Elder Law/ Trusts & Estates

Revoking an Irrevocable Medicaid Asset Protection Trust

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The Medicaid Asset Protection Trust is the bread and butter of an Elder Law practitioner. When discussing the funding of an irrevocable trust, Elder Law attorneys are often asked the same question by the clients, "May I fund the Trust with some assets now and then fund it with additional assets at a later date?" Some practitioners may advise their clients that the client may fund the trust now and in the future, while others may suggest the creation of a new trust to hold these additional assets.

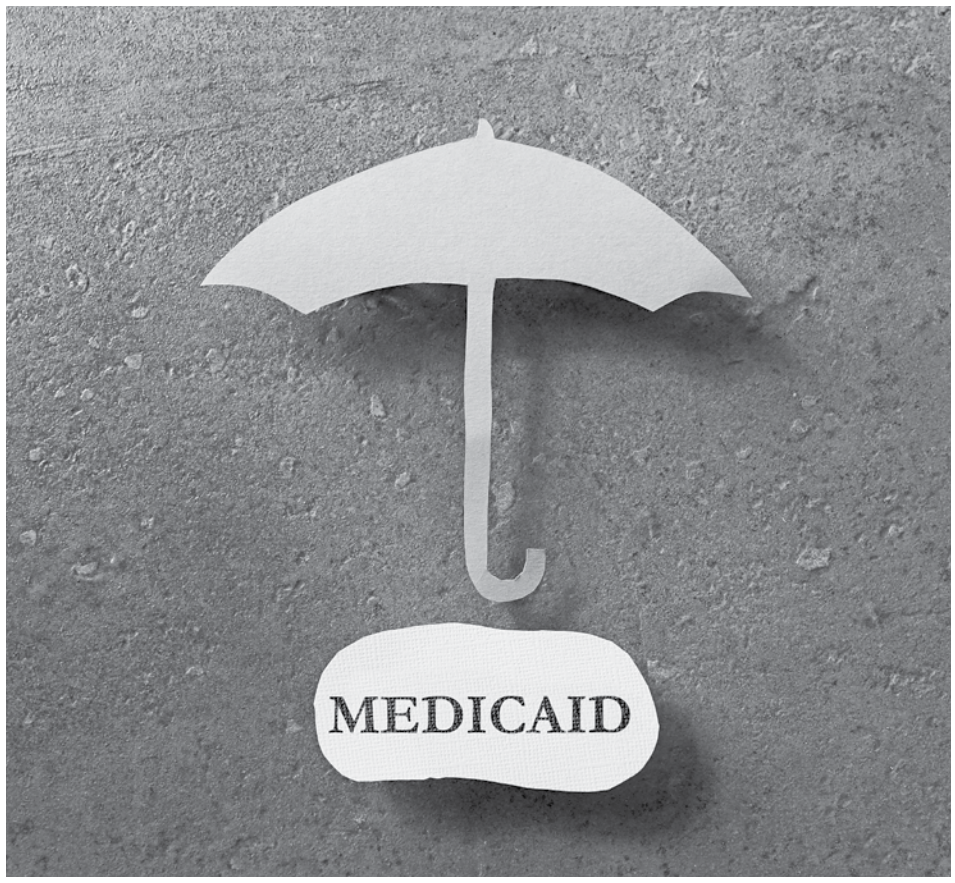
In either case, the Elder Law practitioner must raise the five-year look back issue. The five-year look back window starts each time another asset is transferred into the existing trust or into an entirely new trust. It is imperative to explain to clients that should a crisis happen where the Creator[1] of the trust later seeks to qualify for nursing home Medicaid coverage, then it might be necessary to return the Trust assets to the Grantor, and, at that time, the trust can be revoked.

An irrevocable trust can be revoked by its Creator under two circumstances: If the trust terms permit such a revocation—which Medicaid Asset Protection Trusts do not—or pursuant to EPTL § 7-1.9. Section 7-1.9(a) permits both full and partial revocation of irrevocable living trusts. Therefore, no matter what the practitioner advises (funding the existing trust or creating a new trust), the result remains the same–the trust asset that must be removed from the Trust and returned to the Grantor, can be revoked from the trust by utilizing Section 7-1.9.

Requirements of Revoking an Irrevocable Trust

To properly revoke an irrevocable trust or a portion of an irrevocable trust pursuant to Section 7-1.9, the Creator must: (1) provide the trustee with an acknowledged written revocation of the trust, along with (2) the acknowledged written consent of "all persons beneficially interested" in the trust.[2] Upon the trustee's receipt of the consent from the beneficially interested persons and the Creator's written revocation, the trustee no longer has any control over the revoked asset(s).[3] It is at this time that title to the revoked asset should be returned to the Grantor.

Revocation of a trust, either full or partial, has been in existence for decades. For example, in the 1946 Court of Appeals case *Culver v. Title Guar. & Trust Co*, the issue was whether or not a partial revocation of a living trust was permissible when one of the several Creators of the Trust was now deceased.[4] After the death of one of the Settlors, the surviving joint Settlors sought to partially revoke the trust, but only to the extent of their individual contributions. The court denied the joint Settlors' requests for partial revocation by stating that revocation pursuant to Section 7-1.9(a) is only possible through the consent of all interested parties, meaning *all* of the Settlors, alive or dead.[5] The court held that although one of the Settlors died, it did not deprive the deceased Settlor[6] of her right to refuse consent to a partial or total revocation of trust, and therefore, the Court held that the surviving Settlors could not partially revoke the trust.[7]



Beneficially Interested Party

This leads us to the second criterion of revoking an irrevocable trust pursuant to Section 7-1.9(a): Who is a beneficially interested party? The EPTL does not define a beneficially interested party, but instead tells us what it is not. For any trust created after 1951, a disposition "in favor of a class of persons described only as the heirs, next of kin, or distributees (or *by any term of like import*) of the creator of a trust does *not* create a beneficial interest in such persons."[8]

Based on the plain meaning of the statute, it is clear that the present beneficiaries and remaindermen of a living trust are "beneficially interested" persons. It is, however, not clear as to whether or not whether "beneficially interested" persons include a trust's contingent beneficiaries.

