



ELDER LAW

The newsletter of the Illinois State Bar Association's Section on Elder Law

Every will needs a paragraph allowing for a supplemental needs trust

By Carl M. Webber and J. Amber Drew

In your morning mail is a letter from a client that includes an inquiry as to why her 35 year old bi-polar daughter no longer qualifies for SSI or Medicaid. In addition, the daughter has been given a formal notice to vacate her Section 8 housing.

After some inquiry, you find that she has too much money. Hardly a bad thing. But here, it's not so good. You are informed that your client's brother, who recently passed away, left \$50,000 to each nephew and niece.

So, now your client's daughter has \$50,000, but

no SSI, no Medicaid and no apartment.

You call the attorney who drafted the uncle's Will. She says that it's not her fault, since at the time of writing his Will, she obtained an estate planning checklist that was filled out in full. No beneficiary was shown to be disabled. Unfortunately, that was then and this is now.

Imagine now the same scenario but it is your elderly mother, suffering from dementia, who has

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Limited liability companies, life insurance and business succession development planning

By Randall H. Borkus, Esq. ©

Business owners like things straightforward and as their advisors we need to keep it that way for them. Transitioning ownership of a business to the next generation can be pretty complex stuff for many business owners so we really need alternatives to offer our business clients. Jack Welch (GE) once said "Don't make the process harder than it is."

Buy-Sell Planning Basics

The vast majority of buy-sell planning is constructed using a traditional buy-sell agreement and is generally funded by life insurance. This is by far the most popular planning tool for business succession upon the death of an owner or partner. What is important about traditional buy-sell planning is that business owners can agree to a predetermined disposition of each owner's business interest upon her or his death or other

event.

The two primary buy-sell planning scenarios generally involve an agreement between the business owners where: 1) the other owners agree to buy a deceased owner's share upon death (referred to as a "cross-purchase agreement"), or 2) the business will buy back the deceased owner's share upon death (referred to as a "redemption agreement"). The death of a business owner generally creates the need for liquidity to fund these obligations under the buy-sell agreement, so in most all cases life insurance on the business owners is the favorite liquidity mechanism.

Limitations of the Traditional Buy-Sell Planning Options

There can be significant limitations that prevent many businesses from implementing solid

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Every will needs a paragraph allowing for a supplemental needs trust

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received the inheritance from her recently deceased brother. The same dire consequences might apply to her.

Any beneficiary can become disabled at any time. A Will speaks as of the future date of death and should protect beneficiaries who may become disabled during the time between the execution of the will and the death of the testator.

As shown in the example above, a gift to a disabled person can result in automatic disqualification from a number of well-known government assistance programs.¹ Even immediate reversal of the disqualification can still lead to the person being placed on long waiting lists to resume participation in the programs.²

Every will should include all the protection possible for those who may already be disabled as well as for those who might become disabled by the time of the testator's death. In all cases, a Will should include a paragraph that allows the Executor to set up Supplemental Needs Trusts, if, at the time of the death of the testator, any beneficiaries qualify under the Social Security Administration's definition of "disabled."

This requirement is in addition to the more traditional inquiry into whether any beneficiaries have any then current disabilities, which often results in the need to incorporate a Supplemental Needs Trust in the estate plan. All estate planning client-intake forms should elicit information about existing supplemental needs issues.³

For clients who have beneficiaries with current disabilities, the need for a Supplemental Needs Trust can be addressed in the client's will⁴ or in either a testamentary or living trust.⁵ The key is to assure that, if appropriate, upon the death of the grantor/testator, the share of the estate going to a disabled beneficiary is transferred to a supplemental needs trust.

It is not the goal of this short article to review the many details of drafting a Supplemental Needs Trust. Such considerations as assuring that it is truly "supplemental," avoiding an "ascertainable standard," determining whether the trust should be a "third-party trust" or a "self-settled trust" are for the client and the attorney to address.

