

SSA CHALLENGES ARC OF TEXAS TRUST

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on April 23, 2008.

The Association of Retarded Citizens ("ARC") of Texas operates a master pooled special needs trust designed to be exempt from the trust-counting rules for the Supplementary Security Income ("SSI") and Medicaid programs. A pooled trust maintains a separate sub-account for each disabled beneficiary, including the elderly, but pools funds for investment and management purposes. A federal law exempts such trusts from being counted as resources if certain requirements are met.

SSI, which is administered by the Social Security Administration ("SSA"), recently challenged the ARC trust contending that its early-termination clause renders it revocable. As a result, at least two individuals in Texas were disqualified for SSI until funds in their sub-accounts were spent down. Similar trusts in Colorado and New Mexico were also affected by SSA's new ruling.

The change shocked professionals and lay persons involved with ARC beneficiaries because it was unknown whether SSA would then rule that all of the sub-accounts within the ARC trust would also be at risk of being counted as an asset for SSI recipients.

In 1993, the ARC Board of Directors established a committee to consider setting up a pooled trust. The then-Executive Director, Libby Doggett, wife of U.S. Representative Lloyd Doggett, convened the committee consisting of attorneys, other professionals, and family members of persons with special needs. The committee reviewed laws exempting pooled trusts established with a beneficiary's own assets, as well as the work of similar committees in other states.

Renee Lovelace, an Austin attorney who was a primary drafter of the ARC trust and who is a nationally recognized expert in special needs trusts ("SNTs"), says, "We wanted to include provisions in the ARC trust that were as generous as possible for the trust beneficiaries without putting the trust unduly at risk of disqualification of benefit programs." Lovelace points out that there was limited guidance on pooled trusts at the time and standardized language approved by public agencies was used. "We surveyed approaches to pooled trusts that were underway or in operation across the country, and carefully selected language for the trust from the most credible and studied sources that we could find," reports Lovelace. During the 10 years that the ARC trust has been in operation, rules impacting SNTs have changed significantly and it is commendable that the ARC of Texas trust has withstood the test of time for so long.

Chris Oglesby, an ARC trust attorney, responds, "Since we became aware of the issue in January, the ARC of Texas has been communicating with the Social Security Administration to determine what amendment(s) may be required to the trusts in order to meet the changed standard in question."

Oglesby said that the ARC's trust documents are easily amended and that the organization will be able to meet the new SSA standards, once they are defined by SSA. He said the ARC is currently enrolling new trust beneficiaries with the caveat that the trust will be amended later.

A representative from the Dallas Regional Office, SSI Policy, Center for Programs Support, sent word to the ARC recently saying that the SSA is in the process of reviewing all four master pooled trusts and joinder agreements so that SSA can provide guidance regarding suggested amendments.

The public should be aware that the laws and their interpretation are complex and subject to change at any time. The best way to protect a disabled individual's assets is to seek the advice of an experienced elder law attorney.