

To: New Jersey Law Revision Commission
From: Jayne Johnson
Re: Outreach conducted in regard to the Draft Final Report concerning *Saccone*
Date: March 7, 2016

The Commission considered, at the January 2016 NJLRC meeting, the Draft Final Report proposing statutory language to codify the decision of the New Jersey Supreme Court in *Saccone v. Bd. of Trustees of Police and Firemen's Ret. Sys.*, 219 N.J. 369, 388 (2014) (*Saccone*). During the meeting, the Commission reviewed the following proposals provided from two attorneys, specializing in elder and disability law:

- (1) The benefit provided to the authorized beneficiary may be payable to a special needs trust established for the authorized beneficiary pursuant to 42 U.S.C. 1396p(d)(4) and any rule or regulation adopted pursuant thereto.
- (2) A special needs trust established pursuant to 42 U.S.C. 1396p(d)(4) and any rule or regulation adopted pursuant thereto may be the vehicle for, or beneficiary of, any pension or compensation benefit available to any beneficiary authorized hereunder.¹

The Commission held release of the report to further consider the comments provided and to allow for additional outreach to other practitioners specializing in elder and disability law. Commissioner Bertone suggested contacting Regina Spielberg, Esq., who specializes in special needs law, among other practice areas. The Commission requested Staff to conduct further outreach to obtain comments from Ms. Spielberg and other practitioners specializing in this area of practice.

Commissioner Bertone was instrumental in assisting Staff to directly contact Ms. Spielberg, who graciously reviewed the NJLRC report, provided detailed comments, and proposed statutory language. Ms. Spielberg recognized that the NJLRC report seeks to include trusts under each subsection of 42 U.S.C. 1396p(d)(4), including Miller or pooled trusts under subsections (B) or (C). She observed that “[i]t is entirely possible that one person with disabilities can have two trusts: a (d)(4)(A) or (C) trust and a Miller trust.”² Ms. Spielberg advised that removing the reference to “special needs trusts,” ensures that the scope of the draft language extends to all of the intended trusts. She stated that:

¹ This proposal was submitted by an attorney who provided an amicus curiae brief in *Saccone* on behalf of the National Academy of Elder Law Attorneys (NAELA).

² Email from Regina M. Spielberg, Esq., Partner, Schenck, Price, Smith & King, LLP, to Jayne J. Johnson, Counsel to the NJLRC (Feb. 29, 2016 10:38 AM EST) (on file with the NJLRC). NJLRC).

At the time of the *Saccone* decision, New Jersey did not permit the use of ‘Miller’ trusts, which are authorized under 42 U.S.C. 1396p(d)(4)(B). However, New Jersey now requires the use of Miller trusts if an individual applying for Medicaid has income greater than the income cap. Miller trusts are unique in that they do not have special needs language and are created solely to receive excess income (such as the retirement system survivor’s pension). As a result, the revision should include all trusts created under 42 U.S.C. 1396p(d)(4), that is special needs trusts (d)(4)(A), Miller trusts, and pooled trusts under (d)(4)(C).

Ideally, these trusts should be the authorized beneficiary in the place of anyone entitled to benefits. It is not sufficient to pay directly to a person with disabilities and have them (or the guardian) place the funds into the trust. That arrangement can result in the loss of Supplemental Security Income benefits.³

Ms. Spielberg recommended the following statutory language:

- (3) The compensation due to a widow, widower or child may be paid directly to any trust established for the benefit of the widow, widower or child pursuant to 42 U.S.C. 1396p(d)(4) and any rule or regulation adopted pursuant thereto.⁴

Along with this proposal, Staff obtained comment from Donald Vanarelli, Esq. who represented the Saccone family for more than six years, culminating with the 2014 New Jersey Supreme Court ruling. Mr. Vanarelli provided insightful accounts of his work on behalf of Thomas Saccone to demonstrate how codifying the *Saccone* decision will ensure that individuals with disabilities, entitled to benefits under the state-administered retirement system, are protected as the Supreme Court envisioned.⁵ Mr. Vanarelli also observed that a “clearly drafted” proposal is “vital” to avoid future misapplication of N.J.S. 43:16A-12a. and the other related statutes. Mr. Vanarelli submitted the following proposal:

- (4) A beneficiary identified in this subsection shall be defined to include a special needs trust established for the such beneficiary pursuant to 42

³ *Id.*

⁴ *Id.*

⁵ Letter from Donald D. Vanarelli, Esq., Law Offices of Donald D. Vanarelli, to Jayne J. Johnson, Counsel to the NJLRC (Mar. 1, 2016) (enclosed, on file with the NJLRC).

