Special Needs Law Group of Massachusetts, PC

presents

The Year in Review:

A *Brief* List of Key Developments in Special Needs Advocacy and Planning, Estate Planning, and Elder Law in 2016

January 10, 2017

Happy New Year! We've gathered for you, a baker's dozen of what we consider to be the most significant legal developments in 2016 (and a few that may be upcoming) affecting the world of elder law and special needs.

1. The Special Needs Trust Fairness Act

Many programs for the disabled, such as SSI (Social Security Supplemental Security Income) and some forms of Medicaid ("MassHealth" in Massachusetts) have limits on the amount of assets a person can have and qualify for benefits … typically $2,000. Since 1993, disabled persons have been able to have their excess assets owned by statutory form of special needs trust authorized by Congress at 42 USC §1396p(d)(4)(A), otherwise known as a "d4A Trust." These d4A trust assets do not count toward the $2,000 asset limit. The trust is for the sole benefit of the disabled person during his or her life, can be funded at any time up until the disabled person turns 65 years old, and must have a provision requiring Medicaid payback on the disabled person's death.

A drafting glitch in the 1993 statute required such trusts to be created by the disabled person's parent, grandparent, or legal guardian, or by a court of law … but did not allow a disabled legally competent adult to create their own d4A Trust. This omission made it necessary for such disabled adults without a living parent to endure the expense and delays of petitioning a court to establish such a Trust.

Congress has now rectified the problem, and as of December 8, 2016, a legally competent disabled adult under the age of 65 can now create their own d4A Trust, saving significant delay and legal expenses.

2. Subsidized Housing and Special Needs Trusts

City and town housing authorities are typically charged with administering federal (Section 8) and state subsidized housing programs. Most of these programs charge rent of 30% of a program participant's income. Federal housing law requires that funds received as a lump sum (such as an inheritance) are not income (but rent is adjusted based on the income the lump sum can earn). Yet, if that same lump sum were received in the form of a trust, many of those authorities around the nation were treating any distributions from a trust as income to the trust beneficiary, effectively taxing the lump sum at 30% as it was used. The authorities were doing this regardless of how infrequent the distribution, and even if the distribution was not cash to the beneficiary but rather to pay for something for the beneficiary (like a medical expense).

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The federal First Circuit Court of Appeals in *DeCambre v. Brookline Housing Authority* rebuked this practice, at least with respect to a d4A Trust funded with the housing program participant's own funds, ruling that only the income earned by the trust, when distributed, can be counted as income for these housing programs. The Court left open the question of whether a special needs trust funded by a third-party (such as an inheritance) would receive similar treatment.

We have heard that Brookline Housing Authority has requested US Supreme Court review, but so far no word on whether that case will advance. In the meantime, many housing authorities around the country and even in Massachusetts are telling recipients that this case does not apply to them, so individuals with special needs continue to struggle to get appropriate and affordable housing.

3. *Heyn v. Director of the Office of Medicaid*

The MassHealth agency has since 2009 been conducting a war on various forms of trusts that had for years been understood to be non-countable assets for Medicaid purposes under federal law. In April 2016, the Massachusetts Appeals Court in *Heyn* dealt the MassHealth agency a well-deserved legal blow.

MassHealth has repeatedly denied benefit claims by saying that a trust that can distribute only income to the beneficiary applying for MassHealth can distribute the entire trust to the beneficiary, and therefore the trust is countable. Three of the most egregious arguments MassHealth has made to support this thinking are: (1) Most trusts have broad power in the trustee to make investments. Therefore, the trust could buy an annuity, and since all annuity payments are income, the entire trust can be distributed. (2) If the trustee has discretion to make distributions of principal to other beneficiaries, those other beneficiaries could give money to the MassHealth applicant. (3) Because the trust could sell its assets to the beneficiary (who is broke, remember) at fair market value, that means the trustee can distribute everything to the beneficiary.

The *Heyn* court struck down all three arguments in a concise, well-reasoned opinion.

These and other MassHealth attacks are characterized by gross mischaracterization of centuries-old trust and property law and federal Medicaid law, and worse offenses. However, few of our seniors and disabled can afford to fight a state agency with an annual budget in excess of $16 Billion. But finally, with *Heyn*, the tide may be turning.

