Protect public benefits for your special-needs client

A special-needs trust can secure a disabled client's future without jeopardizing public benefits. But don't get tripped up by these common myths.

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The settlement of a personal injury case is often viewed as the end of a legal battle—one that may have been fought long and hard. But attorneys representing clients with disabilities cannot rest on their laurels. These clients require additional guidance and legal representation to ensure that their eligibility for public-assistance programs—like Medicaid—is not compromised by their receipt of the settlement funds. Before settlement, plaintiff counsel should consult a board-certified elder law attorney and financial advisor well versed in public-assistance issues.

Clients who have disabilities, whether due to injury or illness, often cannot work. Some are not able to care for themselves without help. Mounting medical bills may have left them in severe financial straits, and their disabilities may have limited or eliminated their ability to obtain medical insurance.

Proceeds from the settlement can help to make the client whole and defray the costs of living with a disability. But it may not be enough, and it should never jeopardize the client's ability to tap other financial resources, including public-assistance benefits programs. The type of public benefits your client receives has a tremendous impact on the planning needed to preserve them. In general, the primary government-assistance programs that must be considered fall into two broad categories. Similarities in their names and initials make it easy to confuse them.

The first category is funded by the Federal Insurance Contribution Act (FICA) taxes paid by workers and employers. For purposes of this article, the most important of these are retirement benefits for seniors (often called simply Social Security), Social Security Disability Income (SSDI), and Medicare. These are true entitlement programs, because the recipients have paid premiums into the system and so are entitled to receive benefits.

The second category includes so-called means-tested programs; to qualify for them, a person must show he or she has limited means. The eligibility rules of these programs—Supplemental Security Income (SSI) (easily confused with SSDI) and Medicaid—count an applicant's resources and income. To be eligible for benefits, a recipient must have less than $2,000 in assets and limited income—the amount depends on the state where the person lives and his or her living circumstances.

SSI, administered by the Social Security Administration, provides financial assistance to U.S. citizens who are 65 or older, blind, or disabled.[1] The recipient must also meet the financial eligibility requirements.[2]

Medicaid provides health care coverage for those who cannot afford it. This state- and federally funded program is run differently in each state, and eligibility requirements and available services vary. Medicaid can supplement Medicare coverage if the client qualifies for both programs. For example, Medicaid can pay for prescription drugs and Medicare copayments or deductibles.

In most states, even one dollar of SSI benefits automatically triggers Medicaid coverage. You must preserve some level of SSI benefits if your client will need Medicaid in the future.[3]

A special-needs trust can help secure a disabled client's future. The third-party special-needs trust is controlled by state common law, and so-called (d)(4)(A) and (d)(4)(c) trusts are regulated by federal law at 42 U.S.C.

§1396p(d)(4)(A) and (C). There are three types of special-needs trusts:

- A third-party special-needs trust is funded and established by someone else—such as a parent, grandparent, or donor—for the benefit of the client. The client still must meet the definition of disability, and there is no age requirement. When the client dies, Medicaid does not have to be reimbursed.
- A (d)(4)(A) trust can be established only for those who are disabled and under 65; it is established with the client's settlement money for his or her own benefit.[4]
- A (d)(4)(C) trust, typically called a pooled trust, may be established with the disabled client's funds and has no age restriction. A pooled trust is established and managed by a nonprofit association, and it can be joined by any disabled person. The trustee must maintain separate accounts for each trust beneficiary but pools the funds for investment and management. At a beneficiary's death, if the funds that remain in his or her account are retained by the trust, Medicaid does not have to be reimbursed. If the trust does not retain the funds and they are distributed to the beneficiary's heirs, Medicaid must be reimbursed.[5]

If your client is disabled and receives public benefits, you need to understand the eligibility criteria of public-assistance programs to properly plan for your client's financial future. At the same time, be careful not to be led astray by common myths about cases involving public benefits. Here are several common myths, debunked.

