

What Personal Injury Lawyers Need to Know About

SSI Medicaid and Special Needs Trusts



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Introduction

Practicing personal injury, wrongful death and medical malpractice law is already tough enough. It's hard to negotiate a favorable settlement or secure a favorable trial verdict for your client. A few years ago, you did your job well, got the money into your trust account, had the client sign a Closing Statement, disbursed the checks and closed the file.

But now Congress, the courts, and clients are asking you to also consider whether steps should be taken to preserve the client's access to Supplemental Security Income (SSI) disability checks and future medical health insurance benefits through the Medicaid program by the creation of a Special Needs Trust.

This booklet is designed to answer most of your questions, and help you determine when it is, and isn't, appropriate to call for help.

A Special Needs Trust is not for everyone. However, failure to consider retention of access to medical insurance may cause your attorney's professional liability carrier's heart to skip a beat.

As you will see, the Special Needs Trust can result in tens or hundreds of thousands of additional dollars to your client. Also, the possibility of retaining SSI disability payments and access to Medicaid health insurance, especially for uninsurable clients, may affect the equation you use in deciding whether to settle for the defendant's last offer. If the client will be purchasing future medical care at top dollar fee-for-service rates, you will need to settle the case for much more than if the client will have access to future Medicaid health insurance,

not to mention the tax-free SSI disability payments of up to \$7,600+ per year, adjusted upward for inflation each December.

We have written this booklet to answer the questions most personal injury lawyers ask us before we get to specifics about their client. It is presented in four parts:

- ♦ Deciding whether a Special Needs Trust is right for you and your client
- ♦ Procedures for creating the trust
- ♦ Managing the Special Needs Trust
- ♦ Miscellaneous questions

If you are like most trial lawyers, you will be primarily concerned with the first area, determining when a Special Needs Trust is appropriate. Once you and your client have decided to proceed, you will probably call upon us or another Social Security and Medicaid attorney specialist to create the trust. We include the information about creating and managing trusts for your general background information, and so you can explain generally how the trust works.

If you have questions after reviewing this booklet, please call us. If you have any suggestions for including additional questions and answers, we'd appreciate anything you can offer which will make this booklet more useful to trial attorneys.

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Glossary

The **Supplemental Security Income (SSI)** Benefits Program is a welfare program paying monthly cash disability payments to individuals who are medically disabled, have few assets and little income, and who have no current disability insurance coverage through the SSDI program, described below. The maximum monthly payment is \$674 in 2009.

Medicaid insurance benefits are automatically provided to all disabled individuals who receive SSI payments, welfare recipients, and to the elderly over 65 who are not covered by Medicare per §1634 of the Social Security Act and §409.903, Florida Statutes.. In addition to doctors, hospitals and other covered medical services, Medicaid pays for nursing homes and prescription drugs.

The **Social Security Disability Income (SSDI)** Program is funded by worker contributions through FICA (Social Security) payroll deductions or self-employment taxes in which workers earn credits in case they, or their survivors or dependents, become unable to work at any job. Sometimes referred to as Title II or “regular” Social Security disability income benefits program, it is an insurance benefit, and paid to medically qualified individuals regardless of need. The amount of the monthly payment depends on the worker’s lifetime contributions to the system.

Medicare benefits pay for doctors, hospitals and other medically-related expenses. This is the same insurance that all workers receive at age 65, the normal retirement age. Medicare insurance is provided to all SSDI disabled workers, after they complete a 24 month waiting period. Traditional Medicare does not cover extended stays in nursing homes nor prescription drugs, but Part D now provides some prescription drug coverage..

I. Deciding whether a Special Needs Trust is right for your client

Q. Why is there so much interest in Medicaid/SSI Trusts of late?

There are several reasons why attorneys are placing personal injury/wrongful death proceeds in Special Needs Trusts:

- In 1992 the Florida Supreme Court suggested that trusts in general are an appropriate vehicle to manage the money for disabled minor plaintiffs, both during their minority and into adulthood. *Kush v. Lloyd*, 616 So.2d 415, 424 (Fla. 1992).
- A 1992 Florida Bar CLE course for trial lawyers recommended use of Special Needs Trusts where appropriate to maintain Medicaid benefits.
- In August 1993 President Clinton signed the Omnibus Budget Reconciliation Act which amended the Medicaid statute to permit and encourage trial courts to create Special Needs Trusts for disabled children and adults.¹ The provisions are simple: the disabled child or adult retains Medicaid eligibility, and Medicaid has a lien for reimbursement of amounts paid when the individual dies, but only if there is any money left in the trust.
- In March 1994 the Social Security Administration amended its internal operating procedure manual to more clearly affirm the validity of trusts for disabled individuals so they may retain their eligibility for SSI, and through SSI, for Medicaid insurance.
- In November 1994 the federal Health Care Financing Administration issued new instructions to the states implementing the Special Needs Trusts' sections of OBRA '94.
- On December 14, 1999, President Clinton signed H.R. 3443 which in Sec. 206 of the legislation directs that the Social Security Administration apply the same exemptions to Special Needs Trusts in the Supplemental Security Income (SSI) program as exist in the August 1993 Medicaid amendments, but otherwise outlaws transfers of assets (settlement funds) to others.

Q. What are the advantages of a Special Needs Trust?

The best way to explain the advantages is by example.

