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INSIDE

P&F REPORTER

Leaving Money to Your Children: When You Have a Special Needs Child

By Marcia C. Fidis

This is the second of a series of articles entitled "LEAVING MONEY TO YOUR CHILDREN". The first article "How to Leave Them at Peace Not War" was in the July 2004 newsletter.

Estate planning is critical for parents who have a "special needs" child, i.e. a minor or adult child who because of a disability might need extensive financial support and/or supervision after the death of the parents. Frequently the financial security of the child will depend on maintaining the child's qualification for government benefits available to persons with disabilities. However, special needs planning includes not only providing for the future financial security of the child, but also should address appropriate guardianship provisions so that a person is designated to take on the day to day responsibilities of supervising the child when neither parent is available to provide such supervision. The nature of the child's disability will affect the nature of the plan.

All parents, but particularly parents of children with disabilities, should have a will (or a "will substitute" such as a revocable living trust) which directs distribution of the parent's property at death. If a parent does not have a will then upon his or her death, the parent's property will be disposed of in accordance with the state law of the deceased parent's residence. In most cases, state law will provide that some or all of the parent's property will be distributed to the children. As discussed below, this situation can result in a loss of necessary government benefits for a special needs child.

Proper planning for a special needs child will usually include establishing a trust to hold the child's inheritance. A trust allows the parents to transfer the child's inheritance into a special trust account, name the trustee who will handle the child's trust, specify the uses of the trust property without disqualifying the special needs child from receiving government benefits and determine who is to receive the trust property upon the death of the special needs child.

Some parents may wish to avoid the use of a trust by leaving money to a sibling and relying on the sibling to take care of the special needs child. This is generally a poor substitute for estate planning. If the sibling dies, divorces, has judgments against him/her, or becomes incapacitated prior to the death of the special needs child, the money intended for the special needs child could pass to the sibling's beneficiaries (including the spouse) or judgment creditors or otherwise be dissipated and unavailable to the special needs child.

A special needs trust avoids the risks described above and is frequently the best vehicle for providing for a special needs child.

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P & F welcomes Faith D. Dornbrand as a partner in the Divorce & Family Law Group.

The Pasternak & Fidis Reporter

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SPECIAL NEEDS TRUST.

If the child with a disability receives – or one day may need to depend on - government benefits (such as Supplemental Security Income (SSI) or Medicaid or housing programs) for a person with disabilities, the parents should consider establishing a special needs trust as a part of their estate planning. Such a trust will allow parents to leave an inheritance to provide for the child without disqualifying that child from government benefits which may be available to the child.

Generally, if a person has assets of more than $2,000 in his or her name, that person will not be entitled to certain need-based government benefits, such as SSI and Medicaid benefits which are based on need. Depending on the state, need-based government benefits other than money and health care may be available to the child. These can include vocational rehabilitation, subsidized housing, personal attendant care which may also be based on need. With proper planning, a parent can leave an inheritance to a trust for a special needs child without disqualifying that child from government benefits based on need.

There are two types of special needs trusts. First is a special needs trust established by a parent or other person who is making a gift or leaving an inheritance to a child. This trust if properly drafted can provide for a child during the child's lifetime without disqualifying the child from government benefits. Further, because the assets did not come from the child's own assets, under current law, the trust will not have to include a "payback provision" for Medicaid benefits as discussed below. This trust can be set up during the parents' lifetime to hold gifts from parents to the child or, as is the more common case, it can be set up to come into being at the death of the parent(s).

A second type of trust is called a "payback" special needs trust. This trust is established with the child's own assets (rather than a parent's assets). For instance it can be established for a child who already has received an inheritance or already has other assets in his/her own name. These trusts are frequently used to hold a personal injury settlement or job earnings received by a child or an inheritance for the child received from a person who did not plan for the special needs child. If a trust meets the "payback trust" requirements of Medicaid law, the trust will not disqualify the beneficiary of the trust from receiving governmental benefits. However, the trust must contain a "payback" provision that, at the death of the child, Medicaid benefits provided to the child during his/her life must be repaid to the government before the assets are distributed to anyone else.

