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Special needs require special lawyers.

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AMENDED SPECIAL NEEDS TRUST STILL EXEMPT

The Kansas Court of Appeals recently considered the case of a special needs trust (SNT) that was later amended to comply with a change in Kansas law. The Court held that the state Medicaid agency erred in counting the SNT as a resource.

The settlors established an SNT for their son with disabilities. The trust was fully discretionary, and the trustee had complete discretion regarding distributions of income and principal from the trust for the beneficiary's benefit. The settlors' intent that the trust supplement other benefits was clearly expressed in the trust document, "It is the express purpose of Settlor that the Trust Estate herein provided for Charles L. White be used only to supplement other benefits received by said Charles L. White."

The mother died in 1998, the father died in 2005, and it appears that the trust was funded in December 2005 from the father's estate. The successor trustee (the settlors' daughter) obtained a modification in the local district court. The modification was made to comply with a 2004 statute requiring trust documents to make specific reference to Medicaid, medical assistance, or Title XIX of the Social Security Act, in order for the trust to be exempt for Medicaid eligibility purposes.

In 2006, the beneficiary was receiving food stamps and Home Community Based Service. A worker in the local Social & Rehabilitation Services (SRS) office reviewed the benefits and discovered the trust. She contacted the Kansas Health Policy Authority (KHPA) to determine whether the trust impacted the beneficiary's eligibility for benefits. The KHPA determined that the trust was an available resource because "the amendment to the trust was not sufficient to meet the requirement of the trust to contain specific contemporaneous language." The local SRS then counted the trust resources and determined that the beneficiary was ineligible for benefits.

The settlors' daughter, who was also the guardian and conservator for her brother, the trust beneficiary, filed a demand for a fair hearing with SRS regarding the termination of benefits. The hearing officer agreed with the guardian's argument that the trust "had been properly modified to include the necessary language referring to Medicaid benefits." The hearing officer reversed the SRS ineligibility determination, and SRS filed a request for review with the KHPA State Appeals Committee. The Appeals Committee agreed with SRS that the trust failed to comply with the statutory requirements because the new language in the trust was not contemporaneous with the creation of the trust. The Appeals Committee reversed the hearing officer's order and determined that the beneficiary was ineligible for benefits. The guardian filed a petition for judicial review in the district court.

The district court adopted the hearing officer's findings, and concluded that the trust had been properly modified, and that the modification satisfied the 2004 statutory amendment. The court also concluded that "the legislature either did not intend to apply the statute retroactively or else intended to allow existing trust instruments to be modified to conform to the statute." The court alternatively concluded that "because the trust was not funded until December 2005, the trust modification qualified as "specific contemporaneous language" as required by the statute." The district court reversed the Appeals Committee's final order and determined that the beneficiary was eligible for benefits. KHPA appealed to the Kansas Court of Appeals.

The Court of Appeals reviewed the language of the statute at issue: "Any such discretionary trust shall be considered an available resource unless: . . . (2) the trust contains specific contemporaneous language that states an intent that the trust be supplemental to public assistance and the trust makes specific reference to Medicaid, medical assistance or title XIX of the social security act." (Emphasis added by the Court of Appeals). The court determined that under a plain reading of the statute, the word "contemporaneous" only modifies "language that states an intent that the trust be supplemental to public assistance" and not "specific reference to Medicaid, medical assistance, or title XIX of the social security act." The court said that KHPA's interpretation of the statute would mean that no trust created prior to the legislative change in 2004 could ever be modified to comply with the change in the law. The court cited the Kansas Uniform Trust Code pertaining to trust modifications: "(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention." (Editor's note; this language is identical to the language in Virginia Code § 55-544-12 (A)). The court found that the settlors clearly intended that the trust be a supplemental needs trust, and that the change in the statute was a circumstance not anticipated by the settlors. The trust was then modified to conform to the new law. The court determined that the legislature could have included language in the statute to make it clear that it applied retroactively to trusts created prior to 2004, and that such earlier trusts could not be modified to comply with the change in the law, but the legislature did not do so. The court concluded that the district court properly applied the plain language of the statute, and the trust did not disqualify the beneficiary from receiving benefits. The court also noted that the legislature enacted a Senate Bill in 2008 that eliminated the specific language requirements of the statute at issue in this case, although the court did not need to use this change to resolve this case.

The attorneys at Oast & Hook can assist clients with reviewing trusts and, if necessary, petitioning the appropriate courts to modify the trusts to comply with current law and the settlor's intent.

Ask Allie

O&H: Allie, we have learned about a Web-based program to assist animals who need transportation to new homes. Can you tell us about this program?

Allie: Yes, Pilots N Paws was recently highlighted in the *Daily Press*. A James City County, Virginia, pilot participates in the program that connects animals in need with pilots who can fly them to new owners or to no-kill shelters. This national program started in February 2008, and so far the program has helped save approximately 200 animals, most of them dogs. Pilots N Paws has recruited more than 100 volunteer pilots for its efforts; many of them are general-aviation pilots who need to fly a certain number of hours to maintain their licenses. The organization is working to gain nonprofit status, which would allow the pilots to deduct fuel costs as a charitable contribution. For more information, visit www.pilotsnpaws.org. The website includes information on animals needing transport; any animal that can fly in a small airplane is eligible for the program. The organization is also looking for more pilots and airplane owners who are willing to volunteer their time. The *Daily Press* story can be found at www.dailypress.com/news/dp-local_pilotsnpaws_0104jan04,0,4916508.story. I'm so glad I only had to move a short distance to be rescued by the folks at Oast & Hook!



Please feel free to e-mail your pet and animal-related questions to Allie at: allie@oasthook.com.

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