Without a Special Needs Trust. A prominent Miami attorney settled a medical malpractice case for a low income family whose seven year old daughter was receiving SSI and Medicaid prior to the settlement. The case settled for \$1 million net to the family, but no Special Needs Trust was created. Instead, funds were placed as usual in a court-restricted guardianship account, earning then about 5% per year (\$50,000). When Social Security learned of the existence of the guardianship account, SSI benefits were terminated, and Medicaid insurance was eliminated. (In Florida, SSI and Medicaid are linked; if the client is eligible for SSI, they automatically receive

¹At the same time, Congress further discouraged the creation of trusts for the elderly to qualify them for Medicaid nursing home benefits. This trend towards further restricting elderly access to nursing homes has been widely reported; thus "conventional wisdom" is that it is harder to get Medicaid. That is not the case with disabled individuals who are under age 65.

Medicaid benefits). The first year, the daughter's medical expenses were \$70,000 at regular fee-for-service rates, thus exceeding the \$50,000 earnings, and requiring that the principal be invaded.

With a Special Needs Trust. Had the same family secured a court order creating a Special Needs Trust at the hearing to approve the settlement, the investment options would have been significantly greater than courts generally approve for guardianships. But for our purposes, assume the same earnings. Because Social Security treats correctly drawn trusts favorably, and guardianship accounts unfavorably in determining eligibility (even if access to the guardianship account is by court order only), the eligibility for SSI (paying \$674 per month in 2009) would not have been affected, and therefore the family would have retained eligibility for Medicaid. Under the 1993 Medicaid amendments, the family would have paid nothing unless and until the child died. Medicaid providers must accept the Medicaid payment as “payment in full” for medical expenses. Upon the death of the trust beneficiary, the trustee would reimburse Medicaid, but only the actual cost that Medicaid paid for the same service many years before, without interest, and only to the extent there are any funds left in the trust. Since that cost is about 11-17% of the fee-for-service regular rate, the total contingent charge to be re-paid is \$11,600.

	Without Trust	With Special Needs Trust
Beginning Principal	\$ 1,000,000	\$ 1,000,000
First Year Earnings	\$ 50,000	\$ 50,000
Continued SSI Benefits	\$ 0	\$ 8,088
First Year Medical Costs	\$ (70,000)	\$ 0
NET AFTER ONE YEAR	\$ 980,000	\$ 1,058,088

In summary, there are several advantages to the Special Needs Trust:

- By federal and Florida state law, the disabled person has automatic and full access to Medicaid health insurance and social services. Yet the family can still purchase medical services and equipment at regular rates whenever they elect to do so if they voluntarily choose to go outside the system, and employ the best doctors in the world, using the funds in the Special Needs Trust.
- The disabled person continues to receive SSI disability benefits, currently up to \$8,088 tax-free income per year (Year 2009 rates), and adjusted upward for the cost of living each year. Over time, that also yields a significant amount of money.
- A trust is, as the Florida Supreme Court stated in *Kush v. Lloyd*, an ideal vehicle to provide continuity of fiscal management over a long period of time, even without consideration of eligibility for SSI and Medicaid; there are no annual guardianship reports to file, and trust withdrawals can be made on a regular as well as an emergency basis without court order, unless the court imposes prior restraints for another reason. For minors’ settlements, there no longer is the worry that the child will get all the money at age 18 and “blow it,” nor that other family members will take it away from the disabled person at any age. The money is professionally managed, with the disabled person as the “sole beneficiary” of the trust.

Q. What are the disadvantages of establishing a Special Needs Trust?

The primary purpose of creating a Special Needs Trust is to continue the monthly tax-free SSI disability benefits to trigger access to Medicaid health insurance for uninsurable disabled clients. The continued right to a Medicaid insurance card is primarily through the receipt of SSI disability benefits. Generally speaking, if a client loses SSI, they lose Medicaid coverage. In Florida, a client who is eligible for SSI is automatically eligible for Medicaid, F.S. §409.903. The SSI disability program, administered by the Social Security Administration, is an “income” and “resource” (asset) sensitive program.

Thus, to maintain Medicaid, the trust must be drafted in accord with the SSI eligibility rules regarding income and resources (assets). These rules are more than a little strange.

For example, a home of any value is an exempt resource (asset), as is one vehicle used by the disabled person. A second vehicle is counted against eligibility, unless owned by a trust.

There are income limitations on how much the SSI recipient can earn, and if the individual is a child under 18, or has a spouse, SSI “deeming” rules apply. “Deeming” means that the income and resources of a person lawfully obligated to support the recipient are, at least in part, counted to determine the SSI recipient's eligibility. However, these rules take into account other children, and distinguish between earned (wages) and unearned (e.g., interest on savings) income.

Some examples follow:

- A family with a disabled *minor* child, age 17, and \$50,000 per year family income *does not* qualify for SSI and Medicaid.²
- A family with a disabled *adult* child, age 18, and \$200,000 per year family income, *does* qualify.³
- A family of five (with a disabled minor child and two others) with an annual income of \$26,426, *does not* qualify.
- If the same family has an additional child, the family then *does* qualify.

Don't worry about trying to figure this out; that's our job. There are tables and formulas to compute eligibility.

The point is that the main disadvantage to establishing a Special Needs Trust is that the individual, or the family, cannot have unrestricted use of the money to spend willy-nilly at a rapid rate. However, with good planning and under the appropriate circumstances, the settlement proceeds can be used to substantially improve the life of the disabled person and his family, provide for future security, protect access to Medicaid, and manage the money in an efficient and secure manner.

