



HELPING HAND

A Monthly Update from the
Special Needs Planning Practice Group

FLETCHER, TILTON & WHIPPLE
C O U N S E L O R S A T L A W
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How to Administer a Special Needs Trust Saturday, October 18, 2008

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A MESSAGE FROM THE PRACTICE GROUP CHAIR

MAY 2008

By Frederick M. Misilo, Jr., Esq.



In this edition of Helping Hand, the lead article relates to the importance of how the estate planning of aunts, uncles, grandparents, siblings and other extended family members can affect a special needs estate plan created by the parents of a person with a disability. It is quite important that well-intentioned relatives do not inadvertently create a loss of important government benefits by a bequest, whether in trust or outright, on behalf of an individual with a disability. Communication and coordination is very important between family members in the area of special needs planning.

I noticed recently that many supermarkets, malls and general retailers now have kiosks containing a dizzying array of gift cards for sale. You can now purchase gift cards in most any amount for restaurants, home supply stores, book stores, sporting goods stores – even movie theatres. It occurred to me that gift cards are often given to beneficiaries from trustees of special needs trusts and to others who may be on Supplemental Security Income or who may be receiving Medicaid waiver services from the Department of Mental Retardation or Department of Mental Health. Trustees of special needs trusts and others who give gift cards or gift certificates should be aware that this can adversely affect benefits. If the gift card or gift certificate can be used to purchase food or shelter or if it can be resold, then the value of the gift card or gift certificate will be considered income and will be subject to the general rules of income and income

exclusions. On the other hand, the value of the gift card or gift certificate is not income if it cannot be used to purchase food or shelter and it cannot be resold. The Social Security Administration will presume a gift card or gift certificate can be resold unless there is evidence to the contrary, such as an express prohibition of transfer on the face of the card or certificate.

Here are some examples:

John receives a \$400 gift card from Home Depot for use at any Home Depot store. The gift card is restricted for use to purchase only products from Home Depot and has a legally enforceable prohibition on its resale. Since John can not purchase food or shelter from a Home Depot store and he can't sell it for cash, the gift card is not considered income.

Mary receives a \$200 Visa gift card for use at any location where Visa debit cards are accepted. The gift card includes a prohibition against selling the card to another or redeeming it for cash. However, it can be used to purchase food or shelter items. Based on these facts, the \$200 Visa gift card would be considered as unearned income based on its face value (\$200) in the month it was received, subject to the general rules on income and income exclusions.

So, gift cards are convenient and quite useful. However, if they can be used for food, shelter or converted to cash, they will be considered as income in the month they are received. For feedback or questions, contact me at (508) 459-8059 or fmisilo@ftwlaw.com.



NEWS BRIEFS

Not Filing a Tax Return? You May be Losing an Important Benefit

Individuals with special needs, especially those who qualify for SSI, often skip filing a tax return because their income is not high enough to require one. However, because their income is so low, individuals with disabilities who do file a return may qualify for the Earned Income Tax Credit, a special credit that has existed for the last 33 years to help low-income working individuals and families.

If a taxpayer with special needs who makes under \$12,590 a year files a tax return and owes no taxes because of her minimal income, the Earned Income Tax Credit may provide a refund of up to \$428. Families with annual incomes under or around \$30,000 to \$37,000 may be eligible to receive several times this amount. Importantly, the Earned Income Tax Credit doesn't count as income for SSI, Medicaid or Section 8 recipients. (The rules for assets vary by program.)

With Veto-Proof Majority, House Votes to Block New Medicaid Regulations Affecting Those With Special Needs

On April 23 the U.S. House of Representatives passed a bill, HR 5613, that would put off implementation of several new Medicaid regulations affecting people with special needs until early 2009. The bill's passage is seen as a victory for advocates for people with special needs, and was passed by a veto-proof, bipartisan vote of 349-62. The Senate is working on its own version of the legislation, S 2819, which is currently before the Finance Committee.

The proposed Medicaid regulations being blocked by the bill would make it more difficult for people with special needs to obtain rehabilitation services, and would also cut funding for case managers and equal access special education programs. Specifically, the regulations redefine Medicaid's definition of rehabilitation, forcing a physician to prepare a detailed rehabilitation plan and follow complicated guidelines when prescribing services.

