

DISABILITY LAW NEWS

New Jersey ®

Legal News for the Severely Disabled and Chronically Ill

July 2007

**Publisher of the Disability Law News
Recognized as 2007 "Super Lawyer"**

 Academy of
Special Needs Planners

Donald D. Vanarelli, Esq., with offices at 242 St. Paul Street, Westfield, NJ, has been selected as a "Super Lawyer" in the areas of Elder Law and Estate Planning. The selection of outstanding lawyers identifies the top 5% of all lawyers in New Jersey who have attained a high degree of peer recognition and professional achievement.

The rigorous multi-step selection process includes peer evaluation, a review of credentials and current bar status, and review and approval from a blue ribbon panel of leading attorneys.

Mr. Vanarelli, a Certified Elder Law Attorney, represents older and disabled persons and their representatives in financing long-term medical care, nursing home issues, qualifying for Medicare, Medicaid and other public benefits, estate planning, probate, guardianship proceedings and special needs planning.

In addition to being board-certified as an Elder Law Attorney by the National Elder Law Foundation, accredited by the American Bar Association, Recently, Mr. Vanarelli was designated as an Accredited Professional Mediator by the New Jersey Association of Professional Mediators. He is a founder of the Elder Mediation Center of New Jersey. Mr. Vanarelli mediates cases involving elder law, guardianship, probate, and family law.

Mr. Vanarelli is a graduate of Montclair State College and Rutgers' University Law School. He served as Law Clerk to Hon. Herbert S. Alterman, J.S.C., and as a Peace Corps Volunteer in Nepal. For more information, call (908) 232-7400. ✉

Donald D. Vanarelli, Esq., Certified Elder Law Attorney, is pleased to announce that he is a charter member of The Academy of Special Needs Planners. "Special needs" law deals with the financial and care needs of individuals with physical, mental or learning disabilities - many of whom are the middle-aged children of aging Americans.

Special needs lawyers believe that wills are often insufficient to ensure adequate care for disabled children. They say leaving an estate to a child with special needs can result in the loss of benefits and medical coverage.

Some parents try to deal with this problem by disinheriting the child and leaving the money to another child or individual. But this creates numerous other difficulties.

A better approach is to create a special needs trust, which preserves assets by ensuring that Supplemental Security Income or state Medicaid benefits aren't lost. The trust can stipulate that its proceeds are supplemental to government benefits and cannot be used for the beneficiary's food, clothing or shelter. Typically, special needs trusts will be used to provide for extra medical care, personal items, public transportation, home improvements and services to enhance the child's self-esteem or living situation. Special needs trusts can also be funded by personal injury settlements, if an individual's special needs are the result of an accident.

The Academy's website, www.specialneedsplanners.com, provides information for lawyers and consumers alike. ✉

DISABILITY LAW NEWS: Supplemental Needs Trusts and Planning for Disabled Children

Americans are living longer than they did in years past, including those with disabilities. According to one count, 480,000 adults with mental retardation are living with parents who are 60 or older. This figure does not include adult children with other forms of disability nor those who live separately, but still depend on their parents for vital support.

When these parents can no longer care for their children due to their own disability or death, the responsibility will fall on siblings, other family members, and the community. In many cases, expenses will increase dramatically when care and guidance provided by parents must instead be provided by a professional for a fee.

Planning by parents can make all the difference in the life of the child with a disability, as well as that of his or her siblings who may be left with the responsibility for caretaking (on top of their own careers and caring for their own families and, possibly, ailing parents). Any plan should include the following elements:

A Plan of Care

It will help everyone involved if the parents create a written statement of their wishes for their child's care. They know their child better than anyone else. They can explain what helps, what hurts, what scares their child (who, of course, is an adult), and what reassures their child. When the parents are gone, their knowledge will go with them unless they pass

it on.

In almost all cases where a parent will leave funds at death to a disabled child, this should be done in the form of a trust. Trusts set up for the care of a disabled child generally are called "supplemental" or "special" needs trusts. Money should not go outright to the child, both because the child may not be able to manage it properly and because receiving the funds directly may cause the child to lose public benefits, such as Supplemental Security Income (SSI) and Medicaid.

Supplemental Needs Trusts

Supplemental needs trusts (also known as "special needs" trusts) allow a disabled beneficiary to receive gifts, lawsuit settlements, or other funds and yet not lose his or her eligibility for certain government programs. Such trusts are drafted so that the funds will not be considered to belong to the beneficiary in determining his or her eligibility for public benefits. As their name implies, supplemental needs trusts are designed not to provide basic support, but instead to pay

for comforts and luxuries that could not be paid for by public assistance funds. These trusts typically pay for things like education, recreation, counseling, and medical attention beyond the simple necessities of life. (However, the trustee can use trust funds for food, clothing and shelter if the trustee decides

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Americans with disabilities are living longer than they did in years past. When the parents of a disabled adult child die, the caregiving responsibility will fall on siblings, other family members, or the community. Planning by parents can make a significant difference in the life of the adult child with a disability, as well as that of his or her siblings who may be left with the responsibility of providing care.

doing so is in the beneficiary's best interest despite a possible loss or reduction in public assistance.