With a professional as trustee, such as a bank or trust company, the funds are safe from depletion by family members. The bank trust officers become financial parents. No funds can be spent except with bank approval. A Special Needs Trust is an excellent way to protect the personal injury settlement proceeds.

²The family's income is deemed to the minor child, and is over the maximum limits to retain SSI eligibility.

³Even though this family has substantial income and wealth, because the disabled child is over the age of 18, the family's income and resources do not count against the child, since there is no statutory duty to support adult children.

Q. How do I identify clients who are likely to benefit from a Special Needs Trust?

Generally, if a client is currently covered by Medicaid health insurance (due to SSI disability payments or W.A.G.E.S., the Florida Welfare program formerly called Aid to Families with Dependent Children), and medical care is presently provided by Medicaid, or Medicaid and Medicare both, you should question whether a Special Needs Trust should be established.

If you suspect that a client may be currently eligible for SSI and Medicaid, but they have not applied, have them apply by calling the Social Security Administration toll-free information number: (800) 772-1213. Until 1998, individuals could apply for Medicaid, based on their disability, separately from their application for SSI monthly disability payments. But due to changes in legislation reversed a federal court order that had previously required the State of Florida to process Medicaid claims separately, that is no longer the case. Access to Medicaid is generally through a successful SSI disability application. Please note: Our office has represented SSI applicants since 1977 on a 25% contingent fee basis, and can help your disabled clients attain SSI and Medicaid if they have been denied.

Q. I have heard that there are two disability benefit programs, the SSI disability and "regular" Social Security Disability Insurance (SSDI) Benefits based on the plaintiff's Social Security contributions.

If my client gets "regular" Social Security disability benefits, not SSI, will those benefits and Medicare be lost if we accept a settlement award?

No. Benefits received under Title II of the Social Security Act, called "regular" or "SSDI" (Social Security Disability Insurance) or "DIB" (Disability Insurance Benefits), are like any insurance payment. They are not income or resource sensitive.

You do not need a Special Needs Trust to protect regular Title II (SSDI or DIB) benefits and the Medicare (as opposed to Medicaid) health insurance that follows Disability Insurance Benefits.

You may need to consider a Medicare Set Aside Trust, however, for your client's future eligibility for Medicare benefits, even if they are not eligible for Medicaid.

Q. How can I tell which benefits (SSI or SSDI) my client receives? My client isn't much help and doesn't understand the difference either?

This is a very common situation. And to confuse matters further, some clients receive both SSI and SSDI, and both Medicaid and Medicare, in what is called "concurrent" benefit status. If you are paying off a Medicaid lien in settling your case, your client probably needs a Special Needs Trust.

If you have any doubts, and want to be sure, get an "opinion letter" from us or another attorney specializing in Social Security disability benefits that protects you and your client in the future. Also, your client can request a "Proof of Income Letter" from the Social Security Administration, online at <http://tinyurl.com/5hvfau>.

This is too important an area to leave to guesswork.

Q. There is a Medicaid lien on the proceeds of the proposed settlement right now. If I call you to establish a Special Needs Trust will that reduce or eliminate that lien or Medicare liens?

Absolutely not. Under §409.910, F.S., the “Third Party Medicaid Recovery Act,” any sums expended by Medicaid as a result of the injury, and between the time of the injury and settlement, must be repaid.⁴ Medicare also may have a lien pursuant to federal law found at 42 U.S.C. §1395y(b)(2). However, in a 9-0 decision in favor of the plaintiff, the United States Supreme Court ruled on May 1, 2006, in a case arising in Arkansas but using the same federal Medicaid statute as Florida’s, the state’s third party liability lien is only on the proportion of the recovery that relates to medical benefits, and the state has no lien on lost wages, pain and suffering, and other claims. *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006):

When a Medicaid recipient in Arkansas obtains a tort settlement following payment of medical costs on her behalf by Medicaid, Arkansas law automatically imposes alien on the settlement in an amount equal to Medicaid’s costs. When that amount exceeds the portion of the settlement that represents medical costs, satisfaction of the State’s lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs—like pain and suffering, lost wages, and loss of future earnings. The Court of Appeals for the Eighth Circuit held that this statutory lien contravened federal law and was therefore unenforceable. *Ahlborn v. Arkansas Dept. of Human Servs.*, 397 F. 3d 620 (2005). Other courts have upheld similar lien provisions. See, e.g., *Houghton v. Dept. of Health*, 2002 UT 101, 57 P. 3d 1067; *Wilson v. Washington*, 142 Wash. 2d 40, 10 P. 3d 1061 (2000) (en banc). We granted certiorari to resolve the conflict, 545 U. S. ____ (2005), and now affirm.

In Heidi Ahlborn’s case, the 19 year old college student was severely and permanently brain injured in an automobile accident. The value of her claim, by stipulation with Medicaid, was over \$3 Million. However, she was only able to recover \$550,000 from the defendants, and the Medicaid lien was \$215,645. The state Medicaid agency sought the full \$215,000 from the \$550,000 total gross settlement, rather than the proportionate share of \$35,581. The court limited the Medicaid reimbursement to \$35,581 on the basis that another section of the Medicaid statute, the anti-lien provision, prohibits any lien on personal property, and a chose in action is personal property. Thus an allocation must be made between the medical costs recovered, and the other claims, either by stipulation, or by separate court proceeding.

