



Hafernicks Perspectives

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After the Case is Over . . . What to do with the \$\$\$

Trusts can be used in a variety of circumstances to carry out a number of financial objectives. They are wonderful vehicles to plan for the care of injured and disabled persons. A life care plan sets out the injured or disabled person's medical needs and the related expenses associated with that person's lifetime care. A trust can provide the financial management necessary to accomplish the goals set forth in the life care plan. The ongoing collaboration between the case management of the injured or disabled person's needs. This allows the family to focus on caring for the injured or disabled person on a day to day basis.

Grant trusts, testamentary trusts, irrevocable trusts and court ordered trusts are different types of trusts. The trustee, like the executor, the guardian, or the agent, and similar parties, owes the one whom he represents a duty to act solely in the interest of the beneficiary of the trust. Trustees fall into two main groups: individual and corporate trustees. Trustee powers are basically twofold: those relating to the investments and those relating to the distributions. The primary concern of someone in selecting a trustee is whether the trustee would faithfully carry out his duties as trustee. The basic trustee duties include: preserving the principal of the trust, and distributing the income and/or principal in accordance with the terms of the trust.

Considerations when selecting any trustee include: the nature of the assets to be placed in trust, their value, the terms of the trust, the beneficiaries thereof, and other circumstances. The selection of the trustee/s should be determined in relation to the special needs and objectives of the trustor in light of circumstances existing at the time the instrument creating the trust is executed.

The trust agreement appoints a trustee, identifies the beneficiary, defines what the beneficiary is entitled to receive, defines the donor's intent, and sets the termination date or event. The trustee's fee provision is most important, especially to the trustee. If the document does not specify the trustee fees, then state law will rule.

Two acts must occur in order to create a trust: the intention to create the trust and the terms of the trust must be expressed by the settlor with sufficient definitions so that it can be enforced; and the trust property must be placed in the possession and control of the trustee. Trusts terminate in accordance with the terms of the trust agreement. Standard termination provisions are that the trusts terminate when a minor becomes of age or upon the death of the beneficiary.

There are no income taxes due on damages awarded in a personal injury suit except for amounts received for nonmedical and punitive damages. The theory being that the award does not create a gain. Instead the award merely restores the injured party to their previous position.

Irrevocable and testamentary trusts are established with their own tax ID number. The trustee is required to file a 1041 Return each year. Court Ordered and Grantor Type Trusts are established using the beneficiary's social security number. The trustee of these accounts must issue a 1099 each year showing all income in the account.

Trusts are also very useful for handling the proceeds of lawsuits. Most of the people involved with lawsuits are unaware of the benefits of using trusts. Self Settled Trusts, Court Ordered Trusts, Supplemental Needs Trusts and Medicare Set Aside Trusts are a wonderful way to structure lawsuit proceeds.

If an injured plaintiff in a lawsuit has capacity and he has been awarded proceeds in that lawsuit, the funds may be delivered directly to him. These proceeds can be structured in a variety of ways including: outright receipt, a grantor trust, an irrevocable trust, an annuity payment or any combination of these methods.

An injured plaintiff in a lawsuit can also establish an irrevocable trust to control the management of the law proceeds. Oftentimes, the grantor will want to put an irrevocable trust in place to protect himself and his family from his creditors or his own potentially unwise spending choices. Irrevocable trusts can be also used to protect Medicaid and other governmental benefits with supplemental needs language.

The purpose of a Court Ordered Trust or a Court Created Trust is to provide for the management of assets for a minor or incapacitated person receiving proceeds of a lawsuit. The other alternative for these proceeds may include formal guardianship, deposits into the Court registry and structured settlements.

Trusts that arise as a result of lawsuits are drastically different from the traditional trust business. Many are very intensive and communication is often difficult because the beneficiaries may be partially or completely incapacitated. Professionals in the trust area must be specialists. For additional questions, please contact **Jean Moncla, JD**, Vice President & Trust Officer, Hibernia Bank, Beaumont, Texas, jmoncla@hibernia.com.

