

The Polner Abrahams Report

The Source For Intelligent Estate and Elder Law Planning

Courtesy of The Law Office of Beth Polner Abrahams

Volume 3 Issue 2

Celebrating... Our Fifth Anniversary!

Five years ago – following twenty years of law practice – I opened my firm in Garden City. Since then, and more than 500 clients later, it is still my privilege to listen to the stories of individuals and families, and create plans to secure a legal future for them and their loved ones.

Some of these cases – and my legal representation – are particularly memorable:

- The single parent appointed guardian for her infant daughter after a tragic negative reaction to a childhood vaccination and eight-year process to secure benefits under the federal Vaccine Compensation program;
- A 100-year-old gentleman determined to remain in his apartment, out of a nursing home
- Five retarded siblings cared for by their seven other siblings in the family home, and now appointed guardians to make health care decisions as their siblings age.

Other legal stories are thankfully run-of-the-mill:

- Parents who make the time for wills and estate planning, and leave my office knowing that their minor children or disabled children will be protected with trusts
- Busy seniors planning for retirement, who update their estate plans and keep powers of

attorney and health care proxies current.

As they exhale, these clients often say, “Now we can close this chapter and move on.”

The objective of my law firm is to provide quality legal representation personalized for you and your unique legal needs in estate planning, elder law, special needs planning, guardianship litigation and estates.

To fulfill my personal commitment to public education, I also conduct workshops, at no charge, on how to do a 17A guardianship proceeding for a retarded or developmentally disabled child, as well as planning for seniors with powers of attorney and health care proxies. In addition, I offer in-house reviews for professionals and their constituents in the elder law and special need area.

Yes, it has been a wonderful five years. Thank you for your confidence in me and my law firm.

Welcome to the fifth issue of my quarterly newsletter. Each



edition addresses concerns of the elderly and disabled, their families and guardians. Please email your comments to Info@bpaElderLaw.com.

Attention Special Education PTAs! At no charge, I will gladly visit schools and non-profit organizations to provide an introduction to 17A Guardianship proceedings and the value of Special Needs Trusts. Please call (516) 741-9175 to schedule a convenient presentation date for the 2007-2008 school year.

Our office is located at 300 Garden City Plaza, Suite 404, Garden City, adjacent to the Roosevelt Field Mall. For directions, please visit our [website](http://www.bpaElderLaw.com) or telephone our office.

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Pay Back Special Needs Trusts

In the last article on special needs trusts (SNTs), I discussed the importance of these trusts as part of your estate plan. Testamentary special needs trusts – those that spring to life after your death and which can hold and manage an inheritance for a loved one with disabilities – are an invaluable tool for raising the quality of life of a family member.

In 1993, Congress passed a special needs trust law (called an ‘exception trust’). That law, modeled on New York State law, permits a disabled individual under age 65 to have income and/or resources greater than the usual State Medicaid limits of about \$2,000.

Why Use a Pay Back Special Needs Trust?

In some instances, the disabled loved one inherits funds from a family member who didn’t realize he or she should have prepared a will or trust with a testamentary SNT. Sometimes, the onset of the disability – such as Multiple Sclerosis, Parkinson’s disease, or the result of an accident – occurs after years of savings and hard work.

Pay back special needs trusts permit the disabled individual to keep assets; and this often means the difference between having the funds to continue to be able to live in their homes and communities rather than be institutionalized for care.

Just about any asset can be retitled to the trustee of the pay back SNT, such as bank accounts, investment accounts, life insurance with cash

surrender value, and if appropriate, the home owned by the disabled individual. While IRAs and other retirement-type accounts may be transferred to the SNT, there are better strategies for protecting retirement accounts. Please be sure to discuss these with my office before retitling IRAs to the SNT. Also note that savings bonds are not transferable to an SNT.

How Is the SNT Established and Who May Act as the Trustee?

The pay back trust may only be created by a parent, grandparent, court or legal guardian for a disabled person under age 65 years.

If there is no living parent or grandparent and the disabled individual does not need a legal guardian (due to retardation or developmental disability; or under Article 81 of the Mental Hygiene Law due to incapacity), there is now a streamlined procedure for a competent adult to establish the SNT if they live in Nassau or Suffolk counties.