However, the Special Needs Trust we are talking about is prospective, and is designed to preserve future access to SSI and Medicaid even after you make your client a millionaire. The Special Needs Trust would not be available, in Heidi Ahlborn’s case, to shield her from the obligation of paying the proportionate \$35,000 Medicaid third party liability lien on the medical recovery.

Also be aware that some hospitals, such as Jackson Memorial Hospital in Miami, have in the past taken the position that they are authorized to collect the amount that Medicaid did not pay. This practice is called “balance billing.” For example, in a recent case in which I was involved, at the time the plaintiff was injured, he had no medical insurance. The hospital rendered care in the alleged amount of \$340,000 and billed Medicaid, which paid \$30,000. Under federal Medicaid law, a medical provider who accepts Medicaid agrees, by operation of law, not to bill the patient for the difference between what they charge, and what Medicaid pays, that is, the provider gives up the right

⁴The amount of repayment, however, has been negotiated downward by some trial attorneys, even before the U.S. Supreme court’s 2006 decision in the *Ahlborn* case. Attorneys are well advised to always pay the agreed amount and secure a release from Medicaid. If an attorney fails to pay the Medicaid lien, the attorney assumes personal liability for the amount unpaid, and the State may pursue claims for treble damages and institute a criminal action for Medicaid Fraud against the attorney. See §409.910, F.S.

to “balance billing” in exchange for the security of the Medicaid payment. The U. S. Court of Appeals for the Seventh Circuit has held in *Evanston Hospital v. Hauck*, 1 F.3d 540 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 921 (1994), that it is illegal for a hospital to bill the patient for what Medicaid does not pay. Jackson Memorial Hospital (JMH) in Miami had alleged for many years that Florida statutes and the Florida Administrative Code give it the authority to collect the balance when there is a third party liability claim. However, in *Public Health Trust v. Dade County School Board*, 693 So.2d 562 (Fla. 3DCA. 1996), the Third District Court of Appeals held Jackson’s policy illegal. In that case, the JMH bill totaled \$1,374,000 of which Medicaid paid \$295,000. JMH attempted to impose a lien for the difference on the PI settlement proceeds. The Third District held that “JMH was precluded from “balance billing” although the recipient of the Medicaid services received a substantial settlement from a third-party tortfeasor.” *Public Health, supra*, at 567. The Academy of Florida Trial Lawyers appeared as amicus curiae in the case.

Q. Does a Special Needs Trust affect the obligation to repay other doctor's and hospital's liens on the settlement proceeds?

No. However, if those same doctors or hospitals are Medicaid providers and continue to treat the client after the settlement, and the client retains Medicaid through this trust, the doctors and hospitals will bill Medicaid and not your client. The client will owe nothing for future care during his or her lifetime.

By federal law, a physician or hospital who accepts Medicaid payments for services rendered after the personal injury settlement, cannot bill the client for the difference between what Medicaid pays and their standard charge. There are essentially no Medicaid co-payments or annual deductibles.

Q. Are there any amounts that are too small to consider placing in a Special Needs Trust?

Yes. Less than \$2,000 is always too little. However, we have created trusts for individuals receiving as little as \$15,000, although the type of trust would be quite different than a trust for a larger amount.

Why would a client even consider establishing a trust for such a small amount? A man in Oklahoma received a gross settlement of \$50,000. The month after receiving his net of approximately \$30,000, he was hospitalized and needed surgery for an auto accident totally unrelated to his prior personal injury award. Because he had lost his SSI and Medicaid, he spent his entire award on this subsequent, unrelated hospitalization. Had he or his attorney established a Special Needs Trust, he would have secured the surgery and hospital care at no cost up front, and would have retained his \$30,000. The client was not amused to later learn that he could have had both. Neither was the lawyer's malpractice carrier when they paid the claim.

In 2003, a Texas law firm and the Guardian ad Litem in the case recently settled a claim for \$4.1 Million when the client lost Medicaid as a result of not having a Special Needs Trust, and had to use settlement moneys to pay for medical care at the “retail” (highest) billing rate, called “fee-for-service” rather than the negotiated reductions and free access to medical care through Medicaid. *Grillo v. Petiete et al.*, Cause No. 96-145090-92 and *Grillo v. Henry Cause*, 96-167943- 96, 96th District Court, Tarrant County, Texas

Q. Is there any guarantee that if we create a Special Needs Trust that the client will always retain SSI and Medicaid eligibility?

No. If the client wins the Florida Lottery next week, they will no longer be financially eligible for any needs-based (welfare) programs like SSI and Medicaid. The trust will still serve as an appropriate vehicle to manage the client's proceeds, however.

Also, there is no guarantee that Congress will not amend the Medicaid statute, nor that the Social Security Administration staff reviewing the client's trust and their new financial situation will not make a mistake and attempt to disqualify the client.

However, Congress' actions in 1992 and in August 1993 and December 1999 have shown movement towards expanding access to Medicaid benefits for *disabled individuals*. It appears that Congress is attempting to encourage other family members and the courts to financially plan for and use additional resources to meet disabled individuals' medical needs. With regard to children and SSI eligibility, Congress amended the Social Security Act in 1992 to expand SSI benefits for children, and to provide that if children who were previously denied subsequently became eligible and received large retroactive awards, such retroactive awards may be held in Special Needs Trusts.

