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Seniors and Special Needs News - April 24, 2015

1 message

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With help, seniors and people with special needs can keep some of their assets in the family rather than lose their entire life savings to the costs of long term care. They can use these protected assets to enhance their quality of life beyond what long term care alone will provide.

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The Koewler Law Firm
 JAMES L. KOEWLER, JR.



Seniors and Special Needs News

Setting aside Money for a Loved One with Special Needs

Today's newsletter continues the series about Special Needs Law.

The newsletter on February 19, 2015 gave an overview of the legal issues facing people with special needs. The newsletter on February 5, 2015 discussed the new ABLE accounts. The newsletter on February 26, 2015 discussed sources of income for people with special needs.

The newsletter on March 6, 2015 discussed medical insurance for people with special needs. The newsletter on March 13, 2015 discussed how the Social Security Administration requires people with special needs to prove a disability to qualify for Supplemental Security Income (SSI.) The newsletter on March 20, 2015 discussed how the Social Security Administration requires people with special needs to prove that they have low enough income and assets to qualify for SSI. The newsletter on March 27, 2015 gave an overview of how someone with too many assets can lower those assets to qualify for SSI. The newsletter of April 3, 2015 discussed how a self-settled Special Needs Trust can help someone with special needs qualify for SSI and Medicaid. The newsletter of April 10, 2015 discussed how a Pooled Trust can help someone with special needs qualify for SSI and Medicaid.

Today's newsletter discusses parents, grandparents, and other family members (and, for that matter, anyone) can make money and other assets available to someone with special needs without creating a problem with his or her Supplemental Security Income (SSI) or Medicaid eligibility.

Most parents and grandparents want to name their children and grandchildren equally in their wills. A child or grandchild who relies on SSI or Medicaid who receives assets (no matter from where the assets come) can lose SSI or Medicaid because of these new assets. The arrival of the assets can be income, causing the special needs person to fail the income eligibility test. If enough of the assets remain in the possession of person with special needs a month later, then the person may fail the asset eligibility test. When the assets are used up, then the person may get back onto SSI and/or Medicaid. (Giving the assets away to achieve eligibility will be considered an "improper transfer" or "illegal transfer," which still creates ineligibility for the time period that the assets would have covered.)

So, how do parents and grandparents share their legacies with their loved ones who have special needs?

The most common way to leave a legacy for a loved one with special needs is through a trust. The person who wishes to make sure that money (or other assets) are available to someone with special needs will set up a trust for the benefit of that loved one. (If a trust already exists, then the person who wishes to leave money or other assets can transfer the money/assets into the already existing trust.)

First, let's be clear about something very important. We are talking about money and other assets that never belonged to the person with special needs. Such money and assets would be considered "third-party" money/assets because they never belonged to the person with special needs (the first party) who wants government benefits (or may want benefits in the future) from Medicaid and/or SSI (the second party.)

The person who sets aside the money (Let's call this person the "donor.") has no legal obligation to set money aside for the person with special needs (Let's call this person with special needs the "beneficiary" since we're talking about trusts.) Because there is no legal obligation to give money or assets to the beneficiary, the donor's money isn't subject to a payback requirement like with assets placed in a stand-alone first-party Special Needs Trust or with a Pooled Trust.

So, when setting aside money for someone who needs, or will likely need, Medicaid and/or SSI, the keys are:

1. To avoid screwing up the beneficiary's Medicaid or SSI eligibility, and
2. To avoid wasting the donated assets, like through a payback requirement after the beneficiary dies.

If the donor gives money or assets to the person with special needs, that

money and those assets would then belong to the person with special needs.

The money and assets must be considered in determining the eligibility (or continuing eligibility) of that person for Medicaid and SSI benefits. In other words, giving money or assets to someone on SSI or Medicaid might make that person too "rich" to get SSI or Medicaid. The person with special needs could be forced to spend the money or assets before SSI or Medicaid would be available for his or her care. The gift directly to the person with special needs makes the gifted money and assets the property of the person with special needs, and, therefore, subjects them to his or her asset and income limits. Such a direct gift reduces the costs of the government programs and increases the costs to the family.