It is possible to have both types of trust for the same individual. A payback trust, for instance, might be created to hold a malpractice award settlement for damages suffered by the child or for an inheritance received by the child from relatives who were not aware of special needs planning. A second trust might be created for the same child by the parents as a part of their own estate planning, either by will or by creation of a trust during the parents' lifetime.

Because of the $2,000 asset limitation, parents with a special needs child cannot set up a Uniform Transfers to Minors Act custodial account, fund a 529 plan for education or set up a savings account for the child because these assets would cause the child to become ineligible for government benefits. Parents should not place assets in joint names with a child with a disability. Parents who wish to gift to a special needs child either during their lives or upon death should set up the special needs trust to hold these gifts or inheritances. If there are other relatives (such as grandparents, aunts or uncles) who may wish to make gifts or leave an inheritance to the special needs child, the parents may wish to set up a special needs trust during the parents' lifetime to provide a receptacle for gifts from these other relatives.

SELECTING A TRUSTEE AND CARE SUPERVISOR

So long as a parent is living, he or she will generally serve as the natural guardian for the special needs child and will supervise that child's living arrangements, activities and other needs if the nature of the disability is such that the child cannot be entirely responsible for himself/herself. Parents should plan carefully for living arrangements and any required supervision after the death or disability of the parents. If the special needs child has even limited capacity to be involved in this planning, it may be appropriate to include the child in such discussions. If the special needs child has other siblings, these issues should be discussed openly with them to determine their willingness and ability to assist. If the special needs child will require a legal guardian to make personal decisions about living arrange-

personal decisions about living arrangements and health care after the parents' deaths, the guardian should be identified and designated in the parents' wills. The parents should consider whether or not special provisions need to be put in the special needs trust to compensate friends or family members who may spend significant time and/or incur expenses to supervise the child or who may be willing to provide a home for the child.

Selection of the right trustee, and sometimes co-trustees, for the trust is another important aspect of special needs planning. Determining the right trustee requires consideration of the nature of the child's needs, the size of the trust, the skills and abilities of the potential trustee, whether or not a corporate trustee is advisable and the identity of persons available and willing to serve as trustee or care supervisor. For example, the special needs child's brother may be a willing and compassionate sibling but may lack the financial responsibility and skills to serve as sole trustee of the trust. However, he might be able to serve as co trustee or work with another trustee who has other skills required of a trustee.

LETTER OF INTENT

Organizations that provide services for persons with disabilities suggest that the parents, as a part of their planning, prepare a written letter directed to those who will supervise, care for or provide for the special needs child after the parents' deaths. Sometimes called a "letter of intent", this document is not legally binding. Rather, it is intended to assist those who will care for and interact with the special needs child after the parents are gone. It can help minimize the disruption that follow the death of a parent on whom the child depended. It provides a forum for the parents to describe their wishes for the child's future after they are gone. The letter should describe the child's history, the child's current status, skills and capacities, whether the child has the ability to work or live independently as well as the child's current need for supervision, financial support and medical, including mental health treatment. It should provide information about case managers and other resources, such as government benefits and support services that the child receives. It should include information about the child's family members and physicians. Each child is unique and this letter can provide a valuable tool for those persons seeking to understand and assist the special needs child. Professionals in the field of disability suggest involving the child in the drafting of this letter to the

PASTERNAK & FIDIS, P.C.

NEWS

P & F welcomes Faith D. Dornbrand as a partner in the Divorce & Family Law Group. Faith is a Magna Cum Laude graduate of Yale University, where she was a member of Phi Beta Kappa. She received her law degree from the University of California at Berkeley (Boalt Hall) where she was an Associate Editor of the California Law Review. *Washingtonian* magazine calls her "a family-law superstar" and has repeatedly listed her as one of the area's top divorce lawyers. Look for an in-depth profile of Faith in our February, 2006 newsletter.

