



# HELPING HAND

An Update from the Special Needs Practice Group

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## PRACTICE GROUP MESSAGE

By Frederick M. Misilo, Jr., Esq.



With the holiday season right around the corner, we normally have an opportunity to be with family and friends who we may not have had the chance to be with during the year.

And, of course, it's a time to catch up on significant events that have occurred over the past year, to share stories and, perhaps, reminisce about past holidays that have come and gone. During these holiday festivities, my clients are frequently asked by family and friends how they can help set aside a part of their estate for the benefit of a family member with a disability. A useful tool to accomplish this is a Family Special Needs Gift Trust. This is a trust that you can establish for the specific purpose of receiving assets from the estates of extended family members and friends. Following the creation of a Family Special Needs Gift Trust, a "Dear Family/Friends" letter can be distributed to extended family members and friends containing the appropriate language that can be incorporated into their estate plan. The creation of this type of trust creates a convenient and reliable vehicle to receive

a portion of the estate of a family member or friend which can then be managed by the beneficiary's parents for the benefit of their son or daughter. Of course, the funds held by a Family Special Needs Gift trust are not considered resources owned by the beneficiary (for purposes of financial eligibility for means tested government benefits). For clients who have already established a Third Party Special Needs Trust as part of their estate plan, a Family Special Needs Gift Trust can be written so that eventually it can eventually be merged into the pre-existing Third Party Special Needs Trust when that trust is funded after the death of both parents. If you haven't added this type of trust to your estate plan and if you have extended family members and friends who have an interest in including your family member with a special need into their estate plan, you should seriously consider adding this to your special needs plan.

I wish all a happy and enjoyable holiday season and a very happy New Year!! **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).

## PUTTING ALL THE HYPE ABOUT LONG-TERM CARE IN PERSPECTIVE

by Frederick M. Misilo, Jr., Esq.

We've all heard or read the daunting statistics of our aging population and the pending crisis in long-term care. For example, every day 10,000 baby boomers (those born from 1945 to 1965) turn 65 years old. A 2005 study estimated that 58% of men and 79% of women will need long-term care at some point in their lives. This same study reported that the average stay in long-term care is 2.2 years for men and 3.7 years for women. The average annual cost of assisted living in the U.S. is reported to be \$43,200, with the average private pay rate for nursing facilities being \$91,250.

These statistics are often used by agents selling long-term care insurance or by attorneys who tout the absolute necessity of putting your home and other assets in an irrevocable trust. Both strategies



Home care services, community support services and family care providers make staying at home longer a real possibility.

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may be helpful. But before these and other options are undertaken, it is important to put planning for long-term care in perspective.

Where one can receive long-term care has undergone a massive evolution over the last several years. Many people can now receive some form of long-term care without having to move to a skilled nursing facility. Home care services, community support services and family care providers make staying at home longer a real possibility. Under the Program of All-Inclusive Care for the Elderly (PACE), eligible seniors can receive community-based Mass Health-funded services while remaining at home. PACE can help pay for some long-term care services in an assisted living facility rather than in a medical-oriented skilled nursing facility.

*Rapid technological advances in remote medical monitoring, virtual care management and on-call response systems will likely provide seniors with greater capacity to remain home longer in the relatively near future.*



There are also loans available for eligible seniors for modifications to the home to accommodate diminished physical capacity. Rapid technological advances in remote medical monitoring, virtual care management and on-call response systems will likely provide seniors with greater capacity to remain home longer in the relatively near future.

The development of continuing care retirement communities and assisted living facilities has provided seniors with the opportunity to make a thoughtful transition from their home to a community with a robust set of opportunities for personal enjoyment and comfort. While these settings do have up-front costs and on-going fees, it has been my observation that such environments optimize the possibility of having long-term care services provided to the senior in her or his living unit rather than having the person move to a more restrictive skilled nursing setting. There is a big difference between a continuing care retirement community and a stand-alone assisted living facility. A continuing care retirement community provides a continuum of services and supports from independent living to assisted living to skilled nursing care. Many assisted living facilities do not provide this type of continuum. Transfer to a more restrictive setting is required if the assisted living facility is unable to provide the necessary services and supports to a senior who loses physical and/or mental capacity.

