



WINTER 2015

HELPING HAND

An Update from the Special Needs Practice Group


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- Special Needs Planning
- Medical Malpractice

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- Special Education Advocacy
- Transition to Adult Services
- Special Needs Planning
- Guardianship and Alternatives

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- Special Needs Planning
- Adult Service Advocacy
- Special Needs Trust Admin.
- Guardianship and Alternatives

EXTENDED FAMILY

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PRACTICE GROUP MESSAGE

By Frederick M. Misilo, Jr.



As I prepared to write this message, my in-box has been bombarded with email blasts from a myriad of disability based organizations, professionals and advisors touting the passage of two notable pieces of federal legislation involving special needs planning. The Achieving a Better Life Experience Act (“ABLE Act”) and the National Defense Authorization Act of 2015 were recently passed by Congress and, as of this writing, are expected to be signed by President Obama. These new laws will provide some benefit to a narrow group of individuals in limited circumstances. This edition contains two articles which succinctly and accurately describe the benefits and limits of these two new pieces of legislation. What concerns me about many of the press releases I have received is that they fail to accurately describe the limits and constraints of the new legislation. For instance, none of the press releases I received from national disability organizations mentioned the Medicaid payback requirement of ABLE accounts and trusts receiving Veterans Benefits. More importantly, the annual limitation of distributions of \$14,000 into ABLE accounts was also not mentioned in most email messages.

Knowledge, as the saying goes, is power. However, knowledge that is incomplete or faulty can lead to bad decision-making and adverse consequences. The fact is that the ABLE Act was fundamentally altered from previous drafts during the 2014

Congressional legislative session. The imposition of age 26 years requirement as the age of onset of the disability will eliminate many individuals with acquired brain injury, traumatic brain injury and many of our returning wounded soldiers from Iraq, Afghanistan and other fields of battle. The new annual limit of contributions to an ABLE account equal to the annual gift tax exclusion (currently \$14,000 per year) dramatically limits the relevance of ABLE accounts for many people. So, yes – passage of the ABLE Act is dramatic and it will help some in limited situations. But the last minute alteration to the version of the ABLE Act that had been basically unaltered for years was equally dramatic. Advocates and families are well advised to understand that what many have hoped and expected from the ABLE Act is not what actually has been passed.

Please remember that Medicaid payback trusts and Medicaid payback accounts are not a panacea and are not a substitute for traditional special needs planning. These Medicaid payback tools serve specific purposes in limited situations for a limited number of people. Traditional third party supplemental needs trusts that do not have a Medicaid payback requirement remain the fundamental tool in special needs planning for all families who want to safeguard assets for their family member with a disability. **FT**

To contact me on these or any other related issues, my direct line is 508.459.8059 and my email address is fmisilo@fletchertilton.com.

POST-EMANCIPATION SUPPORT AVAILABLE ONLY IF ADULT CHILD IS UNDER GUARDIANSHIP

by Marisa W. Higgins, Esq.



The Massachusetts Appeals Court recently clarified the obligation of a non-custodial parent to pay support for an adult disabled child beyond age twenty-three (23). In Vaida v. Vaida (No. 13-P-1827), the Court found that continued support beyond

the age of emancipation is not available to adult children who are not incapacitated persons placed under guardianship.

By way of background, for most non-custodial parents, the obligation to pay child support terminates upon their child’s attaining the age of

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CONGRESS PASSES ABLE ACT OF 2014

by Meredith H. Greene, Esq.



On December 16, 2014, Congress passed the ABLE (Achieving a Better Life Experience) ACT of 2014, which President Obama is expected to sign into law. This bill has been much anticipated in the disability community and has undergone many amendments and changes prior to its passing.

Under this new law, states will have the option, beginning in 2015, to establish ABLE programs. These programs allow disabled residents to save in excess of \$2,000 in an ABLE account (also referred to as a Medicaid Payback Account) for disability-related expenses without impacting eligibility for other government benefits. The ABLE account allows for tax-free growth similar to a Section 529 educational account or a ROTH IRA. Any person can make non-tax-deductible contributions into the account. The income earned on the account will not be taxed, and qualified distributions are not taxable. Beneficiaries are limited to one ABLE account. Total annual contributions to the account are limited to the federal gift tax limit, which remains at \$14,000 for 2015. Aggregate contributions on behalf of a beneficiary are also restricted to the state limitation on Section 529 plans, which in Massachusetts is currently \$350,000.

In addition to having been disabled prior to age 26, an eligible individual must be receiving either SSI or SSDI benefits, or must have a physical or mental impairment resulting in marked and severe functional limitations which are expected to last for at least one year or result in death. Once an account is established for an eligible beneficiary, distributions may be made for disability-related expenses which include education; housing; transportation; employment training and support; assistive technology and personal support services; health, prevention and wellness; financial management and administrative services; legal fees; expenses for oversight and monitoring; and funeral/burial expenses. Distributions which are not disability-related will be subject to income tax on that portion attributed to earnings from the account as well as a 10% penalty.

ABLE accounts should be viewed as another tool to help create a comfortable and meaningful life for persons with disabilities. However, families should be cautioned that these accounts have drawbacks as well. ABLE account funds are not counted as resources for other means-tested federal programs only to a certain limit. SSI will disregard only up to \$100,000 in an ABLE account as a resource of the beneficiary. Once an ABLE account has more than \$100,000, SSI will be suspended (not terminated) for the period of time the account is over the limit. Once the account is spent down to \$100,000 or less, SSI will be reinstated without the need to reapply. Additionally, distributions for food and housing expenses

from an ABLE account will be counted as income for SSI purposes. Fortunately, the same restrictions do not apply to MassHealth, and there is no asset limitation in ABLE accounts for Medicaid eligibility, regardless of the suspension of SSI benefits.

