

# Estate Planning for the Parent(s) of a Child with Disabilities

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# ESTATE PLANNING FOR THE PARENT(S) OF A CHILD WITH DISABILITIES

## I. INTRODUCTION

Children who are born with or develop disabilities are often eligible to receive income from one or more programs administered by the Social Security Administration. Other programs are available to provide payments for medical care. Often these programs have eligibility criteria which limit their availability to children who have limited assets. For that reason, it is vitally important for the parents of persons eligible to receive these benefits to consider whether these benefits are important to their children and, if so, to design their own estate plans in such a way that they provide for their children but do not disqualify them from receipt of benefits to which they are otherwise entitled.

Social Security Disability Income Benefits (SSDI) and Medicare are available to otherwise eligible persons regardless of financial need. Supplemental Security Income (SSI) and MassHealth (MH) are available to eligible persons who can demonstrate financial need. The key to planning for the person with disabilities who receives or plans to receive benefits based on financial need (need-based benefits) is to structure a plan that will complement, rather than replace, benefits from relevant need-based financial and medical assistance programs. A successful estate plan will segregate the bequest for the child with disabilities, and the income generated therefrom, in an appropriate trust to prevent ineligibility for these benefits.

This paper will review three topics:

- A. The eligibility rules of the public benefit programs most commonly available to persons with disabilities;
- B. How a bequest can be left for the benefit of a child who receives public benefits without affecting those benefits; and
- C. How a trust holding the bequest can be administered to minimize interference with public benefits.

## II. INCOME AND MEDICAL PROGRAMS

### A. Income Programs

1. *SOCIAL SECURITY DISABILITY INCOME (SSDI)*. Social Security pays monthly disability benefits to an insured person

who is unable to engage in substantial gainful activity by reason of a medically determinable impairment which has lasted, or can be expected to last, for at least twelve months. The amount of those benefits is determined by the amount of money that has been paid into the Social Security system by the wage earner on whose record the benefits are being paid, not by the financial need of the recipient. Children of a wage earner can often qualify to receive benefits based upon a parent's earnings once the parent is either retired, disabled or deceased.

2. *SUPPLEMENTAL SECURITY INCOME (SSI)*. SSI is a program intended to guarantee a minimum income to persons who are disabled (as described above in the section on SSDI) and whose Social Security benefits are relatively low or who are not insured under the Social Security system. The amount of an individual's SSI benefit is based on the individual's financial need. Until a child is 18 years of age or living independently, whichever is earlier, the income and assets of the parents are deemed to the child. The basic eligibility requirements are as follows:

- a. *Income*

The maximum SSI benefit which is available to a Massachusetts resident in 2009 is \$788.39 if disabled and \$823.74 if blind (unless residing in an assisted living facility).

If an SSI recipient has "unearned income", \$20.00 a month of this income is ignored. One advantage of the SSI program in Massachusetts is that any person eligible for SSI is also automatically eligible for MassHealth.

- b. *Assets*

In order to receive SSI, a person must have not only low income but also countable assets which do not exceed \$2,000. The following are non-countable assets:

- (1) home which is used as principal place of residence;

- (2) automobile of any value;
- (3) life insurance with a face value of \$1,500;
- OR
- a separately identifiable amount set aside for burial and funeral expenses of \$1,500 or less;
- OR
- irrevocable trust available to meet funeral arrangements;
- (4) inaccessible assets; and
- (5) personal possessions such as furniture, other household goods and personal effects.

c. *Transfer of asset disqualification*

On December 14, 1999, the Foster Care Independence Act of 1999 reintroduced a transfer of assets penalty in the SSI program for all transfers made after that date. As a result, with few exceptions, any SSI applicant who gives away assets within 36 months of applying for SSI will not qualify for a certain period of time. The length of the penalty is determined by dividing the amount of the transfer by the SSI federal benefit rate plus the SSI state supplement. The penalty period starts on the date of the gift.

Transfers to certain statutorily defined trusts are exempt from penalty as are transfers to certain persons such as disabled children.

## B. Medical Programs

1. *MEDICARE*. Medicare is federal health insurance that is available to persons who have been disabled for two years or, in some cases, for less time, and who are receiving or are eligible to receive Social Security disability or retirement benefits regardless of the person's financial need. Part A is hospital coverage and is free. Part B reimburses doctors' fees and has a monthly premium. Part C pays for prescription drugs. A Medicare recipient can purchase a Medigap policy from a private insurer or enroll in a Medicare Advantage plan to supplement Medicare. A Medigap policy or Medicare

Advantage plan is advisable because Medicare coverage is limited. The additional coverage is available regardless of a person's medical condition, with very few exceptions.

2. *MASSHEALTH (MH)*. MassHealth is a medical assistance program administered by the Commonwealth with federal and state money. MassHealth pays for hospital care, doctors' bills, prescription drugs, home health care, and sometimes, long term care in public or private intermediate and skilled facilities. The eligibility rules for MassHealth for medical services in the community are different from the rules for MassHealth payment of long term care in a nursing home.