Myth No. 1: Clients who receive Medicare and Social Security Disability Income require special-needs trusts. SSDI and Medicare are available without regard to the client's finances. You do not need to set up a special-needs trust to protect eligibility for these benefits.

Clients who meet Social Security's definition of disability and have paid premiums long enough can receive disability benefits.[6] SSDI is funded by FICA, and workers earn credits based on their work history to accrue eligibility for benefits if they become disabled. Medicare is a federal health insurance program for people 65 or older and some under 65 with disabilities or end-stage renal disease. Medicare entitlement begins at age 65, or 24 months from the month of disability entitlement.[7]

If the case involves workers' compensation, you may need a Medicare set-aside (MSA) to preserve entitlement for Medicare if both medical and indemnity are settled.[8] A set-aside allows a claimant to preserve Medicare benefits by allocating funds from the settlement to a separate account to pay for Medicare-covered expenses. Once those funds are exhausted, the claimant gets full Medicare coverage without any subrogation.

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However, eligibility for SSI and Medicaid is dependent on income and assets, so planning is needed to preserve these benefits. If a client receives SSI or Medicaid, he or she needs a special-needs trust because the funds in such a trust do not count as resources for purposes of qualifying for Medicaid or SSI. A client can use the trust funds as needed and still qualify for these public-assistance benefits.

Myth No. 2: My client's special-needs trust can pay for anything. As a general rule, a special-needs trust can pay for things that benefit the Medicaid recipient for whom the trust was created, such as medical items or services that Medicaid does not cover and are needed to improve the beneficiary's quality of life.

However, to maintain his or her Medicaid eligibility, the beneficiary can use the trust funds only for his or her "supplemental" or "special" needs. These categories are interpreted quite broadly and include, but are not limited to, medical and dental expenses not covered by Medicaid; attendant care, 24-hour or as needed; durable medical equipment and supplies; rehabilitation services, including respiratory, physical, occupational, speech, visual, and cognitive services; and transportation, including vehicle purchase, maintenance, and insurance.

The trust can also pay for nonmedical items, such as vacations and travel to visit relatives or friends; electronic equipment, including MP3 players, CD players, televisions, DVD players, and computer equipment; camps; educational needs, including tuition for private school, college, or technical school; and other things that enhance the client's quality of life. The trust generally cannot pay for "food, clothing, and shelter," which are theoretically provided for by the SSI payment. However, the interpretation of "food, clothing, and shelter" is quite narrow, so, for example, "shelter" expenses would not include payments by the trustee directly to a cleaning service for the client's home. If the "food, clothing, and shelter" rules are violated, the client could lose all SSI benefits or receive a reduced payment.

Myth No. 3: If my client no longer needs SSI or Medicaid, we can terminate the special-needs trust. A special-needs trust is irrevocable. Most states, though, allow modification or termination of an irrevocable trust by court order in certain circumstances, such as if the client's situation changes and public-assistance eligibility is no longer an issue. For example, a disabled minor might get a college degree and enter the work force.

If the trust is reformed, the trustee no longer has to worry about keeping the client eligible for public assistance. Medicaid still has to be repaid for services it provided from the trust's creation

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until its reform. Similarly, if the trust were to be terminated, Medicaid would have to be repaid first before any assets were distributed.

Myth No. 4: Structured settlements and special-needs trusts are not subject to Medicaid or Medicare reimbursement requirements. Neither a structured settlement nor a special-needs trust will avoid the obligation to repay Medicare or Medicaid. In fact, if there is a Medicaid lien, you cannot create a special-needs trust until it is satisfied. All states require any sums paid by Medicaid as a result of the injury, and between the time of the injury and the settlement, to be repaid. Similarly, any Medicare lien must be satisfied before you can create a Medicare set-aside.[9] Federal law gives Medicare the right to make conditional payments for medical expenses related to an inquiry, then recover those amounts through subrogation.[10]