Nancy Fax authored a feature article published in the September 26, 2005 edition of *Legal Times* which discusses the estate planning needs of domestic partners. "Beyond Traditional: Domestic Partners Can Use Trusts to Fulfill Their Estate-Planning Needs" discusses revocable living trusts, grantor retained interest trusts, qualified personal residence trusts, charitable remainder trusts, and other estate planning ideas for domestic partners.

Jan White will be a speaker at the 2005 Diversity and Women Leadership Summit and Gala to be held November 16-17 in Washington, DC. Jan, a partner in P & F's Divorce & Family Law Group, will discuss the legal and financial aspects of divorce.

Divorce & Family Law Group partner, Linda Ravdin, and Estate Planning & Administration partners, Nancy Fax and Marcia Fidis, have been selected for inclusion in the 2006 edition of *The Best Lawyers in America*. This reference book highlights an elite group of the most respected attorneys in the nation and is considered the most reliable and unbiased source of legal referrals available.

The November, 2005 issue of *The American Lawyer's* Trusts & Estates section will feature in-depth profiles of Marcia Fidis and Nancy Fax.

Estate Planning & Administration attorney, Lauren Krauthamer, spoke at the September meeting of the Estate Planning Council of Suburban Maryland. Lauren discussed estate planning for special needs children.

P&F Partner, Linda Ravdin was re-appointed Chair of the Publication Development Board of the American Bar Association's Family Law Section.

Financial Professio on Terrorism: OFA

On September 23, 2001, President Bush issued Executive Order 13224 to aid in the war against terrorism. This Order blocked all property and interests in property in the U.S. of certain individuals or entities, known as Specially Designated Nationals, who have committed, pose a risk of committing, assisting, sponsoring or financing acts of terrorism. Attached to the Order was a list of these Specially Designated Nationals. This list has been updated since September 23, 2001. Transactions or dealings by any U.S. person or within the U.S. in blocked property of these Specially Designated Nationals is prohibited.

Penalties for violations of the Order are significant. They include civil penalties which may be imposed regardless of the violator's intent and criminal penalties for willful transgressions. OFAC (The Office of Foreign Assets Control), a division of the Treasury Department, is authorized to block assets subject to the Order and maintain a list of individual Specially Designated Nationals and their entities whose assets are frozen and who are barred from conducting business dealings.

maximum extent possible so that the child can express his or her wishes, desires and concerns. The parents can periodically add to the letter so that it will become a valuable history which will be of great assistance to those responsible for caring for the child.

CONCLUSION

Proper estate planning for a special needs child can be a difficult and emotional experience for parents who already have challenging demands placed on them. Nevertheless, this planning is essential to provide as much protection as possible for the special needs child. Once it is in place, it can also provide a great source of relief to parents who know they have done their best to prepare for their child's future.

ons and the War AC Compliance

By Mitchell I. Alkon

OFAC compliance affects business professionals in many ways. The most obvious is the banking industry. Financial institutions receive transactional funds (including by wire and through the use of letters of credit) and conduct financial transactions. Institutions must therefore take steps to ensure that they are complying with OFAC requirements. Institutions should maintain OFAC compliance procedures, for if noncompliance is determined, then the procedures employed by the institution may be considered as a mitigating factor in determining the penalty.

The real estate industry is also particularly affected by OFAC. Landlords, both commercial and residential, conduct transactions with proposed tenants who may be Specially Designated Nationals and blocked persons. Further, Specially Designated Nationals may attempt to purchase real estate to launder, invest and secure funds in the U.S. and thus title companies and lenders assume OFAC obligations. Of course, in both leasing and sales transactions, real estate

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Spotlight on Marcia Fidis

Marcia Fidis, a member of the Estate Planning & Administration Group, is one of the founding members of the firm of Pasternak & Fidis, P.C., along with Al Pasternak (profiled in the June, 2004 issue of this newsletter). In addition to maintaining a busy estate planning practice, Marcia was the firm's managing partner for 18 years until August, 2004. During that time she presided over the firm's growth from 4 lawyers to 14.

Marcia did not start out to be a lawyer. Her undergraduate degree from Duke University was a B.S. in Chemistry. After undergraduate school she worked as a biochemist at a laboratory at University of Pennsylvania. She married and had two daughters.

