



# HELPING HAND

An Update from the Special Needs Practice Group

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## EXTENDED FAMILY

Special Needs Planning  
Elder Law  
MassHealth Planning

## PROBATE AND FAMILY COURT PRACTICE

Estate Planning Petitions  
Adult Support Petitions  
Guardianship/Conservatorship

## PRACTICE GROUP MESSAGE

By Frederick M. Misilo, Jr., Esq.



During the summer of 2017, the U.S. Senate was unable to muster sufficient votes to pass a bill that would have had major negative impacts on, along with many other Americans, individuals with intellectual and developmental disabilities receiving Medicaid services and supports. The fact that the latest proposal, despite the clear harm the bill would have caused, narrowly lost – by one vote – is a stark reminder of the tenuousness of the existing safety net for individuals who need some degree of government support. For the individuals and families I work with on a daily basis as an attorney, these programs are vital and life sustaining. These safety net programs help define how our society chooses to assist our most vulnerable citizens.

The fact is that every piece of the safety net (i.e. SSI, Social Security, food stamps, special education, subsidized housing, Medicaid community based services and supports, etc.) came as a result of advocacy and a spirit of bipartisanship. No, it wasn't easy and, of course, not a single law passed unanimously. Bipartisanship nowadays seems like a quaint concept – almost naïve and inconsequential – perhaps even a sign of political weakness. Yet, bipartisanship is about reaching a consensus – a search for a mutuality of interest – where social policies and laws to advance those policies reflect a shared sense of common values and responsibility. That is how Social Security was enacted in the 1930's, how Medicare and

Medicaid was enacted in the 1960's and how Supplemental Security Income was enacted in the 1970's. Those major pieces of legislation weren't unanimous and they weren't without critics. But experience has demonstrated the benefits of these programs far outweigh their disadvantages. Those major pieces of the safety net have, of course, been modified over the years through amendment, regulatory changes and administrative practice to respond to inevitable challenges in funding and implementation. The Affordable Care Act and Medicaid funded community based services and supports are critical pieces of the safety net for our most vulnerable citizens. To the extent that changes are deemed, by some, to be warranted to existing law and safety net programs, such change should be done "the old-fashioned" way – through committee hearings, bipartisan collaboration and thoughtful understanding of the consequences such change will bring.

Attorney Lauren Miller whose practice is focused on elder law has authored an excellent article highlighting the distinctions between Medicare and Medicaid with respect to long term care. This article is a "must read" for those seeking to understand the limitations of Medicare and the dimensions of the Medicaid program. Attorneys Theresa Varnet and Dani Ruran have co-authored a useful article for anyone interested in using their IRA funds for charitable donations and gaining some income tax benefits at the same time. **FT**

To contact me on these or any other related issues, my direct line is 508-459-8059 and my email address is [fmisilo@fletcherilton.com](mailto:fmisilo@fletcherilton.com).

## FINANCING YOUR LOVED ONE'S SKILLED NURSING CARE - MEDICARE VS. MEDICAID

by Lauren E. Miller, Esq.



Many of us have experienced that moment of panic when we learn a parent, grandparent or other beloved elder is being rushed to the hospital after a fall. Once the frenzy of the immediate crisis passes, reality sets in. Our loved one is no longer safe to return home immediately and live on his or her own.

After an acute injury or illness, doctors often recommend rehabilitation through an extended stay at a skilled nursing facility. While this care might be necessary for our loved one's health and safety, these facilities can cost upwards of \$400 per day. Families already feel stretched thin trying to facilitate the care of their loved one while maintaining their own responsibilities, careers and

*Continued on pg. 2*

health. Because people today tend to live longer, children of elderly parents are often seniors themselves. For these reasons, it's important to understand the options for financing a stay in a skilled nursing facility before your loved one ever takes a tumble that lands him or her in the hospital.

Oftentimes, a stay at a skilled nursing facility can be financed through Medicare. Medicare is a federal health insurance program benefitting primarily those age 65 and older. Coverage is available for inpatient rehabilitation, skilled nursing care, home health care and outpatient therapies, subject to certain conditions. A common way to qualify for Medicare coverage of a stay in a skilled nursing facility is to be admitted after a Medicare-covered hospital stay of at least three nights. While Medicare may cover up to 100 days in the facility (per benefit period), it may cover less if at some point the determination is made that skilled care is no longer clinically necessary. Medicare covers the first 20 days in full but only partially covers the rest, with the patient being responsible for a daily co-payment.

