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USING A SPECIAL NEEDS CONSULTANT IN SETTLING PERSONAL INJURY CASES

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Personal injury attorneys are realizing that a special needs consultant can be invaluable in settling personal injury claims involving persons with disabilities. Very often, the client is receiving public benefits, such as SSI and Medicaid. The Medicaid is often vital in ensuring that the client will receive appropriate care. Lawyers specializing in the field of elder and disability law are able to provide a number of services to facilitate the settlement. There are a number of issues that need to be addressed.

1. *Is a Special Needs Trust Necessary?* A special needs consultant should first determine whether a special needs trust is necessary or appropriate. There are a number of factors to be considered:

- Is the plaintiff a “disabled” person with a determination of disability made by the Social Security Administration?
- Is the disabled person receiving means-tested public benefits, such as SSI, Medicaid, Medicaid Waiver Services, Section 8 Housing, or certain services provided by DDD?
- Is the disabled person likely to receive those benefits in the future?
- Is the disabled person under age 65?
- Are the assets to fund the trust the assets of the disabled person?

2. *Alternatives to Special Needs Trust*

Once these questions have been answered, if it is determined that the client is receiving or is likely to receive means-tested benefits, then there are alternatives to be considered with respect to the settlement. These include the following:

- Can the disabled plaintiff simply accept the money?
- How important are the benefits?
- Can the disabled person transfer the assets to a third party to establish a support trust?
- Can the disabled person accept the assets and transfer them to a third party to establish a third party special needs trust?
- Can the disabled person accept the money and “spend down” to the necessary asset level to maintain public benefits?
- Is it appropriate to transfer the assets to a pooled trust that may be less expensive to establish and administer, but which involves some loss of control?
- Is a self-settled special needs trust the best option?

3. *Striking a Balance Between a Lump Sum and a Structure.* A special needs consultant can assist in striking a balance between the lump sum to be placed in a trust and the structured settlement. Immediate cash needs of the person with disabilities and the family are often overlooked. An analysis should be made to determine if the disabled plaintiff will need funds to purchase a residence, handicap van, take a vacation, buy furniture, buy a prepaid funeral or pay outstanding debt. These will require immediate cash. There should also be a reserve set aside for future unanticipated emergencies. These funds should be set aside in a lump sum prior to determining the amount of a structured settlement.

4. *The Trust.* The most obvious service that the special needs consultant provides is in connection with the special needs trust that is required to hold the personal injury settlement, so that the plaintiff can maintain his public benefits. These trust services include the following:

- Determine whether a self-settled special needs trust is appropriate
- Draft the special needs trust
- File the trust with the Social Security Administration for approval
- File the trust with the State Medicaid Agency for approval
- File the trust with the Bureau of Administrative Action and Recoveries
- Assist in indentifying an appropriate trustee
- Obtain a taxpayer identification number for the trust

4. *Counselling Session*

There are a number of additional trust-related services that consultants can provide to ensure that the trust ultimately works the way it was intended and that all parties involved understand their rights and responsibilities. These services revolve around a counseling session. At that session the person with disabilities and/or their family is encouraged to complete a budget. The budget is broken into sections relating to housing expense, automobile expense, and personal expenses. The expenses are then totaled. An analysis is then made of the income that will be available to fund these expenses. A disabled client will usually receive income from Social Security. The trust will generate income and, if necessary, the principal of the trust can be used to meet expenses. An analysis should be made as to how long the trust assets will last at a given level of expense. Expenses may need to be adjusted.

6. *Explaining Legal Concepts*

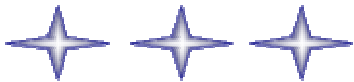
In New Jersey there are certain regulations governing special needs trusts. These include the following:

- *Sole Benefit Of.* The trust must be for the “sole benefit of” the disabled beneficiary.
- *Pro Rata Share.* If a trust makes distributions that incidentally benefit other persons, those persons must contribute a pro rata share.
- *Legal Obligation of Support.* Parents shall not be relieved of their duty to support their minor children, if they are capable of doing so. A minor’s trust fund shall not be expended on routine support, unless the parent’s income is insufficient for these expenses.
- *Bond.* Bond is required unless waived by the court, if the beneficiary is a minor or incompetent adult.
- *Accounting.* An annual accounting is required to be filed with the State Medicaid Agency.
- *\$5,000 Cap.* Any expenditures in excess of \$5,000 require 45 days advance notice to the State Medicaid Agency.
- *Irrevocability.* The trust must be irrevocable.

It is important that the trust, the beneficiary, and the beneficiary’s family understand these legal concepts.

7. *Arbitration.* A special needs consultant is useful to a personal injury attorney to serve as an expert witness in an arbitration.

8. *Mediation.* A special needs consultant is very useful in a mediation proceeding. The consultant can often identify public benefit programs that will be available to meet the disabled plaintiff’s expenses, especially medical care. This can help reduce the amount necessary to meet the needs of the disabled plaintiff and facilitate settlement.



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Begley & Bookbinder

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The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley & Bookbinder at 800-533-7227.

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