After a number of years working in a lab, she started to think about a different course for her future. While scientific work was good, it was lonely. She wanted to be involved in work with more contact with people. Law school seemed like a good option but she gave serious thought to medical school as well. As it happened, the LSAT, the law school placement exam, came up before the medical school standardized test. She took the LSAT and did well. She started at American University Washington College of Law and received her law degree in 1976, two months before her third child, a son, was born. She took the bar exam a week before her son was born and remembers being so tired that she fell asleep in the exam room, waking up in a panic. Happily, she only slept for 20 minutes and was able to finish the exam.

After law school Marcia came to what is now Pasternak & Fidis as a law clerk. After passing the bar, she became an associate with the firm. In the early years, she worked on a variety of matters with no particular emphasis on any one practice specialty. Bruce Goldberg and Durke Thompson (now a judge of the Montgomery County Circuit Court) -- then partners in the firm – were important mentors in those years. From them she learned a great deal about collegiality.

Then Al Pasternak joined the firm. Al's primary work was in estate planning and Marcia began to work with him. Al became an important mentor. As Marcia did more estate planning work, she grew to love it. Estate planning requires a great deal of personal contact with clients and their family members. That has made the work enjoyable. She also likes the intellectual stimulation of the tax issues involved in estate planning. That motivated her to go back to Georgetown University Law School for an L.L.M. in Taxation so as to be able to work on the more complicated estates.

It may surprise some to know that estate planning is never boring. As a legal specialty, wills, trusts and the administration of decedents' estates has ancient roots. Yet there are always new developments. For example, medical science has enabled many more children born with disabling medical conditions to live long and productive lives. Planning for the parents of these children has become an increasingly important and challenging aspect of estate planning. (See accompanying article in this issue.) The law and customs regarding premarital agreements continue to develop in interesting ways as well. Many more couples now seek to enter into such agreements. Marcia, along with Linda Ravdin, a partner in the firm's Divorce & Family Law Group, is currently writing a manual for lawyers on drafting and negotiating premarital and domestic partnership agreements to be published by MICPEL (Maryland Institute for Continuing Professional Education of Lawyers).

Traditional trusts and estates work continues to be the core of Marcia's practice. That entails drafting wills, trusts, powers of attorney and advance healthcare documents, estate and income tax planning and the administration of an estate or trust after the death of a client. Counseling clients on how to achieve their personal estate planning goals brings Marcia a great deal of satisfaction. In addition to her estate planning practice, Marcia has an uncommon practice niche as an expert in the specific aspects of tax law that affect divorced and separated persons and in the division of retirement benefits and deferred compensation at divorce.

When she is not working Marcia likes to listen to music, to play music – piano, flute and organ – and to garden on the five acres surrounding the home she and husband, Nick, maintain on the Eastern Shore of Maryland.

When Child Support Does Not End At Graduation From High School– The Adult Disabled Child

By Anne (Jan) W. White

In most of the country, including Maryland, the District of Columbia and Virginia, parents have a duty to support adult children who are unable to support themselves because of a mental or physical illness or disability. Parents are well aware of their financial obligation to support their minor children, but they may be surprised to learn that their legal obligation to a disabled or ill child can continue indefinitely. The parents' obligation springs from the public consensus that children, including adult disabled children, are entitled to depend on their parents for support first and on the taxpayers only if parents are unable to provide for them. The courts of all three jurisdictions have recognized this consensus and imposed this support obligation on parents by law. Both Virginia and Maryland have also passed statutes to this effect and have criminalized the failure of parents to support their children, including adult disabled children. D.C. has imposed the obligation to support an adult disabled child by case law.

Most often, parents' quiet acceptance of this obligation to care for adult disabled children does not attract notice. However, when parents of adult disabled children divorce, the issue of their support often ends up in the courts. In all three jurisdictions, the courts have recognized that both parents owe a duty of support to their adult disabled children and have ordered the non-custodial parent to pay child support. The courts have been flexible in determining the amount of support and how it should be paid. In some cases the court may order support to be paid to the parent with whom the child is living or who is primarily in charge of monitoring the child's welfare. In other cases, courts may order that support be paid directly to the child or to third party service providers.

