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## An introduction to Self-Settled Special Needs Trusts for Personal Injury, Estate Planning & Family Law Lawyers

### Will my client's settlement result in disqualifying them from their government benefits?

Yes, if a settlement award is more than \$2000 and no Special Needs Trust is created, the client will lose Supplemental Security Insurance and Medicaid when the Social Security Administration is advised of the settlement award. The client must<sup>1</sup> turn in a Medicaid card within 10 days after receipt of the settlement funds if they do not have a trust.

### I. Deciding whether a special needs trust is right for your client.

1. Type of Client: Clients should be advised about Self-Settled Special Needs Trusts if they will be: (1) awarded a settlement; (2) when they are under the age of 65; and (3) if they are receiving or may in the future receive certain government benefits.
2. Type of Benefits: Supplemental Security Income (SSI)<sup>2</sup> and Medicaid<sup>3</sup> are needs-based government benefit programs with income and asset rules, which limit eligibility. These programs should be distinguished from Social Security Disability Insurance or 'SSDI'<sup>4</sup> and Medicare<sup>5</sup> programs, which serve similar functions but are unrelated to a person's assets and income.
3. Value of Benefits: A qualifying disabled person in 2009 can collect up to \$8,095.32 tax free in SSI payments per year. More important, a disabled person's medical expenses without Medicaid insurance coverage can be very high – especially if they are uninsurable due to that disability<sup>6</sup>. Without a Special Needs Trust settlement funds will be counted as a resource and will need to be 'spent down' until the individual's resources are again within the acceptable amount.
4. Law: In 1993 the US Congress, passed the Omnibus Budget Reconciliation Act (OBRA), which under 42 U.S.C. § 1396p(d)(4)(A) amends the Medicaid statute to permit and encourage trial courts to establish Special Needs Trusts for Disabled children and adults.
5. Practical Issues:
  - a. Settlement Amount: Special Needs Trusts are valuable for clients even for settlement amounts as low as \$15,000.

<sup>1</sup> It is a crime to fail to report such a settlement to Social Security if it will affect future eligibility ([RCW 74.09.210](#) - Fraud). The Social Security Administration runs regular computer sweeps of all bank accounts in the nation for persons on their SSI disability rolls.

<sup>2</sup> The SSI Benefits Program is a welfare program paying monthly cash disability payments to individuals who are medically disabled, have few assets and little income, and who have no current disability insurance through the SSDI program described in footnote 3.

<sup>3</sup> Medicaid insurance benefits are automatically provided to all disabled individuals who receive SSI payments, welfare payments, and the elderly over 65 who are not covered by Medicare. In addition to doctors, hospitals, and other medical services, Medicaid pays for nursing homes and prescription drugs.

<sup>4</sup> SSDI program is funded by worker contributions through FICA (Social Security) payroll deductions or self-employment taxes in which workers earn credits in case they, or their survivors or dependents, become unable to work at any job. It is paid to medically qualified individuals regardless of need, and the amount of monthly payment depends on the worker's lifetime contributions to the system.

<sup>5</sup> Medicare benefits pay for doctors, hospitals, and other medically-related expenses. This is the same insurance that all workers receive at age 65, the normal retirement age. Medicare insurance is provided to all SSDI disabled workers, after they complete a 24-month waiting period. Traditional Medicare does not cover extended stays in nursing homes nor prescription drugs, but now part D does provide some prescription drug coverage.

<sup>6</sup> In 2003, a Texas law firm and the Guardian ad Litem in the case settled a claim for \$4.1 million when the client lost Medicaid as a result of not having a Special Needs Trust, and had to use settlement money to pay for medical care at the "retail" (highest) billing rate, called "fee-for-service" rather than the negotiated reduction and free access to medical care through Medicaid. *Grillo v. Petiete et al.*, Cause No. 96-145090-92 and *Grillo v. Henry* Cause No. 96-167943-96, 96<sup>th</sup> District Court, Tarrant County, Texas.

- b. No Guarantee: A Special Needs Trust does not guarantee SSI and Medicaid eligibility. Although Congress' actions have shown movement toward expanding access to Medicaid benefits for disabled individuals, this trend could change. Also, Social Security Administration staff reviewing a trust could make a mistake and attempt to disqualify the client.
- c. No burden to opposing party: The Special Needs Trust imposes no additional obligations on the defendant or opposing party. Even complex structured settlements need only to change the name to the payee to the Trust.

## **II. Procedures for creating a Special Needs Trust**

1. First Step: Call me. We can schedule a meeting where I can answer your client's questions, explain the advantages and disadvantages and determine if your client wishes to proceed.
2. Settlement Language and Court Orders: First, DO NOT DISTRIBUTE FUNDS TO THE CLIENT. A structured settlement should include simple language that payments should be made to the trust. If the settlement involves a minor child, or an incompetent adult more court involvement will be necessary. Even a competent adult may still need a Court Order approving and establishing the Special Needs Trust.
3. Choosing a Trustee: The ideal trustee: (1) understands public benefits; (2) Acts in the best interest of the beneficiary; (3) has investment expertise; (4) understands taxes; (5) keeps perfect books; (6) carries insurance; and (7) can identify abuse. For settlement amounts starting at \$200,000, a professional trustee is a wise choice. A personal trustee, such as a close relative can also serve as trustee if the person is sufficiently skilled with the above responsibilities.
4. Cost: I currently charge \$2500 for this work. This can be paid from the settlement amount or as a fee advancement, which will be deposited into my IOLTA until I have delivered the final draft of the trust. This fee covers my time and expertise in telephone conferences and meetings with you and your client, drafting the trust, and responding to a reasonable number of follow-up questions and minor re-drafting matters. I will register the Trust with Washington State DSHS and formally serve notice on the Social Security Administration that manages the SSI program. I will write a letter of advice to your client's trustee. And, I will present a motion to have the court establish the trust if necessary. Additional services, undertaken only upon your request, will be billed at my hourly rate of \$200.

## **III. Managing a Special Needs Trust**

1. Payments from trust: Payments can cover a broad range of expenses but generally cannot cover food, clothing, or shelter.
2. Costs of administration: Depending on the level of complexity of trust arrangements, trustee costs can range from nothing to very expensive. A family member may decide to serve for free, while appointing an Advisory Committee to give direction to a Professional trustee could be very expensive. Taxes are usually minimal because the beneficiary will not have other income and large medical expense deductions can offset any taxes that do exist.