Planning for long-term care should be done in conjunction with other family members, financial advisors and a competent elder law attorney. This type of planning should not be undertaken lightly. A transfer of a home to an irrevocable trust has consequences. It is important to fully appreciate these consequences in light of your lifestyle, the amount of savings you have and your willingness to give up control over an important asset. This area of the law is constantly changing, and given the anticipated increase in the number of Americans needing long-term care, current federal and state laws regarding financial eligibility, asset transfers and trusts will likely be further changed in order to lower the cost to government of long-term care. So there are no guarantees that what works today will be viable in the future.

A long-term care insurance policy should be purchased only after consultation with an experienced elder law attorney as well as other trusted advisors. There are myriad options to consider when selecting the long-term care policy that may be right for you. These considerations include, but are not limited to, the availability of existing funds or future income to pay for a portion of anticipated long-term care costs, careful scrutiny of what is and what is not covered under the long-term care contract, the length of the elimination period, your ability to maintain your lifestyle while paying for the premiums, the likelihood of being able to afford the premiums with retirement income, whether there is a death benefit associated with the policy and, of course, the length of coverage. There is no one-size-fits-all long-term care policy for everyone. Of course, you should never feel pressured to purchase a long-term care insurance policy.

Planning for possible long-term care is one part of a comprehensive estate plan. In addition to evaluating your options for long-term care, you should be planning to avoid probate with appropriate legal documents, minimizing your exposure to estate taxes, and ensuring that you have named the appropriate persons to make important financial, personal and health care decisions for you in the event of your incapacity.

The sheer abundance of information and the complexities in this area require careful analysis to determine what is right for you and for your family. As with any important decision we make in our lives, it is important to gather the right information with a set of trusted and competent advisors and evaluate your options. The often-used quote from Benjamin Franklin, "Failing to plan is planning to fail," is an apt way to close this discussion. With the right set of advisors and with careful planning, you can have peace of mind knowing that you've made important decisions in an informed fashion for you and your family. **FT**

## MA ABLE PROGRAM LAUNCHED: THE ATTAINABLE SAVINGS PLAN

by Theresa M. Varnet, Esq.

The Stephen Beck Jr. Achieving a Better Life Experience Act of 2014 (known as the ABLE Act) was signed into law by President Obama on December 16, 2014. The ABLE Act amended the Internal Revenue Code of 1986 to extend certain expiring provisions and to make technical corrections to the IRS code. This legislation, which took nearly nine years to pass, provides tax-free savings accounts to help individuals with disabilities and/or their families save funds in excess of \$2,000 without jeopardizing eligibility for means-based programs such as SSI, SSDI, Medicaid, SNAP and Section 8. Many compromises were made to gain passage of the bill. The original bill allowed all persons who qualify for SSI and SSDI to create an ABLE account. The bill, as passed, limits ABLE accounts to those persons who were disabled prior to the age of 26. Another compromise was the inclusion of a “pay-back” provision, which requires that if there are any funds left in the account when the disabled beneficiary dies, the state is entitled to reimbursement for the cost of all Medicaid-funded services received over the lifetime of the beneficiary. For this reason, ABLE accounts are sometimes referred to as Medicaid payback accounts.

Massachusetts launched its own ABLE program in May 2017. Massachusetts is the 21st state to launch such a program. The Massachusetts ABLE program is called the Attainable Savings Plan<sup>SM</sup>. The Attainable Savings Plan will be established and maintained by the Massachusetts Educational Financing Authority (MEFA). Fidelity Investments will be managing the funds and all distributions. The Massachusetts ABLE program allows qualifying individuals to save a maximum of \$14,000 per year without losing eligibility for means-based programs. The accounts can accumulate up to \$100,000 without jeopardizing receipt of SSI benefits and up to \$400,000 without jeopardizing Medicaid eligibility. The funds must be used for disability-related expenses that enhance or maintain an individual’s health or quality of life.

In order to utilize an ABLE account, the beneficiary must show “proof of disability.” Proof of disability is that the person was receiving SSI or SSDI prior to age 26. In those cases where a person did not receive benefits, he can have his or her disability certified by medical providers and qualify to use an ABLE account. The ABLE account allows disabled individuals to accumulate funds that will grow tax-free. The account can be funded only with after-tax funds -- and will be treated similar to a Roth IRA account. All contributions to the account must be in the form of cash and not in the form of stocks or other assets.

