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MEMBER



Special needs require special lawyers.

INSIDE THIS ISSUE

- Assisted Living Facility Costs as Tax Deductions
- Announcements
- Ask Allie

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ASSISTED LIVING FACILITY COSTS AS TAX DEDUCTIONS

A recent *NAELA News* article by Robert Anderson discusses the process for deducting assisted living facility (ALF) costs on federal individual income tax returns. Internal Revenue Code (IRC) § 7702B provides rules for deducting certain qualified long-term care costs as medical expenses. Normally, the costs of nursing home care should be deductible, but the status of ALF costs has not been as clear.

For ALF residents, qualified long-term care costs are “necessary rehabilitative services, maintenance or personal care services that are (1) required by a chronically ill individual, and (2) provided pursuant to a plan of care by a licensed health care practitioner.” The ALF resident must first qualify as a chronically ill individual. The resident can meet this definition if within the previous 12 months, a licensed healthcare practitioner certifies that the resident meets one of two descriptions pursuant to IRC § 7702B(c)(2):

1. The resident is unable to perform at least two activities of daily living (ADLs) without substantial assistance from another individual for at least 90 days due to a loss of functional capacity. ADLs are eating, toileting, transferring, bathing, dressing, and continence.
2. The resident requires substantial supervision to be protected from threats to health and safety due to severe cognitive impairment.

Maintenance or personal care services provide assistance for a chronically ill individual with his or her disabilities; therefore, if an ALF resident needs help with two ADLs, then the assistance provided by the ALF qualifies as personal care services. Likewise, if the ALF protects the individual from safety and health threats due to severe cognitive impairments, then the assistance provided by the ALF qualifies as personal care services. The certification of the chronic illness requirement must be done within the preceding 12 months. The certifying licensed care practitioner can be any physician, registered

professional nurse, or licensed social worker, and this practitioner does not have to be an employee of the ALF, although this practitioner could be. The licensed care practitioner must personally examine the resident and provide a written opinion. The opinion should be obtained prior to admission to the ALF.

The plan of care is not defined within the Internal Revenue Code. Federal statutes require that nursing facilities have a written plan of care for each resident. Although written care plans for ALFs are not required by federal statutes, most ALFs prepare them. The plan of care must be prepared by a licensed care practitioner, and it should be prepared at or as soon after admission to the ALF as possible.

If these requirements are satisfied, then 100% of the costs of the ALF (including room and board) are deductible on the resident's 1040, Schedule A, to the extent that the costs are not reimbursed by government benefits or insurance. Under IRC § 213 (a), the resident can claim an itemized deduction for unreimbursed medical expenses to the extent that such expenses exceed 7.5% of adjusted gross income. These expenses include the qualified long-term care expenses, as well as insurance premiums and other eligible medical expenses.

If the resident does not meet the requirements of IRC § 7702B, then the resident can still deduct the percentage of the ALF costs attributed to nursing services, pursuant to IRC § 213. The room and board and personal services costs would not be deductible. The ALF should provide an estimate of the deductible portion of its costs, and the taxpayer can attach the statement to the Schedule A. Typically 30% to 40% of the ALF costs are for nursing services.

The attorneys at Oast & Hook can assist clients with their long-term care, tax, insurance, financial, estate and veterans' benefits planning needs.

Announcements

Oast & Hook is pleased to announce that attorney Andrew Hook has been named by *Virginia Super Lawyers* and *Rising Stars* magazine as one of the Super Lawyers in Virginia for 2008, and attorney Sandra Smith has been named as one of the Rising Stars for 2008. Only 5% of the lawyers in the state are listed in *Super Lawyers*, and only 2.5% of the lawyers in the state are listed in *Rising Stars*.

The selections for *Super Lawyers* and *Rising Stars* are made by *Law & Politics*, a division of Key Professional Media Inc. of Minneapolis, Minnesota. Each year, *Law & Politics* undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by *Law & Politics'* attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Oast & Hook is pleased to announce that the 2nd edition of the BNA Tax Management Portfolio entitled "Durable Powers of Attorney" has been released. This portfolio contains basic information and

worksheets on durable powers of attorney and discusses many aspects of their creation and use for disability planning. The portfolio is authored by Oast & Hook attorney Andrew Hook, with assistance by Oast & Hook attorney Lisa Johnson.

Ask Allie

Buckwild Easy As Rain (“Bear” for short, but my human calls me Sugar Booger Bear): Hello Allie! I always look for your “Ask Allie” column in the *Oast & Hook News*. I am a Scottish Terrier owned by a social services employee. I am 2 years old and worry that my human works too hard at her job. She plans to retire soon, and she has asked me several times how much money she should set aside in a trust for me. Can you tell me how to calculate what my needs might be?

Scotties are prone to bone cancer and usually live about 12 years. I plan to live much longer than that because my human has promised to buy me a brother or sister when she retires so I will have a new lively playmate. We plan to do a lot of traveling; my human only goes to “pet friendly” places! Thanks Allie!

Allie: Dear Sugar Booger Bear: I asked the lawyers and financial planners at Oast & Hook for help to answer your question.

Virginia law permits the creation of a trust to provide for the care and burial of a human’s pet(s) after the human’s disability or death. The trust may be funded with an amount that is necessary for this intended use and to pay necessary trust administration expenses. You have estimated your life expectancy at 10 years, but you want to plan for a longer life. Let’s assume you will live 12 years. Your human intends to adopt another pet. Let’s assume this new pet will live 14 years. Therefore, your human should provide for about 26 years of care. My humans estimate that it costs about \$1,000 per year to feed (including kitty treats) and provide veterinary care for a pet. Therefore, the trust must be funded with about \$26,000, plus trust administrative costs. Assuming a family member or friend serves as trustee to hold down administrative expenses, I recommend that your human fund the trust at her death with about \$30,000. Of course, more is always better. Your human should review this projected amount every five years and make necessary adjustments caused by inflation, changes in your age, and other factors. In addition to creating the trust, your human should identify a family that will serve as your guardian if she is disabled or deceased. Oast & Hook can help your human develop a “pet friendly” estate plan.

Please feel free to e-mail your questions to Allie at: allie@oasthook.com.

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