Similarly, the Social Security Administration (SSA) has issued new amendments to its internal procedure manuals in March 1994, February 2001, September 2001, and August, 2002, clarifying that individuals may be the recipients of trusts and still retain SSI (and Medicaid). New "deeming regulations" issued in January 1995 are also more expansive and extend SSI and Medicaid benefits to families previously disqualified. And SSA POMS (the internal staff operating manual) were amended in October 1999 to make clear that either the disabled individual, or his trust, may hold title to the disabled person's home, and the disabled person will still be eligible for SSI and Medicaid regardless of the costs of the residence. SSA has also distributed informational brochures to clients telling them that correctly drafted trusts will not eliminate eligibility for SSI benefits. However, there are literally tens of thousands of SSA employed claims reps across the country making individual claims decisions every day. No one can guarantee that they will not make a mistake and deny a claim for continued SSI and Medicaid benefits that should be approved.

However, the Special Needs Trusts which we draft are designed after a review of existing (updated) federal Social Security Administration statutes, rules and regulations, SSI internal policy memoranda and staff procedure handbooks, as well as federal caselaw. We do everything we can to maximize the possibility that the trusts we create give the client the best possible chance at retaining SSI and Medicaid eligibility. We take immediate action to amend the trust if rules change.

There is one thing we can absolutely guarantee: if the settlement award is more than \$2,000 and if no Special Needs Trust is created, the client will lose SSI and Medicaid when the Social Security Administration is advised of the settlement award. The client must turn in the Medicaid card 10 days after receipt of the settlement funds if they do not have a trust. Furthermore, it is a federal crime to fail to report such a settlement to Social Security if it will affect future eligibility, and the Social Security Administration may seek to recover the resulting overpayments through collection by the U.S. Attorney's office. The Social Security Administration runs regular computer sweeps of all bank accounts in the nation for persons on their SSI disability rolls.

Three individuals were criminally prosecuted in 2003 by the U.S. Attorney's office in Miami, Florida for failure to report. It is "welfare fraud" and the federal criminal penalties are very strict. One attorney was successfully prosecuted in federal court and subsequently disbarred in 2007 for conspiracy to help clients hide assets to qualify for SSI and Medicaid. It's not necessary to make a criminal problem out of a civil one, when the government has provided a perfectly good statutory solution, is specifically and individually advised of the solution by our office, and approves of the Special Needs Trust in writing.

Q. What if after discussing this with my client, the client and I decide not to have the settlement proceeds placed in a Special Needs Trust?

There are personal lifestyle reasons why the client may choose not to set up a Special Needs Trust; just don't get caught in the client's change of heart a year or two later when the money's been spent and the client still faces large medical bills down the road.

Be aware that there are alternatives to a Special Needs Trust, such as investing the funds or spending them down in a legal, permissible way that does maintain eligibility for SSI and Medicaid benefits without putting the funds into a Special Needs Trust. For an hourly consultation fee, we can advise your client of all the options.

For your own protection, however, we suggest you get a signed, knowing waiver by your client if they have opted not to have a Special Needs Trust nor to do an alternative spend down plan.

You may want to schedule an appointment for your client to meet with us to make sure they understand what it is that they are giving up before they sign the waiver. We can help you fully advise your client of the alternatives, and give them time to consider the options.

Also be advised that if the client does not opt to have a Special Needs Trust, or to otherwise devise a legal "spend-down" plan to preserve eligibility for SSI and Medicaid benefits, the client may be eligible to do so in the future; however, "may" is the operative verb here. Depending on what the client does with the settlement proceeds if he or she decides not to opt for a trust at the time of settlement, could prevent eligibility for future Medicaid health insurance benefits for up to 3-5 years in the future, the "transfer of resources penalty" imposed by the federal FCIA in 1999.

Q. Do defendants object to creating a Special Needs Trust?

No. The Special Needs Trust imposes no additional obligations on the defendants. Even if a structured settlement is used, the costs are exactly the same to the defendant; only the name of the payee is changed to read "Mary Client Irrevocable Special Needs Trust." The defendants get their general releases in the same manner as they would if there were no trust.

II. Procedures for creating the Special Needs Trust

Q. What is the first step in creating the Special Needs Trust?

Call us. Usually we meet with you and your client in person or by conference call, at a mutually convenient time and place, to explain the purpose of the trust, its advantages and disadvantages, answer questions and determine if you and your client wish us to proceed. If so, we draft the proposed trust and submit it to you and your client for review. We will also do an assessment of alternatives to a Special Needs Trust permitted by the complex and often confusing eligibility rules of the federal and state governments for SSI and Medicaid benefits.

Q. When should the trust be created?

You should call when you feel negotiations are close to complete settlement. The settlement documents need to include simple provisions for payment of settlement sums to the trust only if you are opting for a structured settlement. Otherwise, **SETTLE THE CASE AS YOU NORMALLY WOULD**: get as much money as you can for your client, have settlement check paid jointly to you and your client, deposit in your trust account, and pay your fees and costs. **JUST DON'T DISTRIBUTE TO THE CLIENT UNTIL THE TRUST IS IN PLACE**. Checks may still be drawn to your law firm jointly with the trustee of the trust, or with your client, or in some other manner that will protect your fee.

If the settlement involves a minor child, or an adult who is incompetent, there will be a hearing to approve the settlement. Provisions for the Special Needs Trust should be included in the Motion to Approve Minor's (or Incompetent's) Settlement, and the Guardian ad Litem should have the opportunity of reviewing the Special Needs Trust before the Guardian ad Litem's report is filed. We can provide suggested language for both the Motion to Approve Settlement and the Order.

If the settlement involves a competent adult, you may still need an Order from the Trial Court approving and creating the Special Needs Trust, and tracking the language of the recent amendments to the Medicaid statute.