Failing to address lien issues or trying to manipulate the rules can have dire consequences for plaintiff counsel. Some states allow Medicaid to bring legal action against the attorney.[11] Under federal law, the government can sue the attorney for the full amount of the Medicare subrogation claim if he or she ignores it.[12]

Similarly, manipulating a settlement to defeat a lien can result in criminal charges and suspension or disbarment. Take the case of a Florida personal injury attorney who settled a claim involving two separate clients. One client's medical expenses were covered by Medicaid, which filed a lien against the recovery. The attorney manipulated the settlement numbers and made it appear as if the Medicaid client received only one-half of one percent of the settlement, with the balance going to the other client. The Medicaid client actually received 20 percent.

The attorney was convicted of grand theft for fraudulently manipulating the settlement to defeat Medicaid's reimbursement claim[13] and was suspended from the practice of law for three years.[14]

Myth No. 5: At the client's death, funds left in the special-needs trust will go to his or her beneficiary. At the client's death, any remaining trust funds go first to repay Medicaid for benefits provided during the trust's existence. The balance, if any, will then go to the client's beneficiary.[15] Even if a lien was satisfied when the personal injury claim was settled, Medicare or Medicaid could have another reimbursement claim for expenses paid after the trust was established.

However, with a pooled trust, the nonprofit association can retain the funds at the client's death and use them to assist other trust beneficiaries instead of paying back Medicaid.[16]

Myth No. 6: My client is over 65, receiving Medicaid, and settled a claim for nursing home negligence, so we need a special-needs trust. This is not so much a myth as it is a misstatement of what is needed. A (d)(4)(a) special-needs trust can be established only for clients who are under 65. For a disabled client 65 or older, the only trust option is a pooled trust. Or you can consider options other than a trust, such as a personal services contract or the purchase of exempt assets to keep the nursing home resident eligible for public benefits. Consult an elder law attorney to discuss the available options.

Myth No. 7: A structured settlement alone will preserve my client's Medicaid eligibility. While a structured settlement annuity is not considered an asset for Medicaid eligibility purposes, the payments are income and will reduce the SSI benefit and may defeat Medicaid eligibility. If your client is on public assistance, you should always consult an elder law attorney and obtain a recommendation on the viability of a special-needs trust. When used on its own, a structured settlement is a financial-planning tool, not a public-assistance-preservation mechanism.

Myth No. 8: If my client is on Medicaid, the only option he or she has is to put all the settlement proceeds into the special-needs trust. This is inaccurate. All the proceeds *could* be placed in the special-needs trust. The trustee will invest the money, and taxes will be due on any gains. However, another option is to seed the trust with only part of the settlement proceeds and put the remaining funds in a typical structured settlement.

Payments from the structured settlement can fund the trust on a monthly, quarterly, semi-annual, or annual basis. The interest earned on the structured settlement is not taxed. However, once money is paid to the trust and invested by the trustee, the interest earned by the trust is taxable. Combining a tax-free structured settlement with professional management by a trustee is a powerful money-management plan.

In addition, some settlement proceeds could be used to purchase assets that are exempt from consideration when determining Medicaid eligibility, such as a home or vehicle.[17] If done incorrectly, there can be an ineligibility period if money is received and exempt assets are purchased. The calculation of the ineligibility period is complicated, and you should consult an elder law attorney before finalizing any transaction where money will be given directly to a Medicaid recipient or his or her family.

Myth No. 9: Due to a policy change, structured settlements can no longer fund special-needs trusts. No formal statement from the Social Security Administration has changed the policy on additions to special-needs trusts. To the contrary, in a 2003 letter, the agency said there has been no change to its policy that "a legally assignable payment that is assigned to a trust is in-

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come for SSI purposes *unless* the assignment is irrevocable."[18]

Periodic payments from a structured settlement into a special-needs trust, when irrevocably assigned to the trust, should not be countable as income or a resource to the trust beneficiary and should have no effect on SSI and Medicaid eligibility.

