DOES YOUR CLIENT NEED A SPECIAL NEEDS TRUST?¹

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ALABAMA MEMBER OF SPECIAL NEEDS ALLIANCE

The call often comes a day or two before a scheduled settlement hearing. The question is always the same: “Do you think my client needs a special needs trust to receive personal injury settlement proceeds?” The answer is usually the same, too - “it depends.” The next part of the conversation focuses on the following questions to make a preliminary analysis of the client's need for government benefits and likelihood of becoming eligible or maintaining eligibility:

**Critical Questions**

1. What is the client’s existing disability and health prognosis, along with his or her health care insurance?

2. Is the client presently receiving Social Security Disability Income (SSDI), and if so, when is Medicare scheduled to begin? SSDI and Medicare are based on a client's work record. If the client has paid into the Social Security system for at least 20 out of 40 consecutive quarters, he or she should be eligible. These programs are not "means-tested," so the settlement does not affect the client's eligibility for SSDI and Medicare.

3. Is the client presently receiving any (even as little as $1.00) Supplemental Security Income (SSI) or eligible for any Medicaid program (even a Waiver program)? The maximum amount of monthly SSI in 2013 is $710. It increases to $721 for 2014. The check comes on the first day of the month. SSI and Medicaid are "means-tested" (subject to very strict financial limits for eligibility) and will be affected by the settlement. It is possible for a client to receive SSDI, SSI, Medicare and Medicaid if he or she was a low-wage earner during employment.

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4. If the client has existing health care coverage, such as through an employer or a parent's employer, how long will this coverage be in existence and what are the guarantees the client will continue to be covered for life?

5. If the client lost his or her present health care insurance, would he or she be able to obtain it from another source, such as by purchasing a private policy or obtaining it through a spouse's employment? The Affordable Care Act may now bring the client the ability to obtain a policy, allowing a person with capacity to avoid an SNT if he or she can afford to pay the premium.

6. Even if the client is receiving SSDI and Medicare, and has never received Medicaid, would the client need to reside in a skilled care facility (nursing home) if family were not available to take care of the client? If so, is the client less than 65 years old?

7. If the client would need to live in a skilled care facility if no family member could care for him or her, are there enough funds to privately pay for it and all the client's other needs for his or her lifetime?

8. Does the client have a "disability" pursuant to the definition of that term in the Social Security Act? 42 U.S.C. §1614(a)(3) provides that for a person to be determined "disabled," he or she must be incapable of "substantial gainful activity," which is the inability of that person to work and earn, on a consistent basis, $1,040 per month (2013 applicable amount for a non-blind individual). These earnings limit changes annually. It is not necessary that the injured client has actually been through this determination process, but that this determination would be met if he or she did apply for benefits. Young children with injuries who have a working parent often have never been through the medical eligibility process.

9. Does the plaintiff have a spouse or minor children that anticipate being able to live off the plaintiff's settlement award?

10. Is the client able to handle the settlement for his or her best use from a management and investment standpoint? Are family members eager to "help" the client (perhaps help him right out of it)?

11. If the client took the money outright now, and years after the settlement decided to contribute it to a special needs trust (assuming the law still provides for this), would most of the funds have disappeared, making this like shutting the barn door after the horse is gone?

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1 The amounts for 2014 are $1,070 per month for a non-blind individual and $1,800 per month for a blind individual.
12. Is the injured client under age sixty-five (65)?

**Know the Proper Type of Special Needs Trust to Use**

There are several types of special needs trusts with different requirements. The type of trust to use for a situation depends upon whether the funds going into the trust belong to the beneficiary (i.e., the plaintiff with a disability) or to a third-party (such as a parent of a child with a disability).

The type of special needs trust designed to receive an injured party’s settlement proceeds is authorized in 42 U.S.C. §1396p(d)(4)(A), which provides that a trust containing assets available to a beneficiary will not disqualify the beneficiary from certain public benefits if it is

...a trust containing the assets of an individual under age 65 who is disabled (as defined in §1614(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual or a Court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.

Because of the final requirement of this statute, this type of special needs trust is sometimes referred to as a "payback special needs trust." Others refer to it as a "first party special needs trust" or a "self-settled special needs trust" because it contains assets of the beneficiary. When considering a special needs trust, do not let the required payback to Medicaid overwhelm the thought process. The payback is limited to the amounts Medicaid paid for the beneficiary and to the extent funds remain in the trust at the beneficiary's death. Medicaid's payments are often low and no interest accrues. Having the use of the trust funds, while not having to give up government benefits, allows for an increased quality of life for the client with a disability.

Assuming that the answers to the twelve questions above indicate that it is important for the client to retain present or future eligibility for means-tested government benefits (such as
SSI and Medicaid), a payback special needs trust (or spend-down plan, as discussed below) should be considered.

**Structured Settlements and Payback Trusts.**

Often a special needs trust and a structured settlement (assuming the client's needs and financial factors are appropriate for a portion of the award to be structured) work together to provide the ultimate protection for the client’s settlement funds. When a structure is purchased as part of the settlement for a client who needs to maintain eligibility for government means-tested benefits, the payments *must* be paid directly to the Trustee of a payback special needs trust, rather than to the plaintiff or to his or her Conservator or Guardian. When structured settlement funds are paid directly to the client or to a Conservator, Social Security and Medicaid count the funds as the client's income in the month received, and later as his or her resource to the extent the funds carry forward into the next month. This often causes the income limit, and possibly the resource limit, to be exceeded every month. As a result, the client's eligibility for SSI and Medicaid will terminate.