Prior to 2013, many Medicare contractors were erroneously using the "Improvement Standard," which allowed Medicare to deny coverage if the individual was no longer making progress. However, in January 2013, the U.S. District Court in Vermont approved a settlement agreement in the case of *Jimmo v. Sebelius*, which clarified that "improvement" was not required for coverage. While Medicare covers only care it deems reasonable and necessary with respect to the individual's diagnosis or treatment, skilled care may be reasonable and necessary even if there is no expectation of improvement. The goal of the settlement was to make Medicare claims processing more consistent, and to ensure individuals receive the coverage to which they are entitled under the program. As a result of that settlement agreement, in February 2017 the federal court approved a Corrective Statement to be used by the Centers for Medicare and Medicaid Services, which prohibits the requirement of improvement as a prerequisite to coverage. It is now clear that coverage may be approved even if the treatment is expected only to prevent further deterioration or preserve current capabilities.

While up to 100 days of rehab in a skilled nursing facility might be sufficient to allow some individuals to return home safely, others require skilled nursing care on a permanent basis. Because of the high cost of this care, once Medicare benefits are exhausted, many people can finance their care for only months or weeks before running out of funds. In the absence of a robust long-term care insurance policy or substantial financial resources, many people turn to Medicaid to pay long-term care costs.

Medicaid (which in Massachusetts is referred to as MassHealth) is a program funded by state and federal dollars. A Medicaid applicant

has to meet both clinical and financial eligibility requirements to be eligible for long-term care benefits under the program. Unlike Medicare, there is no limit to the number of days MassHealth will cover an individual's care in a skilled nursing facility. However, the application process has become progressively complicated and adversarial, and it can take a year or more to be approved for benefits. Because applicants are physically or mentally incapacitated at the time they need to apply for benefits, their children are typically the ones signing the application as power of attorney. For this reason, it is critical that a valid, current power of attorney has been executed prior to an individual's medical decline.

Once the application is approved, MassHealth often pays benefits retroactive to the date originally requested on the application. But those months in between, while the application is still pending, can be a stressful time for the families of the applicants, the nursing home and the applicants themselves.

In certain situations where our loved one wants to return home after a stay in a skilled nursing facility but still needs some level of care, there are MassHealth benefit programs that will provide services in a community setting. Over the years, Massachusetts has continued to develop and improve the availability of these community-based programs, particularly for those with low income.

For example, the Frail Elder Waiver program is available if the individual clinically qualifies for long-term care benefits and meets certain other eligibility criteria. An applicant's monthly income must be less than 300% of the federal poverty level, which sets the current income cap at \$2205 per month. Under this program, MassHealth individuals can receive health care and perpetual support services in their home or other community living residences. The Program of All-Inclusive Care for the Elderly (known as the PACE Program) can similarly supplement the cost of care in the home and in certain assisted living facilities. Because these community programs offer benefits along a continuum of care, they can assist elders in fulfilling their goal of living in the community for as long as possible.

Ensuring that our loved ones receive the appropriate level of care after an illness or injury can be a daunting task. However, knowing the options to finance short-term skilled nursing care, long-term care and community-based care makes the experience more manageable.

Long-term care benefits, the Frail Elder Waiver, and the PACE Program are just three examples of the programs currently available under MassHealth. Because the Medicaid program's structure and funding are still changing and developing at both the state and federal levels, the landscape of future Medicaid coverage is yet to be determined. **FT**

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The Fletcher Tilton Special Needs Practice Group provides legal counseling, advocacy and innovative solutions on behalf of individuals with differing abilities and their families. We strive to serve as a reliable, trusted advisor committed to providing excellent service to our clients throughout their lifetime. We recognize the importance of treating our clients with respect and dignity.

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# USING AN IRA CHARITABLE ROLLOVER TO MAKE CHARITABLE GIFTS TO ELIGIBLE CHARITABLE ORGANIZATIONS

by Dani N. Ruran, Esq. & Theresa M. Varnet, Esq.



The individual retirement account (IRA) charitable rollover provision [Internal Revenue Code Section 408(d)(8)] allows taxpayers who are over the age of 70 1/2 to make donations (called “qualified charitable distributions”) directly

from their IRA to certain charitable organizations that qualify as an eligible charity. The Protecting Americans from Tax Hikes (PATH) Act, which makes the charitable rollover provision permanent, was signed by President Obama in December 2015. The PATH Act allows individuals over 70 1/2 to reduce their taxable income by transferring a charitable gift directly from their IRA to the charity.

