

Beyond the lawsuit

How you can help your disabled clients with benefits, trust planning and ABLE accounts

By Tanis Kelly

Obtaining a favorable result in a lawsuit is often the goal, but many times attorneys overlook the implications a settlement may have on their clients. By arming yourself with an overview of the resources available to your client, you can help them stay afloat while awaiting resolution of the lawsuit and ensure their financial stability long after you secure a recovery for them.

Pre-settlement assistance

Many claimants have no experience being disabled, and as such, they may not know what resources are available to them. Here are a few programs that may provide some relief:

Disability insurance

This program is often overlooked. Most working individuals who become disabled are eligible for state disability and federal disability. Others may also have access to a private disability insurance policy. State disability insurance (commonly referred to as SDI or EDD) is available to individuals who were employed or actively seeking employment at the time they became disabled and are no longer able to work. These individuals must apply for EDD within 49 days after their disability begins or they may lose these short-term disability benefits. Due to the short time frame, it is best practice to ask the necessary questions at the onset to determine if disability

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insurance will be needed, and if so, recommend that the claimant file for state disability as soon as possible. Social Security Disability Income should also be explored if the client has accumulated sufficient credits and has been unable to work for a full year. If the client is eligible for SSDI, they will receive Medicare 24 months later.

Cash assistance

When there is no disability insurance available to a client, they still may be able to receive cash assistance. Depending on their assets and income level, they may qualify for Supplemental Security Income (SSI). A similar program – Cash Assistance Program for Immigrants (CAPI) – exists in California to provide for those who do not qualify for SSI solely due to immigration status. If the claimant was injured due to the criminal act of another individual, the crime victim's fund may be another available resource.

Health insurance

COBRA coverage is not the only option for clients who are no longer able to work and thus lose their employment and accompanying insurance. They may be eligible for Medicaid (Medi-Cal in California), In-Home Supportive Services, Medicare or a subsidy for private insurance. It is highly recommended that claimants who are eligible for COBRA also look into alternative options, as COBRA coverage is typically quite costly; individual insurance may be available through Covered California at government subsidized rates.

Special education/Regional Center services

For many disabled children, services such as speech therapy, occupational therapy, and physical therapy can be provided at no cost to the family through the Individuals with Disabilities Education Act (IDEA) and local Regional Centers. These services are available to children starting at birth, so please encourage clients to request an early intervention.

It is important to note that while the purpose is well intentioned, money raised via fundraising programs (e.g., GoFundMe) could disqualify claimants from receiving certain benefits and may need to be placed in a special needs trust (SNT) – we'll delve into SNTs a little later in this article. First, let's look at the implications associated with lump sum cash settlements.

Post-settlement: Understanding the implications of cash

From a risk management standpoint, it is always wise to ensure that your client understands all of their options related to the settlement and the implications of each. This holds especially true if your client is leaning towards accepting the settlement proceeds in cash, as the sudden influx of income could disqualify not only them, but also their family members, from eligibility for needs-based benefits.

If your client was receiving needs-based government benefits before settling, the acceptance of a cash lump sum would most likely render them ineligible. Although needs-based benefits certainly aren't a cash cow – SSI monthly maximums, for example, are $910 for an individual and $1532 for a couple in California – millions of Americans rely on the funds to pay for basic food, shelter, and medical needs. Preserving access to these benefits frees up the settlement proceeds to pay for their needs above and beyond what the government will provide. In California, In-Home Supportive Services (IHSS) provides a maximum of 283 hours of in-home care per month, a benefit that could cost your client over $50,000 per year to replace.

The point is that claimants are often unaware of the dollar value that their benefits provide; they are shocked to learn that the value of their benefits can be as high as $65,000 per year. Once claimants understand how much of their settlement will be eaten up just replacing their benefits, they begin to seek alternatives to accepting cash. That's where trust planning comes in. If your client faces lifelong disabilities and is receiving a settlement or funds from a lawsuit, trust planning can help ensure that the settlement proceeds will provide for their medical and financial needs for years to come without impacting their needs-based government benefits.

When determining the best plan to preserve a disabled claimant's quality of life, there are a few main options to choose from, each with its own set of considerations and restrictions.

Choosing a benefit preservation option

There is no one-size-fits-all answer when it comes to whether to preserve benefits and how to do so; instead, many questions must be answered about the claimant's government benefit status, age, assets, household income, and anticipated future medical and financial needs. The answers to those questions will help provide a better picture of the claimant's needs and eligibility for different trusts.

Special needs trusts offer the unique ability to improve the quality of an individual's life without disqualifying them from eligibility for needs-based benefits. With that benefit comes a few restrictions. Funds placed in a special needs trust can only be used to benefit the SNT beneficiary. The beneficiary cannot hold cash, give away funds or spend funds on others (including dependent children and spouses). When the beneficiary passes away, Medicaid has a right to reimbursement from the funds prior to distribution to their heirs. It is important that clients understand these restrictions before they make their decision.

There are three main types of special needs trusts to consider for disabled claimants: First-party special needs trusts, third-party special needs trusts, and pooled trusts. A brief overview of each type is provided below.

First-party special needs trusts

A first-party special needs trust (sometimes referred to as a self-settled or (d)(4)(a) trust) is funded with assets belonging to the beneficiary; in this case, settlement proceeds. Candidates for a first-party special needs trust (SNT):

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• Are under age 65;
• Meet government guidelines that qualify them as disabled; and
• Are currently receiving or likely to receive needs-based government benefits (e.g., SSI, Medicaid, IHSS, etc.).

