

Elder Law Today



SURPRENANT & BENESKI
Estate, Tax, Medicaid and Disability Planning

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We invest 100% of our time & energy to delivering first-class service to our clients. As a result, our valued clients, partners, & friends refer their family, clients, friends & associates to us. We build strong, lifelong relationships one person at a time.

Catholic Social Service
Presents:

A "Planning for Persons with Disabilities" Workshop

Learn how to protect assets, an inheritance or a settlement if you, your child or grandchild has Special Needs.

Tuesday, October 20th from 6:00-8:00pm
21 Father DeValles Blvd. Suite # 5
Fall River, Ma 02723

Be sure to call today to reserve your spot
1-800-929-0491
(code: CSS)

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October, 2009

Legal Developments—IMPORTANT INFORMATION –
Recommended Changes to Your Irrevocable Trust

As a client or friend of Surprenant & Beneski, we promised you that we would keep you updated as the world of Medicaid law developed. Many clients choose our firm because of our ongoing education and commitment to stay on top of any law changes or developments, and to inform you if changes are recommended. That is the purpose of this article.

Major Developments in Medicaid (MassHealth) Law
Doherty vs. Dehner and how it may affect you:

In a recent Massachusetts case, Doherty vs. Dehner, the Court criticized provision of an irrevocable trust. In that case, the MassHealth applicant lost. The case involved an irrevocable trust set up to protect certain cash assets. The trust used by the applicant was different in many ways from the irrevocable trust that we use for our clients. Still, from the Court's analysis, we have learned where MassHealth may try to challenge irrevocable trusts in the future. For instance, while the Trust claimed to limit the grantor's access to the income of the trust and prohibit access to the trust's principal, the Court concentrated on the totality of the powers retained by the grantor and found that the grantor's powers were enough to consider the trust assets available to the grantor for use in paying for nursing home care.

Our goal in creating irrevocable trusts is to have the trust assets considered not available for the grantor's nursing home care. Therefore, by paying attention to this decision we are able to strengthen our trusts going forward. The balance of this article explains the powers that the grantor in Doherty retained and why the Court or MassHealth considered the power a problem.

First, Doherty trust contained "supplemental needs" trust language. Supplemental needs language allows for payment of trust income and principal for the benefit of a beneficiary to pay for anything government benefits won't pay for. This language is fine if the trust is created by someone other than the senior whose assets are placed in the trust for protection. However, it has long been accepted that supplemental needs language is prohibited in a trust seeking to protect the principal of the grantor. We never place supplemental needs language in our irrevocable income only trust.

Next, the Doherty trust indicated that the trust assets should be accumulated for the grantor's future needs. According to the Court, accumulation for the grantor's future needs implies that the principal of the trust will be used for the grantor. We have never placed this language in our trusts.

Next, in the Doherty case, the grantor also retained lifetime and a testamentary power of appointment over trust property. This means that during the grantor's lifetime, the grantor can direct the trustee to give the trust property away and at the grantor's death, the grantor can change to whom the property is left. The Court seemed to have difficulty accepting the lifetime ability of the grantor to gift the property out of trust (even if gifting to the grantor was prohibited). It concluded that this power gave the grantor indirect access to the principal. The Court did not indicate a problem with power to change the beneficiaries receiving property at the grantor's death (a testamentary power of appointment). In our pre-2006 trusts, we did allow grantors to retain both a lifetime and a testamentary power of appointment. During the past several years, we have only allowed the grantor to retain a testamentary power of appointment. Instead, we have granted the Trustee (not the Grantor) the power to distribute property during the grantor's lifetime only with the consent of an independent third party known as "Trust Advisor." We clearly indicate in our trust that at no time may a distribution of principal be made to the grantor.

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**Mark Your Calendars For These Upcoming Events in
September! Call 1-800-929-0491
To Reserve Your Seat!**



Living Trust Seminar

All programs are from 6:30pm-8:00pm

Tuesday, October 14th (code: Wamsutta)

The Wamsutta Club, 427 County Street, New Bedford.

Wednesday, November 11th (code: NBCC)

The New Bedford Country Club, 585 Slocum Road, North Dartmouth.

Long Term Care Presentations, including Veteran Benefits

Thursday, October 15th (code: Kimwell) 6:30pm-8pm

Kimwell, 495 New Boston Road, Fall River.

Thursday, October 22nd (code: Cedars) 6:30pm-8:00pm

The Cedars Assisted Living, 626 Old Westport Road, North Dartmouth.

Thursday, October 29th (code: Sippican) 6:30pm-8:00pm

Sippican Healthcare Center, 15 Mill Road, Marion.

