

Special Planning for Special Needs

In the confusing landscape of public benefits and financial planning for a client with

disabilities, finding your way can be a daunting task.

By || **JASON D. LAZARUS**

When you represent a catastrophically injured client who receives a large monetary settlement or award, many questions arise. Should the client seek Social Security Disability benefits and become Medicare eligible? Should he or she create a Medicare set-aside? What if the client receives needs-based benefits such as Medicaid and Supplemental Security Income (SSI)? Is coverage under the Patient Protection and Affordable Care Act (ACA)¹ a better or even an available option? How should the recovery be managed from a financial perspective? Is a trust or a structured settlement appropriate? There are no easy answers to these questions. But here are some guidelines for navigating the terrain and advising your client.

Let's consider a real-world example. Jan Smith, in her early 40s, decided to have elective back surgery for degenerative disk disease. A problem developed while she was being intubated, and the procedure was cancelled. She was moved to the ICU, and no neurologic monitoring was performed that evening. The next morning she was found to be quadriparetic, and her condition was irreversible.

Smith sued multiple defendants for medical malpractice and received a substantial settlement offer. She and her family had Medicaid coverage since the injury, she received SSI as the result of her disability, and she had applied for Social Security Disability Income (SSDI). At the time, she was not yet eligible for Medicare. As her lawyer, how do

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you protect her eligibility for public benefits—and that of her family? Is that the right thing to do? Should ACA coverage be considered? How should the settlement proceeds be protected? Although our example is a settlement, these same issues should be considered with a judgment or trial award.

An important question is whether it makes sense for Smith to give up her needs-based benefits completely by taking the settlement in a lump sum and becoming privately insured through coverage under the ACA. This isn't a question that can be answered with a simple yes or no. There are multiple issues to consider, including whether the case involves needs that aren't covered by plans under the ACA, such as in-home skilled attendant care and long-term facility care. These services can be costly and may be covered by Medicaid in many states but are not required to be covered by ACA plans.

In Smith's case, she will need a significant amount of attendant care that can be covered by certain Medicaid programs available in her home state but not by plans under the ACA. So does that mean she should not apply for an ACA policy? Should she create a special needs trust to protect Medicaid and SSI? The answer lies in analyzing the costs of the plans available under the ACA and the amount of spendable income that results if using a special needs trust. The complicated details involved are beyond the scope of this article.² However, such a trust places many restrictions on how settlement monies may be used. So it isn't a decision that should be made just for financial reasons. You need to carefully analyze all the issues.

For Smith, other considerations outweighed the use of a special needs trust. She and her family didn't want the restrictions that come with the special needs trust. Because monies were

allocated to her spouse and their children, all the family's assets disqualified her for needs-based benefits.

Public Benefits

You need to understand the basics of public benefit programs and their differences to protect your client's eligibility for them and plan for his or her recovery. Two primary public benefit programs are available to the injured and disabled: Medicaid with the intertwined SSI, and Medicare with the related SSDI. Receipt of a personal injury recovery can jeopardize a client's eligibility for both programs.

Medicaid and SSI. SSI is a needs-based cash assistance program administered by the Social Security Administration. To receive SSI, the person must be 65 or older, blind or disabled, and a U.S. citizen, and he or she must meet the financial eligibility requirements.³ In many states, one dollar of SSI benefits automatically provides Medicaid coverage. It is imperative in most situations to preserve some level of SSI benefits if Medicaid will be needed in the future. Medicaid provides basic health care coverage for those who cannot afford it. The state- and federally funded program is run differently in each state, so eligibility requirements and available services vary. Because Medicaid and SSI depend on income and assets, a special needs trust may be necessary to

preserve eligibility.

Medicare and SSDI. These are entitlements and not income or asset sensitive. Clients who meet Social Security's definition of disability and have paid enough credits into the system can receive disability benefits regardless of their financial situation. SSDI is funded by payroll contributions to Federal Insurance Contributions Act and self-employment taxes. Workers earn credits based on their work history.

