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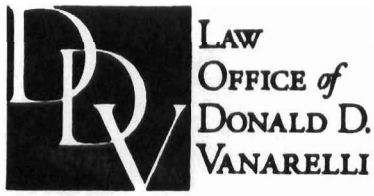

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June 11, 2010

VIA CERTIFIED MAIL/RRR
Honorable Michal Lissek
Office of Disability Adjudication and Review
1100 Raymond Boulevard
3rd floor
Newark, New Jersey 07102

Re: G.Z.
Social Security No.: XXX-XX-XXXX

Dear Judge Lissek:

Please be reminded that the undersigned represents G.Z. recipient of SSI benefits. A hearing was held on this matter on May 27, 2010 concerning the recipient's continuing eligibility for SSI benefits and the appropriate level of benefits to be paid. At the conclusion of the hearing the Court requested (1) additional briefing on the effect of the recipient's self-settled special needs trust ("SNT") on his eligibility for SSI, and (2) copies of checks from Mr. Z. to his nephew, with whom he lives. Please accept the following letter brief as a summary of the legal basis for the establishment of Mr. Z.'s SNT, and a discussion of funding the trust with the proceeds from his divorce settlement.

A disabled individual may be the beneficiary of an SNT as long as such trust is in compliance with the medical assistance program ("Medicaid") provisions of 42 U.S.C. §1396p(d)(4)(A), as interpreted in the Program Operations Manual System, Section SI 01120.203(B)(1), the New Jersey Statutes and Administrative Code, N.J.A.C. 10:71-4.11(g)(1), the Supplemental Security Income ("SSI") provisions of 42 U.S.C. §1382b(e)(5), and the general eligibility provisions of the New Jersey Division of Developmental Disabilities ("DDD").

Federal law, §42 U.S.C. §1382c(a)(3), in applicable part, provides that an individual shall be considered "disabled" if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months. As of the date of the subject Trust Agreement, Mr. Z. was an adult, age (Date of Birth –), and was determined to be a disabled individual as provided under 42 U.S.C. § 1382c(A)(3).

The Medicaid provisions of 42 U.S.C. §1396p(d)(4)(A), Section 3259.7A of the Federal Department of Health and Human Services, Health Care Financing Administration's Transmittal No. 64, dated November 1994 (hereinafter "Transmittal No. 64") and the SSI provisions of 42 U.S.C. §1382b(e)(5), in applicable part, and New Jersey Administrative Code Section 10:71-4.11(g)(1), provide that assets of a disabled individual under age 65 held under an irrevocable trust created by a parent, grandparent or guardian of such a disabled individual, or by a Court, shall not be treated as an available asset, so long as such trust provides at its termination for Medicaid to have a first right of recovery for any such benefits paid to, or for the benefit of, the disabled individual.

Further, it is the public policy of the State of New Jersey as set forth in N.J.S.A. 3B:11-36 *et seq.*, and elsewhere "to facilitate the establishment of trusts..." in order "to encourage persons to set aside amounts to supplement and augment assistance provided by government entities to persons with severe chronic disabilities" ... and to "persons who are disabled under the federal Social Security Act".

The following excerpts from N.J.A.C. 10:71-4.11 set forth the basic requirements for a trust to qualify as a special needs trust (and thereby be excluded from the rules regarding the treatment of a trust as "available" to the trust beneficiary):

* There shall be no provisions permitting the trust to be altered for any reasons other than to comply with changes in the State's Medicaid laws.

* Only trusts that are intended for the sole benefit of the disabled individual are special needs trusts. Any trust that provides benefits to other persons shall not be considered an individual special needs trust.

* The trust shall specifically state that its purpose is to permit the use of trust assets to supplement, and not to supplant, impair or diminish, any benefits or assistance of any Federal, State or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

* If the trust provides for food and shelter, such expenditures shall be considered income under Social Security and Medicaid eligibility rules.