The amount of support is dependent on the financial situation of the parents and the child. Any disability benefits, assets, and income of the child must be taken into account in determining the parents' support obligation. However, once the court has determined that the child has a mental or physical disability that impairs his or her earning capacity, the parent may nevertheless be ordered to pay support to or on behalf of a child who is employed if the child's reasonable expenses exceed his or her income. The courts have looked closely at the degree of dysfunction caused by the child's illness or disability. If the child can work, transport him- or herself, pay rent and other bills, and have a semblance of a normal life, the court is unlikely to impose a support obligation on the parents.

When divorcing parents negotiate plans for providing financially for adult disabled children, they need to avoid certain pitfalls. Putting assets in the child's name can disqualify the child for certain government benefits, discussed more fully in Marcia Fidis' article in this newsletter. Also, if the child has substantial assets he or she is unlikely to be determined an adult disabled child in need of parental support. If the parents set up a trust for the child, they must be careful about the trust provisions, particularly if one parent wants the court to impose a support obligation on the other parent. If the court orders a party to pay child support to an adult disabled child, certain trust assets intended for the child may no longer be available for the child's support. If the trust provides that its income and assets are to be used for the child's support and welfare after taking into account other support available for the child, the trust assets usually cannot be used for basic support needs of the child once the court orders payment of child support. The ability of the trustee to distribute income to the child depends on the terms of the trust and the applicable state law. The reason is that such use of the trust funds would have the effect of substituting for the support obligation of the parent and would no longer benefit the child. Trusts vary enormously in their terms and are governed by the choice of law stated in the trust or, alternatively, the law of the state where the trust is administered. It is important to seek legal advice in the applicable state to obtain precise guidance on how a legal support obligation can affect the intended use of trust funds.

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brokers might be involved, and thus OFAC obligations may fall on them as well. Indeed, even an assignor may unwittingly assume OFAC liability.

Attorneys, accountants, financial advisors and other professionals may also have OFAC obligations. Accepting a Specially Designated National as a client may well constitute a transaction. The receipt of payment from the client could constitute receiving funds or services for the benefit of that person. The range of other professionals who can be subject to OFAC is limited only by the imagination of the government officials charged with enforcing the Order..

There are steps that can be taken in light of the above. Software can be purchased that updates and scans the Specially Designated Nationals list and checks variations in spelling. If a match is made then further investigation is warranted to ensure it is not a "false positive". If, after this, you have reason to believe that a match has been made, OFAC must be contacted.

Those involved in contracts for the sale or lease of real property can include appropriate representations, warranties, and indemnifications in the applicable contracts. Whether OFAC compliance is the ultimate responsibility of the seller or lessor of the real property at issue or of the broker who is the procuring cause of the transaction, may be a matter of negotiation between the parties.

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NEWS

The September/October, 2005 issue of the *Maryland Bar Journal* features excerpts from P & F partner, J. Michael Conroy's remarks as he assumed the office of President of the Maryland State Bar Association. "Committed To Doing the Right Thing" highlights some of Mike's objectives for this year including the establishment of a Public Protection Committee to lead the effort to stop scam artists from taking advantage of the elderly, poor and disadvantaged by practicing law without a license.

J. Michael Conroy, President of the Maryland State Bar Association and P & F partner, is quoted extensively in an article in the September, 2005 issue of the *MSBA Bar Bulletin* entitled "Over the Line Attacks on Lawyers: MSBA's Immediate Response Team Poised, Ready to Act." The article describes in depth Mike's new initiative at the MSBA to create a quick response team that can counter some of the negative perceptions and inaccurate statements appearing in the media about lawyers, the judiciary and the legal system. Mike also co-authored an article in the *Bulletin* entitled "Tribute to Public Service: MSBA's Amicus Curiae Brief" that highlights the pro bono work of two Maryland attorneys who produced, on behalf of the MSBA, an important brief for the Court of Appeals of Maryland on First Amendment issues and the right of the public to zealous advocacy.

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