

ABA GP Solo ABA ESTATE PLANNING, PROBATE & TRUST COMMITTEE Newsletter
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ABA General Practice, Solo and Small Firm Division

Chair - Kenneth Vercammen, Edison, NJ

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1. 486b TRUSTS By Thomas D. Begley, Jr., Esquire

Section 468(b) of the Internal Revenue Code^[1] authorizes the establishment of Designated Settlement Funds or Qualified Settlement Funds. These funds are usually collectively referred to as Qualified Settlement Funds (QSFs). The purpose of these funds is to permit a defendant in certain types of litigation to deposit funds into a trust and to receive a full and complete release of liability. The defendant is entitled to a current income tax deduction for the amount paid into the fund at the time the funds are deposited into the trust. This is an exception to the general rule under which the tax deduction is not permitted until the funds are actually disbursed to the plaintiff, which is normally the time in which the plaintiff has received the "economic benefit" of the settlement.

These QSFs arose out of class action lawsuits. They can be very useful in personal injury actions and other types of cases where there are multiple plaintiffs. Many of these cases also have multiple defendants. The QSF is usually established prior to trial. The parties agree on a maximum amount for a settlement. The defendant pays that amount into the QSF and the parties can then take their time in allocating the settlement among themselves and in dealing with various liens, such as Medicaid, Medicare, and third party subrogation. The QSF could also be established after a jury award, as long as there is an appeal pending.

Advantages of 468(b) trusts include the following:

- *Defendant Removed from Litigation.* Defendants want to be out of the case. By utilizing a QSF a defendant can pay and go. The defendant pays the funds into the QSF and the parties later allocate the settlement between themselves, determine how much should be lump sum and how much to structure,

determine whether a special needs trust is required, and wait while a guardian is appointed for an incompetent plaintiff, if required.

- *Defendant Removed from Allocation of Settlement.* Where 468(b) trusts are used, the defendant leaves to the plaintiff the issue of allocating the settlement among injured parties.
- *Plaintiff's Attorney's Fees and Costs.* When a 468(b) trust is used, the plaintiff's counsel can be paid fees immediately from the QSF and litigation expenses can also be paid.
- *Income to Plaintiff.* The plaintiff will immediately begin to receive income from the settlement held by the 468(b) trust. Without the trust, the defendant would be holding the money and the plaintiff would not be receiving the benefit of the income.
- *Deduction to Defendant.* Defendants and their insurers are able to obtain immediate tax deductions, rather than waiting for "economic performance" to occur.
- *Negotiations.* Time is no longer a factor in negotiations with Medicare, Medicaid, and third party insurers. Addition time is available to negotiate and satisfy those liens.

Copyright 2008 by Begley & Bookbinder, P.C., an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and Oxford Valley, Pennsylvania and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania. Tom Begley Jr. is one of the speakers with Kenneth Vercaemmen at the NJ State Bar Association's Annual Nuts & Bolts of Elder Law and co-author with Kenneth Vercaemmen, Martin Spigner and Kathleen Sheridan of the 400 plus page book on Elder Law.

The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley & Bookbinder at 800-533-7227.

2 Where mother neglected and abandoned child she could not inherit boy's million estate

New Jersey Division of Youth and Family Services v. M.W. //
In the Matter of the Guardianship of R.W., F.W. and T.H.

A-5756-05T4; A-6485-05T4 02-26-08

DYFS filed an action to terminate parental rights of two children against mother who abused and abandoned them. A third child also abused and neglected by the mother died as the result of abuse by the person to whom mother abandoned her children.

Mother sued DYFS for wrongful death of third child and received \$1 million settlement from the State. Trial court permitted amendment of guardianship action to include third child and terminated mother's parental rights to all three children. Held in these unusual circumstances that parental rights to child could be terminated posthumously on principle that equity will not permit wrongdoer to profit by wrongdoing.

