

## The Voice, *The Official Newsletter of SNA*

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### Welcome!

This issue of *The Voice*, the e-mail newsletter of The Special Needs Alliance, was written by SNA member Roger Bernstein of Coral Gables, Florida. Mr. Bernstein and his wife, Margrit, focus their practice on planning for personal injury settlements and for aging, illness, and incapacity.

### What to Pay Before Funding a Special Needs Trust



**Introduction:** A medical malpractice case on behalf of an injured child has been pending for four years. During this time, medical needs of the child have been covered by the State Medicaid Program. Typically, at least one of the parents has had to give up the income from work in order to care for the child at home. Since there is no other health insurance to cover the child, it is critical to keep Medicaid in place as the primary payer. This is accomplished through the establishment of a Special Needs Trust with the child as the beneficiary. All of this is explained in the blur of the post-mediation settlement.

The family and its advisors should understand that there is a one-time opportunity to make certain payments before the establishment of the Special Needs Trust. This article describes some payment opportunities that often arise and explains the mechanism for making those payments without causing problems with Medicaid eligibility:

**Payment Opportunities Before Funding the Special Needs Trust.** The Trustee of a Special Needs Trust funded with assets belonging to the trust beneficiary (such as proceeds from a litigation settlement) is required to use such assets for the "sole benefit" of the disabled trust beneficiary. Thus, there are certain debts and expenses that can only be paid prior to funding the trust. Here are some of the most common:

Credit card debt. Many families amass significant credit card debt at crushing rates of interest in order to care for an injured child prior to settlement. That debt should be paid down or paid off before funding the Special Needs Trust.

Loans to family and friends. With credit cards maxed out, a family often turns to other family members and friends for "loans" to care for an injured child. If the family wants to repay these loans, this is the time to make the payments before the establishment of the Special Needs Trust.

**Past attendant care.** The parent or other family member who has given up a job to care for the injured child typically received no compensation. Although parents are obliged in all states to provide care for their minor children, this 24/7 care goes above and beyond the parental duty of support. It is sometimes possible to justify payment for past services rendered by a family member. We ask the caregiver to document the hours of care. We then seek to price competitive care in the marketplace based on the qualifications of the family member. We then take this calculation before the Guardianship Court in the case of a child, and ask the Court to approve the payment. Please note that this payment is taxable income to the person receiving it. There may be some adjustment for employment tax (see IRS Employer's Circular 15). Also consult your Special Needs Trust advisor on the "deeming" issues that arise when a parent receives a lump sum of money.

**Mortgage.** If the family home where the child is living has a mortgage, this is an opportunity to consider paying off the mortgage. This increases the cash available for the family every month.

**Prepaid funeral.** Follow your state Medicaid rules about the purchase for the child of a burial plot and a non-refundable prepaid funeral contract.

**Note: Estate planning for the parents.** A properly drafted Special Needs Trust will provide for the disposition of the trust assets at the death of the beneficiary, after any Medicaid pay-back. In most cases, the parents will inherit what is left in the Trust. These assets can be substantial and the parents should do their own estate plan, making clear their wishes with respect to each other and with respect to other children in the family. The parents may also have estate tax issues depending upon the size of their possible inheritance from the Trust. Such estate planning is a necessary expense but cannot properly be paid from the Special Needs Trust.

**How should the above payments be made?** The trial attorney is holding cash in an escrow account prior to the payment of any liens and prior to the funding of the Special Needs Trust. The one-time payments should come directly from that account to the providers, for example: to the credit card companies. Under no circumstances should payments be made to the parents for them to pay the providers. (Because of the deeming rules, this could result in income to the parents and affect Medicaid benefits or a loss of Medicaid benefits). This process will also provide a valuable check on the proposed payments, particularly where payments are being made for past services or to pay off outstanding loans.

**Conclusion.** A properly drafted Special Needs Trust will provide flexibility in the use of trust funds for the trust beneficiary. There can be incidental benefit to other family members who are providing care as well as a salary to caregivers who may be family members. However, there is no ongoing opportunity to make the kinds of expenses set forth above after the trust has been established. It is important that the family and their advisors be aware of this and take the time to identify the types of obligations that are outstanding.

**About this Newsletter:** We hope you find this newsletter useful and informative, but it is not the same as legal counsel. A free newsletter is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation,

including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while taking into account a whole panoply of laws, rules and practices, many not published. That is what The Special Needs Alliance is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting [www.specialneedsalliance.com](http://www.specialneedsalliance.com).

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