The Role of Special Needs Trust Counsel in Personal Injury Litigation: A "Value Added" Approach

PART THREE

THE FINAL INSTALLMENT OF A THREE PART SERIES THAT DISCUSSES THE ROLE OF SPECIAL NEEDS TRUST COUNSEL IN PERSONAL INJURY LITIGATION

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This is part three of a three part article. Part One provided an overview of the landscape in this area, as well as some of the issues that personal injury attorneys face when settling these types of cases. Part Two focused on some of the government benefits programs available to individuals with disabilities. Part Three takes a look at how Special Needs Trusts (SNTs) can be utilized to help protect the proceeds of a lawsuit without disqualifying the plaintiff from government benefits.

SPECIAL NEEDS TRUSTS

The reader should understand that there are two basic types of SNTs, those funded with the assets of someone other than the disabled beneficiary (referred to here as a "third party" SNT), and those funded with the assets of a disabled beneficiary, such as an injured plaintiff in a personal injury action (referred to here as a "first party" SNT).

Counsel should consider utilizing an SNT any time a disabled plaintiff is currently (or may at some point in the future be) receiving any form of means-tested government benefit such as SSI, Medicaid, Section 8 housing supports, etc. These trusts maintain certain preferences under federal and state law, and as long as they are drafted properly, benefit eligibility will continue after the litigation proceeds are paid.

A. FIRST PARTY TRUSTS: MEETING THE STATUTORY REQUIREMENTS

First party SNTs are essentially creatures of the federal Medicaid statute, and premised on a provision of the federal statute which states that transfers of assets (like litigation proceeds) to a properly drafted SNT will not generate a period of eligibility for certain Medicaid program benefits. These trusts are usually framed by language provided by our state SNT statute, N.Y. Estates Powers & Trusts Law § 7-1.12. The statutory language is not complete, however, and there are other factors that will need to be considered when drafting a first party SNT.

As a preliminary matter, the drafting attorney will need to ensure, at a minimum, that the criteria found in the federal statute are met. Specifically, 42 U.S.C. §1396p(d)(4)(A) provides that:

> [there shall be no transfer penalty for transfers to] a trust containing the assets of an individual under the age of 65 who is disabled (as defined in section 1614(a)(3) [42 U.S.C.S. §1382c(a)(3)]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 U.S.C.S. §1396 *et. seq.*].

The federal Medicaid statute thus sets out four explicit criteria for these trusts:

- The assets being used to fund the trust must come from an individual who is under the age of 65 at the time the assets are transferred to the trust;
- The individual must be disabled as that term is defined in the Social Security law;
- The trust must be "established" (*i.e.* created by) a parent (of the beneficiary), grandparent (of the beneficiary), legal guardian (of the beneficiary), or court (*i.e.* pursuant to a court order);
- There must be a "payback" provision in the trust which provides that upon the beneficiary's death,

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the state is repaid for any medical assistance provided to the beneficiary.

The age requirement needs little explanation, other than to point out that the age of the beneficiary is measured as of *the date the assets are transferred to the trust*. As long as the funds are transferred to the trust prior to age 65, they will remain exempt even after the beneficiary reaches that age. The second requirement, that the individual be "disabled," is generally satisfied by providing proof of SSI or Social Security Disability Income ("SSDI") eligibility. For first-time applicants for benefits, this standard may cause a delay in the application process, or a denial altogether if the individual's disability is called into question by the local social services agency, which uses the same standard as the Social Security Administration in determining disability. Disputes such as this often arise for individuals with psychiatric disabilities who are controlling their illness through medication, and for high-functioning developmentally disabled individuals who may be able to secure some employment, but who still need significant supervision and assistance in the management of their daily affairs.

The third requirement can prove to be troublesome in cases where there is no independent need for a guardian or court involvement, but where the disabled beneficiary lacks a parent or grandparent to "establish" the trust on his behalf. In such a case, the practitioner will need to obtain an independent court order for the sole purpose of establishing the trust, notwithstanding the fact that the beneficiary may have capacity to establish the trust himself. Such an order can be obtained through a "single transaction" guardianship proceeding under Article 81 of New York's Mental Hygiene Law, or through a miscellaneous proceeding in Surrogate's Court. The fourth requirement is the "payback" to the state. Although the language may vary county by county, the following is an example:

> The New York State Department of Health, or other appropriate entity, shall be reimbursed for the total amount of medical assistance provided to the beneficiary, as consistent with federal and state law. Prior to making any such payment, the trustee shall request from the state agency or other entity requesting reimbursement a Claim Detail Report or other detailed record of expenditures which substantiates the reimbursement claim.

In addition to meeting the specific requirements of the federal statute, New York State social services regulations contain certain additional requirements for first party SNTs, although these do not necessarily need to be drafted into the trust instrument. Instead, they are affirmative obligations of the trustee that govern issues such as reporting the creation and funding of the trust, bonding, etc. *See* 18 N.Y.C.R.R. Section 360-4.5(b)(5)(iii)(a) through (e). Nonetheless, on occasion a social services agency will ask that one or more of these regulatory provisions be included in the text of the trust instrument.

Finally, in cases where the first party SNT is being drafted in connection with a court proceeding, a judge may have his own specific requirements governing the trustee's accounting obligations, designation of remainder beneficiaries, etc. And because in most court proceedings the local social services agency will be put on notice and have a right to appear, there may be other, negotiated provisions that will need to be added to the trust instrument in order to have it approved. *(continued on page 13)*

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VI. CONCLUSION

The most important recommendation that one can make to a litigating attorney who seeks assistance in these matters is to involve SNT counsel early in the process. While there may be a significant stretch of time before the SNT is drafted or estate planning issues are discussed, SNT counsel can provide advice on how a guardianship petition should be structured, can help the personal injury attorney consider the benefits of a lump sum payment versus the purchase of a structure, and can help identify and negotiate government benefit liens and ongoing eligibility issues that will have an impact on the quality of life of the individual with disabilities long after the case is closed.

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