3. Contract Like support/ palimony case could be heard in Probate Court

In the Matter of the Estate of Robert O. Quarg,
deceased 1-23-08
A-2459-06T3

Decedent's wife, from whom he had been estranged for over forty years, appealed the Chancery Division's order imposing a constructive trust on her surviving spouse's share of decedent's intestate estate in favor of decedent's companion, with whom he had lived since shortly after the estrangement. The court held that, decedent's conduct and actions, together with the lengthy time decedent and his companion lived together, and their mutual consideration as husband and wife, was sufficient to establish a question of fact whether there was an implied promise by decedent to ensure that his companion received adequate provisions during the remainder of her life. The court determined that the Chancery Division mistakenly relied upon an equitable principle of a constructive trust and the court remanded the matter for a determination whether such an implied contractual promise could be established.

4. Palimony expanded in New Jersey

Rosemary Connell v. Edward Diehl 01-08-08
A-2331-05T5

The court held in this palimony action that the supporting person's sole ownership of assets accumulated during their uninterrupted thirty-year cohabitation was not inconsistent with a promise of support for life. The court also held that the dependent person was not required to prove that she expected any remuneration for her efforts to contribute to their marital-type lifestyle over the years. Finally, the court held that a trial judge in calculating a lump-sum palimony award is not required to place the dependent person in the lifestyle she and the supporting person enjoyed, but rather to provide reasonable support sufficient to meet her minimal needs and prevent the necessity of public welfare, and in doing so must consider inflation in calculating the lump-sum award.

5. New articles added to Elder Law website:

Action for Guardianship of a Mentally Incapacitated Person, Rule 4:86
Administration of Estates, Probate and Decedents
Answers to Probate Questions
Application to Surrogate's Court for Probate or Administration, Rule 4:80
Codicil to a Will
Compelling the Sale of Jointly Owned Houses-The Partition Suit
Elective Share of Spouse
Estate Planning/ Guardianship Interview Form
Estate/Will/Trust Inheritance Contests
Executor - Duties & Responsibilities

-. WE PUBLISH YOUR FORMS AND ARTICLES

To help your practice, we feature in this newsletter edition a few forms and articles PLUS tips on marketing and improving service to clients. But your Editor and chairs can't do it all. Please mail articles, suggestions or ideas you wish to share with others in our Tort and Insurance Committee.

Let us know if you are finding any useful information or anything you can share with the other members. You will receive written credit as the source and thus you can advise your clients and friends you were published in an ABA publication. We will try to meet you needs.

Send Us Your Marketing Tips

We are increasing the frequency of our newsletter. Send us your short tips on your great or new successful marketing techniques. You can become a published ABA author. Enjoy your many ABA benefits.

Send us your articles & ideas

To help your practice, we feature in this newsletter edition a few articles and tips on marketing and improving service to clients. But your Editor and chairs can't do it all. Please send articles, suggestions or ideas you wish to share with others.

General Practice, Solo and Small Firm Division:

Elder Law Committee and the ESTATE PLANNING, PROBATE & TRUST COMMITTEE

The ESTATE PLANNING, PROBATE & TRUST COMMITTEE focuses on improving estate planning skills, substantive law knowledge and office procedures for the attorney who practices estate planning, probate and trust law. This committee also serves as a network resource in educating attorneys regarding Elder Law situations. We work with the

Elder Law Committee to schedule programs at the ABA Annual meeting.

To help your practice, we feature in this newsletter edition a few articles and tips on marketing and improving service to clients. But your Editor and chairs can't do it all. Please send articles, suggestions or ideas you wish to share with others.

Let us know if you are finding any useful information or anything you can share with the other members. You will receive written credit as the source and thus you can advise your clients and friends you were published in an ABA publication. We will try to meet you needs.

We also seek articles on Elder Law, Probate, Wills, Medicaid and Marketing. Please send your marketing ideas and articles to us. You can become a published ABA author.

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