In addition, after the age of 70 1/2, individuals are required to take required minimum distributions (RMDs) from their IRAs. These distributions are included in the individual’s adjusted gross income (AGI), and the individual then pays taxes on the distributions. The IRA charitable rollover allows the individual to make donations directly from his or her IRA to a charitable organization without counting the distributions as income, resulting in the individual not having to pay taxes on the amount donated.

Without the IRA charitable rollover provision, taxpayers who itemize deductions – rather than taking the standard deduction (in 2017, \$6,350 for single taxpayers; \$12,700 for married taxpayers) – and want to use an IRA to make a charitable donation would withdraw the desired amount from the IRA, an amount that would then be included in the taxpayer’s AGI. If then donated to a qualifying charity, it would qualify for an income tax charitable deduction, but this deduction could be limited, because (1) charitable deductions made in a given year are limited to a percentage of one’s AGI (50%, 30% or 20%), with the excess carried forward for up to five years, and (2) itemized deductions are limited depending on the taxpayer’s AGI level. These limitations make the IRA charitable rollover provision more effective

in reducing a donor’s income taxes if an IRA is used to fund the donation. In addition, including IRA distributions in one’s AGI could cause income taxes on Social Security benefits to increase and Medicare insurance premiums could increase.

The IRA charitable rollover provision is particularly helpful to those persons who no longer choose to itemize deductions and therefore do not get a federal tax benefit from their charitable contributions. It is important to note that the IRA charitable rollover provision does not permit the taxpayer to also take a charitable deduction for the amount gifted from his or her IRA to the charity, because this income is not included as part of his or her AGI.

In addition, Massachusetts taxpayers may also save on their state income tax returns by utilizing the charitable rollover provision, since Massachusetts is one of the few states that do not permit charitable deductions. Because the amount paid directly to a charity from one’s IRA is not included in one’s AGI, Massachusetts taxpayers may get an added advantage.

The following information is important to keep in mind. Under the IRA charitable rollover provision, charitable distributions can be made only from one’s own IRA (not from an inherited IRA). Charitable donations from 403(b) plans, 401(k) plans, pension plans or other retirement savings plans, such as simplified employee pensions (SEPs) and simple retirement accounts, are not eligible for the special tax treatment. There is also a maximum donation limit of \$100,000 per year from your IRA. Any gifts in excess of \$100,000 per year will not qualify for the tax exemption. In addition, as some charities and private foundations (for example, donor-advised funds, supporting organizations, private nonoperating foundations and split-interest trusts such as charitable remainder trusts) do not qualify for the tax-free treatment, it is important to confirm with the charity and/or an accountant or attorney who is knowledgeable about the IRA charitable rollover. **FT**

## UPCOMING SEMINARS

### ESTATE PLANNING FOR MA-FL SNOWBIRDS

**Tue., Sept. 19** - 8:30-11:30 a.m.

**Speaker:** Attorney Frederick Misilo, Jr.

**Location:** Resort & Conference Center Hyannis, MA

### HELPING FAMILIES WITH MENTAL ILLNESS

**Tue., Sept. 19** - 6:00 p.m.

**Speaker:** Attorney David Guarino

**Location:** Advocates, Framingham, MA

### HELPING FAMILIES WITH DEVELOPMENTAL DISABILITIES

**Mon., Sept. 25** - 12:00 p.m.

**Speaker:** Attorney David Guarino

**Location:** Advocates, Framingham, MA

### SPECIAL NEEDS BRIEFING FOR CPAs AND CFPs

**Tue., Oct 3** - 8:30-11:30 a.m.

**Speakers:** Attorneys Frederick Misilo, Jr. and Theresa Varnet

**Location:** Sheraton Hotel & Conference Center, Framingham, MA

### MASSACHUSETTS ESTATE TAXES

**Thur., Oct. 12** - 5:30-8 p.m.

**Speaker:** Attorney Richard Barry, Jr.

**Location:** Resort & Conference Center Hyannis, MA

**Wed., Oct. 18** - 5:30-8 p.m.

**Speaker:** Attorney Richard Barry, Jr.

**Location:** Ken’s Steak House, Rte. 9, Framingham, MA

### HOW TO ADMINISTER A SPECIAL NEEDS TRUST

**Sat., Oct. 28** - 8 a.m.-1:30 p.m.

**Speakers:** Attorneys Frederick Misilo, Jr., Theresa Varnet & David Guarino

**Location:** Courtyard Marriott, Marlborough, MA

For more information and to register for these seminars and others, visit:  
[FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)