The Top 7 Reasons to Establish a Special Needs Trust

Special needs trusts (SNTs) can play an important role in helping families plan for children with special needs. Here are some of the most compelling reasons to speak with your attorney about establishing an SNT.

1. Preserve public benefits while enhancing your child's lifestyle. The Social Security Administration (SSA) does not count assets in an SNT as income for determining benefits eligibility because the assets are owned by the trust rather than the child beneficiary.

2. Ensure assets will be used as intended. With an SNT, distribution of assets is directed by trust documents as well as SSA and IRS guidelines. By comparison, if you leave assets to an "able-bodied" child and ask that some of the funds be used for the sibling with special needs, the child may fail to honor your request, lose the assets to creditors or die prematurely and leave the funds to his or her own children.

3. Allow others to contribute. If you establish the trust now, grandparents and others interested in helping your child can make annual gifts to the SNT of up to \$12,000 (\$24,000 for a married couple) without triggering the gift tax or generation-skipping tax.

4. Fund the SNT as you wish. SNTs can be funded with cash, securities or other resources.

5. Identify appropriate distributions. If you establish and fund an SNT while your child is young, you can use the trust like a checking account to pay the child's expenses. A future trustee can then refer to a record of these payments as a guide in determining necessary and appropriate distributions.

6. Maximize the benefits of a personal injury settlement. If your child wins a sizable settlement, having the payout (often a lump sum plus a structured settlement) directed to a self-settled SNT offers several benefits. Your child will still qualify for public benefits, can use settlement funds for nonessential expenses and may enjoy the financial security of receiving regular payments for life.

7. Enhance matrimonial settlements. If an adult child who receives SSI and Medicaid divorces, having a self-settled SNT drafted through the divorce decree will allow any alimony or lump-sum payment from your child's ex-spouse to be paid to the trust. ●

Special Needs Planning for Extended Family Members



By David C. Guarino, Esq. and Frederick M. Misilo, Jr., Esq.



David C. Guarino, Esq.



Frederick M. Misilo, Jr., Esq.

Estate planning for families who have a son or daughter with special needs not only includes creating the appropriate legal instruments for the nuclear family - it extends to other family members such as grandparents, aunts, uncles, brothers and sisters.

One of the primary goals in special needs planning is to direct family assets into an appropriate supplemental needs trust in order to preserve eligibility for important government benefits. Very often, well-meaning friends and relatives will make gifts and bequests for the benefit of your family member with a disability in a manner that is not effective for tax and supplemental needs planning purposes. For example, grandparents frequently want to leave property for the benefit of a grandchild with special needs. They will either leave the property to the parent of the grandchild, with the expectation that the parent will use it appropriately for the grandchild, or they will leave it directly to the grandchild. Either approach may be problematic for tax purposes since the parent would then be considered

the owner of property for gift and estate tax purposes. Also, the property would be subject to claims from the parents' creditors. Another common scenario is that grandparents and other extended family members do not amend their estate plan to accommodate for the unique needs of a grandchild, niece or nephew with special needs. The estate plan of an extended family member may inadvertently result in a loss of eligibility for important government benefits by providing for an outright bequest, a support trust with an outright distribution at a specified age, or other distribution of assets from their estate plan.

While steps can be taken to reclaim eligibility through the use of a self-settled trust in many instances, this can be a costly proposition and usually involves a potential pay-back of remaining trust assets to the state Medicaid agency upon the death of the family member with a disability.

We recommend that any family member whose estate plan may result in a distribution of assets to a family member with a disability have that plan reviewed by a competent attorney who can properly advise on what revisions, if any, may be necessary to protect the long-term interests of their family member with a disability. Any distribution for the benefit of a family member with a disability should be made into a

carefully crafted supplemental needs trust. In order to make this transfer irrevocable, the supplemental needs trust receiving the assets must be irrevocable.

Please note that many estate planning instruments are intentionally created to be revocable upon signing and only become irrevocable upon amendment or upon the death of the person who created the trust. Therefore, consultation, if possible, with an experienced attorney should occur prior to transferring assets into a supplemental needs trust in order to avoid potential adverse tax or other undesirable consequences. ●

For feedback or questions, contact me at (508) 459-8208 or dguarino@ftwlaw.com.



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