Adding language to a Will, though, can reduce the risk of a beneficiary becoming disqualified for government assistance. A Will typically contains language that places a minor's share in trust. The Will should also include a provision addressing disability. Any provision for a particular client would have to be tailored to their particular circumstances. A sample provision follows:

ITEM __

(in the GRANTING CLAUSE)

If any beneficiary hereunder is disabled at the time of my death, as defined below, my Executor shall distribute such disabled beneficiary's share according to ITEM X herein. The receipt of the trustee to whom such share is distributed shall be a complete discharge of my Executor,"

ITEM X

PROTECTION OF DISABLED BENEFICIARY'S SHARE

Executor Authority Regarding Beneficiaries Receiving Certain Government Assistance. If the Executor reasonably believes that a beneficiary is receiving (or may receive) governmental benefits under the Supplemental Security Income Act ("SSI"), 42 U.S.C. §§1381 et seq., Medicaid, 42 U.S.C. §§1396 et seq., or other federal or state means-tested government benefit programs, then the Executor may, in the Executor's sole discretion, withhold any distribution due under this Will to or for such beneficiary and retain such distribution amount as a discretionary, non-support, spendthrift trust share for the benefit of such beneficiary. In the alternative, the Executor may establish a separate third-party supplemental needs trust for such beneficiary with such terms as the Executor/Trustee shall deem appropriate and qualify under all applicable rules and regulations in force at the time. It is my intent that any supplemental needs trust provide the maximum benefit to the beneficiary without the principal and/or income of the trust being available to the beneficiary for the determination of the beneficiary's continued eligibility to receive such governmental assistance programs. If any such trust is created for the life of a beneficiary, then upon the death of such beneficiary, the trust shall be distributed to the beneficiary's issue, if any, per stirpes, or if there are no such issue, to the Settlor's issue, per stirpes. If such a trust for the beneficiary can-

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not be established, then the Trustee may create a first-party supplemental needs trust for the beneficiary pursuant 42 U.S.C. §1396p(d) (4) which, to the extent possible, provides the benefits referenced above for a third party trust. However, in the case of a self-settled trust, the contingent beneficiary shall be as then required by all applicable laws and regulations. No trust created hereunder is to be considered a "Medicaid qualifying trust" as that term is defined at P.L. 99-272, §9506 (42 U.S.C. § 1396(a) (k)).

In the best case, this will allow a newly drafted third party Supplemental Needs Trust to receive the share for a disabled beneficiary. If that is not allowed, then, at least, the Executor should be allowed to create a first-party, self-settled, supplemental needs trust for the beneficiary.

This general paragraph is not a substitute for specific estate planning that addresses known needs of a beneficiary who is disabled at the time the document is drafted. It is planned to avoid the dire consequences of a later disability.

Not for everyone? Only a few can say that they are sure they will never need the kind of governmental support referenced in this article. But, even for them, placing funds into

a Supplemental Needs Trust should not be expected to have adverse consequences. A proper trustee of a Supplemental Needs Trust should not be unduly restrained in caring for a beneficiary who, it turns out, is never in need of these benefits. ■

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1. See 89 Ill. Adm. Code 120.308, et seq. (establishing eligibility for medical assistance generally.) and 89 Ill. Adm. Code 120.384 (spend-down rules). See also 89 Ill. Adm. Code 120.381 (inheritance is not exempt from the category of "resources" and thus counts towards excess resources); 89 Ill. Adm. Code 120.388(d)(3)(B) (waiving an inheritance triggers period of ineligibility under the look-back provision). For social security issues, see 20 C.F.R. §404.415 (deductions from disability benefits due to excess earnings). See also 20 C.F.R. §404.430

and §404.434 (excess earnings). Note, however, that the disqualification limits for Medicaid differ for income versus assets. Considered income the month it is received but assets thereafter, it is possible that an inheritance might only disqualify a beneficiary for one month—a potentially palatable option.

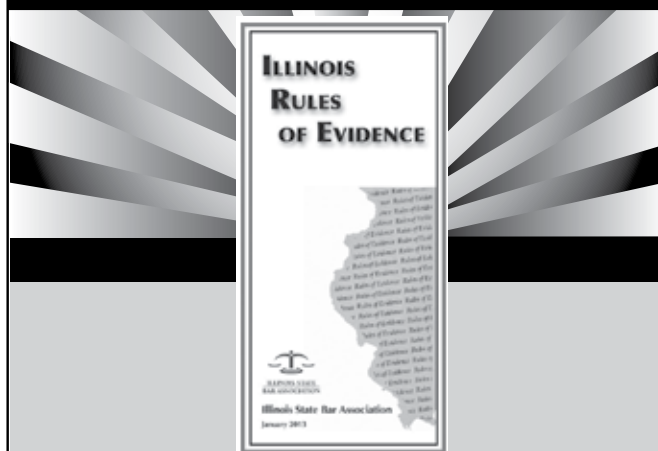
2. Statistics in a 2010 Minnesota court case highlighted that disqualification from a program, even when immediately corrected, could lead to a disabled beneficiary being disqualified from aid and placed on a three-year waitlist to get back into that crucial programs, *In re Sabrina M. Schultz*, 368 B.R. 832.

