TRACK 10
Advanced Special Needs Planning: New Strategies

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TRACK 10:

ADVANCED SPECIAL NEEDS PLANNING: NEW STRATEGIES. PLANNING OPPORTUNITIES TO REDUCE ESTATE RECOVERY FOR THE CLIENT WITH A DISABILITY

I. INTRODUCTION

Many plaintiffs who are injured become disabled and thus have received government entitlements. Although Special Needs Trusts remain a viable and essential planning tool, some clients look to avoid the estate recovery associated with an SNT. The following scenarios discuss planning options using the Medical Indemnity Fund, MAGI Medicaid and the ABLE Act in order to reduce Medicaid's recovery from the assets of a person with a disability after any lien has been satisfied. The materials also include drafting tips for trusts to promote flexibility in the plan.

You will meet with PAUL, Plaintiff's attorney, and his clients. The clients are interested in planning options that will eliminate or reduce estate recovery in the future but also keep their benefits.

II. MEET MAUDE AND THE MEDICAL INDEMNITY FUND

A. MAUDE is a 6 year old child who was injured at birth. She is totally dependent upon her mother for support. She is unable to perform any activities of daily living unassisted. She does not walk, talk, toilet or feed herself. She attends school where she has a 1:1 aide. She has a home attendant paid for by the Medicaid program from 3pm – 11pm. Her mother is unable to work outside the home because of MAUDE's needs. Whenever she tried to work, her frequent absences due to MAUDE's health crises resulted in her being fired. Her mother is a high school graduate who had worked at Macy's prior to MAUDE's birth. MAUDE's father has not been involved with MAUDE in any way.

Up until now, MAUDE has been receiving SSI based on her disability and MOM's low assets and income, and Medicaid. They live with Grandma. The apartment is crowded and the atmosphere is tense, because Grandma always thinks she knows what's best for MOM and MAUDE.

The case has settled for $4,000,000.00 in money from the Defendants. A portion will be allocated to the Medical Indemnity Fund. You are going to explain the Fund, its effect on MAUDE's government benefits, and what options are available to manage her money and also reduce Medicaid's recovery from her estate when MAUDE passes away.

MOM's goals are to be able to buy a home and continue her daughter's home attendant. PAUL wants to make sure that Medicaid recoups as little as possible from MAUDE's assets when she passes away.

B. The Medical Indemnity Fund:

A great deal of medical malpractice claims are paid for infants injured during birth who are born with neurological impairments. These large recoveries are often comprised

of money intended to provide for pain and suffering, past care, future damages and losses of the infant, but also include money needed for the future health care costs of the infants during their lifetimes. However, with the advent of SNTs, their care has often been paid for by the Medicaid program.

In an effort to stem the costs of medical malpractice insurance premiums and keep down Medicaid costs, the New York State legislature enacted the New York Medical Indemnity Fund. N.Y. Pub. Health L. § 2999-g. Proposed by the Medicaid Redesign Team, "[t]he purpose of the fund is to provide a funding source for future health care costs associated with birth related neurological injuries, in order to reduce premium costs for medical malpractice insurance coverage." Id. The Fund will pay the medical costs of those enrolled, id. at h(3), and will be primary to Medicare and Medicaid. Id. at § 2999-j(3). There are no financial criteria in order for a qualified plaintiff to be enrolled in the Fund and no reimbursement to the State upon the death of the qualified infant plaintiff for the expenditures made from the Fund on his/her behalf. Id. at h(4).

It is a comprehensive Fund to provide all medical care for qualified infant plaintiffs. "Those expenses that will or can be covered as qualifying health care costs are defined as broadly as defined by the statute." Preamble, 10 N.Y.C.R.R. 69-10. The benefits are portable, and will be paid for even if the infant is no longer in New York.

When a settlement has been reached, the parties allocate a portion of the recovery for past losses and for future nonmedical needs such as loss of services and pain and suffering. The portion allocated to the Fund is then paid for by tax revenue. In a case that has settled for $4,000,000.00, for example, in which 50% is allocated to nonfund damages, the Defendant will pay $2,000,000 to the plaintiff for the portion representing the past medical expenses and the future nonmedical needs. The Plaintiff will pay legal fees on

his/her $2,000,000.00 to the attorney. The Defendant will pay the legal fees on the $2,000,000.00 allocated to future medical care, but the $2,000,000 being allocated to the Fund will be paid NOT by the Defendant, but by tax revenue.

