sadly, this happens. Medical training of the parent justifies the payment unless it is exorbitant.
- C. Payment can be for services to the Beneficiary; however, each payment will be subject to this test. SSA and DSHS are auditing expenditures for income and compliance.

**II. Early Termination Provision**

- A. DSHS/Medicaid must be paid back.
- B. If anything remains, can only go to Trust beneficiary. It cannot pay then to heirs. Almost all old special needs trusts paid to heirs.
- C. 90 days to fix a defective trust following notice from Center for Medicare & Medicaid Services.

**III. Special Needs Trust Creation**

- A. Must be 'established and created' by the Grantor or Court.
  - a. Court must REQUIRE, CREATE and ESTABLISH the trust. Simple approval is NOT SUFFICIENT.
  - b. The trust CANNOT be established by action of the disabled person, meaning the disabled person cannot be the petitioner. You must use a parent, grandparent, guardian (or GAL) or Court.
    - i. Yes this is stupid if the person is competent, but it is the rule with d4A trusts. NOT with d4C trusts.
    - ii. Guardians are surrogates. Have the Court establish the trust. If the Guardian is guardian of the person only, this can still work, but is unwise. Use the Court to create the trust.
    - iii. Petitioner must not be Attorney-in-Fact for beneficiary. A recent South

Dakota case held that parent who had POA for child was acting as AIF when funding, NOT as parent, so trust was available.

- c. GAL practice pointer: Use a GAL to review, approve and petition the Court to establish the trust.
- d. Consider modeling on the Spokane County Order Establishing Trust.
- B. A competent adult can establish a trust now for future use. POMS SI 01120.203. B I f allows the parent or grandparent to seed the trust with a minimal amount to establish it.
  - a. To Seed or Not to Seed: One Washington case (unpublished) in Stevens County held that a trust lacking a corpus at inception was not a valid trust. No corpus = no trust. Recommendation: Seed the trust. It only takes ten bucks to provide protection.
    - i. If you seed, make the seed money a gift to the trust to both make it work and to avoid any risk that the Beneficiary might be the Grantor.
    - ii. Copy the check or bill and attach it to the trust to prove the seed money and source.

#### IV. Legislative Rumblings

- A. Law to eliminate the self settled restriction as to d4A's and not d4C's may be in the works.
- B. Law to allow deceased veteran's child pension benefits to be allowed to be paid to a SNT for a disabled child may be in the works.
- C. POMs pending for the use of so-called 'VA trusts' designed to access Improved Pension Benefits. Nothing expected in 2013, but something may come in 2014.

**Robert Nettleton: WSBA Elder Law Section work with the WSBA Legislative Liaison, Kathryn Leathers, and the Legislature.**

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Robert B. Nettleton and Karen Trieger are the Legislative Co-Chairs of the WSBA Elder Law Section Executive Committee. The goal of the WSBA Elder Law Section (ELS) is to be an "honest broker" by being available to respond to questions from Senators, Representatives, Senate and House nonpartisan staff, and Senate and House partisan staff concerning Elder Law issues. For example, ELS in the recent past participated in stakeholder meetings involving POLST, vulnerable adult issues, care provider licensing and discipline, and guardianship. The ELS, as noted by Dick Sayre, also works with DSHS on drafting and implementing regulations.

ELS legislative activities are controlled by GR 12. ELS has and continues to work with others sections, such as RPPT on the trust act and recent amendments and on the pending uniform power of attorney legislation.

Currently, ELS is not seeking Board of Governors approval for any "Bar sponsored" legislation relating to Elder Law issues. In the past, ELS did so with regard to SHB 1053 based on the Guardianship Task Force Report recommendations and the Office of Public Guardian (OPG).

The process of ELS reviewing proposed legislation during session is: Robert Nettleton and Karen Trieger receive proposed legislation, review it, and, if it is a bill within ELS area of

practice, confer with ELS “veters” to analyze the bill and make recommendations to the Executive Committee. The ELS Executive Committee then votes on its position on the bill. Possible outcome is (1) no action or response (neutral); (2) support; (3) express concern and offer solutions; or (4) oppose. Even if ELS opposes a bill, as an “honest broker”, ELS often works to help improve the legislation to address concerns. For example, ELS did not support passage the recent standby guardian bill (especially in its original form), but then worked with the Legislature to revise the bill to provide court oversight over delegation of a guardian’s duties during a guardian’s planned absence.

ELS, within WSBA rules, continues to advocate that OPG continue to be funded.

ELS, on August 26, 2013, will participate in a stakeholder meeting on HB 1508 introduced last session. HB 1508 seeks to expand the reporting interval to six years for no asset guardianships and to eliminate the requirement for free lay guardian training in no asset guardianship. ELS expressed concerns last session with HB 1508.

ELS continues to work on a “guardianship complaint” bill which has been introduced in response to constituent complaints that guardians are isolating the incapacitated person from his or her family and friends. A bill could be introduced next session.

