

The Role of the SNT Attorney or Trust Administrator in Working With Probate, Personal Injury, and Family Law Attorneys and their Clients

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**The Role of the SNT Attorney or Trust Administrator in
Working With Probate, Personal Injury, and Family Law Attorneys
and their Clients¹**

By Neal A. Winston

Introduction

Probate, personal injury, family law, and sometimes traditional estate planning attorneys often see elder law and special needs attorneys as only being able to draft a special needs trust to protect public benefit eligibility, but our roles can be much greater and more important to the welfare of the individual than just as a specialized estate planning document drafter. Although these attorneys are often already experienced in many of the traditional techniques that are described here, we can also provide important additional expertise for our new client's current and future support and security by providing greater long term value than the sole monetary value of the inheritance, support, or settlement itself. This outline explains and expands on these options and procedures.

A critical period for reviewing the trust and public benefit options is often at the onset of the other attorney's representation rather than at the end. The structure of how, how much, and when the funds become available to the beneficiary with special needs is important in determining long-term value, especially the long term effect of the funds on public benefit eligibility. For example, in the case of a younger age divorcing spouse permanently receiving nursing home care through Medicaid coverage, the greatest family benefit might be to shift the traditional majority of property that would go to the parent away from the institutionalized individual to the dependent children. Similarly, it does not make financial sense to put substantial funds into a Medicaid payback trust for an individual with a limited life expectancy in

¹ The outline is adapted from a prior presentation at the 21st Stetson National SNT Conference, *Roles of the SNT Attorney and Trustee in Advising and Managing Litigation Settlements*

order to retain SSI eligibility or Medicaid when that person has already received a large lifetime amount of Medicaid that will unnecessarily be paid back upon death.

Although the primary focus is often due to receipt of public benefits, budgeting and protecting against wasteful or unnecessary spending or exploitation of an inheritance, support payments, or settlement can be just as important to the individual with special needs. An individual can be at the mercy of parents, siblings, children, romantic acquaintances, or friends to properly manage funds for it's own benefit. This can be caused by a host of possible pitfalls including inexperience or incompetence of the family to manage funds, inattention due to overwhelming duties in caring for the individual, syphoning due to substance or gambling abuse, a general attitude that the settlement belongs to the entire family unit, spendthrift tendencies, or intentional fraudulent behavior. Older children and adult individuals with special needs may be victims even if they know that the abuse is occurring because in addition to a reduced capacity to manage or understand their financial affairs, their dependency on the potential abuser for day-to-day support or attention may even cause acquiescence.

For the competent adult individual, there is the balance between righteous self independence to do with the inheritance, settlement, or support as he or she pleases and a perceived societal duty to see that it is not unduly wasted so that the individual does not prematurely require full support by others. Even if public benefits are not required or available, management and protection of the funds for the long-term needs of an incompetent, spendthrift, or otherwise vulnerable individual can be an essential component.

Courts and attorneys will often look to other professionals to provide the plan for settlement management, which special needs attorneys, trust administrators, and financial advisors can be uniquely experienced to provide. It is important to evaluate the capacity of the injured individual or family to manage the settlement. Structured annuities and third-party professionally managed trusts are a common method of deferring access and maintaining independent control that may maximize the long-term protection of the settlement. Determining the type of special needs or settlement protection trust to recommend will often depend upon multiple factors of age, current

and future work capacity, personal assets and family support, family needs and expectations, and the medical diagnosis causing deviation from the so-called average individual.

In conclusion, we should not just take a d4A trust form off the shelf and plug in the names to maintain SSI and Medicaid eligibility. Due to variations of needs based programs from state to state, future residency should also be a consideration, even if a Medicaid pay back trust seems like the obvious current option in the current state. While client needs and welfare should be the predominant consideration, the client and families may also place an emphasis on protection of the remaining settlement in trust for inheritance by the remaining family members upon death.

