



Our Military and Special Needs Trusts for Dependents

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Prior to 2015, members of and retirees from the military could not designate any portion of their military Survivor Benefit Plan ("SBP") to a special needs trust ("SNT"), even when a child of that servicemember needed the protection of a SNT in order to ensure his/her access to government benefits. That rule changed in late 2014 with the passage of the legislation initially called the Military Child Protection Act, legislation subsequently rolled into and incorporated as part of the 2015 National Defense Authorization Act. On December 31, 2015, the Department of Defense ("DOD") released a memorandum (the "DOD Memorandum") describing how DOD intends to implement Congress' requirement that SNTs be available to the children of our servicemen, servicewomen and retirees when such structures are needed.

The DOD Memorandum provides that an active duty member of or retiree from the military may now, or in the future, during the member's or retiree's life, irrevocably substitute a self-settled SNT created for the benefit of a child with a disability as the SBP beneficiary rather than having the SBP annuity payments made directly to the "disabled dependent child." According to the DOD, such an election must be made via a written statement clearly designating that future SBP annuity payments are to be made to the SNT instead of being made to the disabled dependent child directly. A little surprisingly, the DOD Memorandum does not create a new form for making the election, instead it refers active military and retirees to DD Form 2656 and its Section X (Remarks). Separate statements, though, attached to DD Form 2656 are probably the better practice because of, as described below, the amount and type of information that the election statement must contain.

For the SNT to qualify as an SBP recipient, the DOD Memorandum requires that the election statement include (i) the trust's name, (ii) its tax identification number and (iii) a statement from a licensed attorney certifying that the trust satisfies the requirements of a self-settled special needs trust pursuant to federal and state law. The trust must also be irrevocable and it is not clear that DOD's requirement that the trust be "irrevocable" has the same flexibility as provided to SNT's under Social Security's regulations (the "POMS"). Therefore, creating a standalone, irrevocable SNT to receive those annuity payments seems to be the safest approach in meeting the DOD requirement.

When a servicemember dies in the line of duty or at any time prior to assigning the SBP benefits to a qualifying SNT, the DOD Memorandum provides that in certain circumstances the surviving

parent, a grandparent, or a court-appointed guardian may file the election. Effectively, the process outlined by DOD is not much different from that which occurs outside of the military when an individual receiving government benefits like Social Security income ("SSI") and Medicaid unexpectedly inherits property; the inheritance must be placed in a 1st Party or self-settled SNT to protect the individual's government benefits.

All of this is very important for a dependent child with a disability. If military SBP benefits are paid directly to a dependent child with a disability, whether the child is an adult or a minor at the time, those payments will negatively impact that dependent's access to public benefits, especially SSI and Medicaid, with Medicaid being the key benefit required in order to access many services needed for any level of independence as an adult.

Some of the other issues which exist under the new law and the DOD Memorandum include:

- i. It does not authorize the use of SNTs for disabled spouses;
- ii. It only allows the use of self-settled SNT's (those treated as created by the beneficiary, even if created by certain family members or a court, with the beneficiary's own assets) which means that Medicaid recovery applies upon the death of the dependent child and the imposition of the more restrictive "sole benefit" doctrine during the child's life;
- iii. Finally, an attorney certification is required whether the SNT is a standalone 1st party, self-settled trust (under 42 U.S.C. Section 1396p(d)(4)(A)) or a 1st party, self-settled pooled trust account. That certification requirement could force pooled trust administrators to submit their trust's documents and internal policies to a significant number of substantial attorney reviews. To cut down on the number of such intrusive reviews, pooled trust administrators might consider choosing a few attorneys knowledgeable in special needs planning with whom to work on a regular basis, thereby keeping the number of such reviews to a manageable number.

If you have questions or would like additional information about this new development with respect to special needs trusts, please contact:

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