* Subsequent additions made to the trust corpus shall be reported to the appropriate eligibility determination agency. Subsequent additions to the trust (other than interest on the corpus) shall cease when the trust beneficiary reaches age 65, or shall be subject to transfer provisions.
* If subsequent additions are to be made to the trust corpus with funds not belonging to the trust beneficiary, it shall be understood that those funds are a gift to the trust beneficiary and cannot be reclaimed by the donor.

* The special needs trust shall state that it is established by a parent, grandparent, or legal guardian of the trust beneficiary, or by a court.

* The trust shall specifically state that it is irrevocable. Neither the grantor, the trustee(s), nor the beneficiary shall have any right or power, whether alone or in conjunction with others, in whatever capacity, to alter, amend, revoke, or terminate the trust or any of its terms or to designate the persons who shall possess or enjoy the trust estate during his/her lifetime.

* The trust shall specifically state that, upon the death of the primary beneficiary, the State will be notified, and shall be paid all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of the beneficiary.

* The trust shall specify that a formal or informal accounting of all expenditures made by the trust shall be submitted to the appropriate eligibility determination agency on an annual basis.

* The State shall be given advance notice of any expenditure in excess of $5,000, and of any amount that would substantially deplete the principal of the trust.

It was Mr. Z.'s intention that his trust conform with the Medicaid provisions of 42 U.S.C. §1396p(d)(4)(A) and the SSI provisions of 42 U.S.C. §1382b(e)(5) and, accordingly, that the assets assigned to this trust would not be considered available income, or as an asset for purposes of determining continuing or future Medicaid and/or SSI eligibility, nor that the assignment of said assets to the trust be considered a transfer of assets for less than fair market value for the purpose of determining the

Medicaid eligibility of the Beneficiary as further provided in 42 U.S.C. §1396p(c)(2)(B)(iv) and/or the SSI eligibility of the Beneficiary as further provided in 42 U.S.C. §1382b(c)(1)(C)(ii).

The SNT was established by Hon. John A. Jorgensen, J.S.C. of the Superior Court of New Jersey. The SNT was funded with an award of alimony and equitable distribution made pursuant to the independent analysis and recommendation of the Middlesex County, New Jersey Matrimonial Early Settlement Panel which was incorporated into a Judgment of Divorce through a Matrimonial Settlement Agreement in the matter entitled G.Z. vs. L.Z., Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, bearing Docket No. . The Court made specific findings in its decision that the agreed upon division of assets was equitable, and in accordance with the factors set forth in N.J.S.A. 2A:34-3. The Judgment of Divorce, annexed hereto as Exhibit A, established the SNT, and incorporated the parties Property Settlement Agreement.

The facts in this case are nearly identical to the facts in J.P. v. DMAHS, 392 N.J. Super. 295 (App. Div. 2007). In J.P., the Court approved the funding of an SNT, and even the payment of alimony to an SNT, to protect a disabled individual's interests. In J.P., the court specifically considered whether alimony payments to an SNT shielded the alimony received by the trust from being considered as income to the disabled individual. However, the SNT established by the Family Part court was originally funded by equitable distribution, and half the net proceeds from the sale of real estate. In J.P., the court ultimately concluded that an SNT "is a legitimate Medicaid planning vehicle for which the Federal and State Medicaid laws clearly provide." Id. at 306. The Court approved the funding of the SNT with the equitable distribution from the divorce, and the continued addition of monthly alimony payments.

Therefore, the equitable distribution between Mr. Z. and his ex-wife, as well as the funding of the trust with the proceeds from the divorce, were in accordance with federal and state law.

As an additional matter, at the hearing on May 27, 2010, you requested that Mr. Z. provide copies of the checks that he used to pay his nephew, J.Z.

As you can see, Mr. Z. made regular payments for rent and food pursuant to the agreement with his nephew.

I hope that this information assists you in your analysis of this matter. Please do not hesitate to contact my office if you wish to review the details and facts of this case.

Respectfully submitted,

Donald D. Vanarelli

Donald D. Vanarelli

DDV/SEN
CC: G.Z.