Before The Funds Become Available

Ideally, you will be brought into the case at the onset to evaluate the current and future needs and desires of the beneficiaries so that the attorney's management for allocation of the inheritance, support, or settlement can be structured accordingly. Consider the following steps:

1. Early on, encourage the attorney and family to provide you with their case input information, introduce you to the client, and consider post funds release planning options, so that you may evaluate and make recommendations for the most favorable current and long-term outcome for the client and family. Consider the following factors:
 - a. Severity and permanence of the disability and deviation from the average individual.
 - b. Age and life expectancy.
 - c. Current and future work capacity.
 - d. Personal income, assets, and/or expected family asset support.
 - e. Potential for marriage/partners and children that would add additional dependency needs.
 - f. Future expected ability to care for oneself or reliance on family or professionals for care.
 - g. Expectations of the family and others for direct and indirect support from the settlement.

- h. Availability and expected reliance on public benefit eligibility.
 - i. Medicaid recovery of trust assets through a payback trust upon the individual's death that would otherwise go to family members or descendants.
 - j. Whether or not Medicare eligibility is required and evaluating necessity or not for a Medicare set aside trust.
 - k. Based on the prior factors, assessment of how each of these factors will change over the individual's lifetime requiring lesser or greater support at different time periods of the individual's life expectancy.
 - l. Advice to the attorney and family to set up the possibility of structuring the case to shift assets to family members or other parties to aid in public benefit eligibility for the individual with special needs, defeat liens, and otherwise preserve the assets.
2. Once you have the basic information, you can then consider the following immediate steps:
- a. Recommend and assist in a necessary designation or appointment of a Guardian and/or Conservator for an incompetent party, especially if court approval is required for the incompetent individual's share to be put into trust or a non-traditional allocation shift of assets to other parties is required.
 - b. Establish temporary or permanent public benefit eligibility for the individual with special needs and other family members.
 - c. Provide recommendations to the individual and family regarding pre-fund availability for care and support options other than public benefits.
 - d. Continue the discussion with the attorney, individual, and family the possibility of designating other individuals as additional support recipients, devisees, or plaintiffs to reduce potential lien and reimbursement claim recovery and provide for family needs to aid in support of the individual upon settlement.
 - e. Advise attorney, individual, and family of financial budget needed to care for the individual in addition to public benefits to help set goals and establish reasonable

expectations for use of funds amount².

- f. Prepare interim estate planning documents for the individual and family pending receipt of funds.
- g. Consider income and estate tax related issues that would be created by the receipt of the funds as part of the planning.

Leading Up to the Time of Receipt

When the amount of assets or income is determined and imminent, consider and determine:

1. Final allocation of amount among the individual and other parties to achieve planning goals.
2. Review financial investment options, including structured settlement annuity and other forms of deferred payment for injury settlements to best meet the budget and goals established for the injured and family immediately at the time of settlement and thereafter during the individual's lifetime.
3. Determine the amount of claims for Medicaid liens and Medicare conditional payments and possible Medicare set aside.
4. Determine which public benefit programs will be needed immediately and long-term for the individual, and whether or not already eligible³.

² This would include assessing ability of the family to support the individual, liabilities of the individual and family that would need to be paid off on receipt of funds, and the needs of the individual for major purchases such as day to day care and medical treatment not covered by insurance or public benefits, such as a home or vehicle.

³ For example, when a child reaches age 18, the income and assets of the parents for SSI and certain Medicaid programs will not be deemed as available to the child for public benefit eligibility. Education based support under the Individuals with Disabilities Education Act (IDEA) will end at age 22. Certain public benefit programs such as SSI and subsidized housing have inconsistent and competing eligibility requirements that may need to be chosen or discarded to determine which is the most advantageous to the client. For example, if the child is going to be eligible for long-term Social Security Child's Benefits or Adult Disabled Child Benefits in only a few years following the settlement, it may not be worthwhile planning for current SSI eligibility. It also may not be worthwhile creating a lifetime Medicaid lien that will need to be paid back with a d4A pay back trust for an individual with a very limited life expectancy with a history of substantial Medicaid use if it is desirable for heirs to receive the remainder.