Any person can make a non-tax-deductible gift to the account. The income earned on the account will not be taxed, and

distributions for qualified goods and services will not be taxed. However, should a withdrawal be made for a nonqualified good or service, the withdrawal will be subject to a tax as well as a penalty. Qualified distributions include distributions made for 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 and/or burial expenses.

ABLE accounts should be seen as another planning vehicle to help create a more comfortable and enriched life for persons with disabilities. Families should be cautioned that while these accounts have been compared to 529 accounts, they have a distinct difference in that the 529 account can be distributed to named remainder beneficiaries when the primary account holder dies. A 529 account can also receive multiple gifts of up to \$14,000 per year from several family members. An ABLE account is only allowed to receive a total of up to \$14,000 per year from all sources. With an ABLE account, the funds remaining in the trust at the death of the account holder are first used to pay back the state Medicaid agency for the cost of Medicaid-funded services the beneficiary received since the date of the creation of the ABLE account.

It needs to be stressed that SSI will only disregard up to \$100,000 in an ABLE account as a resource of the beneficiary. If an ABLE account has more than \$100,000 at any time, SSI will suspend SSI benefits until the account is spent down below the \$100,000



*The ABLE account allows disabled individuals to accumulate funds that will grow tax-free. The account can be funded only with after-tax funds -- and will be treated similar to a Roth IRA account.*

level. Once the account is spent down to below \$100,000, SSI will be reinstated without the need for reapplication. As stated above, keep in mind that total annual contributions from all sources is \$14,000 per year, and the maximum value of the ABLE account will be restricted to the state limit for 529 plans. Currently, in Massachusetts, the state limit for a 529 plan is \$400,000. An

individual will retain Medicaid eligibility as long as the ABLE account in Massachusetts has no more than \$400,000. It is important to note that if more than \$14,000 is contributed in any one year, the ABLE account will lose its exempt status and the entire account will be deemed an available resource.

Other key features of ABLE include the following:

- Contributions into an ABLE account can be made by any person, including the disabled individual
- Contributions will not be tax-deductible
- Income earned by the accounts will not be taxed
- Account withdrawals, including portions attributable to investment earnings generated by the account, for qualified expenses would not be taxable
- Individuals are limited to one ABLE account, and total annual contributions by all individuals to any one account would be subject to the gift tax limit, which is currently \$14,000 per year;
- Aggregate contributions to an ABLE account would be subject to an overall limit matching the state limit for 529 accounts (\$400,000 in Massachusetts).

The following is a list of rules for ABLE accounts:

- **Disability Qualifications:** In order to open an ABLE account, one must swear under penalty of perjury that s/he has a disabling condition that manifested itself prior to the age of 26 or show proof that s/he was eligible for SSI or SSDI prior to the age of 26.
- Only one account is allowed per person. If a second account is opened, the funds in the second account will be deemed as available by needs-based programs.
- Anyone can contribute money to an ABLE account. This includes a trust or the owner of the account who is disabled.
- Contributions are capped at \$14,000 per year. This limit is equal to the annual personal gift tax exclusion, so it may increase over time. The limit is to one account per person, not per donor. The owner of the account is responsible for keeping track of all contributions to be sure that they do not exceed \$14,000 per year.

- If one is receiving SSI, the account cannot exceed \$100,000. As stated above, SSI eligibility will be suspended if the account exceeds \$100,000. SSI will resume when the account is spent down to below \$100,000.



*ABLE accounts should be seen as another planning vehicle to help create a more comfortable and enriched life for persons with disabilities.*

- If one is receiving Mass Health (Medicaid), eligibility will be lost if the account exceeds \$400,000.
- Funds must be used for Qualified Disability Expenses (QDEs). QDEs are expenses that are related to the disability of the account owner.
- If used for QDEs, the account funds are not taxed. Distributions made for QDEs are tax-free, and income earned in an ABLE account is not taxed.
- Unused funds remaining in the account following the death of the owner are paid to Medicaid for the cost of all Medicaid benefits received. Only after Medicaid has been reimbursed for all Medicaid-funded services can remaining funds in the account be distributed to the account owner's legal beneficiaries.
- Persons from other states can invest in the Massachusetts ABLE account.