Terms of Like Import

To determine whether or not contingent beneficiaries are "beneficially interested" persons, we must define the phrase "terms of like import." This phrase was discussed in detail in the seminal case, *Matter of Dodge*.[9] In *Dodge*, the Grantor of a living trust sought to revoke his living trust pursuant to Section 7-1.9(b), since the Trustee of his Trust would not consent to revoke the Trust—which was permissible under his Trust's terms. In opposition to the Grantor's revocation, the Trustee of the Trust brought an action against the Grantor by asserting that the Settlor's revocation of the trust pursuant to Section 7-1.9 was invalid.

In *Dodge*, after several amendments, the Trust ultimately provided that during the Settlor's lifetime, the net income was to be paid to the Grantor, for life, and upon the Grantor's death, the net income was to be paid to his wife. If Grantor's wife failed to survive him, then the net income was to be paid "to or for the benefit of settlor's lawful representative issue."[10] If there was no living issue of the Grantor upon his and his wife's deaths, then the net income was to be paid to the "lawful representative issue of Settlor's parents."[11] The principal dispositions of the trust mirrored the net income provisions, such that upon the trust's termination (upon the death of both the Grantor and his spouse), the principal was to be distributed first to the lawful representative issue of Settlor, in equal shares, per stirpes, and if none, then to the lawful representative issue of Settlor's parents, in equal shares, per stirpes.

Receiving only the consent of his wife, the Settlor argued that he properly revoked the trust by asserting that only he and his wife were the only two individuals with a beneficial interest in the trust. The Grantor further argued that the phrase "lawful representative issue" was of "like import" to heirs or next of kin and therefore, the consent from his issue and the issue of his parents was not required to properly revoke the trust.[12]

In determining whether or not the phrase "lawful representative issue" was a term of like import, the Court reviewed the statute's legislative history and its commission. In particular, the Court pointed out that the legislature's commission noted that it was "not attempting to change existing case law with respect to gifts made to 'issue' or 'children,'" which states that that gifts to "issue" or "children" does, in fact, create a beneficial interest in any living issue or children.[13]

Applying the law to the facts of *Dodge*, the Court held that not only did the Settlor's children have a beneficial interest in the trust, but so did the Settlor's siblings. Since the Settlor's children were minors and therefore, unable to consent and because none of the Settlor's sisters consented to revoke the trust, the court held that the trust was not properly revoked pursuant to Section 7-1.9.[14]

How Far Does the Term "Issue" Stretch?

Case law is clear that while the term "issue" creates a beneficial interest in a trust, the term "issue" only applies to individuals who are presently in existence and not to unborn persons.[15] In *Smith v. Title Guar. & Trust Co.*, the Court reasoned that the phrase "persons beneficially interested" would be stretched beyond its plain meeting if it were to include those who are not yet born.[16]

Conclusion

It is common within the field of Elder law to see a Medicaid Asset Protection Trust that provides contingent provisions to the issue of the Grantor's children or to the children of the Grantor's children. This language can become problematic in the event that a trust must be revoked for the purposes of Medicaid planning. If this language is included in the trust, not only are the Grantor's children required to sign the consent to revoke, but so are the Grantor's grandchildren. If any of the children or grandchildren are minors, then the trust cannot be properly revoked, no matter if it is a partial or full revocation. It is advised to check all irrevocable Trusts for these drafting issues.

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1. Creator, Settlor, and Grantor are used interchangeably throughout this article.
2. EPTL § 7-1.9(a).
3. *Id.*
4. 296 N.Y. 74 (1946).
5. *Id.*
6. Planning note: In the event of a Grantor's incapacity, a properly drafted New York State Durable Power of Attorney can enable the Grantor's appointed agent to revoke a Trust on the Grantor's behalf.
7. *Culver,* 296 N.Y. 74.
8. EPTL § 7-1.9(b) (emphasis added).
9. 25 N.Y.2d 273 (1969).
10. *Id.*
11. *Id.* at 277.
12. *Id.*
13. *Id.* at 283.
14. *Id.* at 285.
15. *See, e.g.*, *Matter of Dodge*, 25 N.Y.2d 273; *Matter of peabody*, 5 N.Y.2d 541 (1959). S*ee also Smith v. Title Guar. & Trust Co.*, 287 N.Y. 500 (1942); *Schoellkopf v. Marine Trust Co*., 267 N.Y. 358, 364 (1935) "no person can by his consent destroy an interest even of his own descendants, derived directly from the trust instrument and not derived from the ancestor by succession"); *Rosner v. Caplow.*, 90 A.D.2d 44 (1st Dept. 1982) ("persons beneficially interested" include infant issue); *In re Rosoff*, 653 N.Y.S.2d 227 (Surr. Ct., N.Y. Co. 1996).
16. *Smith*, 287 N.Y. at 504.