Kudos to the Massachusetts Chapter of the National Academy of Elder Law Attorneys, which filed an amicus brief cited by the court in its opinion.

4. Affordable Care Act Effect on MassHealth Spousal Waiver

Medicaid Waiver Programs are largely intended to keep medically frail persons at home, or get them home. In Massachusetts, those Waiver programs are: the Frail Elder Waiver, the Intellectual Disability Waiver, the Acquired Brain Injury Waiver, the Traumatic Brain Injury Waiver, and the Money Follows the Person Waiver. The most well-known of these is the Frail Elder Waiver.

For many years, the Medicaid Waiver programs in Massachusetts provided that the income and assets of the spouse of the MassHealth applicant would be ignored in determining

eligibility. As a byproduct of the Affordable Care Act, this is no longer the case. Like a nursing-home applicant's community spouse, the non-applicant spouse will be limited to countable assets of $120,900.

The change affects those on a Medicaid Waiver in Massachusetts where eligibility was determined on or after January 1, 2014. PACE (the Program for All-inclusive Care for the Elderly) is unaffected by the new rule.

Note: Worse, and unlike nursing-home Medicaid, the income of both spouses would be used in determining program eligibility under new proposed MassHealth regulations that violate federal law (see Item #9 below). Under the proposed regulations, if combined gross income of the couple were over $2,205 per month, a massive medical spenddown of the month's income to just $542 would be necessary to qualify … which does not leave enough for the couple to survive. This effectively eliminates the Frail Elder Waiver program for most couples, unnecessarily splitting up long term marriages and forcing the ill spouse to a nursing-home, where the care will cost the taxpayers far more than the Frail Elder Waiver program.

5. Disabled Military Child Protection Act

On December 19, 2014, the Disabled Military Child Protection Act became law, allowing a military parent to designate a special needs trust, rather than a disabled child directly, as the parent's survivor beneficiary. While the law should have been drafted to allow designating a third-party supplemental needs trust as the beneficiary, as a parent can do with any of the parent's assets, the law was written so that the beneficiary must be a first-party special needs trust … the kind that has a Medicaid payback provision. The special needs trust can be either private trust (a "d4A Trust") or a pooled trust (a "d4C Trust").

Just one day prior to 2016 (and thus qualifying for inclusion in this Year in Review), the Department of Defense issued a memorandum with rules implementing the law. The new rule permits the child's surviving parent, grandparent, or court-appointed guardian to designate the special needs trust as the beneficiary if the deceased military parent do not get around to it while living. Unfortunately, the new rule does not address whether anything can be done for the situation where the deceased military parent did not elect a survivor benefit for the disabled child because of the prior inability to assign the benefit to a special needs trust.

6. IDEA case goes to United States Supreme Court

Signifying the increasing importance of the special needs community, the United States Supreme Court has for the first time since 1982 agreed to take a case involving the standards required under the IDEA. In this Colorado case – *Endrew F. v. Douglas County School District* – parents brought suit, claiming that the school district did not provide an adequate education for their autistic son as required by the 1975 Individuals with Disabilities Education Act (IDEA). They pulled their son from public school after the fourth grade, and sued seeking damages from the school district to reimburse them for the tuition they paid thereafter for Endrew's private schooling.

The trial court and the federal 10th Circuit Court of Appeals held that IDEA only requires the district to provide students with "some educational benefit". Judges in other federal circuits have held the IDEA requires more.

In the Supreme Court's 1982 case, it held that the IDEA guarantees disabled students access to public school classrooms. That ruling, however, did not address the standards of the education that must be delivered to the disabled student.

The United States Solicitor General filed an amicus brief stating that the educational standard of "merely … more than de minimis" set by the 10th Circuit was too low.

As an additional indication that the special needs community is being taken more seriously, the Supreme Court also agreed to hear another case involving the IDEA, this one from Michigan (Fry v. Napoleon Community Schools). Although the case "merely" involves procedural issues, procedural rights often determine substantive rights, and the case, heard in October, bears watching.