Q. How long does it take to create a Special Needs Trust? Will it slow us down in closing this case?

Obviously, we would like to have two weeks or more to do this work. It may take longer to secure the agreement of a proposed trustee to the terms of the trust. However, in an emergency we can do it in as little as a few days, as our time constraints and prior commitments permit. As stated above: settle your case as you normally would, pay your fees and costs; just don't distribute to the client until the trust is in place to receive the client's share of the net settlement funds.

Q. What is the structure of the Special Needs Trust?

For purposes of maintaining SSI and Medicaid, the beneficiary must not have direct control of the funds. The trustee must be directed to maximize the benefit of the trust where appropriate, primarily paying for those items for which the beneficiary is not otherwise eligible from government benefit programs, such as SSI, Medicaid, group homes, nursing homes, etc., unless there is good reason to spend trust funds for those purposes. The trust must be irrevocable. It must be a “sole benefit trust” – solely for the benefit of the disabled child client or disabled adult client.

In some cases, we recommend a single trustee, personal or corporate. In other cases, we recommend a professional trustee to invest and manage the money, but a Trust Advisory Committee to make all decisions regarding disbursements, and issuing directions to the trustee. The Trust Advisory Committee may be composed of one family member (such as a parent or spouse), a social worker or vocational rehabilitation expert, and a third party, such as the family's attorney, who keeps minutes and records of trust proceedings. The Trust Advisory Committee meets at least annually, or more frequently as the situation requires. Approvals for expenditures from the trust are generally done by fax between the Trust Advisory Committee members, and then by faxed instructions to the Trustee. In some other cases, we recommend appointment of a “Trust Advisor” to a sole corporate trustee. The Trust Advisor is usually a close family member. Management of the trust is therefore quite easy. The Trust Agreement can also provide for a “Designated Representative” under the new Florida Trust Code, effective July 1, 2007.

Q. Who chooses the Trustee or members of the Trust Advisory Committee?

Your client, with your input. We can also share our experience in other cases and suggest trustees, social workers and others. If you wish, we can get involved in negotiating fees with the trustee once you and your client select a corporate trustee or investment house, such as SunTrust Bank, Wachovia, Northern Trust, Gibraltar Bank, Citigroup, or another corporate entity.

Q. Is a corporate trustee, such as a banking institution, mandatory?

No. This type of trust can be handled in the same manner as a testamentary trust.

Where appropriate, the family may decide to select an individual trustee, such as a close relative who is sufficiently skilled to invest and manage the money. The trustee can also decide to employ SunTrust Bank, Wachovia, Northern Trust, Gibraltar Bank, or other investment counselors or financial planners to assist in the proper investment of the trust funds. The idea is to maximize the return on the investment, consistent with the normal “reasonable and prudent” investment rules that govern all trustees of private trusts in Florida. The investments can be in totally secure funds, such as insured CDs, or in treasury bonds, stock market equity funds, or anything that is reasonably safe and not speculative. Reasonable and prudent investor rules do not contemplate buying pork belly futures with Hillary Clinton or putting it all the Denver penny stock market.

However, if your client is financially unsophisticated, and no one in the family can fill that role, a corporate trustee may be more appropriate and necessary.

Q. How much does it cost to create a Special Needs Trust?

Our fee is \$7,500. We require either a letter of protection, indicating that our fees will be paid from the settlement amounts as a cost item which is identified and approved by the client on the Closing Statement, or payment in advance of our retainer of \$7,500 to cover our minimum flat fee of the same amount. The funds advanced will be held in our trust account until delivery to you of our final draft of the Special Needs Trust. Based on our experience, the retainer will cover our time and expertise in telephone conferences and meetings with you and your client, drafting the trust, and responding to a reasonable number of follow-up questions and minor re-drafting (e.g., in the event the client decides to change the proposed trustee). Also included is registering the Trust with the Florida Medicaid agency through the Florida Medicaid General Counsel's Office in Tallahassee and securing their approval, and formally serving formal notice on the Social Security Administration that manages the SSI program. Additional services, such as meetings outside the office, meetings with proposed Trust Advisory Committee members, assisting in selecting a corporate trustee and negotiating corporate trustee fees for fund investment and management, are charged at our hourly rate of \$450 per hour. Sometimes as an additional service, attorneys and their clients request our attendance at the hearing to approve minor's settlements, or to meet with and work out the future payments from structured settlement companies. The total additional hourly cost depends on the amount of assistance you need from us. We will work with you and your client to provide just the services you feel are appropriate under the circumstances.

Q. How is your fee paid?

Once you and your client have decided to proceed with a Special Needs Trust, you send me a letter of protection as described above, or our retainer of \$7,500. With a few rare exceptions, most attorneys have regarded our services to their client as similar to other litigation costs advanced, and it so appears on the client's closing statement. Our fees therefore are a proper charge against the client's recovery, not an expense to be born by the trial lawyer. When we have completed our services, we send you a statement indicating that the fees have been paid if the work was routine, and if not, a detailed statement for the additional services rendered, with a statement for the balance due over and above the standard retainer. Remember, we do not undertake "additional services" unless you so request.

