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Important Developments in Special Needs and Elder Law

Bernie Krooks gives a heads-up on what to expect in 2023.

Susan R. Lipp | Jan 10, 2023

The 2023 Heckerling Institute on Estate Planning has officially begun. As in past years, members of our editorial advisory board have been tapped to speak at the various sessions, including Bernie Krooks, chair of our Elder Care Committee, who's scheduled to speak on Wednesday morning, along with Tara Anne Pleat, on "Current

Trends in Special Needs and Elder Law.” I asked Bernie to provide some insights on what we can expect in this area.

SECURE Act 2.0

Bernie noted that based on the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and the recently enacted SECURE Act 2.0, clients won't be able to take advantage of the stretch individual retirement account, unless the beneficiaries of the IRA are eligible designated beneficiaries, such as those who are disabled and chronically ill (DCI). Trusts for DCI beneficiaries are permitted if the DCI beneficiary is the sole beneficiary during their lifetime. This can include special needs trusts. In that case, the life expectancy of the oldest DCI beneficiary is used to determine the stretch period for mandatory distributions of the assets in the IRA. On the DCI beneficiary's death, a charity is allowed to receive the remainder left in the trust.

Gallardo v. Marstiller

This recent U.S. Supreme Court decision allows states to seek reimbursement of money received by Medicaid recipients after they settled a tort lawsuit when the money is allocated to pay the recipient's past and future medical care. The lawsuit was based on a challenge to a Florida statute that permits Florida to recover a percentage of these settlement payments for “past and future medical expenses.” The court upheld the statute. This could impact personal injury settlements because, in some cases, a larger portion of the settlement may be subject to recovery by the government.

Diminished Capacity

Bernie says that in 2023, practitioners will encounter more clients with diminished capacity. This will present certain ethical issues, such as whether the client has the capacity to engage or terminate your services or to execute certain legal documents. Practitioners may also have to fend off malpractice claims from heirs of a client with

diminished capacity if the heirs claim that the client wasn't able to make decisions on the client's own behalf regarding the estate plan. Practitioners need to recognize when a client has diminished capacity and may decide to take steps to help these clients by getting a guardian appointed in appropriate circumstances.

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