

### OAST & HOOK

Offices in  
Portsmouth, Virginia  
and  
Virginia Beach, Virginia  
Tel: 757-399-7506  
Fax: 757-397-1267  
E-mail: [eln@oasthook.com](mailto:eln@oasthook.com)



Member, National Academy  
of Elder Law Attorneys

### INSIDE THIS ISSUE

- Drafting Considerations for Third Party Special Needs Trusts
- Workshop
- Oast & Hook
- Distribution of This Newsletter

## DRAFTING CONSIDERATIONS FOR THIRD PARTY SPECIAL NEEDS TRUSTS

BY  
**SANDRA L. SMITH**

A recent decision of the Supreme Court of Connecticut highlights the need to carefully draft third party special needs trusts to ensure that these trusts are not considered the assets or resources of the disabled beneficiaries. In *Corcoran v. Department of Social Services*, (Supreme Court of Connecticut, SC 16955, November 9, 2004), the court upheld a lower court's dismissal of the plaintiff's appeal of the decision of the Department of Social Services to terminate her Medicaid benefits because her assets (a testamentary trust) exceeded the prescribed limits.

The testator created a trust for the benefit of the plaintiff in his will dated December 7, 1987. The language creating the trust provided that "[i]f my daughter [the plaintiff] is then living, the trust established for her shall be retained by my trustees to hold, manage, invest and reinvest said share as a Trust Fund, paying to or expending for the benefit of [the plaintiff] so much of the net income and principal of said Trust as the Trustees, in their sole discretion, shall deem proper for her health, support in reasonable comfort, best interests and welfare..." The will also provided that "[a]mong the circumstances and factors to be considered by the trustee in determining whether to make discretionary distributions of net income or principal to a beneficiary are the other income or assets known to the trustee to be available to that beneficiary and the advisability of supplementing such income or assets." The testator died on May 29, 1989. The plaintiff's sisters were appointed as trustees of the trust.

Much of the court's opinion deals with the procedural aspects of the case, which involved separate proceedings in the Probate Court and a separate

administrative hearing before a Department of Social Services hearing officer. Those issues will not be discussed in this issue of the *Elder Law News*. The court's opinion also addresses the issue of the hearing officer's determination that the trust was an asset available to the plaintiff under the state's Medicaid regulations. The plaintiff asserted that the testator intended to create a supplemental needs trust; the Department of Social Services contended that the testator intended to create a general support trust; the hearing officer agreed with the Department of Social Services.

The court first looked to Connecticut law regarding trusts and availability. Connecticut law provides that "an available asset is 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. If the terms of the trust provide for the support of an applicant, the refusal of a trustee to make a distribution from the trust does not render the trust an unavailable asset." Connecticut General Statutes § 17b-261(c). General support trusts are considered available because a beneficiary can compel distribution of the trust income. Supplemental needs trusts are not considered available because a trustee retains "unfettered discretion" to withhold the income from the beneficiary.

The court next reviewed the terms of the trust to determine the testator's intent. The court discussed the state's leading case on trust construction with regard to Medicaid eligibility, *Zeoli v. Commissioner of Social Services*, 179 Conn. 83, 425 A.2d 553 (1979). In *Zeoli*, the language of the testamentary bequest to two disabled sisters granted the trustee "absolute and uncontrolled discretion" to make distributions to either daughter, "regardless of whether any one of my daughters may be totally deprived of any benefit hereunder." The trust further provided that "[w]ithout in any way limiting the absolute discretion of my Trustee, it is my fond hope that my trustee pay or apply the net income or principal of the trust for the maintenance, support, education, health and general welfare of ... my daughters...." The court concluded in *Zeoli* that the "the testator's intent was to provide the trustee with sufficient flexibility to use the funds under the trust solely for supplemental support." The court further determined that since the funds were not intended for the plaintiffs' general support, the plaintiffs could not compel distribution, and thus the trust was not an available asset.

The court distinguished the trust in *Zeoli* from the trust in *Corcoran*, stating that the language in *Corcoran* granting the trustees "sole discretion," and providing factors to consider when making discretionary distributions was not as strong as the language in *Zeoli* granting the trustee "unfettered discretion." The court stated that this granted the trustees in *Corcoran* a lesser degree of discretion, and cited earlier Connecticut cases that distinguished between "absolute discretion" and "sole discretion." The court determined that the principal distinction between the two trusts was that in *Zeoli*, the combination of express and precatory ("it is my fond hope") language granted the trustee the "flexibility to provide the support that would benefit either of the beneficiaries the most, that is, imposing on the trustee the legal duty to furnish only supplementary support." In *Corcoran*, the court said, the trustees' discretion was limited by the ascertainable standard of the plaintiff's "health, support in reasonable comfort, best interests and welfare...." The trust did not contain specific language reflecting the testator's intent that the trust be used for the plaintiff's supplemental needs, and the court concluded that in the absence of such intent, the trust was a general support trust and an available asset to the plaintiff.

The result in this case provides valuable lessons to drafters of third party special needs trusts (whether testamentary or inter vivos). It is important that drafters do not inadvertently create problems for

disabled beneficiaries by using unclear language. The trust language should make it clear that the grantor intends that the trust provide for the beneficiary's supplemental needs, and not be considered a general support trust. Granting the trustee unfettered discretion and not limiting that discretion with the use of ascertainable standards for support, health and maintenance also reflects the grantor's intent that the trust be used for the beneficiary's supplemental needs.

Useful website: The *Corcoran* opinion can be found here:

[www.jud.state.ct.us/external/supapp/Cases/ARocr/CR271/271cr129.pdf](http://www.jud.state.ct.us/external/supapp/Cases/ARocr/CR271/271cr129.pdf).

### **Workshop**

Oast & Hook is proud to present our first workshop entitled: "Long-term Care: Issues and Answers." This workshop is open to the public. It will be held at the Holiday Inn Executive Center, 5655 Greenwich Road, Virginia Beach, Virginia 23462, on Wednesday, January 26, 2005. For more information please visit our website at [www.oasthook.com/workshop.php](http://www.oasthook.com/workshop.php).

### **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, estate and trust administration, powers of attorney, advance medical directives, guardianships, conservatorships, and public entitlements (Medicaid, Medicare, Social Security, and SSI), disability planning, estate, gift and income tax matters, bill paying, 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](http://www.oasthook.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](mailto:eln@oasthook.com), call us at 757-399-7506, or fax us at 757-397-1267.

**Copyright © 2004**

**By**

**Oast & Hook, P.C.**

*This newsletter is not intended as a substitute for legal counsel. While every precaution has been taken to make this newsletter accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this newsletter.*

*This newsletter is produced to be sent electronically. If we currently fax you a copy of the Elder Law News but you prefer to receive it by e-mail, then please contact us at: [eln@oasthook.com](mailto:eln@oasthook.com).*

*If you would like to be removed from our Elder Law News distribution list, please e-mail us at [eln@oasthook.com](mailto:eln@oasthook.com), call us at 757-399-7506, or fax us at 757-397-1267.*