

Special Needs Planning and Medicaid Law Newsletter

FROM MARK A. ROSEMAN, ESQ.

WELLS FARGO BANK BUILDING
3325 HOLLYWOOD BOULEVARD, SUITE 308
HOLLYWOOD, FLORIDA 33021-6926



BROWARD TELEPHONE (954) 963-8719 ♦ MIAMI-DADE TELEPHONE (305) 326-7400 ♦ WEBSITE: WWW.ROSEMAN-ELDER-LAW.COM

A FREE LEGAL UPDATE FOR ELDERS AND SAME SEX PARTNERS WHO SEEK ASSET PROTECTION ♦ FEBRUARY, 2016 EDITION

Memo to Personal Injury Attorneys: Myths and Realities Concerning Special Needs Trusts

Most Florida personal injury attorneys are aware of the value of Special Needs Trusts to prevent litigation settlements from causing a loss of Medicaid and other governmental entitlements. But some myths exist concerning such Trusts:

1. "My client has already signed a release to resolve the case; it is too late to create a Special Needs Trust."

The signing of a release authorizing the resolution of a case does not preclude the creation of a Special Needs Trust on behalf of the disabled plaintiff; it will not affect the validity of a subsequent Trust.

2. "Once the settlement monies are in the personal injury attorney's escrow account, it is too late to create a Special Needs Trust."

The receipt of monies by the personal injury attorney does not, in and of itself, disqualify a disabled beneficiary from receiving the benefits of a Special Needs Trust.

Unless the personal injury attorney holds the monies in escrow for more than a few months, Medicaid and Social Security will not impute receipt of the money to the disabled plaintiff.

Instead, these government agencies will consider only the actual receipt of the money by the disabled person to terminate eligibility for Medicaid and SSI.

3. "Once the personal injury attorney has distributed funds to the client, it is too late to create a Special Needs Trust; this is especially true if the client has been disqualified for public benefits."

Even where the client has received the personal injury proceeds and has been disqualified for public benefits, a Special Needs Trust can nonetheless be created to receive the monies and allow the client to become re-eligible for these benefits.

Once again, however, speed is critical; the longer the client waits to create the Special Needs Trust, the longer the period of ineligibility.

However, unlike transfers to other types of Trusts, there is no "look-back" period which would create future ineligibility where the monies are properly placed into a Special Needs Trust.

Consequently, it is preferable to create a Special Needs Trust prior to distributing settlement proceeds to a disabled client.

4. "A structured settlement cannot be used in conjunction with a Special Needs Trust."

To the contrary, structured settlements are routinely used in resolving personal injury claims on behalf of individuals who receive public benefits.

However, it is essential the structured settlement identify the Special Needs Trust as the recipient of each future payment, and not the individual disabled plaintiff.

5. "Where a Special Needs Trust is used, it is best to put most of the settlement proceeds into a structured settlement which will flow into the Special Needs Trust."

While structured settlements can be used to fund a Special Needs Trust, it is important that at least some significant portion of the settlement be included as a lump sum to initially fund the Special Needs Trust.

First, if the personal injury settlement or verdict is large, taxes and probate fees and costs could be due at the death of the beneficiary on the entire personal injury settlement proceeds.

If the substantial majority of the structured settlement proceeds have not yet been received by the Trust (e.g. where the disabled beneficiary dies soon after the creation of the structured settlement with future payments guaranteed), the Special Needs Trust may not have enough liquid assets to pay the these fees and costs in a timely fashion.

Second, many of the best corporate fiduciaries are unwilling to handle a Special Needs Trust unless the Trust is funded with a substantial lump sum (often at least \$250,000.00 to \$500,000.00) at the outset. Alternatively, minimum bank trustee fees can be extremely high.

Third, if the disabled beneficiary is a minor or incapacitated person, principal of the trust can only be used with court approval. Therefore adequate funding is necessary to generate

sufficient income to meet the special needs of the beneficiary.

6. "Where a settlement is small (less than \$50,000.00), the client should not use a Special Needs Trust or other planning technique, but should simply allow himself to become disqualified until the settlement money is gone."

This perspective is virtually always incorrect. First, it may be possible to undertake an immediate (i.e., within the month of receipt of the settlement monies) "spend-down" whereby the disabled beneficiary expends all of the settlement monies for goods or services at fair market value. It is never advisable to give the money away.

What if the disabled beneficiary can spend all of the settlement monies for fair market value during the month of receipt of the settlement? Then, there is no loss of eligibility for Medicaid and SSI.

Pooled trusts operated by non-profit corporations offer the benefit of professional management at reasonable fees to protect smaller personal injury and medical malpractice settlements.

Using a pooled trust assures that the funds will benefit the beneficiary without loss of Medicaid and Social Security Income.

We never recommend to individuals to allow themselves to be disqualified for public benefits and to re-apply later. Such individuals almost never are able to purchase health insurance in the open market.

They would be left without health insurance until they spent the money down below the \$2,000.00 limit for public benefits.

7. "Rather than continuing to accept Medical Assistance, the client will pay for health insurance or for health services out of pocket from the settlement proceeds."

Most individuals who have received Medical Assistance in the past are disabled to the point that no private health insurer will cover that individual.

Most Medicaid recipients are also unable to access any group plan due to an inability to work, age or other disqualifying circumstance.