

RUBIN

LAW A Professional Corporation

Buffalo Grove Business Park - 1110 West Lake Cook Road, Suite 165

Buffalo Grove, Illinois 60089-1997

email@rubinlaw.com - www.rubinlaw.com

847.279.7999 • toll free 866.to.rubin (867.8246) • fax 847.279.0090

Attorneys: Brian Rubin • Benjamin Rubin • Judith Smith • Melanie Hoffman
Staff: Nicole Rosenthal • Linda Rubin • Karen Muschkat • Carmen Cuzmanko • Mitchell Rubin

Our law practice is limited to "special needs legal and future planning" for our fellow Illinois families of individuals with special needs, including, but not limited to, intellectual disabilities, developmental disabilities, and/or mental illness.

(Attorney memberships include the Special Needs Alliance and the Academy of Special Needs Planners)

Military Survivor Benefit Plan (SBP) FOR CHILD WITH SPECIAL NEEDS

Prior to 2015, members of and retirees from the military could not designate any portion of their military Survivor Benefit Plan (SBP) to a special needs trust ("SNT"), even when a child of that service member needed the protection of a SNT in order to ensure his/her access to government benefits. That rule changed in late 2014 with the passage of the legislation initially called the Military Child Protection Act, legislation subsequently rolled into and incorporated as part of the 2015 National Defense Authorization Act. On December 31, 2015), DOD released a memorandum (the "DOD Memorandum") describing how DOD intends to implement Congress' requirement that SNTs be available to the children of our servicemen, servicewomen and retirees when such structures are needed.

The December DOD Memorandum provides that an active duty member of or retiree from the military may now, or in the future, during the member's or retiree's life, irrevocably substitute a self-settled (also known as a first party, OBRA, or d4A) SNT created for the benefit of a child with a disability as the SBP beneficiary rather than having the SBP annuity payments made directly to the "disabled dependent child." According to the DOD, such an election must be made via a written statement clearly designating that future SBP annuity payments are to be made to the SNT instead of being made to the disabled dependent child directly. A little surprisingly, the DOD Memorandum does not create a new form for making the election, instead it refers active military and retirees to DD Form 2656 and its Section X (Remarks). Separate statements, though, attached to DD Form 2656 are probably the better practice because of, as described below, the amount and type of information that the election statement must contain.

For the SNT to qualify as an SBP recipient, the DOD Memorandum requires that the election statement include three items of information:

1. the trust's name
2. its tax identification number and
3. a statement from a licensed attorney certifying that the trust satisfies the requirements of a self-settled special needs trust pursuant to federal and state law. The trust must also be irrevocable and it is not clear that DOD's requirement that the trust be "irrevocable" has the same flexibility as provided to SNT's under Social Security's regulations (the "POMS"). Therefore, creating a standalone irrevocable SNT to receive those annuity payments seems to be the safest approach in meeting the DOD requirement.

When a service member dies in the line of duty or at any time prior to assigning the SBP benefits to a qualifying SNT, the DOD Memorandum provides that in certain circumstances the surviving parent, a grandparent, or a court-appointed guardian may file the election. Effectively, the process outlined by DOD is not much different from that which occurs outside of the military when an individual receiving government benefits like SSI and Medicaid unexpectedly inherits property; the inheritance must be placed in a 1st Party or self-settled SNT to protect the individual's government benefits.

As most of you are aware, all of this is very important for a dependent child with a disability. If military SBP benefits are paid directly to a dependent child with a disability, whether the child is an adult or a minor at the time, those payments will negatively impact that dependent's access to public benefits, especially Social Security income (SSI) and Medicaid, with Medicaid being the key benefit required in order to access many services needed for any level of independence as an adult.

In accordance with the new law and the DOD Memorandum, it only allows the use of self-settled SNT's (those treated as created by the beneficiary, even if created by certain family members or a court, with the beneficiary's own assets) which means that Medicaid recovery applies upon the death of the dependent child and the imposition of the more restrictive "sole benefit" doctrine during the child's life, and an attorney certification is required whether the SNT is a standalone 1st party, self-settled trust (under 42 U.S.C. Section 1396p(d)(4)(A)) or a 1st party, self-settled pooled trust account (under 42 U.S.C. Section 1396p(d)(4)(C)) .