3. Ignore disability issues at your peril – disqualifying a client's child, grandchild, or even elderly parent from valuable aid may trigger a malpractice suit. A malpractice suit was successfully brought Maine against a lawyer who failed to create a special needs trust when he should have and resulted in the impairment of benefit qualification for a beneficiary. (*Board of Overseers of the Maine Bar v. Brown*, SJC-01-06 (Oct. 25, 2002)).

4. In addition to the supplemental needs language discussed in this article, clients may want to consider including guardianship language pertaining to their child with disabilities. (See, e.g., 755 ILCS 5/11a-16). Note that this should not unduly restrain the powers of a guardian existing at the time of the client's death because the provision only becomes effective when that existing guardian cannot continue to serve.

5. See e.g., §15.1 of the Illinois Trust and Trustees Act (760 ILCS 5/15.1).

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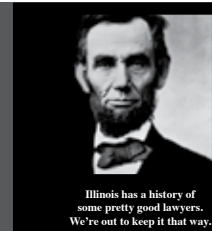
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Limited liability companies, life insurance and business succession development planning

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buy-sell planning.

Here are a few of the limitations:

1. Under a cross-purchase buy-sell agreement, the number of policies required to carry out the plan is expensive and can become difficult to manage when you have many owners because each owner must own a policy on the life of the other owners. For example, a business with four owners needs (12) twelve policies.
2. The cash value (and death benefit) of the life insurance policies can be subject to creditor claims of the individual business owners under a cross-purchase agreement or the business under a redemption agreement.
3. Unintended and undesired income tax consequences can be triggered when remaining policies are transferred between owners following a death of an owner or upon entry of a new partner.
4. It can be difficult to structure the planning to avoid unwanted income tax consequences which result under the "Transfer-For-Value (TFV) rules in IRC §101.
5. The financial burden of paying the premiums may be allocated disproportionately where some owners are much older than others.
6. The success of a buy-sell plan depends upon everyone pulling their weight. The integrity of a plan can be compromised if an individual owner fails to make premium payments or refuses to use the death benefits pursuant to the buy-sell agreement. The control of winding up the buy-sell transaction can become a crap shoot.

An Alternative Structure: Use an LLC

One of our favorite buy-sell planning techniques is an insurance limited liability company (ILLC). This is a separate business entity used to own buy-sell insurance to provide liquidity when it comes time to purchase a deceased owner's business interest. Under this technique, the business owners can still execute a "cross-purchase" agreement coupled with an ILLC to purchase and own a life insurance policy on the life of each owner.

Using an ILLC to purchase, own and administer the insurance policies can combine both "redemption" and "cross-purchase"

agreement benefits. Moreover, the ILLC eliminates many of the disadvantages of both while lessening the administrative burden and adding flexibility:

1. **Avoids Purchasing Several Policies:** In a typically cross-purchase agreement each business owner owns a life policy on each other business owner. But when using an ILLC to own the insurance the ILLC owns one policy on each life. In our earlier example, a business with four owners needs (4) four policies.
2. **Protection from Creditors:** Where the policies are owned by the business owners individually, the policies may be subject to a creditor's claim depending on state law. If the policy is owned by the business, the policy may be subject to the business creditor's claims. But when using an ILLC to own the buy-sell insurance, the policies are protected from the reach of a creditor's claim against the business or the individual business owners when structured appropriately. (We use Wyoming Close Limited Liability Companies for much of our planning.)
3. **Transferability:** It is much easier for new owners to join the ILLC and participate in the existing insurance framework, while also allowing current owners to exit the ILLC prior to death without triggering undesired income tax consequences. At the death of an owner, a death benefit payment to the ILLC is used to buy the deceased owner's business interest which eliminates any ongoing obligations to the deceased owner's estate.
4. **The Transfer-For-Value Rule Exception:** By default if an LLC has two or more members it will be taxed as a partnership (unless the partners elect otherwise) so the TFV issues appear to be moot. In PLR 9625013, the Service held that when LLC members are classified as partners they are qualified for the transfers "to the partner" exception in IRC §101(a)(2). The partner exception to the TFV rule should mean that existing insurance could be freely transferred to the ILLC and new owners of the business are easily admitted as members to the ILLC. (Before implementing, read Rev. Rul. 2012-13 and note the Service's no-rule position as to

whether certain transfers of life insurance policies to unincorporated organizations will be exempt under the TFV rules).