Our country spends a good deal of its national, state and local budgets on education, yet disabled students with equal intellectual capacity as their nondisabled peers are failing at a much higher rate than the typical student. *Endrew* is a key case worth watching and oral arguments are scheduled to begin January 11, 2017.

7. New and Revised Social Security POMS

The Social Security Administration affects a great many of our clients, by its disability determinations, payments for SSI or SSDI, and its impact on MassHealth (Medicaid) eligibility.

The Social Security Program Operations Manual System is a very large and detailed set of procedures for local offices to follow in various matters, including evaluating claims and trust countability. Officially the POMS are not regulations and do not have the force of law, but in practice they are and do.

This year revisions and additions to the POMS were mostly of interest to practitioners. The changes added provisions for ABLE Accounts, and a requirement that a denial for being over-asset on account of trust countability include specific references to the offending trust sections. The ABLE provisions are welcome because although ABLE accounts were authorized by federal and many state statutes already, in practice no state would begin offering accounts without this addition to the POMS. The requirement of specificity regarding trusts may seem technical to the public, but the impact on the public is that this should speed resolution of trust controversies and reduce legal costs.

8. ABLE Account Update

ABLE Accounts are financial accounts available for persons who became disabled prior to age 26. They are non-countable and have a Medicaid payback at death, but without the hassle of administering a (d)(4)(A) Trust.

The first ABLE Accounts were offered by Ohio on June 1, 2016. As of today, accounts are offered by Alaska, Florida (residents only), Kentucky (residents only), Michigan, Nebraska, Ohio, Tennessee, Rhode Island, and Virginia. A change to federal law in late 2015 made an ABLE account in one state qualify as an ABLE account for a resident of any other state, so even though Massachusetts does not have any ABLE accounts, a Massachusetts resident who is otherwise eligible can now establish an ABLE account.

9. MassHealth Proposed Regulations: Their Attempt to Regain Some Ground

MassHealth issued sweeping proposed revisions to its regulations on November 22, 2016, allowing for the shortest possible time for the public to prepare to comment (December 16th). ***MassHealth has been busy and this section is long so bear with us!***

Pervasive throughout the proposed regulations are attempts to "load the dice" in favor of denying benefits and to give the MassHealth agency near arbitrary power to approve or deny benefits. The phrase "as determined by the MassHealth agency" appears in at least ten of its new regulations. This appears to be an attempt to persuade the courts that a decision by MassHealth under any such regulation is not reviewable by a court. There are numerous instances of a change from a clear rule to a fuzzy and ambiguous rule – this means that potential MassHealth members are left unclear as to just what the rules are, and gives MassHealth far more power to arbitrarily deny an innocent applicant on the basis that the applicant has done something "wrong". For example, any transfer for less than fair market value is presumed to have been for the purpose of qualifying for Medicaid and therefore disqualifying. This includes birthday gifts to grandchildren and donations to your local church.

And among the proposed regulations are several that violate federal law. Examples:

- A requirement for a valid d4A Trust that the beneficiary have been determined disabled by Social Security or MassHealth at the time of creation.
- A prohibition of private annuities.
- Restriction on penalty-free transfers to a d4A Trust only for the benefit of the disabled transferor or the transferor's disabled child. Federal law permits transfers to a d4A Trust for the benefit of any disabled person.
- An attempt to make an end-run around any pending decision adverse to MassHealth in the *Nadeau* and *Daley* cases described below at Item # 13.
- Counts the income of both the MassHealth member who is on or applying for MassHealth Home and Community Based Waiver Services and the member/applicant's spouse. See Item # 4 above.

The proposed regulations even violate Massachusetts law by allowing the MassHealth Board of Hearings discretion in issuing a subpoena requested by an appellant. Other changes which are not or may not be violations of federal law or state statute, but which are nonetheless simply mean and nasty, include:

- Imposition of transfer penalties for persons on or applying for Home and Community Based Waiver Services, even if they were already approved and receiving benefits under the Waiver at the time these regulations become effective.
- Imposes a transfer penalty on persons who fund a d4C pooled trust when they are age 65 or older. Whether or not such a transfer penalty is imposed by federal law is presently an unresolved matter of contention among the various states and federal courts. In our view, those courts and agencies that have concluded no transfer penalty is imposed by federal law are correct. Given the current uncertainty, however, MassHealth is under no compulsion to impose such a penalty, which may end up

costing the Commonwealth more due to the resulting inability of the elderly to live in the Community on a MassHealth Waiver.