- a. *MassHealth Standard for Services in the Community*

A person who receives SSI in Massachusetts automatically receives MassHealth for services in the community. If a person does not receive SSI, he/she must meet certain financial eligibility tests in order to qualify for MassHealth.

- (1) *Income*

If a person's income is too high for SSI, he may still be eligible for MassHealth services in the community. The income limits depend on age. For a person under 65, the income limit in 2010 is \$1,201 for an individual and \$1,615 for a couple. For a person 65 and over, the income limit is \$923 for an individual and \$1,235 for a couple but if income is too high, he (they) may nevertheless be eligible with a spenddown if he (they) has large medical bills.

- (2) *Assets*

For a person 65 and over, there is an asset limit as well as an income limit for MassHealth services in the community. A person can have maximum countable assets of \$2,000. All assets other than the following are countable:

- (a) home which is used as a principal place of residence and household goods (in Massachusetts);
- (b) automobile of any value;
- (c) life insurance with a face value of \$1,500 or less (SSI family) or \$2,000 (AFDC family);
- (d) a separate identifiable amount expressly set aside for burial and funeral expense of \$1,500 or less;
- (e) prepaid irrevocable burial contract; and
- (f) inaccessible assets such as term life insurance, assets held by the Court, and certain trusts.

(3) *Transfer of assets disqualification*

There is no transfer of asset disqualification for persons seeking MassHealth to pay for most medical services in the community other than certain long term care services.

b. *MassHealth for Long Term Nursing Home Care*

(1) *Income*

There is no income test for MassHealth services for long term care in a nursing home. So long as the cost of the nursing home exceeds the patient's income, income is not a problem.

(2) *Assets*

The asset test for MassHealth services for long term care in a nursing home is the same as the asset test for persons 65 and over in the community [see 2.a.(2). above] *except* that if a person is married, assets are disregarded for the benefit of the healthy spouse.

(3) *Transfer of assets disqualification*

A MassHealth long term care applicant who gives countable assets to a nonexempt person or trust within 60 months of applying for MassHealth to pay for the cost of long term care, will be denied MassHealth for one day for each \$274 given away commencing on the date of the gift. \$274 is supposed to represent the average daily nursing home rate in the State.

c. *MassHealth CommonHealth or Kaleigh Mulligan*

There are some special programs, a discussion of which is beyond the scope of this paper, under which certain disabled individuals can qualify for MassHealth despite the amount of available income or assets.

### III. A PARENT CAN LEAVE A BEQUEST TO A CHILD WITH DISABILITIES WITHOUT CAUSING INELIGIBILITY FOR NEED-BASED BENEFITS

Because any property available to an SSI recipient, or to certain MassHealth recipients, is considered an asset for MassHealth and SSI purposes, it is important that the parents of such recipients consider structuring their estates so that the property they leave for the benefit of any child with disabilities is not accessible to those children. That means that no otherwise countable assets should be left to the disabled children outright. Instead, parents of such a child should leave that child's share of the estate in a third party Special Needs Trust (SNT) for the benefit of the child.

A SNT created for the benefit of a person with disabilities should not require the trustee to make any specific distributions to the beneficiary. Instead, the trust should give the trustee complete discretion with regard to the distribution of trust income and principal. As long as the trustee has no obligation to make distributions to the beneficiary, the beneficiary will be unable to compel distributions and, therefore, the trust will not be considered an accessible asset of the child for SSI and MassHealth eligibility purposes.

Often a SNT created by a parent for the benefit of a child with disabilities is used not only by the child's parents in their own estate planning but also by

grandparents, aunts and uncles, in fact, by anyone who wants to leave a bequest for the benefit of said child. These individuals simply name the trust, rather than the child, as a beneficiary.

#### **IV. ADMINISTRATION OF A SPECIAL NEEDS TRUST FOR THE BENEFIT OF A CHILD WITH DISABILITIES**

The Trustee(s) of a SNT must understand not only what the creators of the trust had in mind when creating and funding the trust but also the rules of any public benefits program from which the beneficiary is receiving assistance.

Relative to the intent of the creator of the trust, often the creator of the trust provides a letter to the persons who will serve as trustees to tell the story of the trust's beneficiary as a way of explaining how the trust can best be used to enhance the beneficiary's life. These are often referred to as letters of intent.

Relative to public benefits, the trustee must be educated about the impact of distributions from that trust on the child's need-based benefits and how distributions can be made which will not affect ongoing benefits. The trustee should try to make distributions in a way that will not be treated as income to the recipient or, if it is, so that the distribution reduces benefits less than the actual dollar value of the distribution.

##### **A. SSI**

A person who receives SSI has met three eligibility tests: (1) the recipient is either aged, blind or disabled; (2) the recipient's income is limited; (3) the recipient's resources are limited. The receipt of income by an SSI recipient can have an effect on eligibility for, or the amount of, benefits.

Income is counted, and affects eligibility, in the month of receipt. In the month following the month in which it is received, any of the income that remains is treated as a resource. Receipts from the sale, exchange or replacement of a resource are not income but are resources that have changed their form. Thus, if an exempt resource, such as a home, is sold but not replaced, the proceeds of the sale are not income but are resources. This section discusses the effect of the receipt of unearned and in-kind income on the ongoing benefits of an SSI recipient.

