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February 29, 2016

VIA EMAIL

Jayne Johnson, Esq.
New Jersey Law Revision Commission
153 Halsey Street, 7th Floor
Newark, NJ 07102

Re: *Saccone v. Police and Firemen's Retirement System*

Dear Ms. Johnson:

As the attorney representing Thomas Saccone in *Saccone v. Police and Firemen's Retirement System*, 219 N.J. 369 (2014), I hereby submit the following comments on the proposed statutory revision to codify that decision.

As you are aware, in *Saccone*, the New Jersey Supreme Court ruled that the disabled child of a retired firefighter may have his survivors' benefits paid into a first-party ("d(4)(A)") special needs trust, rather than having those benefits paid directly to the child, thereby allowing the child to maintain eligibility for Medicaid and other public benefits based on financial need. Anthony lives with his parents, is unable to work, has been found to be totally disabled by the Social Security Administration, and for many years has received needs-based public benefits (Supplemental Security Income ("SSI") and Medicaid), which are critical in providing for Anthony's care.

The Supreme Court ruling was a recognition that the agency and lower court decisions had not only violated the spirit of the public employees' pension law, which is to be liberally construed in favor of the member, but also the public policy favoring the establishment of special needs trusts for the disabled.

What makes the decision particularly noteworthy to me is that it ended a years-long battle through the agency and courts to vindicate the rights of Mr. Saccone and his disabled son. Mr. Saccone first requested that the Division of Pension and Benefits (the "Division") permit the survivors' benefits to be directed to a special needs trust on August 18, 2008. The Supreme Court decision was



reached more than six (6) years later, on September 11, 2014. During those six years, on behalf of Mr. Saccone and his son, I corresponded with the Division. I filed an administrative appeal, which was denied. I appealed that administrative decision, which was affirmed by the Appellate Division. I petitioned for certification to the Supreme Court, and that petition was granted and the case was summarily reversed and remanded to the PFRS Board of Trustees (the "Board"). On remand, the Board again denied the relief Mr. Saccone requested. Again I appealed, and again the Appellate Division affirmed the administrative decision. I believe that there are few fathers who would be willing and able to dedicate the time and resources that Mr. Saccone committed to this cause. Throughout this process, I saw how vigorously the pension board fought against the relief that its pension member deserved.

It is unrealistic to expect the Division to have a detailed understanding of the complex world of disability planning issues, including the nuances of special needs planning law or the critical differences between various types of "special needs trusts" (which are also referred to as "supplemental needs trusts," "supplemental benefits trusts," and "d(4)(A) trusts").¹ It was apparent from its initial stance that the Division believed we were trying to somehow evade taxes: its initial response to our request was that it would not "be a party to an effort to enable [Anthony] to continue to be eligible for public assistance by not reporting the benefit he receives as a beneficiary as taxable income". Similarly, throughout the process, the Division maintained that a solution to Mr. Saccone's problem was to have the monthly benefits check "sent to 'in care of' anyone designated to act as the trustee for the trust," although in fact a direct distribution such as this would have been considered income to Anthony, thus rendering him ineligible for needs-based public benefits each month that the distribution was made.

I provide you with this procedural background to emphasize how important clear legislation would be to members of the Police and Firemen's Retirement System and their families, who should not be required (as Mr. Saccone was) to expend the time and resources to pursue their rights through similar challenges in the future. Therefore, it is vital for proposed legislative revision to *N.J.S.A.* 43:16A-12.1(a) to be clearly drafted so that the likelihood of future misapplication is limited.

¹ In fact, in our second appeal to the Appellate Division, the panel requested that the parties submit supplemental briefing addressing the legal authority supporting the establishment of special needs trusts in New Jersey.



As you know, the Supreme Court made the following ruling on this issue:

We construe the reference to "child" in *N.J.S.A.* 43:16A-12.1(a) to be equivalent to a first-party SNT established for a disabled child... pursuant to 42 *U.S.C.A.* §1396p(d)(4)(A).

Id. at 388. During the course of its analysis, it rejected the Board's position that "forecloses the possibility of designating a trust for the benefit of one of the statutorily designated beneficiaries." *Id.* at 381.

So how should the text of the statute be amended to effectuate the Supreme Court's ruling? When I contacted the Division to ask that the decision be implemented on behalf of Mr. Saccone, I asked that the Division confirm for me that, "in accordance with the Supreme Court's decision in *Saccone v. Police & Firemen's Retirement System*, 219 *N.J.* 369 (2014), the Self-Settled Special Needs Trust for Anthony J. Saccone ... will be the vehicle for, or beneficiary of, any pension death benefit to which Anthony will be entitled pursuant to *N.J.A.C.* 43:16A-12.1(a)."

Upon reflection, I would suggest the following addition to the statute (additional language indicated by underscoring):

[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. A beneficiary² identified in this subsection shall be defined to include a special needs trust established for such beneficiary pursuant to 42 U.S.C.A. §1396p(d)(4)(A), or any successor statute or rule or regulation adopted pursuant thereto.

² Although the issue before the *Saccone* Court was a special needs trust for a child, the Court's reasoning extends to a spouse designated under the statute. The Court stated that, "[w]hile the language of [the statute] makes clear that a PFRS member is not free to designate any beneficiary he or she so chooses as the recipient of the death benefit, it does not necessarily follow that the language forecloses the possibility of designating a trust for the benefit of one of the statutorily designated beneficiaries." 219 *N.J.* at 381.



Such special needs trust may be the vehicle for, or beneficiary of, any benefit to which the beneficiary is or will be³ entitled pursuant to this subsection.

Incidentally, codification of the *Saccone* decision to protect the disabled children of retired police and firemen in New Jersey would achieve the same result that was achieved for the disabled children of military families through the legislation passed by Congress with the December 12, 2014 passage of the National Defense Authorization Act of 2015 ("NDAA"). Among other provisions in the NDAA, Section 624 protects the disabled children of military families by allowing their parents' survivor benefits to go into a special needs trust, rather than directly to the child, thus allowing the disabled child to remain eligible for needs-based government benefits that may be essential for the child's care.

I thank you for providing me the opportunity to comment on this important topic. Please contact me if I can be of further assistance.

Very truly yours,


Donald D. Vanarelli

DDV/wb

³ I include the "or will be" language 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 any such ruling would be "clearly hypothetical since Saccone and his wife are still alive and his son may or may not be alive when Saccone dies."