5. Consider options for defending challenges by public benefit agencies claiming unreasonable allocation of funds among parties that would increase the agency's liability for benefit support or reduce agency's ability for eventual benefit recovery.
6. If a class action or multiple defendants are involved in a personal injury matter that may result in settlements at different times, determine whether the initial settlement amount should be received pursuant to a Qualified Settlement Fund account (QSF), 26 U.S.C. § 468B.
7. Advise and educate the individual and family of the options available so that the best plan can be implemented for care, support, and protection of the individual and family, and provide for a plan that will encourage continuing family support of the individual.
8. Consider and decide upon trust models available to meet the plan goals⁴.
9. Choose the trustee(s) and successors⁵.
10. Advise family and attorney regarding relationship of structured settlement, public benefit eligibility, and taxation upon death of individual⁶.
11. Advise attorney regarding Medicaid and Medicare reimbursement claim compromises and waiver, pay back, and set aside⁷.

At the Time of Receipt

⁴ These might include a first party Medicaid pay back (d4A) SNT, a settlement protection trust, a revocable or irrevocable trust, a first party trust that can be converted to a Medicaid pay back trust, a pooled (d4C) trust, or auxiliary family or support trust that makes the family or others a direct beneficiary, but provides some collateral or auxiliary support for the individual. For example, if multiple plaintiffs are involved, or the court otherwise allows a division of the settlement, consider an SNT for the injured individual and a family trust to purchase and own a family home. Determine optional trust terms such as conversion to pay back trust, trust protector, trust committee, testamentary power of appointment, and contingent beneficiaries.

⁵ Consider family members, professionals, or a combination of both. Many attorneys advise against family trustees, and some professional trustees will not serve with a family trustee with equal authority. For those cases in which it is necessary to name a family trustee, the trust can be written so that the authority and duties of the "family trustee" are limited to being an advisor to the professional trustee, especially involving financial decisions and distributions.

⁶ Consider a commutation clause upon the death of the individual in a structured settlement to cover possible taxation and other obligations that might be immediately due. State Medicaid programs have different requirements for naming of contingent beneficiaries in structured settlements other types of annuities upon the death of the individual that also need to be considered.

⁷ While Medicare set aside accounts are *apparently* not required for personal injury settlements at this time, some insurers attempt to require set-asides as a condition of settlement.

Once the funds are ready to be distributed, the next step is to draft the documents and facilitate the plan.

1. Review releases, devisee decrees, court petitions, and agreements prepared by the attorney to meet public benefit program eligibility requirements, satisfy Medicaid and Medicare claims or liens, and meet requirements for Court approval or order for establishing a trust if the individual is incompetent.
2. Draft trust(s) and related documents for attachment to court petition for approval.
3. Meet with injured person, family member(s), and trustee to advise, review, and complete:
 - a. Signing trust and related documents.
 - b. Obtaining tax ID number.
 - c. Opening bank and investment accounts.
 - d. Finalizing initial budget and allocation of funds to be used with investment plan.
 - e. Obtain fiduciary bond or insurance if required.
 - f. Advising or assisting with public benefit eligibility, such as providing notice to public benefit agencies for existing eligibility, applications for new eligibility, and terminating benefits no longer necessary or allowed under the current plan.
 - g. Purchasing real estate, vehicle, or other major items with assets before or after the trust is funded.
 - h. Advising ongoing management of trust including:
 - i. Establishing expectations with family and injured individual for budget and distributions.
 - ii. Meeting public benefit eligibility requirements for current and future distributions.
 - iii. Reviewing investment plan with trustee and investment advisor
 - iv. Advising other allowable distributions related to public benefit eligibility and options such as through an ABLE account.
 - v. Taxation options and requirements.
 - vi. Assisting with future purchases of real estate or vehicle titling.
 - vii. Considerations for life and disability insurance for individuals essential to the support of the injured at under market rates.

- i. Preparing auxiliary or final estate planning documents for injured and other family members.

In General

There are also a number of auxiliary issues that should be considered as part of the process.

1. Ethical issues such as
 - a. Who is your client? What are your state attorney requirements for clarity in who you represent? Have all necessary parties been individually represented?
 - b. Written fee agreement requirement.
 - c. What are your duties to your client regarding competing advice and interests of the attorney, family members, financial advisor, and other potential conflicts.
 - d. Reporting improper activities of parties.
2. Attorney liability
 - a. Insurance and bonding.
 - b. Court approval and continuing oversight.
3. Court and SSA fee approval for representation and fiduciary duties.
4. Can the advising attorney also serve as trustee?
5. Marketing to the probate, family law, and personal injury attorney community.