

Settling a Case for a Disabled Client

When is a Special Needs Trust Required?

A Special Needs Trust is required for a disabled person if the person is receiving SSI, Medicaid, Section 8 Housing, certain types of state disability benefits or benefits under any other means-tested program, or if the person is likely to receive such benefits in the future.

There are four alternatives to establishing a Self-Settled Special Needs Trust:

- *Accept the Money.* The disabled person will lose public benefits, but if the amount is large enough or the likelihood of requiring expensive medical treatment is small enough, this could be considered.
- *Transfer the Money.* The transfer of the funds will disqualify the disabled person from receiving public benefits for three years. If the amount is large enough and the person does not need means-tested public benefits for a period of three years, this should be considered.
- *Spend the Money.* In smaller cases this option often makes the most sense. Examples of how monies could be expended would be for repayment of debt, purchase of a home, purchase of a car, purchase of furniture, appliances, etc. A special needs trust attorney can be consulted to design a spend down plan.
- *Pooled Trust.* If a settlement is small and spend down is not a viable option, it may be more practical to place the litigation proceeds in a Pooled Trust. The disadvantage is often a lack of personal attention.

Requirements of a Special Needs Trust.

Special Needs Trusts are authorized by Congress, but there are certain requirements:

- *Assets of Individual.* The trust must be funded with assets of the individual, typically the litigation proceeds.
- *Age.* The individual must be under 65 years of age at the time the trust is funded.
- *Disabled.* The individual must be disabled as defined in the Social Security Act.

- *Establishment.* The trust must be established by a parent, grandparent, guardian, or a court.
- *Payback.* The state Medicaid agency must be reimbursed upon the death of the disabled person.

In addition, the trust must give the trustee discretionary authority to make distributions and the trust must be irrevocable.

Public Benefits Programs.

The purpose of a Special Needs Trust is to preserve public benefits programs for the disabled person. Typically these benefits include:

- SSI – a monthly income
- Medicaid – a medical payment program
- Section 8 Housing – a low-income housing program
- State Disability Programs – they might include group homes, vocational training, etc.

What Can the Trust Pay For?

The trust can pay for a very broad range of goods and services so long as payment is made directly to the provider rather than to the disabled person. Examples include personal effects such as appliances, computers, automobile, a residence, rent, purchase of a home, home improvements, pools, utilities, medical insurance, newspaper subscriptions, furniture, services of a care manager, federal and state taxes, funeral and legal fees. Payments for food and shelter are likely to reduce the SSI payment by one-third or one-third plus \$20 depending on living arrangements.

Purchases of homes and cars are special assets. While they are non-countable, there are a number of options that must be considered in consultation with the special needs lawyer assisting in the case.

Generally funds in the Special Needs Trust can only be used for the benefit of the disabled person. Other family members or friends benefiting from the trust are usually required to pay a pro rata share. Trust assets are usually not permitted to be used to discharge a parent's legal obligation of support.

How Much of the Settlement Should be Structured?

Most disabled persons and their families have three wishes: a new home, a new vehicle, and a trip to Disney World. There may also be a certain amount of debt. A lump

sum should be set aside to pay for these items and for future emergencies. Only after these determinations have been made should the amount of the structure be determined.

Structures have significant advantages. These include:

- *Tax Benefit.* The income, including the investment income, is tax-free to the trust beneficiary.
- *Rated Age.* Many plaintiffs have a rated age. This means that an insurance company feels that the disabled person is physically much older than their actual age and has a shorter life expectancy as a result of the injuries. Therefore, an annuity can be purchased to pay for the lifetime of a much older person, thereby significantly increases the monthly payment.
- *Preservation.* The average personal injury settlement, like the average lottery winning, lasts five years. By obtaining a structured settlement the plaintiff can be guaranteed a monthly income for life with a fixed period guaranteed even if the disabled person dies.

Features to Consider in a Structure.

- *Cost of Living.* Over time with cost of living increases the purchasing power of a dollar declines. Structures can be designed to include a cost of living feature. Historically, the cost of living increases 3% per year, so a structure with a 3% COLA compounded makes sense.
- *POPs.* POPs means that at certain stages of the disabled person's life additional lump sums will be paid out. For example, if the disabled person is likely to go to college, then at age 18 a significant lump sum should be paid to cover college tuition.
- *Commutation Rider.* If the settlement is large and the disabled person dies, there may be federal and/or state estate tax due. The structure should include a commutation rider so that monies are available to pay these taxes if necessary.