It is also important to note that upon the death of the beneficiary, any remaining funds are required to be paid back to MassHealth for monies expended for medical assistance to the beneficiary after the creation of the ABLE account. This differs significantly from a third-party special needs trust, which allows for family members or other remainder beneficiaries to receive the unused funds. Although these new ABLE accounts will allow for more opportunities for individuals with disabilities, careful and thoughtful analysis should be given to all estate-planning options in order to select those that are most beneficial to each person.

Before ABLE accounts can be set up, regulations will have to be written and states will have to establish ABLE programs. In anticipation of the passage of the Federal ABLE Act, Massachusetts enacted the establishment of ABLE accounts in Chapter 226 of the Acts of 2014, more commonly known as the Autism Omnibus bill. **FT**

UPCOMING SEMINARS

LIFE-LONG PLANNING FOR YOUR RELATIVE WITH SPECIAL NEEDS

January 10, 2015

Speaker: Theresa M. Varnet, Esq.

Location: Venus de Milo Restaurant, Swansea, MA

LIFE-LONG PLANNING FOR YOUR RELATIVE WITH SPECIAL NEEDS

April 30, 2015

Speaker: Theresa M. Varnet, Esq.

Location: The Arc of Adams County, Quincy, IL

For more details and registration information, visit the *Seminars & Events* page on our website.

To arrange a seminar by a representative of the Elder Law and Special Needs Practice Group, contact Fred Misilo at 508-459-8059 or fmisilo@fletcherilton.com.

RECEIVE THIS NEWSLETTER VIA EMAIL

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Continued from page 1 – Post-Emancipation Support Available Only If Adult Child is Under Guardianship

emancipation, which is anywhere between the ages of eighteen (18) and twenty-three (23). In cases where an adult child is incapable of self-support due to mental illness, intellectual disability, or physical incapacity, Massachusetts Probate and Family Courts have traditionally invoked their equity jurisdiction to order non-custodial parents who are financially able to contribute to the support of their adult son or daughter. The Vaida case makes clear that the use of such equity jurisdiction to award support post-emancipation is available only in cases where the adult child is under guardianship.

In the Vaida case, the mother filed a Complaint in Equity in the Norfolk Probate and Family Court against the father, seeking continued child support for their son, Evan, who was a partial quadriplegic as a result of injuries sustained in an accident when he was approximately seven (7) years old. The Complaint in Equity was filed once Evan reached the age of emancipation and the child support ordered under the Judgment of Divorce terminated.

The Norfolk Probate and Family Court allowed the father's Motion for Summary Judgment, finding, in part, that no action in equity for post-emancipation support is recognizable under Massachusetts law, absent a finding of incapacity by the Court in connection with

a guardianship action. Despite his significant medical and physical needs, Evan attended and graduated from college. No guardian had ever been appointed for Evan, and the evidence presented at trial established that Evan did not meet the criteria for guardianship since he is not an incapacitated person. The current statutory language allows a guardianship only for "incapacitated persons."

The mother appealed the decision to the Appeals Court, which affirmed the Probate and Family Court's ruling that post-emancipation support is not available to adult children who are not incapacitated persons placed under guardianship. The Vaida Court recognized the Massachusetts Probate and Family Courts' equity jurisdiction but determined it was not available in situations where the incapacitated person has not been placed under guardianship. Since Evan is not an incapacitated person and cannot be placed under guardianship for those reasons, he does not meet the criteria for the Court's use of equity jurisdiction to order post-emancipation support. **FT**

CONGRESS PASSES LEGISLATION THAT WILL ENABLE MILITARY MEMBERS TO NAME SPECIAL NEEDS TRUSTS AS BENEFICIARIES OF SURVIVOR PLAN

by Theresa Varnet, M.S.W., J.D.



On December 15, 2014, Congress passed the National Defense Authorization Act of 2015. This legislation allows military families to protect their Survivor Benefit Plans (SBP) by allowing the benefits to be directed to a "payback" special needs trust. If there are any assets left in the

trust when the recipient of SBP dies, the funds are paid back to Medicaid for the cost of the recipient's care. These individuals will now be able to remain eligible for Medicaid which is the primary payer of residential placements such as group homes and other residential options for persons challenged with disabilities who need residential supervision and or assistance from a Medicaid Waiver program. Up until now, individuals who received SBP have often been locked out of Medicaid funded support programs.

The Disabled Military Child Protection Act grants military members the authority to name a special needs trust as a beneficiary of Survivor Benefit Plans (SBP). The military allows military members with special needs children to participate in the SBP, which permits monthly benefit stipends up to 55% of the military member's pension to be paid for the benefit of a disabled child. Benefits were required to be paid directly to the disabled child. Because the benefits were not allowed to be redirected to a special needs

trust, the child of a military member was often left in a worse position for having received the SBP because the child lost eligibility for critically needed government benefits such as Supplemental Security Income (SSI) and Medicaid.

The Disabled Military Child Protection Act will allow the survivor benefit to be paid directly to a d4A or d4C special needs trust (sometimes called a first party special needs trust or a Medicaid Payback Trust). If the benefits are distributed directly to the trust, the child will remain eligible for needs based benefits such as SSI and/or Medicaid.

The Disabled Military Child Protection Act has been introduced each year for the past 6 years and until now never came close to passing. This year advocates added the provisions of this critically needed bill to the 2015 Defense Authorization Act, the annual bill that funds the military. This strategy worked and after 6 years of failing to be passed, the bill passed on December 15, 2014. Passage of the bill is the first step. It is now time to spread the word so that military families are made aware of the need to create a first party special needs trust and to contact the military to change the beneficiary of their SBPs to a properly worded special needs trust. **FT**