## 1. *WHAT IS INCOME?*

*Income* for SSI purposes is anything received in cash or in-kind which can be used to meet the recipient's needs for food or shelter. Income includes both earned and unearned income. In-kind receipts can also be treated as income. In-kind income is not cash, but is actually food or shelter, or something you can use to obtain food or shelter.

The SSI regulations specify some things that are not *income* because they cannot be used as food or shelter or to obtain food or shelter. They include medical care and services; social services; a loan or repayment of a loan (except for interest the SSI recipient receives on the money that has been loaned); the payment of the recipient's bills directly to the supplier (so long as the products for which the bills are paid are not defined as in-kind income); and receipt of an item that would be excluded as a non-liquid, non-countable resource. A trustee should try to make distributions for the benefit of an SSI recipient/beneficiary which will not be characterized as income or in-kind income. The SSI regulations give the following examples to explain when a gift is not income and the impact of receipt of non-countable assets.

**Example 1:** A community takes up a collection to buy you a specially equipped van which is your only vehicle. The value of this gift is not income because the van does not provide you with food or shelter and will become an excluded non-liquid resource under § 416.1218 in the month following the month of receipt.

**Example 2:** You inherit a house which is your principal place of residence. The value of this inheritance is income because the house provides you with shelter and shelter is income.

## 2. *WHAT IS THE IMPACT OF RECEIPT OF INCOME?*

SSI determines how much of a recipient's income is countable. The first \$20 per month of unearned income is not countable. There are other exclusions. Once countable income is

determined, it is deducted from the maximum SSI payment the person would otherwise receive. The result is the amount of the monthly SSI payment.

3. *DOES THE PAYMENT OF BILLS FOR AN SSI RECIPIENT CONSTITUTE INCOME TO THE RECIPIENT?*

The payment of an SSI recipient's bills is not counted as income to the recipient. However, the value of anything received because of the payment is income if it meets the definition of in-kind income. In-kind receipt of food or shelter or something that can be used to purchase food or shelter is treated as *in-kind* unearned income. The regulations give the following example.

**Example:** If your daughter uses her own money to pay the grocer to provide you with food, the payment itself is not your income because you do not receive it. However, because of your daughter's payment, the grocer provides you with food; the food is in-kind income to you. On the other hand, if your brother pays a lawn service to mow your grass, the payment is not income to you because the mowing cannot be used to meet your needs for food or shelter. Therefore, it is not in-kind income as defined in § 416.1102.

The payment of bills for services such as medical services, social services, cleaning services, transportation services, telephone services, newspaper or magazine subscriptions, cable television, Internet Service, airline tickets that the SSI recipient cannot cash in, or for health insurance premiums, do not constitute in-kind income.

If an item purchased for an SSI recipient could be sold to generate cash to pay for food or shelter, then it is considered in-kind income and is generally valued at its fair market value. However, the Social Security Administration (SSA) has special rules for valuing food or shelter that is received by an SSI recipient. Shelter includes room, rent, mortgage payments, real estate taxes, heating fuel, gas, electricity, sewerage and garbage. SSA presumes that the shelter provided to an SSI

recipient is worth an amount which is roughly equal to one-third of the federal benefit rate (the federal benefit rate is currently approximately \$674 a month for an individual).

## **B. MassHealth**

A person who receives SSI in Massachusetts automatically receives MassHealth. A person *under 65* who does not receive SSI but does receive MassHealth has met two eligibility tests: (1) the recipient is either under 18, the parent of a dependent child, or aged, blind or disabled; and (2) the recipient's income is limited (unless he receives MassHealth through the CommonHealth program). If the person is *65 or older*, or receiving MassHealth to pay for long term care services, the recipient has met a third test: limited resources. The receipt of income by a MassHealth recipient can have an effect on eligibility for, or the amount of, benefits.

For the most part the MassHealth rules are similar to the SSI rules relative to receipt of income. The receipt of income affects the MassHealth recipient in one of three ways. If the recipient lives in the community and is under 65, it could make him ineligible by putting his income over the income limit. If the community recipient is 65 or older, the receipt of income could increase the recipient's spenddown, i.e., the amount of funds a recipient must pay for medical services before MassHealth will take over. If the recipient lives in a nursing home, the receipt of income would ordinarily increase the recipient's patient paid amount (monthly payment to the nursing home) unless the patient's spouse is entitled to receive additional income from the nursing home spouse for the monthly maintenance needs allowance. Notably, unlike SSI, the MassHealth program does not count in-kind income received by the recipient.

## **IV. IN CONCLUSION**

A parent of a child who is disabled can establish a fully discretionary third party Special Needs Trust for a child who is eligible to receive need-based benefits which will not affect the child's eligibility for those benefits. Further, with a thorough understanding of the income rules, a trustee can administer a trust for the benefit of an SSI or MassHealth recipient to enhance the life of the recipient without jeopardizing eligibility for MassHealth or SSI or the amount of the SSI benefit.