Medicare is a federal health insurance program, and benefits begin at age 65 or two years after becoming disabled. Medicaid can supplement Medicare coverage if the client is eligible for both programs. For example, Medicaid can pay for prescription drugs as well as Medicare copayments or deductibles. A special needs trust is not necessary to protect eligibility for Medicare benefits. However, the Medicare Secondary Payer Act (MSP) may necessitate use of a Medicare set-aside.

Planning Techniques

Here are some planning techniques to help protect your client's eligibility for benefits.

Protect Medicaid and SSI eligibility. The primary vehicle for protecting needs-based benefits is a special needs trust. Assets held in a special needs trust are not countable for purposes of Medicaid or SSI eligibility.

Federal law governs the creation of and requirements for such trusts.⁴ First and foremost, a client must be disabled.⁵ There are two primary types of trusts, each with its own requirements and restrictions. The (d)(4)(A) special needs trust is only for those who are under 65.⁶ This trust holds the personal injury victim's recovery and is for the victim's own benefit. It can be established only by a parent, grandparent, guardian, or court order, not by the injury victim individually. Alternatively, a (d)(4)(C) trust,

typically called a pooled trust, may be established with the disabled victim's funds without regard to age.⁷ A pooled trust can be established by the injury victim.

Protect future Medicare coverage.

In our case study, Smith has applied for SSDI, so, according to the Centers for Medicare and Medicaid Services (CMS), she has a "reasonable expectation of Medicare enrollment within 30 months."⁸ For any client who is a current Medicare beneficiary or reasonably expects to become one within 30 months, you must consider the MSP Act. According to CMS's interpretation of this law, Medicare is not supposed to pay for future injury-related medical expenses covered by a liability or workers' compensation settlement or award.⁹

In certain cases, a Medicare set-aside may be advisable to preserve future eligibility for Medicare coverage. A portion of the settlement is put into a segregated account and can be used only for the client's injury-related care that would otherwise be covered by Medicare. Once the set-aside funds are exhausted, the client gets full Medicare coverage without Medicare seeking further contribution, reimbursement, or subrogation. In certain circumstances, Medicare signs off on the amount to be set aside and agrees to be responsible for all future expenses once those funds are depleted.

Dual eligibility. If a client is potentially a dual Medicaid and Medicare recipient, extra planning is in order. A Medicare set-aside can affect eligibility for needs-based benefits such as Medicaid and SSI, if it is not set up inside a special needs trust. Therefore, to maintain the client's full benefits, the set-aside must be put inside an appropriate trust. A hybrid trust that addresses both Medicaid and Medicare is a complicated planning tool but one that is essential when you have a client with dual eligibility.


Financial Planning

After protecting public benefits, you should also consider how to best manage a client's financial recovery. Should part of it be a structured settlement? Does the client need ongoing management of financial affairs or help from a

fiduciary such as a corporate trustee? There are no right or wrong answers to these questions. Here are some options to consider to help your client make an informed decision.

One is to take the whole personal injury recovery in a lump sum. This lump

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sum is not taxable, but any investment gains are.¹⁰ This option does not provide any spendthrift protection and leaves the funds at risk for creditor claims, judgments, and waste. Also, the injured client has the sole burden of managing the money to cover future needs such as lost wages and medical expenses. As discussed above, the client would lose any needs-based public benefits.

The second option is a structured settlement to provide fixed periodic payments. A structured settlement's investment gains are never taxed,¹¹ it offers spendthrift protection, and the money has enhanced protection against creditor claims and judgments. A structured settlement recipient can avoid disqualification from public assistance if he or she

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also implements an appropriate trust, as discussed above.

A third option, which should always be considered, is a settlement trust. These are typically managed by a professional trustee and can also contain provisions to help preserve needs-based benefits. Settlement trusts provide liquidity and flexibility that a structured settlement can't offer and, at the same time, protect the recovery. The investment options become limitless, and the trust can always be paired with a traditional structured settlement. Having a professional trustee in place that has a fiduciary duty to the client provides security and a trusted resource for life

and financial management issues. In certain cases, this solution makes a lot of sense because of its ability to adapt to changing circumstances. When a disabled injury victim has needs that are not easily quantifiable or predictable, the settlement trust can adjust to the client's needs. When a settlement trust is paired with certain fixed-income investments and a deferred lifetime annuity via a structured settlement, the client can have guaranteed income for life but sufficient liquidity.

