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PLANNING FOR RETIREMENT BENEFITS REVISITED

BY
ANDREW H. HOOK

After my recent newsletter article “Life and Death Planning for Retirement Benefits,” I received an e-mail from David Lillesand, a Miami, Florida, attorney, who represents those with disabilities. Mr. Lillesand asked me to make two additional points in a follow-up article.

The first point concerns the 10% penalty for distributions from an IRA or retirement plan account prior to the participant turning age 59 ½. Within my article, I stated that the penalty generally applied; however, there are exceptions. One of the exceptions occurs when a distribution is made to a participant who is younger than 59 ½ years of age, and who is disabled. For the purpose of this exception, the term disabled means “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-term duration.” Note that this definition requires total disability. Internal Revenue Service Publication 590 states that a person is considered disabled “... if you can furnish proof that you cannot do any substantial gainful activity...” IRS Publication 590 further states that the distribution must be “because” of the disability to qualify for the exemption; however, the IRS, in Private Letter Ruling 2001-26037, stated that any distributions commenced after the participant became disabled would be exempt from penalty. Another reader asked that I call to your attention that distributions following the death of a participant are also exempt from the 10% penalty. Additionally, one must to remember that, although a distribution is exempt from the 10% penalty, the participant (or recipient after the death of the participant) must report the distribution as taxable income.

Mr. Lillesand’s second point concerns designating a supplemental needs trust as a beneficiary of an IRA or retirement plan account. In my prior article, I stated that one should designate a trust as a beneficiary only if there is a compelling reason to do so. The reason for this statement is the complexity

that such an arrangement creates in preserving the right to withdraw the death benefits over the beneficiary's life expectancy. There is a compelling reason, however, to designate as a beneficiary a supplemental needs trust created for a disabled person as the beneficiary. If the disabled person is designated as the beneficiary, then the death benefit under the IRA or retirement plan account will be a countable resource for Medicaid or SSI eligibility. A supplemental needs trust, however, is not a countable resource because the trustee has discretion regarding whether to distribute trust funds to or for the benefit of the disabled person. If the supplemental needs trust passes outright at the disabled beneficiary's death to now-living individuals, such as the beneficiary's siblings, the trust may withdraw the IRA or retirement plan account over the life expectancy of the oldest beneficiary. One should consult with an expert like Mr. Lillesand or a member of the Special Needs Alliance ("SNA"), www.specialneedsalliance.com, to create a supplemental needs trust and preparing the designation of beneficiary form. Oast & Hook is a member of the SNA.

Oast & Hook thanks the readers of the *Elder Law News* for their comments and suggestions concerning its articles. Keep them coming. The *Elder Law News* will respond to as many as possible.

Oast & Hook counsels and assists its clients in planning for retirement to avoid "over reliance" on entitlement programs.

Andrew H. Hook is a principal at Oast & Hook. He is a Certified Elder Law Attorney and a Certified Financial Planner®.

Alan Greenspan Warns about the Costs of Entitlement Programs

In a March 15th speech to the Futures Industry Association in Boca Raton, Florida, former Federal Reserve Chairman Alan Greenspan warned that the pending retirement of the Baby Boomer generation would be a "seminal event" for the U.S. economy as costs of entitlement programs, including Social Security, Medicare, and Medicaid, rise. Mr. Greenspan stated that successive administrations had over-promised benefits to the point where the United States faces a "serious ethical problem."

Announcement

Oast & Hook is pleased to announce that Sandra Smith has earned the designation of Certified Elder Law Attorney (CELA). The National Elder Law foundation has developed this certification program to identify those lawyers who have the enhanced knowledge, skills, and experience to be properly identified to the public as certified elder law attorneys.

The American Bar Association's Standing Committee on Specialization for Accreditation has approved the National Elder Law Foundation as the only organization offering certification in elder law.

Oast & Hook

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of - beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at www.oasthook.com.

Oast & Hook is a Virginia member of the Special Needs Alliance, a nationwide network of disability attorneys. As members of this alliance, we assist personal injury attorneys in resolving their cases to enhance the judgments and awards of their disabled clients and to maintain the eligibility of these clients for SSI and Medicaid. We are experienced in protecting the public benefits of persons with special needs and in assisting with the management of their assets. For more information about the Special Needs Alliance, visit its website at www.specialneedsalliance.com.

Distribution of This Newsletter

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Elder Law News*, then please e-mail us at eln@oasthook.com, telephone us at 757-399-7506, or fax us at 757-397-1267.

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Our website contains information about Oast & Hook and an archive of our newsletters and other estate planning, estate administration, and elder law articles in searchable form at.

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