A trust, if prepared properly, can hold the money for the person with special needs, as the lifetime beneficiary, without reducing or cutting off SSI or Medicaid benefits. The trust contents never belong to the beneficiary, so they don't become "first-party" money. Because it isn't first-party money, it isn't subject to the beneficiary's control.

The trust must also be written to avoid an obligation to pay out for things that SSI and Medicaid would normally pay. Many trusts state that they are meant for the health, maintenance, welfare, or support of the beneficiary. SSI and Medicaid pay for health, maintenance, welfare, or support. Such a trust would have to pay out for the beneficiary's benefit before Medicaid and SSI would pay.

To avoid the perception of a payment obligation, the trust should have no payment obligation during the lifetime of the beneficiary. The best way for a trust to have no payment obligation is to have no "standard" for payment. (A "standard" for payment is an event or condition triggering a payment obligation, such as health care costs of a beneficiary when the trust says it is for the beneficiary's health.) A Wholly Discretionary Trust, in the Ohio Revised Code, is the most often used no-standard trust for this purpose in Ohio (where I work.)

A Wholly Discretionary Trust provides that the trustee (a person other than the person with special needs) can pay out of the trust when he or she wants with complete discretion. (I wish that the name of the trust were "Completely Discretionary Trust" because people often hear "Holy Discretionary Trust" with some sort of religious meaning rather than "Wholly Discretionary Trust" is the sense of complete discretion. Unfortunately, the Ohio Revised Code uses the name "Wholly Discretionary Trust," so that name is pretty much stuck in place.)

With a Wholly Discretionary Trust, the trustee can pay out for a beneficiary when the trustee wants, for any reason or for no reason. Likewise, the trustee can choose not to pay out of the trust for any reason or for no reason. For example, a trustee can feel pretty good about life on a sunny day and decide

to use the trust contents to buy something for the beneficiary. Likewise, a Cleveland Browns fan (in a fit of frustration) could easily decide that he or she will pay no money from the trust until the Browns win the Super Bowl (meaning that the beneficiary may never get anything, if the Browns continue to play as poorly as in recent memory.)

Because a trust such as this (if set up properly) has no payback obligation, the trust can be set up to pay out to someone else after the initial lifetime beneficiary (the person with special needs) dies, acting like a will. The remaining contents of the trust (if any) can go to brothers and sisters, nieces and nephews, parents, grandchildren, or anyone else whom the grantor (the person who initially set up the trust) wishes to benefit. The remaining contents can go to a charity as well, if that is the grantor's wish.

Some people call trusts like this "third-party special needs trusts." I prefer not to use that label. Because first-party special needs trusts must have a payback obligation, SSI and Medicaid personnel take notice of anything that is called a "special needs trust." I'd rather call these trusts something else to avoid having to clarify (over and over) the difference between a first-party special needs trust that has a payback obligation and a third-party special needs trust that has no payback obligation. I like to call them "supplemental services trusts." (I don't care if you call one "Bob" or "Stairway to Heaven." I just suggest avoiding the words "special needs." There's no legal necessity to avoid those words. It's just a suggestion to help avoid confusion.)

As mentioned above, the donor doesn't need to set up a new trust if one already exists for a particular person with special needs. Perhaps, for example, one set of grandparents already set up a supplemental services trust for a special needs grandchild as part of the grandparents' estate plan. Rather than creating a new trust, the other grandparents can designate that existing trust as the recipient of the money that they wish to set aside for the grandchild. (The original creators of the trust need not be grandparents. It can be anyone. I just used grandparents as an example.)

In fact (absent some serious internal family squabble,) I think it is better to have only one such supplemental services trust. To work properly, a supplemental services trust should be completely separate from the people who set it up. It must be irrevocable. Because of the complete separation from a person or a married couple, the trust must pay its own taxes and have its own accounting. Two separate trusts paying for tax preparation and accounting services wastes money that could have remained in trust for the benefit of the beneficiary with special needs. To avoid duplicate trusts, the person or couple that sets up a supplemental services trust must make the trust known to other family members and to anyone else likely to wish to set aside money for the beneficiary.

To set aside money for someone with special needs, the most protective

vehicle to hold that money is an irrevocable wholly discretionary trust. This allows a person with special needs to participate in the last will and testament of or a significant gift from a relative, just like the siblings and cousins who do not have special needs. At the same time, if done correctly, the gift via trust does not take away the Medicaid and SSI benefits on which the person with special needs might rely.

Suggest a Newsletter Topic

I try to write something new (and useful) in my newsletter every week. So, I know that I will sometimes have writer's block. I'd like your help, please.

If you have a topic for my newsletter that you'd kindly suggest, I promise to consider it. (I don't promise to pursue it. I just promise to consider it.) I try to write about issues concerning seniors, health care, long term care, special needs, Veterans Pension (aka Aid and Attendance) benefits, and Veterans Compensation benefits. Please keep your suggestions within or near to those topics.

Please submit your suggestion [here](#). If I use your topic suggestion, I'll put the content in both my blog and newsletter.

Thank you for your help.

Social Media Posts from the past week

04-23-2015 Study indicates strong link of #Autism and #Genetics <http://ow.ly/K3nK5>

04-22-2015 Plan ahead for your #AgingParent's #LongTermCare <http://ow.ly/K3xhn>

04-21-2015 #LifeInsurance with #LivingBenefits can help with #LongTermCare costs <http://ow.ly/LLQF7>

04-20-2015 #NursingHomes pursue #Rehab residents over #LongTermCare residents <http://ow.ly/LLQ1j>

04-19-2015 #Veterans could see changes in #Benefits <http://ow.ly/LLPgV>

04-18-2015 Big picture statistics about #LongTermCare <http://ow.ly/K3wZ1>

04-17-2015 How an #ABLEaccount can help someone with #SpecialNeeds qualify for #SSI and #Medicaid <http://wp.me/p47F09-aw>

Older social media posts can be found in the [social media post archive](#) on the firm's website, ProtectingSeniors.com.

The Koewler Law Firm News

4-29-2015 Jim Koewler will present Navigating Medicaid, Medicare, and the Affordable Care Act at Kemper House in Highland Heights, Ohio.

Continuing education credit is available for Certified Case Managers, social workers, counselors, and nurses.

5-26-2015 Jim Koewler will discuss the legal issues that seniors face, especially focusing on long term care, at HCR ManorCare in Parma, Ohio.

6-9-2015 Jim Koewler will discuss Preventing Senior Fraud at The AbbeWood in Elyria, Ohio. Continuing education credit is available for Certified Case Managers, social workers, counselors, and nurses.

6-16-2015 Jim Koewler will speak on planning ahead to protect your life savings against long term care costs at a meeting of the University Hospitals Bedford Medical Center SeniorNet at the Atrium of Anna Maria in Aurora, Ohio.

Older items of firm news can be found in the [news archive](#) on the firm's website, ProtectingSeniors.com.

Jim's available presentations

- Navigating Medicaid, Medicare, and the Affordable Care Act (Continuing Education credit available for social workers, counselors, nurses, and Certified Case Managers)
- Overcoming Seniors' Resistance to Long Term Care (Continuing Education credit available for social workers, counselors, nurses and Certified Case Managers)
- Preventing Senior Fraud (Continuing Education credit available for social workers, counselors, nurses and Certified Case Managers)
- My Care Ohio and Medicare/Medicaid "Dual Eligibles" (Continuing Education credit available for social workers, counselors, nurses, and seeking approval for Certified Case Managers)
- Government Benefits that can help Pay for Long Term Care (Continuing Education credit available for social workers, counselors, nurses, and seeking approval for Certified Case Managers)
- Legal Issues for People with Dementia (Continuing Education credit available for social workers, counselors, and nurses)
- Protect your Life Savings from the Costs of Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Veterans Benefits for Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Advance Directives – Powers of Attorney, Living Wills, etc. (Continuing Education credit available for social workers, counselors,

and nurses)

- Buying Long Term Care Insurance Wisely (Continuing Education credit available for social workers, counselors, and nurses)
- Planning Ahead to Protect against Long Term Care Costs (Continuing Education credit available for social workers, counselors, and nurses)
- Organizing for Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Pre-planning your Funeral (Continuing Education credit available for social workers, counselors, and nurses)
- Protecting your Money when you need Long Term Care and Essential Estate Planning Considerations (with free living wills for the audience)
- Myths about Long Term Care Costs
- How to help your Parents Manage their Affairs

Upcoming meetings

4-24-2015 Eldercare Professionals of Ohio, Shaker Gardens, Shaker Heights, Ohio, 9:00 a.m.

4-28-2015 Summit County Senior Services Network, Anthony Kucko Kertesz Funeral Home, Akron, Ohio, 8:00 a.m.

4-28-2015 Wayne Holmes Senior Service Coalition, Wayne County Care Center, Wooster, Ohio, 8:30 a.m.

4-28-2015 Western Reserve Area Agency on Aging, Annual Luncheon and Lecture, Holiday Inn, Independence, Ohio, 9:00 a.m.

4-29-2015 UH Bedford Senior Network's Spring Fling, Hilton Garden Inn, Twinsburg, Ohio

4-30-2015 The Association of Specialists in Aging, Mentor Senior Center, Mentor, Ohio, 8:30 a.m.

5-5-2015 Aging Services Network of Euclid, Euclid Hospital's Waltz Auditorium, Euclid, Ohio, 8:30 a.m.

5-6-2015 Stark Senior Services Network, Canton Baptist Temple, Canton, Ohio, 9:00 a.m.

5-6-2015 Richfield Chamber of Commerce luncheon, The Taverne of Richfield, Richfield, Ohio, 11:45 a.m.

5-6-2015 Medina County Senior Services Network's Client Services Committee, Sully's, Medina, Ohio, 3:00 p.m.

5-8-2015 Eldercare Professionals of Ohio, Century Oak Care Center, Middleburg Heights, Ohio, 9:00 a.m.

5-13-2015 Medina County Senior Services Network, Waite and Sons Funeral Home, Medina, Ohio, 8:00 a.m.

5-13-2015 Summit Senior Sales, Administrators and Marketers Association, Canal Pointe, Akron, Ohio, 2:30 p.m.

5-14-2015 Lorain County Senior Services Network, Life Care Center of Elyria, Elyria, Ohio, 8:30 a.m.

5-18-2015 Medina County Senior Services Network's Education Committee, Tres Potrillos, Medina, Ohio, 11:30 a.m.

5-19-2015 UH Bedford Medical Center Senior Network, Light of Hearts Villa, Bedford, Ohio, 8:30 a.m.

5-20-2015 Geauga Professional Association Specializing in Seniors

("PASS"), West Geauga Senior Center, Chesterland, Ohio, 8:30 a.m.

5-21-2015 Portage Senior Services Network, Family and Community Services Building, Ravenna, Ohio, 8:30 a.m.

5-22-2015 Eldercare Professionals of Ohio, HCR Manorcare, Mayfield Heights, Ohio, 9:00 a.m.

Newsletter Archive

Past issues of this newsletter can be found in the [newsletter archive](#) on the firm's website, [ProtectingSeniors.com](#).

Contact Jim Koewler

If you'd like to contact Jim, this newsletter has a dedicated [contact page](#) on the firm's blog site, [ProtectingSeniorsNews.com](#).

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