For more information on a Massachusetts ABLE account, known as the Attainable Savings Plan, you can contact a special needs law attorney at Fletcher Tilton PC. Fletcher Tilton PC can also provide you with a chart that compares the First Party Special Needs Trust, Third Party Special Needs Trust and Attainable Savings Plan. The following sources can also provide more information on ABLE/the Attainable Savings Plan:

- [ABLE National Resource Center - ablenrc.org](http://ABLENationalResourceCenter.org)
- [Fidelity.com/able](http://Fidelity.com/able)
- [mefa.org/attainablesm-able-savings-plan](http://mefa.org/attainablesm-able-savings-plan)

**FT**

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## THREE COMMON MISCONCEPTIONS ABOUT QUALIFYING FOR MASSHEALTH LONG-TERM CARE BENEFITS

by Lauren E. Miller, Esq.



An attorney working long enough in any area of the law will inevitably find there are certain misconceptions that many clients have. Here are three misconceptions I come across time and time again in my practice as an elder law attorney.

### 1. “I can gift \$14,000 to my kids each year, and it won’t impact my MassHealth eligibility.”

This is by far the most common misconception that comes up in client meetings. Under tax law, the first half of this statement is accurate. The federal tax code allows you to gift up to \$14,000 (the current annual gift exclusion) per person, per year, without the requirement of filing a gift tax return. If you gift more than \$14,000 to someone in any given year, you must file a gift tax return, but you will not owe any tax unless you have exhausted your lifetime gift tax exclusion of \$5.49 million. There is currently no gift tax in Massachusetts.

However, in the world of MassHealth, the rules are very different. For MassHealth long-term care eligibility, gifts of any amount in the five years prior to applying for MassHealth may be considered “disqualifying transfers.” A disqualifying transfer creates a penalty period equal to the number of days the gift would have covered the cost of care in the nursing home. Unfortunately, this penalty period is imposed when you are “otherwise eligible,” i.e., in a nursing home with \$2,000 or less in assets. In other words, you could find yourself living in a nursing home with no assets or access to MassHealth benefits for weeks, months or longer. Even though you may have given it with the best intentions, the gift can jeopardize your eligibility for care down the road.

After learning this, clients often then ask if this means that they cannot give any gifts at all. The answer to that question really depends on the particular facts and circumstances of your situation. Generally, MassHealth is not looking to penalize an applicant for giving small gifts throughout the year for events such as holidays, graduations and weddings. However, during

the application process, the MassHealth caseworker will comb through up to five years of bank statements for each of your accounts, and he or she has the right to ask you to verify any transaction. If you are uncertain as to whether a gift will jeopardize your future MassHealth eligibility, it’s best to consult an elder law attorney prior to making the gift.

### 2. “I can save money by letting the nursing home complete my MassHealth application for free.”

If you enter a nursing home with little to no money, or are already in a nursing home and running out of money, the nursing home will tell you that you need to apply for MassHealth, and sometimes it will also offer to submit the application for you for free. This may seem like an attractive offer for certain patients who have no resources to hire an attorney. But oftentimes, letting the nursing home complete your MassHealth application will not save you money. Attorneys are better versed in spend-down strategies that allow you to preserve certain assets, present the facts of any potentially controversial financial transactions and establish MassHealth eligibility sometimes months or years before the nursing home could have. When a MassHealth spend-down is inevitable, paying legal fees to retain an attorney to advocate on your behalf, rather than paying the nursing home privately for a number of additional weeks, results in no financial difference to you. Hiring an attorney provides you with expert legal counsel to represent you through the MassHealth application process. For those who have few or no assets, but have, for example, gifted away assets in the past five years, hiring an attorney may allow you to reduce or eliminate a MassHealth penalty period that is all but certain without the help of an elder law attorney.

### 3. “Once I’ve been approved for MassHealth, I should cancel my other health insurance policies.”

When you are approved for MassHealth long-term care benefits, you should not cancel your other health insurance because doing so will not save you any money. When your MassHealth benefits begin, you will owe a monthly payment to the nursing home called the “Patient Paid Amount” or “PPA.” The PPA is calculated by totaling your monthly income, and then deducting (1) any health insurance premiums, (2) a \$72.80 personal needs allowance and (3) occasionally other qualified expenses. If you cancel your health insurance, that amount will no longer be deducted from your PPA, and your PPA will increase by the amount of the premium. Because this results in no net savings, it is best to keep your health insurance, which may cover medical costs above and beyond those covered by MassHealth. **FT**

*When you are approved for MassHealth long-term care benefits, you should not cancel your other health insurance.*



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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