



HELPING HAND

A Monthly Update from the
Special Needs Planning Practice Group



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How to Administer a Special Needs Trust
Saturday, October 18, 2008

APRIL 2008

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A MESSAGE FROM THE PRACTICE GROUP CHAIR

APRIL 2008

By Frederick M. Misilo, Jr., Esq.

In this edition of Helping Hand, our featured article deals with the issue of adult support payments. This is an area of law that has importance for a large number of guardians who have their adult son or daughter living with them. As a consequence of having an adult son or daughter with a disability living with them, a parent/guardian can incur significant costs. Many parents in these circumstances are unaware of their rights for some financial relief. I hope you find this article written by Attorney Marisa Higgins informative and useful.



Another area that I have found to be relevant in some situations is using medical malpractice recoveries to fund a supplemental needs trust. While many disabilities occur through the fault of no one, some severe intellectual and physical disabilities do result from an error or omission by a health care provider during the pre-natal period or during the birthing process. When this happens, a successfully prepared medical malpractice claim can garner significant funds to be used, in part, to pay for future services and

supports. One important limitation to such actions in Massachusetts is the statute of repose. Basically, the statute of repose sets time limits on when to bring a medical malpractice action on behalf of a minor. In Massachusetts, a claim brought on behalf of a minor must be brought within three years from the date of the alleged malpractice except that a child under the age of six years has until his ninth birthday but not later than seven years from the date of the alleged malpractice except where the action is based upon leaving a foreign object in the body. As you can imagine, many parents may be unaware of this time limitation and can be so overwhelmed with the stress and demands of caring for a child with a severe disability that they may inadvertently pass up the opportunity to bring such an action.

In a decision decided in February, 2008, the Massachusetts Appeals Court recognized an alternate theory of recovery even when the child's malpractice claim was brought after the running of the statute of repose. In Chase v. Curran, the Appeals Court determined that the statute of repose would not be a bar to a claim for fraud and intentional falsification of

The FTW Special Needs Planning Practice Group provides legal counseling, advocacy and innovative solutions on behalf of individuals with differing abilities 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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NEWS BRIEFS

Economic Stimulus Payments Not Income

The special economic stimulus payments authorized by Congress in February will not affect the benefits of persons receiving Supplemental Security Income (SSI) or other federal benefits.

The Social Security Administration (SSA) has issued instructions explaining that the stimulus payments, amounting to as much as \$600 for individuals and scheduled to be sent to tax filers over the next several months, do not count as income in determining SSI eligibility and will not count as a resource for two months following the month in which they are received. EM-08029 (Feb. 28, 2008).

A person whose sole source of income is SSI is not eligible to receive a stimulus payment, but many SSI recipients who have at least \$3,000 in other annual income, such as Social Security benefits, are eligible to receive the payments. However, an income tax return must be filed in order to receive a stimulus payment.

For more information on the stimulus payments and what income tax forms to file, go to www.irs.gov or call 1-800-829-1040.

Special Needs Planning for Extended Family Members

Planning for your son or daughter with a disability extends beyond the nuclear family—it also extends to grandparents, aunts and uncles, and brothers and sisters. To ensure eligibility for government and other benefits is maintained, possible inheritances must be taken into account when drafting a special needs trust.

Read the complete article by attorneys Fred Misilo and David Guarino at ftwlaw.com or email smurphy@ftwlaw.com or call (508) 459-8021 to request a copy.

IN THE NEWS

Frederick Misilo, Jr., Esq. was elected President of **The Arc of Massachusetts** at the organization's annual meeting on April 7. He previously served on their Board of Directors.



MESSAGE

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medical records where the health care providers are shown to have intentionally falsified medical records to cover up their negligence. In this case, during the course of delivery the mother exhibited signs of a complication known as a prolapsed cord in which the umbilical cord is delivered through the vaginal canal before the fetus. Upon learning this, the obstetrician alerted personnel and an emergency Caesarian section procedure was performed. Upon delivery, the infant required resuscitation due to a lack of oxygen. Years later, during the discovery process in a malpractice claim against the obstetrician, the parents learned that two health care providers who were present in the delivery room hid from the medical records the fact of a failed initial attempt to insert a breathing tube into the infant and that he was left without oxygen for several minutes before a second doctor took over the resuscitation and got the oxygen flowing properly.