Myth No. 10: We can ignore the benefits of a structured settlement as an investment since we will have a special-needs trust with a professional trustee. A structured settlement offers financial advantages that a special-needs trust cannot provide alone. First, a structured settlement is generally not taxable, but a trust's investments are. Second, annuities enjoy certain legal protections against creditor claims and judgments. Third, structured settlements provide cost-free financial management. There are no ongoing fees or charges associated with a structured settlement. A professional trustee managing a trust's assets will typically charge an annual fee of at least 1 percent of the trust's assets.

Fourth, tax-free structured settlements historically have had higher rates of return than similar, taxable, fixed-income investments (comparing net after-tax rates). Structured settlements also lack the market risks found in market-based investments, even those managed by professional trustees.

Structured settlements can also provide lifetime income, guaranteeing that the settlement proceeds will not run out before the beneficiary's death. No trustee can guarantee, regardless of the performance of the market, that the invested assets will be available for as long as someone lives.

Another advantage of using a structured settlement is obtaining a higher lifetime income when a person's life span is medically underwritten and a rated age is obtained. For example, if a 5-year-old boy has a rated age of 45, this means that, after reviewing the child's medical records, a life insurance company has assigned him the same life expectancy as a person who is 45 years old and healthy. It is less expensive to provide lifetime payments to a 45-year-old than to a 5-year-old—because the company would expect to make fewer payments—so the periodic payments would be greater than without the rated age.

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A plaintiff attorney may face legal malpractice liability for ignoring the benefits of a structured settlement. In *Grillo v. Pettiette*, plaintiff counsel was sued for failing to set up a structured settlement and a special-needs trust.

The allegations in that case were that the lawyers were negligent in "causing constructive receipt [and] failing to fully and properly inform [the client] . . . of the tax-free benefits of a structured settlement with a qualified assignment and rated age for [the client's daughter]." That "caused [the client] to lose the ability to have a structured annuity . . . as part of the settlement, because [the] plaintiff was deemed to have constructive receipt of the funds."[19] The attorneys' legal malpractice carrier and the guardian ad litem settled the claim.

If you are advised to ignore the structured settlement option and place all the funds into the special-needs trust, be sure to get an opinion letter from whoever gives that recommendation—such as a bank, trust company, stockbroker, guardianship lawyer, or trust lawyer. To avoid a malpractice claim, you should clearly document in the file that you considered the option and why it was rejected.

Myth No. 11: Creating a structured settlement for a parent or a spouse will not affect my client's Medicaid eligibility. Under Social Security rules, paying income to a parent is the same as paying it to the minor child; similarly, paying income to a nondisabled spouse is the same as paying it to the disabled spouse.[20] Therefore, setting up a structured settlement for the parent or nondisabled spouse may render the child or disabled spouse ineligible for Medicaid.

There are ways to provide income that will not immediately disqualify the Medicaid recipient, but the income must be limited. For example, if the parent is the disabled child's primary caregiver, a special-needs trust could pay the parent for his or her services caring for the child. This is still income under Medicaid eligibility rules and taxable income to the parent, but the trustee can control the income level to keep it below the rules' limit or terminate it completely if needed to protect benefit eligibility.

Myth No. 12: If my client is a minor or is incapacitated, we need a special-needs trust and a guardianship. A guardianship may be needed to bring suit and approve a settlement, but usually it can be terminated after settlement, particularly if a special-needs trust is in place. A court could require a guardianship even when there is a trust, but this is not typical and may even be redundant.

Having the special-needs trust without a guardianship has some distinct advantages. A professional trustee can invest funds more aggressively, while the court may limit the types of investments that a guardianship can make. The trust usually is not subject to the bond or reporting requirements that usually apply to a guardianship account. Finally, the trustee typically can make distributions without court approval, but a guardianship cannot.