The trust must be established by the disabled individual, or if the disabled individual is unable to do so independently, the trust must be established by the beneficiary's parent, grandparent, guardian, or the court. First-party SNTs must include a Medicaid payback provision, which requires that upon the beneficiary's death, any remaining funds in the trust must reimburse Medicaid for the amount of medical assistance provided to the beneficiary. If any funds remain after reimbursing Medicaid, those funds may be eligible for distribution to beneficiaries and/or heirs.

Pooled trusts

For disabled individuals who may not meet the age criteria for first-party SNTs or for whom a first-party SNT may be prohibitively expensive, a pooled trust (sometimes referred to as a (d)(4)(c) trust) may be a viable alternative for preserving benefits.

The pooled trust is established and managed by a nonprofit organization, and the assets within the trust are "pooled" for investment, with a subaccount managed by the nonprofit for each beneficiary. The pooled trust does not offer the same individualized investments or flexibility that a first-party trust would.

In many cases, the terms of the pooled trust stipulate that any funds remaining after a beneficiary's death may continue to be held in the pooled trust as opposed to being distributed to their designated beneficiaries. In other cases, funds not retained by the pooled trust must be used to reimburse Medicaid before being distributed to any remaining beneficiaries.

Third-party special needs trusts

Another option for disabled individuals is a third-party special needs trust. Third-party SNTs differ from first-party SNTs in several ways, including how they are funded. Unlike first-party SNTs, third-party SNTs are funded with assets owned by parents or other relatives, not by the beneficiary. Much like the other types of SNTs, a third-party SNT can allow the beneficiary to maintain eligibility for needs-based government benefits.

A third-party SNT provides parents and guardians with a solution for ensuring that the disabled individual will have funds to cover medical needs once the parent or guardian passes away – or even during the parent or guardian's lifetime.

When establishing the trust, the Grantor must stipulate how to handle any remaining funds in the trust upon the death of the disabled individual.

Third-party SNTs are often recommended to individuals who are likely to inherit significant funds in the future that would disqualify them from needs-based benefit eligibility.

ABLE accounts

An ABLE (Achieving a Better Life Experience) account is a type of tax-advantaged savings account that an eligible individual can use to pay for qualified disability expenses while maintaining needs-based benefits that are critical to their health and well-being. This option is often a good complement to a special needs trust.

ABLE accounts are available to U.S. citizens and legal residents, regardless of state residency. To qualify for an ABLE account, the "eligible individual" must be a person whose disability developed before the age of 26.

Benefits of an ABLE account:
Tax-advantaged savings: Participants may make annual contributions up to $15,000 for 2018 and earnings are exempt from federal taxes. In addition, some states may offer state tax incentives.
Flexible: ABLE accounts are designed to be easy to manage, easy to contribute to, and easy to use. Funds can pay for a range of qualified disability expenses related to maintaining the health, independence, and quality of life for people with disabilities.
Works with other aid: Generally, funds in an ABLE account are disregarded when determining eligibility for certain means-tested benefits programs such as Medicaid. An account balance below $100,000 does not impact Supplemental Security Income (SSI).

An eligible individual can open an ABLE account through the ABLE program in any state if the state permits it. Each state has unique criteria. For claimants receiving modest settlements and who are unable to meet their daily needs without access to needs-based benefits, ABLE accounts can be an excellent solution. For others, an ABLE account works well in tandem with a special needs trust, giving the claimant more independence and flexibility, since they can access the ABLE account funds on their own. If the ABLE account/special needs trust option is chosen, it is important to ensure that the trust is drafted in a manner that allows the trustee discretion to fund an ABLE account on behalf of the beneficiary.

Spend-down alternative to a special needs trust

Clients who do not wish to utilize a special needs trust to preserve their benefits may elect to spend down the funds within the same calendar month that they receive them. Funds can only be spent on exempt goods and services purchased for the sole benefit of the beneficiary. Your client must report their settlement award to Social Security by the 10th day of the following month (some state Medicaid Offices have earlier requirements) and may have benefits suspended for the month in which they received the settlement funds.

Forgoing a trust or a spend-down: Potential implications

A client's decision regarding how to handle settlement proceeds is a major decision that should not be taken lightly.

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Their decision to forgo a special needs trust can impact more than just their own benefits. It is important to know whether other family members are receiving needs-based benefits, and if so, which benefits they are receiving and what their qualification standards are so that the claimant can be properly advised on the full implications of their decisions.

In some circumstances, clients can obtain a Medicaid waiver such that other family members' income and assets will not disqualify them from receiving needs-based benefits. Some waiver programs have waiting lists that are notoriously long, which is why it is important to have clients apply early.

Incorporating a structured settlement annuity

In keeping with the theme of ensuring that the claimant understands all of their financial options, a structured settlement may also be a useful tool, both during and post settlement. While a structured settlement serves as an excellent stand-alone financial option for an injured claimant, there are also certain advantages to using it to fund other financial arrangements, such as special needs trusts and ABLE accounts. For claimants on needs-based government benefits, the structured settlement can be used as a tool to fund the trust or ABLE account that will provide for the beneficiary's needs. If this option is selected, it is important to pay attention to local, state, and federal laws for each type of arrangement to ensure the structured settlement annuity does not disqualify the client from their needs-based benefits.

Engaging a settlement planner early in the process will help educate your client on the options available to them and ensure that the appropriate language is included in the settlement agreement and release providing for the claimant's ability to choose a structured settlement, protect benefits and best provide for their future.


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