In addition, the proposed regulation would entitle MassHealth to disqualify persons on MassHealth now who made a transfer to a d4C pooled trust within the last five years in reliance on prior regulations.

- An impossible to meet timeframe for an executor to be appointed to appeal a deceased MassHealth applicant's MassHealth denial.

Our thanks to the members of the Massachusetts Chapter of the National Academy of Elder Law Attorneys who made great sacrifices of their time to put together thirty-seven pages of detailed and thoughtful commentary on the proposed regulations in time for the deadline.

10. Tax

Like Social Security POMS, this year was primarily of interest to practitioners. The biggest noise was generated by the release of proposed regulations governing Internal Revenue Code Section 2704. The proposed regulations would impact the federal estate tax of certain wealthier decedents by reducing or eliminating the gift tax valuation discount of transfers of certain closely held business or entity interests.

Eighteen states plus the District of Columbia impose some kind of estate or inheritance tax. It was nineteen states, but Tennessee repealed its estate tax effective January 1, 2016. Major changes in 2016 were: Maine increased its exemption from $2,000,000 to the federal exemption level of $5,450,000 in 2016 ($5,490,000 in 2017). The District of Columbia raised its exemption from $1,000,000 to $2,000,000, possibly higher under certain conditions. New Jersey enacted a law repealing its estate tax (but not its inheritance tax) as of 2018.

Looking ahead to 2017, scheduled exemption increases occur for Maryland (to $3,000,000), Minnesota (to $1,700,000), and New York ($5,250,000 on April 1st). Inflation increases to the exemption occur in Delaware, Hawaii, Maine, Rhode Island and Washington.

No states increased their estate tax rate. Massachusetts holds steady at a variable rate structure for decedents with a taxable estate over $1,000,000.

Coming in 2017?

11. The Political Scene

Although making any changes in government is extremely difficult, we seem to be living in a time in the United States when the politically unexpected is likelier to happen than usual.

Among the more likely possibilities over the next two years are: repeal and replacement of the Affordable Care Act, or at least massive reform; block-granting to states of Medicaid dollars; repeal of the federal estate tax along with carryover basis at death; significant changes to the individual federal income tax including a reduction in the number of brackets and lowering of rates; and a reduction of the corporate income tax (among the highest in the world). In particular it seems that the Republicans, now in control of the Presidency and both Houses of Congress, are in a position where they must "put up or shut up" regarding income-tax reform, and makes such reform a near-certainty in 2017. They also need to "put up or shut up"

regarding the Affordable Care Act, but the complexity of reforming or replacing it, plus the political intricacies in Congress necessary to get it done, may make this more difficult than the campaign rhetoric allowed.

12. ABLE Act proposals

A number of changes to the ABLE Act were proposed in Congress in 2016 to make them more useful, including raising the age of disability onset from 26 to 46, allowing rollovers from 529 Plans to ABLE Accounts, and increasing the $14,000 annual contribution cap for those who can work. These don't look likely to pass, as currently they don't have much political support.

13. MassHealth cases

Nadeau and *Daley* are two important cases coming on the heels of *Heyn* challenging the MassHealth agency's abuse of power and reckless indifference to law. The central issue in both cases is whether a right retained by a trust creator to use and occupy the home, where the trust is irrevocable and prohibits distributions of principal to the trust creator, nonetheless makes the trust principal a countable asset for Medicaid purposes. Federal Medicaid law in conjunction with centuries-old trust law is clear that for trust principal to be "available" (and therefore countable) for Medicaid purposes, the trustee must be able to distribute principal from the trust back to the trust creator, which cannot be done under the *Nadeau* and *Daley* trusts. MassHealth is arguing that because the home is "available" to the trust creator to occupy, it is a countable asset. We hope that these cases will be quickly and appropriately dealt with by our Supreme Judicial Court, which heard both cases together on January 5, 2017.

Many thanks to the hard-working attorneys in the Massachusetts Chapter of the National Academy of Elder Law Attorneys who have worked on this cases.

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