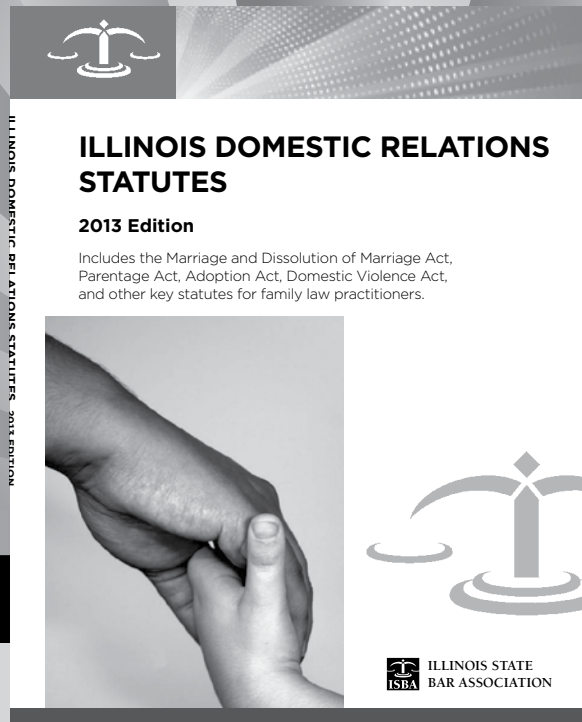
5. **Economic Ease:** The use of an ILLC allows for flexibility in structuring how the premium costs for insurance policies are shared between the owners regardless of a particular owner's age. The business can pay the premiums by making equal distributions to the members who then fund to the ILLC (or distributions may be made directly to the ILLC) to satisfy the total premium obligations. Alternatively, the ILLC can be funded with income producing assets contributed by each owner to create the cash flow to make premium payments.
6. **Ease of Administration:** The use of an ILLC provides a centralized management vehicle to purchase and service the policies which lessens the burden on the individual owners. This ensures proceeds are distributed as intended upon the death of an owner and lowers the risk of failure of a given buy-sell transaction.

Keeping things simple for business owners is the key. Leonardo da Vinci exclaimed "Simplicity is the ultimate sophistication." The use of an ILLC to own life insurance policies limits the complexity of owning numerous policies, provides ease of administration, transferability, and economics while creating solid asset protection in a tax friendly structure that positions business owners for a smoother transition upon the death of owner or partner. ■

Randall is the senior manager of Wealth Preservation Concepts, LLC, a national business planning, strategic succession design and implementation oversight firm. Randall is also the founder of the Oak Brook Illinois law firm Borkuslaw, Ltd.

He is in the business of counseling ultra-high net worth individuals, business owners and entrepreneurs as well as their advisors in asset protection, business succession, philanthropic and wealth transfer planning arenas. Such individuals include closely-held business owners, venture capitalists, investors, lawyers, doctors and former professional athletes. Randall has collaborated with professionals across the country on hundreds of cases involving ultra-high net worth clients. Randall also mentors and teaches attorneys, WealthCounsel members, financial advisors and CPAs devoted to asset protection, business succession, philanthropic and wealth transfer planning.

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Friday, 5/3/13 - Moline, Stoney Creek Inn—Civil Practice and Procedure Update - 2013. Presented by the ISBA Civil Practice and Procedure Section. All Day.

Saturday, 5/4/13 - Oak Brook, The Hyatt Lodge at McDonald's Campus—DUI, Traffic, and Secretary of State Related Issues. Presented by the ISBA Traffic Laws/Courts Section Council. All Day.

Tuesday, 5/7/13 - Chicago, ISBA Regional Office—Legal Considerations for Entrepreneurs, Founders and Startups. Presented by the ISBA Intellectual Property Section. 8:30 AM - 4:30 PM.

Tuesday, 5/7/13 - Live Webcast—Legal Considerations for Entrepreneurs, Founders and Startups. Presented by the ISBA Intellectual Property Section. AM Session 8:30 AM - 12:00 PM. PM Session 1:00 - 4:30 PM

Tuesday, 5/7/13 - Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 1:30 - 2:30 p.m. CST.