When you're settling the personal injury claim of a client with disabilities, you must give the client all the options and explain them thoroughly. As the *Grillo* case shows, you can face malpractice liability if you don't deal with these issues properly. Although the myriad complex considerations may seem daunting, an elder law attorney and cer-

tified structured settlement specialist can walk you through the minefields. ■

Notes

1. Disability is defined the same way as for SSDI, stated at 42 U.S.C. §1382 C (a)(3)(A) (2003): "[A]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." If someone receives SSDI benefits, he or she automatically qualifies as being disabled for SSI purposes.

2. In Florida, a person can receive up to $552 per month ($829 for couples) and have no more than $2,000 in countable resources. The SSI rate is governed by federal law. 20 C.F.R. §416.401-.435, .1100-.1266 (2005). Medicaid varies by state. *See, e.g., SSI-Related Programs Fact Sheet*, Apr. 2005, at 8, *available at* www.dcf.state.fl.us/ess/ssifactsheet.pdf (last visited Apr. 26, 2005).

3. In many states, a poor or elderly person can become eligible for Medicaid even if his or her income exceeds the limit for SSI benefits, through the Medically Needy program, by paying a "share of cost." For example, in one case a woman had severe abdominal injuries and had to be fed intravenously. The state's Medicaid program would pay for her liquid food if she remained eligible for Medicaid. Her SSDI benefit exceeded $1,000 per month, making her ineligible for SSI, but she was able to enroll in the state's Medically Needy program, pay a small share of the cost, and receive Medicaid benefits.

4. 42 U.S.C. §1396p(d)(4)(A) & (C) (2003) governs these trusts. A beneficiary must meet the definition of disability for SSDI at 42 U.S.C. §1382 C (2003).

5. *Id.* §1396p(d)(4)(C).

6. SSDI also provides death benefits. A person who became disabled before age 22 and is 18 or older may receive disability benefits based on the work history of a disabled, deceased, or retired parent as long as the person is unmarried.

7. SSDI beneficiaries receive Part A Medicare benefits, covering inpatient hospital services, home health care, and hospice. They may obtain Part B benefits, covering physicians' charges, by paying a monthly premium. *See* Social Security Online, *at* www.ssa.gov (last visited Apr. 26, 2005).

8. Federal regulations require MSAs in certain workers' comp cases. 42 C.F.R. §411.46 (2005). If the claimant is eligible for Medicare or reasonably expected to be eligible within 30 months of the settlement, and the anticipated total settlement amount is more than $250,000, the Centers for Medicare & Medicaid Services (CMS) must examine the settlement to approve the amount of money set aside. CMS recently indicated that it may require MSAs in third-party claims, but currently they are not required.

9. FLA. STAT. ch. 409.910 (2004).

10. 42 U.S.C. §1395y(b)(2)(A)(ii)(2003); 42 C.F.R. §411.52 (2005). Medicare has subrogation rights under 42 U.S.C. §1395y(b)(2)(B)(iii).

11. *See, e.g.*, FLA. STAT. ch. 409.910.

12. 42 U.S.C. §1395y(b)(2)(B)(iii).

13. Durie v. Florida, 751 So. 2d 685 (5th Cir. 2000).

14. Fla. Bar v. Durie, 729 So. 2d 919 (Fla. 1999).

15. 42 U.S.C. §1396p(d)(4)(A).

16. *Id.* §1396p(d)(4)(C)(iv).

17. *See* 20 C.F.R. §416.1210 (2005).

18. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEMS I01120.201J.1.d (emphasis added).

19. Nat'l Structured Settlements Trade Assn., *The* Grillo *Case and Structured Settlements*, Aug. 9, 2001, *at* www.nssta.com (search for "Grillo"); Grillo v. Pettiette, No. 96-145090-92 (Tex., Tarrant County Dist. Ct. Mar. 23, 2001).

20. *See* 20 C.F.R. §416.1160 (2005).

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