III. Managing the Special Needs Trust

Q. What kind of expenses can be paid from the trust?

The purpose of the trust is to retain Medicaid and SSI benefits, and use trust funds to meet the supplemental, or "special" needs of the beneficiary. These can be quite broad, however, and include special education, health, comfort, medical and dental expenses, trained medical assistance staff (24 hours or as needed), independent medical check-ups, equipment, supplies, programs of cognitive and visual training, respiratory care and rehabilitation (physical, occupational, speech, visual and cognitive), eye glasses, transportation (including vehicle purchase), maintenance, insurance, essential dietary needs, and private nurses or other qualified caretakers.

Also included are non-medical items, such as season tickets to professional sports events, vacations, movies, trips, travel to visit relatives or friends, electronic equipment such as radios, CD or DVD players, televisions, VCRs, computer equipment, summer or day camps, college or technical

school tuition, and other monetary requirements to enhance the client's self-esteem, comfort or situation. In most cases (with rare exceptions due to "concurrent benefit status"), expenses for "food, clothing and shelter" which are part of the SSI disability benefit payment can be paid, subject to a total SSI reduction of a maximum of \$244 per month. However, even "shelter" expenses is broadly defined and would permit payments by the trustee directly to the lawn maintenance service employed to cut the client's grass.

In most cases, monthly mortgage payments can be made; however, the payments may reduce the client's \$674 SSI monthly check due to the application of the "presumed value reduction" rule.

Some of these items will be covered by Medicaid. For example, Medicaid will pay for a specifically fitted wheelchair, costing \$6,000 to \$20,000. However, they will only pay once every five years. If a modification is needed, or a completely new wheelchair before the end of the five years, the trust is available to pay those costs.

As another example, Medicaid does not pay for second opinions prior to surgery. The trust funds can be used for that purpose, to supplement the medical treatment given by Medicaid. A client is not required to use only Medicaid if they have a trust; they can still use other non-Medicaid providers anywhere in the world, using their trust funds to pay those doctors.

Sometimes the trust beneficiary may be covered under a parent's or spouse's employers' group health plan. Yet many of those plans have lifetime caps or restrictions on services, such as the number of respiratory therapy or psychological counseling visits per year. If the plaintiff's private insurance does not pay, the trustee will look to Medicaid. But if neither pays, trust funds are available to pay those medical bills. Also, in dual coverage situations, Medicaid may pay the hospital and physician co-payments and deductibles not paid by the private group health insurance.

Q. Is Medicaid worth preserving? What medical providers accept Medicaid nowadays?

There is no requirement that a particular medical service provider accept Medicaid. Ten years ago, many private physicians and hospitals would not treat Medicaid patients. Those days are long over. If you pay attention, you will see full page ads in the local newspapers and even hear radio ads by physicians soliciting patients with Medicaid insurance. Why? Because Medicaid reimbursement rates, albeit very low, are now higher than what many private HMO and other managed care insurance plans now pay doctors. Hospitals that used to turn Medicaid patients away, now solicit their business. Medicaid now pays more for some services than Medicare and others.

But the good thing about the Special Needs Trust is that the family can use or not use Medicaid on a case-by-case basis. If they want to go to a particular medical specialist who does not accept Medicaid, the trust can pay the specialist (as the family otherwise would if there was no Special Needs Trust). The control and choice remains with the family, subject to the agreement of the individual trustee or the Trust Advisory Committee.

Doctor says: "Pay me \$2,500 now, or pay me \$0, and let Medicaid pay \$160 for the same service." Articles in the Wall Street Journal and the Miami Herald in July 2003 and February 2004 document the value and necessity of having some health insurance. If a person has none, and needs medical care, the person will be charged the maximum fee-for-service rate the medical provider charges. The Wall Street Journal followed the saga of a young woman, age 25, who needed an emergency appendectomy. Having recently lost her job and her health insurance, she was uninsured. The surgeon's fee was \$2,500. If she had been on Medicaid, the Medicaid agency would have paid the doctor, in full, the sum of \$160 for a laparoscopic appendectomy. That demonstrates the negotiating power that large private insurers and large government programs have in reducing medical charges. Let your client be the one who is the beneficiary of such savings. Otherwise, the

client will be paying rates like \$2,500 now instead of \$160 after death – hopefully many decades from now - when the Medicaid lien is repaid, and all at no interest!

Q. What are the costs of administering a trust?

Financial costs. The trustee must prepare and file an annual tax return (Form 1041) to pay any tax due on the interest earned on principal.⁵ However, on a typical trust of up to \$1 Million or more, there are no taxes to be paid, in many cases, because earnings are taxed at no more than 15% on dividends, and 20% on capital gains. Disabled persons don't work, and thus do NOT pay taxes at the higher wage rates we all do. In addition, disabled individuals often have large medical expense deductions to offset any taxes.

If the family chooses an individual trustee who agrees to serve for free, there are no other costs. If a corporate trustee is selected, regular (or negotiated) bank trust department fees will be paid. Those rates vary substantially from relatively modest to very expensive, depending on the financial institution. However, if a trust structure is chosen which uses a Trust Advisor or a Trust Advisory Committee for making disbursement decisions, a bank may agree to reduce its charges in accord with the reduced risk of being allowed to rely on the written instructions of the Trust Advisor or Trust Advisory Committee regarding disbursements.

Members of the Trust Advisory Committee may or may not be entitled to fees for their services, depending on negotiations prior to their appointment to and acceptance as a member of the Committee.

Financial savings. There may be no need to maintain guardianship proceedings (as will be shown below), and consequently court costs and attorney's fees will be saved both for Annual Reports and hearings on Petitions for Orders to approve disbursements from guardianship funds.