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PAIN TREATMENT IN THE ELDERLY

The elderly offer several unique challenges for pain management. Aging is associated with an increased fat-to-lean body mass along with decreased hepatic (liver) and renal (kidney) clearance of medications, which may lead to slower breakdown of medications in general, and specifically of potentially harmful metabolites.

These certainly are not reasons to withhold pain medications in the elderly but to use pain medications with caution. As the elderly are placed on more medications for different medical problems such as hypertension, diabetes, Parkinson's, Alzheimer's and others, there are drug to drug and drug to disease interactions. These interactions can result in constipation, potential for falls, orthostatic hypotension, and cognitive impairment, along with many other side effects. When opioids are used for the treatment of pain an aggressive bowel regimen should be started, to include increased fluid intake, increased fiber intake or supplement and some form of non-sedentary exercise if possible. The use of nonsteroidal anti-inflammatory drugs is more problematic as the risk for gastric and renal toxicity increases for this age group. Some of the newer COX-2 agent forms of anti-inflammatory drugs usually cause less gastric irritation although there is still the renal and central nervous system toxicity. There is a higher peak effect and longer duration of action due to decreased elimination with opioids. Caution must be used in the doses given due to the decreased elimination.

Arthritis is the single most common musculoskeletal condition causing pain in those over age 65. Pain in the elderly represents significant healthcare and quality-of-life concerns. Several other painful conditions affect the elderly more than younger patients including peripheral neuropathies, angina, atherosclerotic vascular disease, cancer, herpes zoster and temporal arteritis; it is also likely for elderly patients to be afflicted with two or more sources of pain, as it is that they have only one pain source.

Many misconceptions exist amongst the elderly population related to pain:

- 1- Pain is "an expected part of aging"
- 2- Fear of further tests and treatments
- 3- Fear of the "meaning of pain"
- 4- Fear of death
- 5- Fear of worsening disease
- 6- Fear of loss of independence

The elderly can benefit greatly from nonpharmacologic interventions. The use of heat, massage, cold, and distraction and relaxation techniques can be used alone or along with opioids or nonsteroidal anti-inflammatory medications.

Clinicians need to look at the elderly patients' quality-of-life and related outcome measures. If a patient is suffering from pain, they are not going to be able to participate in social activities, may not be able to complete their activities of daily living and not enjoy their interpersonal relationships. The elderly patients have experienced multiple losses associated with aging and chronic disease, which are only compounded further by a change in living situations such as moving to an apartment, assisted living facility or into a nursing home.

The best time to call a consultant is **BEFORE** you really need one. **Hafernack Legal-Nurse Consulting** is on call for you anytime from intake to trial!!

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Each patient/client deserves the right to adequate and proper pain control; we cannot ignore the elderly and discredit the discomfort or pain that they are experiencing. **Legal Nurse Consultants are the professionals that can help you decipher the medical record to assure that your patient/client has received the proper pain management and has not gone through unnecessary pain and suffering.**

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Implanted Port Catheter Fracture (Pinch-off Syndrome)

The verdict in this case was in favor of the plaintiff. The hospital, the surgeon, and the chemo nurses were all named as defendants.

In the nurses notes they documented a scant blood return on several occasions and at the same time the notes stated chemo agent infused without difficulty. The nurses depositions in this case stated they never obtained free flowing blood return without having the patient lift the arm on the port side and turn the head to the opposite side. Also, in the nurse's depositions they stated that this situation was not an indication that the port was not functioning properly, so the physician was not notified. A short time later an x-ray was performed and revealed that a 7-inch piece of the port catheter was lodged in the tricuspid valve of the heart.

The nurse expert in this case testified on behalf of the plaintiff stating that the nurses who were infusing the chemo should have recognized the classic symptom of catheter pinch off syndrome as the nurses needed to raise the port side arm in order to get a free flowing blood return.

The plaintiff in this case was awarded over 2 million dollars. The jury in this case felt the nurses should have recognized the symptoms of pinch-off syndrome, and felt that the injuries sustained were preventable and therefore found the nurses were negligent.

In the presence of symptoms, discontinue using the catheter and investigate for the source of the problem in order to prevent the above malpractice from happening to you.

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