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You are reading *The Voice*, a newsletter published by The Special Needs Alliance. Our purpose is to provide information--and answers--about special needs planning for family members and professionals. We hope this newsletter helps you. We would love to hear your questions, suggestions and comments; please feel free to [e-mail us](#). We also encourage you to forward our newsletter to others who might benefit from the information here, or who might have similar questions.

Alternatives to Litigation Special Needs Trusts



Introduction: When settling a personal injury case for a person with a disability today, there is almost an automatic assumption that the best approach is to establish a special needs trust. That often is the best answer--particularly if it is critically important to maintain public benefits eligibility and especially where the settlement amount is substantial but not necessarily enough to provide all the medical care the recipient requires. A good special needs adviser will review and discuss some of the alternatives to special needs trusts--as with so many legal questions, there is no one-size solution that can be made to fit all problems.

Some of the approaches that might be appropriate in some circumstances might be positively harmful or dangerous in others, so there is a real need to seek professional--and personalized--advice. Still, it is good to be familiar with some of the options that might be proposed. Common alternatives to special needs trusts for litigation settlements will include:

Spend-Down: Although the whole purpose of special needs planning for personal injury settlements is usually to maintain eligibility for public benefits, there are some circumstances in which the problems associated with special needs trusts outweigh the benefits. This can

particularly be true with small settlements, when it may be entirely appropriate to simply report the settlement to the Social Security Administration and the state Medicaid office, let the recipient lose current benefits and spend the proceeds until eligibility can be re-established.

In some cases the spend-down cycle can be completed before eligibility is actually suspended. Legitimate debts incurred by the beneficiary before the settlement can usually be paid without incurring any penalty, and money can be set aside for funeral and burial arrangements. Clothing, furniture, personal effects, even groceries and supplies can be purchased without causing any further ineligibility.

Even larger expenditures can be considered as part of a spend-down plan. The beneficiary can own a home without affecting eligibility for most benefits plans, and so the settlement proceeds can be used to purchase, improve or renovate a home. Similarly, since a single vehicle is exempt, the recipient can purchase a new or replacement vehicle, or pay to have an existing vehicle retrofitted for accessibility or convenience.

Obviously, the particular needs of each plaintiff will vary even as the size of the settlement and public benefits profile differ. This approach should not be undertaken lightly, and almost certainly will benefit from careful planning with an experienced special needs attorney. The timing of the spend-down is critically important, and should be planned out in advance of receipt of the settlement proceeds.

Structured Settlement: Special needs trusts and structured settlements often work hand-in-hand, with a structure's payments directed to a special needs trust to maintain future eligibility. In some cases, however, the structured settlement option may even be an alternative to establishing a special needs trust. If, for example, the beneficiary is expected to recover and probably even "graduate" from public benefits programs, it may be advantageous to delay the start of settlement payments until after the public benefits issue is no longer important.

What happens if you guess wrong, and it turns out that public benefits are still required on the future date when a structured settlement payment is received? Assuming the law stays the same and the beneficiary has not reached age 65 in the meantime, future payments can be transferred to

the special needs trust with only (in most cases) a single month of ineligibility. Obviously, the structured settlement alternative works better with younger recipients and infrequent periodic payments. Typically, payments are scheduled for after the beneficiary reaches majority and for payments on an annual, or even three- or five-year, basis rather than monthly.

Pooled Trusts: For smaller settlement amounts it may make economic sense to look for a "pooled" trust alternative. Although pooled trusts are not available in every state, there has been a recent surge in popularity, and the growth of pooled trust options has been remarkable. Your local Special Needs Alliance member will be familiar with all of the pooled trust options operating in your state.

The pooled trust is really a type of special needs trust, but by accumulating assets into a common pool the trustee can save some administrative expenses and thereby reduce the costs to the beneficiary. There is no dollar limit on the amount that can be managed through a pooled trust, though most beneficiaries tend to prefer individual accounts for larger trust amounts. If there is a pooled trust operating in your state, it may be the perfect low-maintenance alternative for settlements of less than, say, \$50,000.

Gifts: With recent changes in Medicaid and Supplemental Security Income rules, making a gift of any significant portion of the settlement proceeds will usually not be a good choice. In fact, if the beneficiary's disability is mental it may not even be possible to make gifts in any amount. Still, there are a small handful of circumstances when gifts may make sense as part of a plan for dealing with eligibility after receipt of a personal injury settlement or award.

Problems With Special Needs Trusts: While considering the alternatives to special needs trusts, it is important to review the reasons why you might wish to avoid creating such a trust with your settlement proceeds. Special needs trusts are great for some situations, but they are not without their own difficulties:

-- Cost. A litigation special needs trust is more likely to require a professional (bank, lawyer or private fiduciary) trustee, and the administrative expenses can be considerable. Especially with smaller trusts, the trustee's fees may be the largest expense paid out of the trust each year. That is not a particularly attractive result, and it

makes trustees as unhappy as beneficiaries when it does happen.

-- Expenditure limitations. Depending on state law and the particular program benefits the beneficiary receives, there may be significant limits on the types of things the trust can purchase. Of course, payments for food or shelter, or cash distributions for any purpose, can create eligibility problems. In addition, problems can arise with care payments (especially to family members), with gifts (even though the beneficiary might be adamant that he or she wants to make gifts--even token gifts--to family and friends), or with any number of other specific expenditures.

--Pay-back provision. Of course, a personal injury litigation special needs trust must include a provision repaying the state government for its Medicaid disbursements upon the death of the beneficiary. While this may not directly affect the beneficiary's quality of life, it is an irritant and can make the special needs trust unattractive to some beneficiaries.

Conclusion: Special needs trusts are a wonderful tool for many personal injury victims who receive settlements that might otherwise affect their public benefits eligibility. Given the cost and limitations imposed by a special needs trust, however, it is important to consider the options before making a final decision. A good special needs attorney will frankly and completely discuss the alternatives to assist you with your decision. Members of the Special Needs Alliance are familiar with those options, and also with the nuances of local practice and programs.

About the Author: Robert B. Fleming is a Certified Elder Law Attorney in Tucson, Arizona, whose practice focuses on special needs planning, elder law and estate planning. Mr. Fleming is a member of the Special Needs Alliance, a non-profit organization dedicated to serving the legal planning needs of people with disabilities and their families.

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