Tuesday, 5/7/13- Teleseminar—Choice of Entity for Service-based and Professional Practice Business. Presented by the Illinois State Bar Association. 12-1

Wednesday, 5/8/13 - Chicago, ISBA Regional Office—Settlement in the Federal Courts. Presented by the ISBA Federal Civil Practice Section. 12:00 Noon - 4:30 PM

Wednesday, 5/8/13- Teleseminar—Ethics and the Use of Metadata in Litigation and Law Practice. Presented by the Illinois State Bar Association. 12-1.

Thursday, 5/9/13 - Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 1:30 - 2:30 p.m. CST.

Friday, 5/10/13 - Chicago, Bilandic Building—Ethics Extravaganza - Chicago Live 2013. Presented by the ISBA Standing

Committee on Government Lawyers. 12:45-5pm.

Friday, 5/10/13 - Lincolnshire, Lincolnshire Marriott—General Practice Update 2013: Suburban Regional Event. Presented by the ISBA General Practice, Solo & Small Firm Section. 8:45 a.m. - 5:00 p.m. CLE Program. 5:30 p.m. - 7:00 p.m. Complimentary Reception Following (RSVP required).

Monday 5/13/13 - Chicago, ISBA Regional Office—Achieving Diversity in Your Law Firm: Business Advantage and Best Practice. Presented by the ISBA Racial and Ethnic Minorities Section; Co-sponsored by the ISBA Sexual Orientation and Gender Identity Section; the ISBA Business and Securities Law Section; the ISBA Diversity Leadership Council; ISBA Standing Committee on Women and the Law Chicago Committee on Minorities in Large Law Firms and the Chinese American Bar Association. 12:30 pm. - 4:30 pm. 4:30 - 6:00 Reception.

Tuesday, 5/14/13- Teleseminar—Estate Planning for Education and Gifts to Minors. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 5/15/13 - Springfield, INB Conference Center—More Issues for the Local Government Attorney. Presented by the ISBA Local Government Law Section. 8:30-1:00.

Wednesday, 5/15/13 - Chicago, ISBA Regional Office—Staying Out of Trouble: Avoiding Sexual Misconduct and Mismanagement of Client Money. Presented by the ISBA Standing Committee on the Attorney Registration and Disciplinary Commission (ARDC). 9:00 - Noon.

Wednesday, 5/15/13 - Live WEB-CAST—Staying Out of Trouble: Avoiding Sexual Misconduct and Mismanagement of Client Money. Presented by the ISBA Standing Committee on the Attorney Registration and Disciplinary Commission (ARDC). 9:00 - Noon.

Thursday, 5/16/13 - Chicago ISBA, Regional Office—ISBA's Reel MCLE Series -

Flight - Ethical Dilemmas. Master Series Presented by the ISBA. 1:00 - 5:15 pm.

Thursday, 5/16/13- Teleseminar—Attorney Ethics in Adding Lawyers to a Firm. Presented by the Illinois State Bar Association. 12-1.

Friday, 5/17/13 - Chicago, ISBA Regional Office—Mental Health Law- Some Basics and All That's New. Presented by the ISBA Standing Committee on Mental Health Law. 9:00 - 4:00.

Friday, 5/17/13 - Live Webcast—Mental Health Law- Some Basics and All That's New. Presented by the ISBA Standing Committee on Mental Health Law. AM Session 9-1; PM Session 1:30- 4:00.

Tuesday, 5/21/13- Teleseminar—Real Estate Development Agreements, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 5/22/13- Teleseminar—Real Estate Development Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 5/22/13 - Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 1:30 - 2:30 p.m. CST.

Wednesday, 5/22/13- Chicago, ISBA Chicago Regional Office—Ethics Fables: The High Cost of Not Playing by the Rules. Presented by the ISBA Energy, Utilities, Telecommunications & Transportation Law Section and the Chicago Bar Association. 12:45-3:00.

Thursday, 5/23/13 - Chicago, ISBA Chicago Regional Office—More Issues for the Local Government Attorney. Presented by the ISBA Local Government Law Section. 9:00 - 1:30 (half day).

Friday, 5/24/13- Teleseminar—Independent Contractor Agreements- Live Replay from 1/11/13. Presented by the Illinois State Bar Association. 12-1. ■

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