How is the Trust Established and Funded?

Federal Law requires that the trust be established by a parent, a grandparent, a guardian, or a court. The trust cannot be established by the disabled person. The trust is funded by having the defendant pay the lump sum by check directly to the trustee of the Special Needs Trust. If a structured settlement is involved, the monthly payments from the structure are also paid by check directly to the trustee of the Special Needs Trust. If payments are made to the personal injury attorney, this constitutes "constructive receipt." This means that for public benefit purposes the agency will consider that the money in the attorney's trust account is available to the disabled person and public benefits will be lost.

How Should the Money be Invested?

Any money, other than the structure, should be invested in accordance with the Prudent Investor Act. This means that investments should be for Total Return. There should be a written Investment Policy Statement defining the disabled person's tolerance for risk and investment objectives.

Selecting the Trustee.

Typically family members want to serve as trustee of the Special Needs Trust. The problem is that the family member lacks the experience and expertise that is necessary. Among other things the trustee must have expertise in the following areas:

- Uniform Prudent Investment Act
- Principal and Income Accounting Act
- Public Benefits Laws

Family trustees almost never have this expertise. A better solution is to have a professional trustee. In those situations the family member can serve as co-trustee or a trust advisory committee can be appointed, including a parent, a lawyer, an accountant, a social worker, and, perhaps, a sibling. The trust advisory committee would advise the trustee with respect to distributions.

Counseling Session.

It is wise to have a counseling session with the disabled person, the trustee and other interested family members. The disabled person and/or family should prepare a budget and it should be agreed as to what items on the budget will be paid by the trustee, what will be paid by the disabled person and what, if anything, can be purchased through use of a credit card that will ultimately be paid by the trustee.

It is also important to do a Monte Carlo Simulation. A Monte Carlo Simulation is a way to determine how long the trust will last assuming certain expenses and certain investment returns. Once it is understood that the trust should last the lifetime of the disabled person and a Monte Carlo Simulation shows the likelihood of how long the trust will actually last assuming certain expenditures, the disabled person and/or family often agree to reduce expenditures to a more appropriate level.

At the counseling session the special needs attorney reviews with the trustee, the family and the disabled person the state law requirements pertaining to the administration of a special needs trust. At the end of the session everyone should understand the rules and a game plan will have been adopted so that the disabled person can receive maximum benefits from the trust during his or her lifetime.

Agency Approvals.

- *SSA.* If the disabled person is receiving SSI, the special needs trust will require approval by the Social Security Administration.
- *Medicaid.* If the disabled person is receiving Medicaid, the trust will require approval by the State Medicaid Agency.
- *Filing.* The special needs attorney is generally responsible for filing with the Social Security Administration and/or State Medicaid Agency. It is important to show SSA and the State Medicaid Agency exactly how the trust document complies with their requirements. It should be done by separate cover letter. In fact, approval is seldom given, but it is very important to file. If SSA or the State Medicaid Agency do not approve the trust, they will respond with the reasons why.

Estate Planning Documents/Disabled Person.

If the disabled person is a competent adult, he should consider a Will, Living Will and Power of Attorney. The disabled person may have assets in his or her name, such as a home, motor vehicle, and personal effects. Everyone needs a Living Will to avoid a Terri Schiavo-type situation, and a Power of Attorney will be extremely helpful if the disabled person become incapacitated and is unable to take certain actions on his or her own behalf.

Estate Planning Documents/Disabled Person.

If there are family members of the disabled person who intend to leave money to or for the benefit of the disabled person, they should have a Will, Living Will, Power of Attorney and Third Party Special Needs Trust. If a family member leaves money to the disabled person, public benefits will be lost. Family members should not leave money to the Self-Settled Special Needs Trust, because that trust contains a Medicaid payback requirement. The Third Party Special Needs Trust can be used to maintain the public benefits being received by the disabled person. It operates in much the same way as a Self-Settled Special Needs Trust except that there is no Medicaid payback and no Medicaid accounting requirements. A special needs attorney should be consulted to prepare the Third Party Special Needs Trust. It is also important that all beneficiary designations be coordinated with the family member's estate plan.