Very often, supplemental needs trusts are created by a parent or other family member for a disabled child (even though the child may be an adult by the time the trust is created or funded). Such "third party" trusts also may be set up in a will as a way for an individual to leave assets to a disabled relative. In addition, the disabled individual can often create the trust him/herself, depending on the program for which he or she seeks benefits. These "self-settled" trusts are frequently established by individuals who become disabled as the result of an accident or medical malpractice and later receive the proceeds of a personal injury award or settlement.

Each public benefits program has restrictions with which the supplemental needs trust must comply with in order not to jeopardize the beneficiary's continued eligibility for public benefits. Both Medicaid and SSI are quite restrictive, making it difficult for a beneficiary to create a trust for his or her own benefit and still retain eligibility for those benefits. But both programs allow two "safe harbors" permitting the creation of supplemental needs trusts with a beneficiary's own money if the trust meets certain requirements.

The first of these is called a "payback" or "(d)(4)(A)" trust, referring to the authorizing statute. "Payback" trusts are created with the assets of a disabled individual under age 65 and are established by his or her parent, grandparent or legal guardian or by a court. They also must provide that at the beneficiary's death any remaining trust funds will first be used to reimburse the state for Medicaid paid

on the beneficiary's behalf.

Medicaid and SSI law also permits "(d)(4)(C)" or "pooled trusts." Such trusts pool the resources of many disabled beneficiaries, and those resources are managed by a non-profit association. Unlike individual disability trusts, which may be created only for those under age 65, pooled trusts may be for beneficiaries of any age and may be created by the beneficiary him/herself. In addition, at the beneficiary's death the state does not have to be repaid for its Medicaid expenses on the disabled person's behalf as long as the funds are retained in the trust for the benefit of other disabled beneficiaries. (At least, that's what the federal law says; some states require reimbursement under all circumstances.) Although a pooled trust is an option for a disabled individual over age 65 who is receiving Medicaid or SSI, those over age 65 who make transfers to the trust will incur a transfer penalty.

Supplemental needs trusts may be created by a disabled person to receive gifts, lawsuit awards, or inheritances. Such trusts are also created by a parent or other family member for a disabled adult child. These trusts allow the disabled adult child to maintain an acceptable quality of life while remaining eligible for needs-based government benefits.

Income paid from a supplemental needs trust to a beneficiary is another issue, particularly with regard to SSI benefits. In the case of SSI, the trust beneficiary would lose a dollar of SSI benefits for every dollar paid to him or her directly. In addition, payments by the trust to the beneficiary for food, clothing or housing are considered "in kind" income and, again, the SSI benefit will be cut by one dollar for every dollar of value of such "in kind" income. Some attorneys draft the trusts to limit the trustee's discretion to make such payments. Others do not limit the trustee's discretion, but instead counsel the trustee on how the trust funds may be spent, permitting more flexibility for unforeseen events or changes in

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circumstances in the future. The difference has to do with philosophy, the situation of the client, and the amount of money in the trust.

Choosing a trustee is also an important issue in supplemental needs trusts. Most people do not have the expertise to manage a trust. An alternative is retaining the services of a professional trustee. For those who may be uncomfortable with the idea of an outsider managing a loved one's affairs, it is possible to simultaneously appoint a trust "protector," who has the powers to review accounts and to hire and fire trustees, and a trust "advisor," who instructs the trustee on the beneficiary's needs. However, if the trust fund is small, a professional trustee may not be interested. This can be an argument for pooled trusts.

Life Insurance

Finally, a parent with a disabled child should consider buying life insurance to fund the supplemental needs trust set up for the child's support. The more resources available, the better the support that can be provided to the child. The good news is that advance planning for a disabled child can make a significant difference in his life. You just have to take the first step. ☒

**A PUBLICATION OF
THE LAW OFFICE OF
DONALD D. VANARELLI**

Donald D. Vanarelli, Esq., with offices at

Publisher of the Disability Law News Designated As An Accredited Professional Mediator

242 St. Paul Street, Westfield, NJ, has been designated as an Accredited Professional Mediator by the New Jersey Association of Professional Mediators.

Mediation is a method of dispute resolution that utilizes trained professionals to act as neutral facilitators to help disputing parties reach voluntary agreements. In selecting a mediator, it is important that the mediator be accredited to ensure that he or she possesses the necessary training and experience in mediation.

Accreditation requires a minimum of a Masters level of education such as a law degree, CPA or advanced degree in business or finance, four or more years of professional practice in a discipline in which the educational requirement was satisfied, eighteen hours of an approved mediation training course and completion of at least 15 cases and 100 hours of mediation.

Mr. Vanarelli mediates cases involving elder law, guardianship, probate, and family law. He is a founder of the Elder Mediation Center of New Jersey. ☒



Articles: Supplemental Needs Trusts and Planning for Disabled Children

Re: The Academy of Special Needs Planners

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**LAW OFFICE OF
DONALD D. VANARELLI**

242 St. Paul Street
Westfield, NJ 07090

Tel: (908) 232-7400

Fax: (908) 232-7214

Email: dvanarelli@dvanarelli.com

Websites: dvanarelli.lawoffice.com

-and- elderlawanswers.com/attorney/vanarelli.html