Name: *
Address: **

Date: ***

Defense Finance and Accounting Services
Retired and Annuity Pay
PO Box 7130
London, KY 40742-7130

Re: Survivor Benefit Plan (SBP), Reassignment of Beneficiary

In accordance with 10 U.S.C. §1450 as amended, subparagraph (a)(4), and the policy issued by the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs, I hereby designate the Dependent Child **** Irrevocable Special Needs Trust dated ***** (Tax ID: *****) as the beneficiary of the SBP elected for Dependent Child ****.

This trust is a special needs trust established under Section 1917 (d)(4)(a) of the Social Security Act and is for the sole benefit of my dependent adult child, Dependent Child ****. Dependent Child has disabilities and is incapable of self-support.

I am enclosing the required certification from my attorney, *****, of Rubin Law, a Professional Corporation.

Sincerely,

*

SSN: *****

DOB: *****

SBP Special Needs Trust Certification

For Enabling Payment of SBP Annuity to a Special Needs Trust

I certify that I, _____, of RUBIN LAW, A PROFESSIONAL CORPORATION, prepared a Special Needs Trust (“Trust”) on behalf of _____, who currently resides at _____, and that the Trust complies with all applicable state and federal laws. Dependent Child _____ is the dependent child of _____.

I understand that if the child named above has previously applied for, or in the future applies for, Supplemental Security Income (SSI) or other benefits, the Social Security Administration may need to review the SNT and ensure that it is compliant with all applicable state and federal laws.

Name of practicing attorney: _____

State licensed to practice: ILLINOIS

Illinois ARDC Number: _____

Signature of attorney _____

State of Illinois
County of Lake

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED BEFORE ME ON THIS _____ DAY OF _____, 20_____.

By: _____

Notary Public



MANPOWER AND
RESERVE AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

DEC 3 1 2015

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR HUMAN
RESOURCES
DEPUTY ASSISTANT SECRETARY OF THE NAVY FOR
MILITARY PERSONNEL POLICY
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE FOR
FORCE MANAGEMENT AND PERSONNEL
DIRECTOR, DEFENSE FINANCE AND ACCOUNTING SERVICE

SUBJECT: Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust

This memorandum establishes the policy required for implementing section 624 of the Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (FY 15 NDAA), Public Law 113-291, which amends title 10, United States Code (U.S.C.), sections 1448, 1450, and 1455. The amendments allow a person who has established a Special Needs Trust (SNT) in accordance with either title 42, U.S.C., section 1396p(d)(4)(A) or (C), to direct payment of a dependent child Survivor Benefit Plan (SBP) annuity directly to the SNT as an add-on election to a member or retiree's SBP election for coverage of a dependent child.¹ In general, members entitled to receive retired pay make an irrevocable decision when they elect to provide SBP coverage for a beneficiary.

The FY 15 NDAA gives military members and retirees the option to direct payment of a SBP annuity for a dependent child to a SNT for the benefit of a disabled child when they elect or elected coverage for that dependent child as a SBP beneficiary (the statute does not apply to disabled spouses). Generally speaking, a SNT is a legal instrument specifically designed solely for the benefit of a person with a disability by providing a set of instructions for managing money set aside to help a disabled person. Unlike many other types of trusts, a SNT is governed by State law. In accordance with the SBP statute, a SNT must also be in accordance with Federal statute (i.e., title 42, U.S.C., section 1396p(d)(4)(A) or (C)). In addition, once created, it must be irrevocable.

As a result of the legislation, a member or retiree who elects SBP coverage that includes coverage for a dependent child may now, at any time, irrevocably decide to substitute a SNT created for the benefit of a disabled dependent child as the SBP beneficiary to receive any SBP annuity payments that would otherwise be payable to or on behalf of the disabled dependent child. This irrevocable decision may be made during the life of the member through a written statement that designates future SBP payments to the SNT (designation in Section X- Remarks of the DD Form 2656 Data for Payment of Retired Personnel will also suffice). In situations

¹ Hereinafter the term "dependent child" means a dependent child as defined in 10 U.S.C. § 1447(11). The dependent child must also be "disabled" as defined in 42 U.S.C. § 1382c(a)(3) (e.g., unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months). Thus, a "disabled dependent child" means a child who is a dependent child pursuant to 10 U.S.C. 1447(11) and "disabled" pursuant to 42 U.S.C. § 1382c(a)(3).

where SBP payments are made to more than one dependent child, the SNT shall be treated as a dependent child for purposes of determining the shares payable to each of the children.