Thursday, November 5th (code: SEMA) 6:30pm-8:00pm

South Eastern Mass Health & Rehab, 4586 Acushnet Avenue, New Bedford.

Thursday, November 12th (code: OLH) 6:30pm-8:00pm

Our Lady's Haven, 71 Center Street, Fairhaven.

Long Term Care Presentations on the Cape

All Programs are from 1:30pm-3:00pm

Tuesday, October 13th (code: Cape)

Cape Cod Island association of Realtors Conference Center

22 Mid Tech Drive, West Yarmouth

Tuesday, November 10th (code: Cape)

Cape Cod Island Association of Realtors Conference Center

22 Mid Tech Drive, West Yarmouth

If you prefer, you can also register for our seminars on-line by going to: <http://www.the-sb-lawfirm.com/upcoming-events/long-term-care-planning-workshop> for long term care seminars <http://www.the-sb-lawfirm.com/upcoming-events/revocable-living-trust-planning> for trust seminars.

Our New Web Site

We hope you enjoy the monthly newsletter and various seminars. We also have launched a new weekly ezine (electronic newsletter). You can register for it on line at www.the-sb-lawfirm.com/newsletter.

If you haven't had the chance to check out our new web site: www.the-sb-lawfirm.com please take a look at it and let us know what you think. We have a blog that we add new articles and tips to regularly. We offer tons of free useful guides to help you and your loved one protect yourself and your assets. We also have just about all our radio programs on the web site for you to listen to organized by topic. You can also register for an upcoming seminar on the web site. So if you or friend is struggling with taking care of someone our site probably has the information you need.

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Further, in the Doherty case, the Trustee had the power to allocate capital gains between income and principal. This is a common power in most trusts. Nonetheless, MassHealth argued that this power meant that the trustee could characterize all capital gains as "income" and pay the capital gains to the grantor. The Court did not entirely agree with this argument but did at least mention it. It has long been held that a trustee has a fiduciary duty act in the best interest of both the income beneficiary (usually the grantor) and the remainder beneficiary (usually the grantor's children). Therefore, acting properly, the Trustee could not characterize all capital gains as "income." However, because the Trust did not expressly limit the Trustee's power to characterize capital gains as income with a restriction that such gains could not be distributed to the grantor, the Court at least considered MassHealth's argument. In the end, the Court did not clearly indicate that this power is prohibited. To be on safe side, we have added language to our trusts beginning in Spring of 2009 that expressly states that even if capital gains are allocated to income, no distribution of such gains can be made to the grantor.

Further, in Doherty, the Trust could be terminated at the Trustee's discretion and the trust property paid out to the "beneficiaries". The Court agreed with MassHealth that this meant trust principal could be paid to the grantors who were income beneficiaries, not just to the remainder beneficiaries. During the past several years, we have placed language in our trust that states that no distributions may be made to the grantor upon termination of the trust.

Again, the judge in Doherty does not say which of these powers, taken individually, created the problem of making the trust principal available to the grantor under MassHealth's interpretation. Rather, it seems that in combination with the other prohibited powers, the totality of the grantor's control over that trust property was too much.

What does this mean to you if you have created an irrevocable trust to protect your home or other property?

Well, if you are a client of Surprenant & Beneski and have created an irrevocable trust, you should have received a letter from our office explaining the Court case and our recommendations to you to have your trust updated. One of the ways that Surprenant & Beneski, P.C. strives to be better than other law firms is our commitment to you to notify you of important law developments. Many of you told us that you wanted our office to do this for you and were looking for a law firm willing to commit to notifying you of legal developments when you hired us. Most law firms simply don't do this. This is the first time since the implementation of the Deficit Reduction Act of 2005 that we have seen a legal development that we believed warranted our contacting our clients directly and recommending an update of a previously executed document. It is your responsibility to contact our office and authorize us to make the recommended updates. We cannot force you to do so but we strongly recommend that you keep your trust up to date. In the end, your Estate Planning will only work in the manner you intended when creating your documents if you maintain them with appropriate changes when a legal development dictates.

If for some reason you have executed an irrevocable trust with our office and did not receive a letter from us recommending an update, **please contact our office right away** and we will get a letter out to you explaining what needs to be done and how to get it done. Because of the large number of these trust created in Massachusetts, we have put in place a process for reviewing and updating the trust that is both time and cost efficient. This process is also explained in our letter to our clients. As always, we are honored by the trust you place in us. Thank you for your continuing support. If you know someone who isn't being supported in this way by his or her attorney, please recommend them to our office. We would love to help.

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Elder Law Today is produced by Robert L. Surprenant, Daniel M. Surprenant & Michelle D. Beneski, Attorneys at Law.

This newsletter is published as a service of Surprenant & Beneski, P.C.,

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