Identify Clients Who Need Planning

You must establish a method of screening your files to identify clients who are sufficiently disabled to warrant further planning and determine whether you should consult outside experts. The easiest way to remember the process is the acronym CAD:

- C—consult with competent experts who can help deal with these complicated issues.
- A—advise the client about the available planning vehicles, or have an outside expert do so.
- D—document your efforts to protect your client.

If the client declines any type of planning, document the advice and education provided, and have the client sign an acknowledgement. If he or she elects a settlement plan, hire skilled experts to put the plan together so they can help you document your file properly to close it compliantly.

Disabled clients especially need counseling given the likelihood they will be receiving some type of public benefits. To prevent being exposed to a malpractice suit, you should understand the types of public benefits for a disabled client and techniques for preserving them.

In these cases, you typically will retain outside counsel who is well versed in settlement law and planning to help

MORE ON CLIENTS WITH SPECIAL NEEDS

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with these complicated issues. The legal fees for creating the trusts to protect the client's assets and benefits are normally paid for out of the injury victim's recovery. Fees can vary, but a normal range is \$3,000 to \$7,500, depending on the issues' complexity.

Jan Smith's Case

In our example case, Smith chose a settlement trust. It has two buckets. One is an immediate fixed-income portfolio of annuities that provides a high-yield stream of periodic payments to the trust that can then provide the client with a monthly income. This portfolio was paired with a lifetime structured settlement that was deferred to maximize return but guarantee payments for life. The second bucket is a cash reserve that is professionally managed but can be accessed when the need arises or circumstances change. This gives Smith the guaranteed income she needs coupled with the flexibility injury victims require when unforeseen needs arise.

Even though this option made her ineligible for needs-based benefits, that did not mean she could never become eligible in the future. Because she might need means-tested benefits such as

Medicaid/SSI in the future and could become a Medicare beneficiary at some point as well, a trust with provisions that would protect these benefits was created.

Smith's settlement trust had provisions that would allow the trustee to move money into a "special needs sub-trust" and a "Medicare set-aside sub-trust." The set-aside sub-trust was contained within the special needs sub-trust so that if the client were "dual eligible," the set-aside wouldn't cause an eligibility problem for needs-based benefits. Until she needs these public benefits, she could purchase ACA coverage and use the settlement monies without the restrictions that accompany a special needs trust or set-aside.

It is a win-win solution in today's complicated planning environment. ■



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NOTES

1. Patient Protection & Affordable Care Act, 42 U.S.C. §§18001-18121 (2010).
2. A 2013 article discusses how the numbers can favor combining ACA coverage with a special needs trust to preserve Medicaid and SSI eligibility. Kevin Urbatsch, *The Affordable Care Act and Settlement Planning*, Pl. Mag. (Dec. 2013).
3. An individual can receive up to \$733 per month (\$1,100 for couples). Soc. Sec. Admin., *SSI Federal Payment Amounts for 2015*, www.ssa.gov/oact/cola/SSI.html.
4. 42 U.S.C. §1396p(d)(4) (2010).
5. 42 U.S.C. §1396p(d)(4)(c)(iii). (To be considered disabled for purposes of creating a special needs trust, the trust beneficiary must meet the definition of disability for SSDI found at 42 U.S.C. §1382c(a)(3).)
6. 42 U.S.C. §1396p(d)(4)(A).
7. 42 U.S.C. §1396p(d)(4)(C). See Annie K.T. Warner, *Settlement Proceeds and Special Needs Trusts for the Disabled*, Trial 52 (Feb. 2014).

8. Dept. of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., *Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide V.2.2 8* (May 29, 2014).
9. Dept. of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Div. of Fin. Mgt. & Fee for Serv. Operations, Region VI, *Memorandum by Sally Stalcup, MSP*

Regional Coordinator (May 25, 2011).
10. *Id.*

11. See I.R.C. §104(a)(2) (2002); see also Rev. Rul. 79-220 (holding recipient may exclude the full amount of the single premium annuity payments received as part of a personal injury settlement from gross income under section 104(a)(2) of the code).

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