The maximum SSI payment in 2013 is $710 per month (increasing to $724 in 2014), and the resource limit to qualify is $2,000 of countable resources. Even if the structure payment is less than the client’s monthly SSI check, direct receipt of it by the client, or his or her legal representative, causes a dollar-for-dollar loss of SSI, resulting in the client being no better off than if the structure had not been purchased, or even worse off if the structure completely offset SSI. This is because SSI recipients in Alabama automatically qualify for Medicaid. If they lose SSI, they lose Medicaid, too.
A totally different result occurs, however, when the Trustee of a properly drawn payback special needs trust receives the payment. In this scenario, the plaintiff’s benefits continue, while the Trustee of the trust applies the structure funds for the plaintiff’s needs not covered by the benefits.

**Additional Considerations.**

Before making a recommendation to the client and his or her family, or to the Guardian *ad litem* for the incapacitated or minor client, about options for distribution of the settlement funds, examine the client’s situation carefully. In addition to the questions above, also consider these issues: (1) Will a corporate Trustee be needed to manage the investments? (2) Does the lump sum amount to fund the special needs trust justify using a corporate Trustee? (3) If not, are there conscientious, trustworthy family members, accountants, or other individuals who could learn how to administer the special needs trust and serve as Trustee? (4) Would the client be well served for the funds to be directed to the Alabama Family Trust or another “pooled” trust that is considered exempt by Social Security and Medicaid? (The pros and cons of a pooled trust should be discussed -- such as, for a client sixty-five (65) or older, it may be the only alternative to preserve means-tested benefits, but where a client anticipates the possibility of building a home with some of the proceeds one day, the pooled trust often does not allow this.) (5) Finally, ask whether alternatives exist for a quick "spend-down" of the funds in a way that benefits the client, yet doesn’t create a countable asset in the client’s name that exceeds $2,000.

**Alternatives for Smaller Settlements**

Consider the following alternatives for a smaller settlement that may not justify a private special needs trust:
- Purchase exempt resources for the beneficiary such as a car, a home, or a life estate in real property.
- Pay off the client's debt, including mortgages and credit card debt.
- Prepay bills or routine expenses.
- Make home improvements.
- Obtain dental care and other health care services.
- Open a savings account not to exceed $2,000.
- Prepay a personal service contract for a limited term or for life.
- Prepay for room and board for a limited term or life.
- Purchase a prepaid burial plan that complies with Medicaid limits.
- Open an irrevocable Alabama Family Trust account for the portion that cannot be spent-down right away.
- Consider a larger allocation of the settlement to other claims in the case. (Be careful, however, as a distribution to a spouse or to a parent of a child injured under age 18 may still affect the injured client's public benefits eligibility.)

Indeed, the cost of creating and funding a special needs trust must be considered, along with the administration expenses of the special needs trust during its existence. Compared to losing health coverage, however, these expenses may be a bargain. Anytime the net settlement is less than $100,000.00, consider a combination of the above-listed options first if retention of SSI and/or Medicaid eligibility is needed.

If one or more of these spend-down options are selected, be aware that timing of the client’s receipt of the settlement funds and expenditures of the types listed above should be coordinated so that these happen within the same calendar month, to the extent possible. Each month the funds are considered "available" to the client is a month that SSI is lost. Careful records and receipts must be kept, as well, so that documentation can be provided to Social Security. The regulations for individuals on SSI require that any change in financial circumstances (such as a recovery in a lawsuit) must be reported within the first ten days of the month following the month funds were received. Consider enlisting the help of an attorney familiar with the regulations of the specific government benefit programs to coordinate the
spend-down and report the transactions to government agencies. An attorney who drafts payback special needs trusts as a regular part of his or her practice can provide this type of assistance.

**Settlement Preservation Trust.**

The promise that all individuals will be able to purchase private health care as a result of the Affordable Care Act brings another consideration into the world of planning for a client with a disability. Where the settlement is large enough, and the injured individual would not easily be able to accept the idea of not being able to control his or her settlement money, then a Settlement Preservation Trust may be a better option than a pay-back SNT. A Settlement Preservation Trust ("SPT") is not created by a statute. It can actually take several forms. It may simply be a more traditional trust that receives funds from the settlement by which a corporate Trustee or other professional Trustee manages these funds in order to help preserve the settlement and protect the beneficiary when he or she is vulnerable. Too often friends and relatives put pressure on the special needs beneficiary to share the settlement money and repay them for helping in the past. Family might say they are going to "help" the individual with managing their money, but too often that help means they are going to help them right out of it. A Settlement Preservation Trust with a prudent Trustee would be helpful in that the disabled beneficiary would be able to refer any requests from others for a "loan."

If the individual is competent, he or she can establish this trust and request that the settlement proceeds be paid into it. If the individual is a minor or is not competent, the trust may need to be established by a Court. In this circumstance, and where the individual has a disability that might require at some point in the future, a need for government "means-tested" benefits (even if that might mean a bed in a nursing home), directions would be included in the SPT to
allow it to flip into a pay-back SNT should the individual ever require qualification for SSI or Medicaid. While the trust would still likely be a totally discretionary trust without specific standards, it is more easily administered by a Trustee while the individual is not on SSI or Medicaid. In addition to contingent SNT provisions, a SPT often includes an MSA within its provisions. A typical scenario where this trust would be of benefit is an injured plaintiff who is receiving SSDI and Medicare, has an MSA obligation, and might possibly need to qualify for nursing home Medicaid eligibility in the long-term future if he or she could no longer live at home.