1. During the life of the member or retiree. A member or retiree who elects or elected SBP coverage that includes coverage for a dependent child may designate a SNT created for the benefit of the disabled dependent child to receive SBP payments that would otherwise have been payable to the disabled dependent child. To irrevocably elect to substitute a SNT for the benefit of a disabled dependent child as a SBP beneficiary in lieu of the dependent child, the member or retiree must submit a statement of the decision to have the annuity paid to the SNT with the name and tax identification number for the SNT. Further, the member or retiree must either submit a separate statement using the attached template from an actively licensed attorney certifying that the trust is a SNT created for the benefit of the disabled dependent child and is in compliance with all applicable Federal and State laws or a certification from the Social Security Administration that the trust qualifies as a SNT pursuant to title 42 of the U.S.C.

2. Upon or after the death of a member or retiree.

a. Upon the death of a retiree. If SBP coverage for the dependent child has been elected, then the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

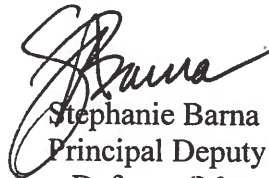
b. Upon the death of a member on Active Duty in the line of duty. If SBP coverage for the dependent child has been elected by the Secretary concerned due to a member's death on Active Duty while in the line of duty, then a disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

c. Upon the death of a member during inactive duty training. If a member dies during inactive duty training and leaves no surviving spouse and the SBP becomes payable to the surviving dependent children, then the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

d. Requirements for a qualifying SNT designation under 2.a.-c. To make this SNT designation under paragraphs 2.a.- c., the surviving parent, grandparent, or court-appointed legal guardian shall submit a statement of the decision to have the annuity paid to the SNT with the name and tax identification number for the SNT, and a separate statement using the attached template from an actively licensed attorney certifying that the trust is a SNT created for the benefit of the disabled dependent child and is in compliance with all applicable Federal and State laws or certification from the Social Security Administration that the trust is a SNT pursuant to title 42 of the U. S.C.

If the SNT is found to be invalid or otherwise fails, then payment of the SBP annuity shall revert back to being made directly to the dependent child. If this occurs, the dependent child's entitlement to other Federal benefits such as Supplemental Security Income and Medicaid may be impacted. Since there are serious consequences if a SNT is found to be invalid, those seeking to have a SNT created need to exercise due diligence to ensure that they consult with an attorney well-versed in this specialized and complex area of law.

This policy and operational guidance will be included in subsequent updates of the Department of Defense Financial Management Regulation Volume 7B and the Survivor Annuity Program Administration, Department of Defense Instruction 1332.42. Further, this policy regarding the use of SNT supplements currently existing SBP policy, which otherwise remains in effect. If you have any questions, my point of contact is Pat Mulcahy at (703) 693-1059.



Stephanie Barna
Principal Deputy Assistant Secretary of
Defense (Manpower and Reserve Affairs),
Performing the Duties of the Assistant
Secretary of Defense (Manpower and
Reserve Affairs)

Attachment:
As stated

cc:
Deputy Assistant Secretary Defense for
Military Personnel Policy)
Deputy Chief of Staff for Personnel, U.S. Army
Deputy Chief of Naval Operations
for Manpower, Personnel, Training and
Education, U. S. Navy
Deputy Chief of Staff for Personnel, U.S. Air Force
Deputy Commandant for Manpower and
Reserve Affairs, U.S. Marine Corps
Assistant Commandant for Human Resources,
U.S. Coast Guard
Director, Division of Commissioned Personnel,
U.S. Public Health Service
Director, National Oceanic and Atmospheric
Administration Corps Operations-NC
Department of Defense Chief Actuary
Deputy General Counsel (Fiscal)