**Lisa Brodoff: (1) The Demise of DOMA (Defense of Marriage Act); (2) Elder Gays’ and Lesbians’ Increased Risk of Needing Long Term Care Services.**

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When I started practicing Elder Law in 1981 at the age of 25 and a member of the Young Lawyers section of the WSBA, there was no practice called “Elder Law”, WSBA Elder Law Section, no QLaw, and almost no one was talking about the rights of gays and lesbians/sexual minorities, let alone Elder gays and lesbians! Now, I’ve aged into my demographic, and I am able to share the latest developments in Elder Law for your LGBTQ clients.

**I. The Demise of the Defense of Marriage Act.**

As I’m sure many of you know, huge changes in the rights of same sex couples has occurred in the last eight months. First, the passage of Ref. 74 and the right to marriage equality as of December 2012 here in Washington State. Then, on June 26, 2013, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act in United States v. Windsor 570 U.S. \_\_\_\_, 133 S. Ct. 2675 (2013).

Now, our clients in same sex relationships have the right to marry in our state and are eligible for both all of the state rights and obligations of marriage and the 1000 + federal rights of marriage as well.

If you practice in the elder law or estate planning area, you simply must understand the possible implications of these changes in order to best represent your clients and to avoid malpractice claims at the very minimum!

The demise of DOMA has huge implications for our clients, and especially our elder LGBTQ clients. I'm going to highlight just a few but highly recommend that you go to our CLEs and other trainings to keep up to date on this still dynamic area of law!

- Married same-sex couples now have the rights to Social Security and Medicare benefits on their spouses' accounts.
- The right to file jointly for IRS and to amend their federal income tax and estate tax returns for generally three years back! Your clients who were registered domestic partners and now married have the date of the marriage revert to the date of registration (under Washington's marriage law). Check to see if your clients could benefit by amending their returns!
- Not my area of expertise: Marital Deduction/QTIP/Disclaimer Federal Gift and Estate Tax Planning – can now be done if couple faces federal estate tax exposure (over \$5,250,000 in gross estate).
- If you have clients who are federal employees or in the military, there are huge changes in retirement and survivor and healthcare benefits options for spouses.
- Immigration - – married couples can get green cards for non-citizen spouse; no domicile problem – marriage valid in state of celebration is enough.
- Medicaid – Big changes! All of the marriage benefits and sometimes penalties in getting long term care coverage are now available to same sex married couples in Washington.
  - Long Term Care Medicaid – spousal protections for transfers, income, estate recovery claims/lien avoidance now apply!
- In order for the federal rights now available to same sex couples to come into effect, your clients must be legally married to their partner. Only “legally married” couples will be recognized for rights. Your clients will need legal advice about whether or not to marry (the impact of marriage on eligibility for benefits etc.) and whether or not they are in fact considered married for the purposes of the particular benefit.
  - Choice of domicile – does the couple need to reside in a marriage state at time of application, or time of death, to link to a desired federal benefit? If so, the couple needs to establish domicile in the correct state at the critical time (application for some benefits, death for other benefits).
  - Guidance from the federal government should be coming soon on many of these questions! And lawsuits and legislation may resolve others.

The Demise of DOMA and Marriage Equality in Washington State is great news for our clients and for us as Elder Law attorneys! There are still so many unanswered questions, giving us the chance to advise our clients and advocate for them before state, federal, and local courts and agencies.

**II. Elder sexual minorities are at significantly greater risk of needing long term care – nursing home and in-home care– than their heterosexual counterparts.**

See: Increased risks of needing long-term care among older adults living with same-sex partners. Hiedemann B, Brodoff L. Am J Public Health. 2013 Aug;103(8):e27-33.

**Eric Watness – Dissolution and Non-Probate Beneficiary Designations**

Eric Watness, Judicial Arbitration and Mediation Services, Seattle.

Providing the evening's promised entertainment and in a true "had to be there moment", attendees were treated to vocals and words by former King County Commissioner Eric Watness, accompaniment from his mandolin, and the participation of many in the room, heeding us all to double-check those beneficiary designations to the tune of (The new untold) Ballad of Clementine – see original lyrics by Commissioner Watness, attached.

## **The new untold Ballad of Clementine**

Refrain:

In a canyon in a cavern excavating for a mine  
Was a miner, forty-niner and his daughter Clementine

Here's the rest of the story that Clementine was never told  
Of the miner's probate planning he did for the time when he got old

Unbeknownst to dearest Clementine her father had a prior life  
With a desk job and a pension, a child with a former wife

Refrain:

In a canyon in a cavern excavating for a mine  
Was a miner, forty-niner and his daughter Clementine

It seems the miner, fulfilling his responsibilities,  
Named his spouse and other child as plan beneficiaries

Sometime later it seems the miner and his spouse had a falling out  
Resulting in a separation that was fair to both, no doubt

Refrain:

Invalidation or divorce as I'm certain we all know  
Is governed by state statute number 11.07.010

Simply put, tho' not simply stated, in the code as you will see  
Spouse or partner is deemed to die on termination or decree

Unless provided otherwise by instrument or court decree  
The former spouse or registered partner is simply not a beneficiary

Refrain:

But what about her surprise brother whom Clementine just came to know  
Is he entitled to all proceeds upon which she has counted so?

So here's the moral of this story when giving clients your advice  
Be sure to review pension documents not just once, but always s twice.

Refrain: