



# HELPING HAND

An Update from the Special Needs Practice Group

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SPECIAL NEEDS &  
ELDER LAW  
PRACTICE GROUPS

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## SCHOOL AGE

Transition to Adult Services  
Special Needs Planning  
Guardianship and Supported  
Decision-Making

## ADULT

Special Needs Planning  
Adult Service Advocacy  
Special Needs Trust  
Administration  
Guardianship and Supported  
Decision-Making

## 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.



As I write this message, it does seem like warmer weather is here to stay – hopefully. In New England, we’ve had a very slow and cold spring. With summer just around the corner, it’s time for me to start training for the 2018 New Balance Falmouth Road Race. This year I’ll be running (slowly) to raise funds for Special Olympics of Massachusetts as part of its Falmouth Road Race Team. Wish me luck! **Here is a link to my webpage if you’d like to support my race by donating to Special Olympics of Massachusetts: <https://tinyurl.com/ybpxsr26>**

My inspiration for running this year at Falmouth is Jennifer Varnet. Many readers know that Theresa and Harvey Varnet are the proud parents of Jennifer. A longtime Special Olympics athlete, Jennifer has won many medals in the International Special Olympics Games in various events. Jennifer also works part-time in the Worcester office of Fletcher Tilton supporting the Special Needs Practice Group. Despite many obstacles put in her path, Jennifer remains a tenacious, positive

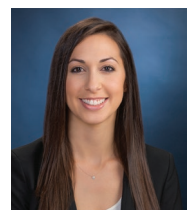
and diligent person with a charming personality. Eunice Shriver’s famous words spoken fifty years ago at the first International Special Olympics Summer Games at Soldier Field on July 20, 1968, “Let me win. But if I cannot win, let me be brave in the attempt,” epitomize Jennifer’s relentless spirit.

I am excited to announce that the Special Needs Practice Group will be sponsoring a seminar on Saturday, September 29, 2018 entitled *Housing: Creative Solutions, Options and Challenges*. This seminar is a joint effort with the Autism Housing Pathways Program, Person Centered Planning Partners and Miller Mortgage. This seminar will present real-life examples of housing models as well as important information on housing-related issues. If you are interested in attending this seminar, you can register on the Fletcher Tilton website at: <http://www.fletchertilton.com/seminars-events>. **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](mailto:fmisilo@fletchertilton.com).

## JUST FOR THE WEALTHY? RETHINKING THE TRUST FUND

By Lauren E. Miller, Esq.



When you hear the phrase “trust fund,” you may think of wealthy families like the Rockefellers or Vanderbilts. However, trusts today are useful for families with estates of all sizes. A trust is essentially a money management tool that designates a fiduciary, called the *trustee*, to manage the trust’s assets. The trust creator, called the *grantor*, determines the terms of the trust such as who will be the beneficiaries and under what circumstances the trustee can make distributions from the trust. Trusts can be revocable or irrevocable, and they help clients accomplish a wide variety of estate planning goals.

One benefit that a properly funded trust can provide is to ensure a smooth transition of assets upon the death of the grantor — without need for

probate. For example, if you own your house in your sole name upon your passing, before the house can be sold or transferred, a petition would have to be filed in the local probate court in order to name a fiduciary (called the *Personal Representative*). This process can take several months or longer. However, if the house was transferred to a trust before you passed away, the trustee would have immediate authority to take action and manage trust assets pursuant to the terms of the trust.

In addition to avoiding probate, trusts are important tools for those who wish to (1) leave assets to minor and/or disabled beneficiaries, (2) remove assets from their estate to minimize estate tax, or (3) protect their assets from Medicaid recovery. A trust is no longer an estate planning tool just for the wealthy, and creating one may be a useful way to ensure your family is protected long after you’re gone. **FT**

# SUPPLEMENTAL NEEDS TRUSTS AND NURSING HOME PLANNING

by Michael T. Lahti, Esq.



Many families want to protect assets from nursing home expenses. This concern becomes acute when there are children<sup>1</sup> with special needs. This article discusses strategies that can be used to protect assets, starting with a discussion of some nursing home terminology, then highlighting the power of advance planning, and concluding with a discussion of how some protective trusts can be set up for children with disabilities and how these trusts can be woven into the estate plan when families are trying to protect assets from nursing home costs.

## FIVE-YEAR “LOOKBACK”

Generally, strategies can be distinguished by whether the planning was done *ahead* of the lookback period or *within* the lookback period. So, what is the “lookback” period? Most people have heard of the five-year lookback period for nursing home care<sup>2</sup>, but do not know exactly how it applies. It applies when one needs Medicaid funding to pay for nursing home bills. At that time, a Medicaid application is filed asking the state for help. To process the application, up to five years’ worth of financial statements may be reviewed. If disqualifying gifts have been made within the five-year period, then the state will apply a “penalty period” measured by the amount given away. During the penalty period, the state will not help with medical costs, which is devastating.

Simply put, the laws prevent a person from giving his or her assets away one day and getting state help with a nursing home bill the next.

## PRE-CRISIS PLANNING

The most effective planning is done well before a crisis occurs. A typical strategy involves creating and funding an irrevocable trust five years before an application for Medicaid is filed. This strategy, although very useful, is not perfect, and some resist doing this because there is an inherent loss of control over assets put inside the trust<sup>3</sup>. This reluctance to plan in advance can become an impediment to effective planning.

## CRISIS PLANNING

If one’s health declines precipitously and assets are at risk of being spent down on long-term care, there are still options. For instance, married couples may consider wills that contain “testamentary” trusts<sup>4</sup>. These are specialized wills used for married couples. When the “first” spouse dies, assets passing under the deceased spouse’s will flow into a trust for the surviving spouse. This trust protects assets within it *without the five-year lookback* constraints. Of course, this strategy has limits because (1) a spouse must pass away for the plan to work, and (2) in most instances, it is tough to predict which spouse will pass away first<sup>5</sup>. Other crisis strategies include spend-downs, last-minute gifts combined with promissory notes to save some, but not all, of the assets (for Rhode Island residents), and specialized annuities<sup>6</sup>. These crisis strategies are very helpful, yet they are not perfect.



Federal and state laws provide protections for children with disabilities. One of the most important strategies is a supplemental needs trust. Supplemental needs trusts stretch out assets for a child's care.

## SUPPLEMENTAL NEEDS TRUSTS OVERVIEW

Federal and state laws provide protections for children with disabilities. One of the most important strategies is a supplemental needs trust<sup>7</sup>. Supplemental needs trusts *stretch out* assets for a child’s care. Without such trusts, assets left directly to a child on a means-tested public benefits program (like SSI or Medicaid) cause the child to lose benefits. And those lost benefits remain unavailable until the child has spent down assets to a pittance, at which point the child can reapply for benefits. This result is

<sup>1</sup> In this article, “children” or “child” refers to relationship as opposed to age. For instance, “my child” could refer to a small child or an adult child.

<sup>2</sup> When “nursing home” care is mentioned in this article it is a generic reference to the long-term-care agencies that pay for care in a nursing home. This would be “MassHealth” for our Massachusetts clients and “DHS” for our Rhode Island clients.

<sup>3</sup> Valuable protections can nonetheless be built into the trust to retain “income” and the right to “occupy” property.

<sup>4</sup> A “testamentary” trust begins upon a person’s death, as opposed to being created while a person is living (a “living” trust).

<sup>5</sup> Typically, assets are titled one-half in one spouse’s name, and one-half in the other spouse’s name, with the idea that if one spouse dies (whoever it is), at least some assets will be protected. Thus this “fallback” strategy is not always perfect because by its nature it protects only a portion of the assets.

<sup>6</sup> Some annuities can be used as a spend-down for married couples where one spouse enters the nursing home and the couple has “too many assets.”

<sup>7</sup> “Supplemental” needs trust is synonymous with “special” needs trust.



nothing short of a disaster, as the assets help the state as opposed to the child. This problem can be avoided with a supplemental needs trust.

There are two broad categories of supplemental needs trusts; one that *must*, upon the child's death, reimburse the state for care provided during the child's lifetime, and one that *does not* have to reimburse the state (so assets go back to the family).

Trusts that have the "payback" requirement can be further categorized as "first-party" supplemental needs trusts, and "pooled" trusts<sup>8</sup>.

Trusts that do not have the payback requirement are called "third-party" supplemental needs trusts.

Understanding this, one may ask why anyone would ever *want* to establish a trust that pays assets to the state upon the child's death. The answer is, sometimes it's the only option. The first situation would be when the assets are the child's. When the assets to be protected *come from the child*, a payback supplemental needs trust is required. So, instead of requiring the child to spend down all of his or her assets, and then forcing the child to live entirely off a (minimal) stipend from Social Security, the laws allow a child to receive the benefit stipend and *supplement* it with his or her assets that have been placed in the supplemental needs trust. This can have extraordinarily beneficial results for the child, as it improves the child's quality of life.

The second situation when a payback-type supplemental needs trust might be used is when a *parent is sick* and cannot wait out the five-year lookback period, but still wants to protect assets.

Our crisis planning might entail having the parent, before entering the nursing home, transfer assets into a supplemental needs trust with a *payback provision*. There is an exceptionally valuable carve-out in the law that allows a parent to transfer assets to a supplemental needs trust (with a payback provision) *without a corresponding penalty for gifts made within the five-year lookback period*. Some quick examples below show how profound this can be:

*Example 1.* Susan Smith is 80 years old, and her health is rapidly declining. She is the surviving parent of Peter Smith. Peter is 60 years old and has had a disability since birth. Susan's primary goal is to maximize what is left to Peter, and she wants to know if it is too late to protect her assets from being spent down on the nursing home care. In this situation, Susan could establish and transfer assets into a "first-party" supplemental needs trust (that contains a payback provision to the state) for Peter that would help him for the duration of his

life. Even though Susan would be transferring assets within the five-year lookback period, *there would be no penalty*. Assets transferred into Peter's supplemental needs trust would benefit Peter, and upon *Peter's* death any remaining assets in the trust would be paid back to the state for benefits provided to Peter during his lifetime.

*Example 2.* Assume the same facts above, except in this example Susan has suffered a stroke and has become incompetent, with a prognosis of an extended nursing home stay. In this second example, Susan's appointed "agent" under her power of attorney could create the "first-party" supplemental needs trust (with a payback provision) for Peter, and Susan's assets could be transferred into it, thereby protecting the assets for Peter's lifetime until his death<sup>9</sup>.

Wrapping this all together, we might instruct a healthy client who wants to (1) protect assets from nursing home costs and (2) preserve assets for a child with a disability to set up an irrevocable third-party supplemental needs trust (which does not have to pay the state back upon the child's death). If this is done five years prior to the *parent's* nursing home crisis, the assets placed in the supplemental needs trust should be insulated from the parent's nursing home costs and *remain protected* for the child with a disability, enhancing the child's quality of life until the child deceases, at which point assets remaining would pass back to family members free of any claim by the state. Alternatively, if the declining health of a parent prevents this optimal planning from working, we could still instruct the client on how to protect assets from the nursing home and protect such assets for the child's lifetime, subject to the payback requirement<sup>10</sup>.

## SUMMARY

Supplemental needs trusts offer important solutions for families who have children with disabilities. Families who plan well in advance can achieve asset protection from nursing home costs and for their children without diminution of the assets upon the child's death. Families who have not planned well in advance still have powerful planning options to protect property from the high costs of nursing home care. If you have a child with a disability, please (1) consider, if you have not done so already, creating and possibly funding a third-party supplemental needs trust that does not contain payback provisions, (2) consider preparing and nominally funding a first-party supplemental needs trust that does have payback provisions, to be on "standby" to receive assets in a crisis and (3) make sure your power of attorney is up to date and contains the specialized language needed to create these helpful trusts in a crisis. **FT**

<sup>8</sup> Both "first party" supplemental needs trusts and "pooled" trusts are typically funded with the child's own assets, but a major distinction between the two types of trusts is how they are administered. A first-party trust is private, whereas with a pooled trust, assets are combined and managed collectively with other children's assets.

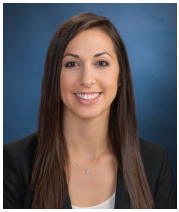
<sup>9</sup> There are some good lessons in these examples. First, it shows the value of creating and funding a third-party supplemental trust well ahead of time (to avoid the requirement of a "payback"). Second, it shows how important it is to have a well-prepared power of attorney that allows the creating and

funding of these specialized trusts even if one has lost capacity. Third, some clients may wish to prepare and nominally fund a first-party supplemental needs trust (with a payback provision) ahead of time, so that it is on "standby" and ready to be used immediately if a crisis presents itself.

<sup>10</sup> This payback requirement is a strong incentive to plan ahead of time, as assets transferred in advance of a crisis do not have to be paid back to the state.

## SOCIAL SECURITY AND REPRESENTATIVE PAYEES

by Lauren E. Miller, Esq.



The Social Security Administration (“SSA”) has long used the representative payee program to designate who will manage the funds of a minor or incapacitated beneficiary. As demand for this program is growing, the government is reviewing how the program functions and the role of a representative payee (also referred to as a “rep payee”).

The representative payee program requires that SSA benefits are managed outside the parameters of conventional legal planning. Conventionally, when children, adults with disabilities and elders need help handling their money, an attorney develops an estate plan to manage and preserve their funds. The plan may include setting up a trust, executing a durable power of attorney (if the individual has capacity to do so) or filing for conservatorship. However, when it comes to SSA benefits, none of these conventional techniques are recognized by SSA. SSA does not recognize the authority of a power of attorney or conservator. Instead, the SSA uses its own system for designating a party to manage the federal benefits of a minor or SSA beneficiary. This party is called a “representative payee.”

*The SSA uses its own system for designating a party to manage the funds of a minor or incapacitated benefit recipient.*



preference list for adults comprises a parent, legal guardian, spouse, or other relative with legal custody. These are followed by a person who either has custody or shows a strong concern for the well-being of the beneficiary. Last, a public or nonprofit corporation would be considered. As of December 2016, more than 63% of all representative payees were parents of the beneficiaries. SSA favors individual representative payees because there is a greater chance that they will have a close understanding of the beneficiaries’ financial needs.

Appropriate parties may apply to become a representative payee in person at a local Social Security office. The prospective representative payee must complete form SSA-11 to request to be selected as the representative payee, and must provide his or her Social Security number or employer identification number if the individual represents an organization.

In addition to managing the beneficiary’s funds, representative payees are responsible for holding the SSA benefit funds in an account that is separate from other monies owned by the beneficiaries, and they must file annual accountings. In practice, the accountings filed for SSA retirement or disability insurance benefits are much less complex than the accountings for SSI benefits, which are needs-based rather than based on an entitlement. Parents who serve as representative payees for a son or daughter with a disability, may find the accounting process burdensome because parents are often juggling reporting requirements and eligibility reviews for other needs-based programs such as Medicaid. On a positive note, parents may soon see a reduction in their representative payee reporting requirements. In January 2018, the U.S. House Ways and Means Social Security Subcommittee released a report which outlined recommendations for the challenges facing the Representative Payee Program. According to the Social Security Subcommittee chairman, Sam Johnson, the report “shows why we need to make changes to Social Security’s representative payee program now,” and “makes a number of commonsense recommendations to strengthen the program.” Specifically, the report recommends that Congress waive or reduce the reporting requirements for custodial parents and legal guardians of minor children, as well as spouses living with adult beneficiaries. Other recommendations in the report include re-evaluating the order of preference for representative payee selection, and developing strategies to inform the public about resources related to the representative payee program — including how to report suspected abuse.

The report is the result of a two-year investigation into the representative payee program with a goal of strengthening and improving its functionality. This signals anticipation of the growing demand for this program and, as a result, the importance of refining the management, oversight, and reporting requirements. While providing an SSA recipient with an opportunity to manage his or her own funds is often preferable, in certain cases the appointment of a representative payee is necessary to protect the beneficiary from being exploited or unintentionally wasting his or her benefits. **FT**

The Representative Payee program began in 1935, following the enactment of the 1935 Social Security Act. With the expansion of Social Security benefits, as well as the creation of the Supplemental Security Income (SSI) program in 1972, the need for representative payees increased dramatically. By the year 2000, approximately 13% of all beneficiaries had a designated representative payee. Today, the representative payee program helps almost 8 million SSA recipients manage their benefits. As the baby boomer generation joins the ranks of SSA beneficiaries, the need for representative payees will continue to grow.

Under the representative payee program, SSA presumes that a beneficiary has the capacity to manage his or her own benefits unless the beneficiary is either a minor or an adult who has been determined to be legally incapacitated. However, a representative payee may be appointed if SSA determines that an SSA beneficiary is unable to manage his or her funds. If a representative payee is needed, SSA will select an appropriate person to serve, based on preference lists. The top of the



## JOIN US IN CONGRATULATING ATTORNEY MEREDITH GREENE

In recognition of her legal ability, expertise, commitment, and community involvement, Fletcher Tilton is proud to announce Meredith Greene has been elected as an officer of the firm.

Meredith's practice focuses on special needs planning, and she regularly meets with family members of individuals with special needs to develop a plan of care for their loved one, including complex estate plans, supplemental needs trusts, guardianship & conservatorship, Department of Developmental Services and adult services advocacy, and government benefits advocacy. Meredith lives in Sudbury and works from the firm's Framingham and Worcester offices.

## UPCOMING SEMINARS

### ESTATE PLANNING AND ELDER LAW SEMINARS

**With Attorney Michael Lahti**

**Tuesday, June 12** - 10 a.m. and 1 p.m.

**Location:** Lafayette House, Foxborough, MA

**Tuesday, July 24** - 10 a.m. and 1 p.m.

**Location:** Colonel Blackinton Inn, Attleboro, MA

**Tuesday, August 14** - 10 a.m. and 1 p.m.

**Location:** Lobster Pot, Bristol, RI

**Tuesday, September 4** - 10 a.m. and 1 p.m.

**Location:** Kirkbrae Country Club, Lincoln, RI

**Tuesday, September 25** - 10 a.m. and 1 p.m.

**Location:** Connors Center, Dover, MA

### SAVE THE DATE

#### HOUSING: CREATIVE SOLUTIONS, OPTIONS AND CHALLENGES

**Saturday, September 29** - 8:30 a.m.-12:30 p.m.

Courtyard Marriott, Marlborough, MA

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

#### HOW TO ADMINISTER A SPECIAL NEEDS TRUST

**Saturday, October 27** - 8:00 a.m.-1:30 p.m.

Courtyard Marriott, Marlborough, MA

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

**For details and to register, visit our website [FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)**

## WE ARE AVAILABLE TO TALK TO YOUR GROUP

Attorneys from our Special Needs Practice can speak to your group of professionals or families on the topics outlined below. Contact us at 508-459-8079 to schedule.

1. Home Control and Ownership through Proper Planning
2. Coming of Age: Autonomy, Emancipation, and Decision-Making Options
3. Transition from Studenthood to Adult Life
4. Planning for a Lifetime: Special Needs Planning Essentials
5. Everything You Always Wanted to Know about Government Benefits for Persons with Disabilities But Didn't Know Who to Ask

**TIME:** Seminars are typically 1-2 hours.

**FEE:** No fee for parent advisory boards, parent organizations and nonprofit organizations.



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You can do so by telling us in an email sent to: [solutions@fletchertilton.com](mailto:solutions@fletchertilton.com) or by calling us at 508.459.8095.

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

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