Also, the trust helps the beneficiary maintain eligibility for monthly SSI disability checks, which currently provides for up to \$8,088 tax-free per year. These funds can be used to offset any costs of administering the trust. If a trust is not used or another permissible "spend down plan" implemented, the individual's SSI will be terminated. There will be no additional funds available to offset the attorney's fees and costs of maintaining a guardianship.

As noted above, corporate trustee fees may be reduced if there is a Trust Advisor or Trust Advisory Committee solely responsible for disbursement decisions.

Q. What happens if the trustee can no longer serve?

The Special Needs Trust may provide for naming alternate trustees in the original document. But the trust terms also include a procedure for selecting trustees if none of the alternate trustees are willing or available to serve.

⁵The payments from a structured annuity arrive to the trust tax-free; any interest earned on those payments after receipt is taxed.

Q. What happens to the trust if the client becomes ineligible for SSI and Medicaid due to some other reason?

If your client wins the lottery, marries into (relative) wealth, inherits other money,⁶ becomes self-employed, or loses SSI eligibility and Medicaid for any other reason, the trust will continue to be available to meet the beneficiary's needs, in the same manner as guardianship account funds would continue to be available, only easier — the limitations on expenditures restricted by the SSI and Medicaid rules would no longer be a factor in decisions the trustee must make about disbursements. Even without the SSI and Medicaid considerations, managing funds through a trust has advantages, including the avoidance of probate upon the death of the beneficiary, since the Special Needs Trust provides for the distribution of remaining assets upon the beneficiary's death.

Q. What happens to the net trust corpus when the beneficiary dies?

The same thing that would happen if there was no trust. If the beneficiary had a valid will at the time of death, the proceeds would be paid to the named beneficiaries. If the beneficiary died intestate, the net would be paid to his heirs at law. The trust document can provide for distribution remaining net trust proceeds after the beneficiary's death, including establishing minors' trusts for the disabled beneficiary's children, etc.

IV. Miscellaneous Questions

Q. With a minor or incompetent adult, do I also need a “guardian of the property” if the personal injury trial court judge directs the settlement proceeds into a Special Needs Trust?

No. If there are no assets for the guardianship court to manage because they have been placed in a trial court-created trust, there is no need for a “guardian of the *property*” to manage those assets. We have even been called upon by guardianship attorneys to terminate existing guardianships because the Social Security Administration learned of the existence of the account, and terminated the ward's SSI and Medicaid benefits because of it. The client then becomes re-eligible for SSI and Medicaid benefits when the former guardianship funds are transferred to trust.

However, if the client is mentally or physically incompetent and needs a “guardian of the *person*” to make medical treatment decisions, or if the client is a child with no current legal guardian, a guardianship of the *person* will need to be established and maintained, whether or not you chose to create a Special Needs Trust.

⁶However, other family members should be advised not to make testamentary gifts directly to the SSI beneficiary. Instead they should make a testamentary trust with discretionary provisions, called a Third Party Special Needs Trust, with directions to the trustee to apply Special Needs Trust rules when making distributions from the testamentary trust. We prepare such testamentary third party Special Needs Trusts also.

Q. What if I have already opened a guardianship file in the probate court?

If there are no other reasons to maintain it, after the Special Needs Trust is established, you can close it as a “no asset” case, just as you would if the personal injury case ended in a defense verdict.

Q. Why should we choose David Lillesand to create our Special Needs Trust?

Frankly, you need to beware of estate planning attorneys and others who allege that they can create a Special Needs Trust, but have no experience litigating SSI and Social Security disability cases. The success of this trust will be measured by whether it passes muster when examined by the Social Security Administration applying federal SSI statutes, regulations, internal rules, and federal caselaw interpreting SSI income and resource (asset) rules.

If the trust, or its management, runs afoul of those federal laws, it will not accomplish the objective of maintaining SSI and Medicaid benefits for your client.

If we draft the trust, we will be available to represent the client on a contingent fee basis in any federal administrative or court proceedings seeking to terminate the SSI and Medicaid benefits.

David Lillesand’s resume of training and experience includes:

- Chair of the Florida Bar Association Elder Law Section’s Special Needs Trust Committee, 2006-2009.
- AV[®] rated (highest category) by Martindale-HubbellSM Attorney Peer Rating System for legal ability and ethical standards.
- member of the Wisconsin, Florida and District of Columbia bar associations, as well as the U.S. District Court, Eleventh Circuit Court of Appeals and U.S. Supreme Court.
- thirty years experience representing SSI claimant's in federal administrative Social Security Administration hearings and federal court actions in the U.S. District Court, Southern District of Florida and the U.S. Court of Appeals for the Eleventh Circuit, Atlanta.
- frequent lecturer at Florida Bar CLE courses on representation of SSI Social Security Administration disability claimants, including specific lectures on creation and use of SSI and Medicaid Special Needs Trusts,.
- frequent lecturer for national organizations, such as the American Bar Association, the National Academy of Elder Law Attorneys, the National Organization of Social Security Claimant Representatives, and a staff trainer and lecturer for national banks and trust departments on the laws and technicalities of Special Needs Trusts administration.
- recipient of the Florida Bar Elder Law Section’s Member of the Year Award, 2003, and the President's Pro Bono Volunteer of the Year for the Eleventh Judicial Circuit of Florida.
- Named by his peers as one of the top 1.6% of practicing lawyers in Florida in 2004 and 2005, published in *Florida Trend Magazine*.

A complete copy of David Lillesand’s resume training and experience is available upon request.