This procedure, handled in Surrogate’s Court, requires an attorney to prepare the necessary legal papers requesting that the Surrogate’s Court establish the pay back SNT. Nassau and Suffolk counties each have different procedures. A modified version of this procedure, in Supreme Court, is used for residents of Queens and New York counties.

With the rising costs of health care, specialized therapies and supplies, as well as cutbacks in governmental programs like Medicaid, the pay back special needs trust remains a wonderful ‘safety net’ for disabled individuals whose families were unable to plan ahead, or those who experience the onset of disability later in life.

Medicaid Update

In February 2006, Congress passed severe legislation amending Medicaid statutes in place since 1993, and in some instances, since 1987. That legislation, the Deficit Reduction Act ("DRA") of 2006, largely impacts the poor and middle class without long-term care insurance.

Most families want to preserve their assets – the family home or vacation home, investment accounts – for their own retirement and for the next generation.

Many of my clients also want these assets available to secure their own care-at-home plan if they are unable to afford or medically qualify for long-term care insurance.

The biggest change to the Medicaid laws was in 'crisis' planning. With DRA, there is no rule of halves. This strategy was often used by advocates when Medicaid eligibility was required sooner rather than later.

The strategy generally went something like this: a senior owned nonexempt assets of \$300,000 and transferred one half of those assets to his or her children in May 2005. Under our prior laws, the penalty period (during which the senior is not eligible for Medicaid), began the month after the month of the gift (for example, June 2005). The remaining one half (\$150,000) of funds was used to privately pay for nursing home care during this period of ineligibility (\$150,000 divided by nursing home fees @ \$10,000/month = 15 months). The balance of assets was preserved for the family.

DRA changed this and effectively eliminated the rule of halves as of February 8, 2006.

The new law states that the penalty period does not begin until the senior/applicant is in a nursing home and is 'otherwise eligible for Medicaid,' another complicated legal hurdle.

The only exception to this rule is for transfers to irrevocable trusts or by deed or gifts of non-exempt assets made more than five years before the need arises for Medicaid.

For example, if a senior transfers \$300,000 to an irrevocable income trust in March 2006, and nursing home care is required more than five years later, the penalty period has passed and Medicaid eligibility may be established.

Complicated? Yes.

Impossible to plan? No, not with a qualified attorney.

The DRA did not change the laws about exempt and permissible transfers, typically, transfers between husband and wife; transfers to disabled adult children; transfers of the family home to a caretaker child residing with the parents for two years, or transfers of the family home to siblings living together for one year.

Over the next several issues of this newsletter, I will discuss the strategies available to help preserve assets and enable seniors to remain at home, or, if medically critical, to receive care in a nursing home.

DO YOU KNOW A SUPPORT GROUP OR NONPROFIT that needs an update on Medicaid, Medicare, Special Needs Trusts or Guardianships for the retarded and developmentally disabled?
Call my office to arrange for a presentation in 2007 at no charge.

Update: Getting Organized

Summer is a good time to review your estate planning documents. Call our office if you need help answering these questions:

- Is your will or trust up-to-date?
- Who will inherit your assets?
- Do you need to minimize or eliminate NYS and/or federal inheritance taxes?
- Should life insurance be purchased and transferred to a life insurance trust?
- Is a trust better than a will in order to avoid multiple probate proceedings?
- Have your family circumstances changed due to a second marriage or non-traditional living arrangement?
- Do you know how to arrange for a legal guardianship (17A or Article 81 for incapacitated) for your disabled or impaired loved one who requires a special needs trust?
- Can your assets safely pass without a will or probate?
- Are your Durable Power of Attorney and Health Care Proxy valid?
- Are the powers and authority for your agents keeping pace with changes in the law?
- Have you updated your agents for financial and health care decision making?
- Is a legal guardianship required to manage a family member's decisions?
- Have you planned for long-term and nursing home care?
- Do you qualify for long-term care insurance to pay for future care needs?
- Did you know that transfers to trusts or gifts made after February 6, 2006 create a 5-year period of ineligibility for Medicaid services in a nursing home and skilled nursing care at home?

DOES YOUR ORGANIZATION NEED MORE COPIES OF THIS NEWSLETTER?

Call my office at (516) 741-9175 and we will arrange to mail additional copies at no charge.

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Dedicated to providing quality, caring and personalized legal representation.

Handling all aspects of estate and tax planning, elder law and representation of incapacitated and disabled adults in guardianship proceedings.

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