U.S.C. 1396p(d)(4), or any successor statute or rule or regulation adopted pursuant thereto. Such special needs trust may be the vehicle for, or beneficiary of, any benefit to which the beneficiary is or will be entitled pursuant to this subsection.⁶

Mr. Vanarelli also stated that codifying the *Saccone* decision would allow for the same protection to beneficiaries with disabilities under the New Jersey retirement system that are afforded children of military families, under section 624 of the National Defense Authorization Act of 2015. 10 U.S.C. 1450 states:

(a) In general. Effective as the first day after the death of a person to whom section 1448 of this title applies (or on such other day as the person may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to the person's beneficiaries under the Plan, as follows:

(1) **Surviving spouse or former spouse.** The eligible surviving spouse or the eligible former spouse.

(2) **Surviving children.** The surviving dependent children in equal shares, if the eligible surviving spouse or the eligible former spouse is dead, dies, or otherwise becomes ineligible under this section.

(3) **Dependent children.** The dependent children in equal shares if the person to whom section 1448 of this title applies (with the concurrence of the person's spouse, if required under section 1448(a)(3) of this title) elected to provide an annuity for dependent children but not for the spouse or former spouse.

(4) **Special needs trust for sole benefit of certain dependent children.** Notwithstanding subsection (i), a supplemental or special needs trust established under subparagraph (A) or (C) section 1917(d)(4) of the Social Security Act (42 U.S.C. 1396(d)(4)) for the sole benefit of a dependent child considered disabled under section 1614(a)(3) of that Act (42 U.S.C. 1382c(a)(3)) who is incapable of self-support because of mental or physical capacity.⁷

⁶ Mr. Vanarelli noted that the phrase "or will be" was included "because, remarkably, during the course of the *Saccone* litigation, the Division argued that Mr. Saccone was not entitled to a ruling on his case because such ruling would be "clearly hypothetical since Mr. Saccone and his wife are still alive and his son may or may not be alive when Mr. Saccone dies."

⁷ 10 UNITED STATES CODE ANN. § 1450(a) (West 2016).

N.J.S. 43:16A-12.1a. provides that:

[u]pon the death after retirement of any member of the retirement system there shall be paid to the member's widow or widower a pension of 50% of final compensation for the use of herself or himself, to continue during her or his widowhood, plus 15% of such compensation payable to one surviving child or an additional 25% of such compensation to two or more children; if there is no surviving widow or widower or in case the widow or widower dies or remarries, 20% of final compensation will be payable to one surviving child, 35% of such compensation to two surviving children in equal shares and if there be three or more children, 50% of such compensation would be payable to such children in equal shares.⁸

Staff proposes revisions to N.J.S. 43:16A-12.1a. to incorporate the recommendations of both Ms. Spielberg and Mr. Vanarelli. The proposal adopts a broad reference to the individuals entitled to compensation under the statute and includes a reference to “successor statutes,” along with language that describes a (d)(4) trust in accord with the *Saccone* decision. Based on the comments received, Staff proposes adding the following to revise N.J.S. 43:16A-12.1a.:

- (5) The compensation due to a beneficiary identified in this subsection shall be paid directly to any trust established for the benefit of such beneficiary pursuant to 42 U.S.C. 1396p(d)(4), any successor statute, or any rule or regulation adopted pursuant thereto. Such trust may be the beneficiary of, or the vehicle for, any benefit to which the beneficiary is entitled to pursuant to this subsection.

Staff seeks to determine whether it is the pleasure of the Commission to incorporate one of the suggested approaches into the proposed revisions of the NJLRC Draft Final Report concerning the *Saccone* decision.

⁸ N.J. STAT. ANN. § 43:16A-12.1a (West 2016).