The Appeals Court concluded that these two health care providers failed to disclose these facts for the sole purpose of hiding their errors. Therefore, the Appeals Court reasoned that the parents should not be prevented from seeking damages for the medical malpractice which the two health care providers sought to fraudulently cover up and the parents were allowed to pursue their claims based on fraud.

In fraud cases, the application of the statute of limitations is suspended if the plaintiff can demonstrate that the defendant fraudulently concealed material facts from the plaintiff which prevented the plaintiff from learning of the cause of action. So, the end result in this case permitted the parents to pursue damages against the two health care providers caused by the negligent actions they sought to fraudulently conceal from the medical records.

For feedback or questions, contact me at (508) 459-8059 or fmisilo@ftwlaw.com.

IN THE NEWS

The Probate and Family Court is now using new Medical Certificate Forms (CJ-P 112) in guardianship cases involving disabled individuals. The new form can be downloaded from the Court's webpage at www.mass.gov.

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Send an email to smurphy@ftwlaw.com with the subject: **SNP Newsletter** and we'll add you to our list.

ADULT SUPPORT PAYMENTS

FINANCIAL OBLIGATION OF A NON-CUSTODIAL PARENT DOES NOT NECESSARILY END WHEN CHILD SUPPORT DOES

By Marisa W. Higgins, Esq.



For most non-custodial divorced parents, the obligation to pay child support terminates at the latest upon their child's reaching the age of 23. Under Massachusetts law, however, it is well-settled that non-custodial divorced parents who are financially able may be compelled to contribute to the support of their adult son or daughter who has a serious intellectual, developmental or other disability. In support of its determination that non-custodial parents may be obligated to provide support for that adult son or daughter to the fullest extent possible, the Feinberg Court recognized the following principle:

The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at a certain age or becomes an adult; nor is it limited to infants and children of tender years. Where an adult son or daughter with a significant intellectual, physical or developmental disability under guardianship is living with a parent, the non-custodial parent may be required to make support payments to the custodial parent.

The custodial parent must petition the Probate and Family Court to seek an order compelling the non-custodial parent to make such payments. The determination of whether to issue such an order is based on the individual circumstances of the parties. Similarly, the amount of such order is also based on the Court's review of a variety of individual factors of each case including, but not limited to, the financial circumstances of the non-custodial parent, the degree of financial support required by the custodial parent and the ability of the adult son or daughter to support him or herself financially.

When this situation exists, a court can impose a legal obligation on a non-custodial parent who is financially able to furnish necessary assistance to continue support payments over the course of their adult child's lifetime.

For feedback or questions, contact me at (508) 459-8041 or mhiggins@ftwlaw.com.

IMPORTANT FACTORS ABOUT ADULT SUPPORT PAYMENTS

Parents should be mindful of the following as it relates to an action for post-majority support:

- ▶ In order to successfully maintain an action for post-majority support, it is necessary to show that the adult at issue cannot through reasonable means provide for his or her own support. In other words, the disability must make him/her incapable of self-support.
- ▶ If you are the custodial parent seeking support on behalf of your adult son or daughter with a disability, it is important to identify and quantify his or her reasonable needs. In Massachusetts, there is no authority requiring the Court to apply the Child Support Guidelines in determining the proper level of support. In most cases, it appears that the Court will look to the son or daughter's reasonable needs as balanced by the non-custodial parent's ability to provide support.
- ▶ If you are challenging an action brought by the custodial parent for post-majority support, it will be necessary to demonstrate that your son or daughter has, at least to some extent, the ability to provide for himself or herself. Any government benefits received may also be relevant in determining whether your son or daughter's reasonable needs are being met without the need for additional parental financial support.
- ▶ Finally, and most importantly, it is necessary to retain counsel who is well-versed in the intersection between financial support for a person with a disability and his or her eligibility for government benefits. An order of the Court labeling the post-majority support as "child support" would likely result in a loss of need-based government benefits. Adult support payments should be directed into an appropriately drafted supplemental needs trust in order to avoid the unnecessary loss of government benefits.