For those enrolled in the Fund, Medicaid is no longer needed to enable an infant plaintiff to receive necessary medical care and services for his/her lifetime, whether in New York or elsewhere. The parents' assets and income are not a factor in the child's enrollment. The Fund pays providers at an insurance rate of reimbursement rather than at a Medicaid rate of reimbursement. Because Medicaid will no longer be needed for any medical services during the child's lifetime, the settlement of a lawsuit stops the Medicaid payback when the plaintiff passes away, whether prior to age 55 or after age 55, as there will be no Medicaid provided after age 55.

C. MAUDE and the Fund

Because MAUDE suffered a neurological injury at birth, she will be enrolled in the Medical Indemnity Fund. The parties have allocated 80% of the recovery to the fund and 20% to the nonfund damages. Legal fees on the 20% allocated to the fund will be paid by the Defendant, while MAUDE will pay the legal fees on her portion. However, the Defendant will not be contributing to the cost of the fund portion. This is funded by a special revenue on hospitals, and the Defendant essentially is paying $4,000,000.00, which includes legal fees on the 20% allocated to the fund. The net amount after payment of legal fees and liens will be $2,700,000.00. PAUL said that the court is willing to allocate $200,000.00 to MOM for her loss of services.

D. The Medicaid Lien

PAUL, the personal injury attorney, has negotiated the Medicaid lien against the lawsuit in accordance with Arkansas Dept. of Health & Human Services v. Ahlborn, 547

U.S. 268, 126 S. Ct. 1752 (2006). Although the case settled for $4,000,000, he demonstrated that due to the injuries sustained by MAUDE, the true value of the case would have been $12,000,000.00 based upon her damages. Because MAUDE received only 1/3 of the value of the case, the Department of Social Services accepted only 1/3 of its $1,000,000 lien filed against the lawsuit, or $333,333,333.33.

E. SSI

The Supplemental Security Income (SSI) program, 42 U.S.C. 1381 et seq., is a needs based program. The federal program provides a monthly cash stipend to the aged, blind and disabled whose available resources and income do not exceed the maximum income and resources standards of the program. A person with a disability is someone whose inability to perform substantial gainful employment is expected to last for 12 months. 20 C.F.R. § 416.905. New York State provides an Optional State Supplement of $87/month to the federal benefit amount, which is $750 for 2018.

An SSI recipient may have no more than $2,000 in countable assets. In general, the uncompensated transfer of resources will result in a period of ineligibility for SSI. The waiting period caused by the gifting of assets is calculated by dividing the amount of resources transferred by the monthly SSI benefit. There is a 36 month look-back, and the ineligibility period is capped at 36 months, no matter how great the transfer. 42 U.S.C. § 1382b(c)(1)(A). No ineligibility period will be assessed to transfers into a trust by someone under the age of 65 which provides a payback to the State for the lifetime of Medicaid provided pursuant to 42 U.S.C. § 1396p(d)(4)(A) (a "payback" trust) or, for a person with a disability under the age of 65, to a pooled trust pursuant to 42 U.S.C. § 1396p(d)(4)(C). There is no payback for SSI benefits when the trust terminates. 42 U.S.C.

§ 1382b(e)(5). Assets in the pooled trust remain with the organization for other persons with a disability.

Until a child reaches 18, the financial eligibility of a child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the child with a disability through the month of his/her 18th birthday. If a parent has more than $2,000 in resources, the child will not be eligible for SSI. A parent's unearned income, as from annuities, reduces the SSI benefits of a child with a disability almost dollar for dollar, after a credit is given for the federal benefit level of an adult, currently $750.00/month. Earned income reduces the SSI benefit only by approximately one half, after a credit is given for the federal benefit level of an adult, currently $750/month.

F. Planning for Asset Preservation and Asset Management

Because a child is under a legal disability due to age, meaning that he or she is unable to own and manage assets, a child's lawsuit recovery will be under the jurisdiction of a court until the child reaches 18. As with any lawsuit, access to the "nonfund" portion of the personal injury lawsuit for an infant will be subject either to CPLR Article 12, SCPA 17, SCPA 17-A, or Article 81. CPLR Article 12 authorizes payment to a parent and natural guardian, jointly with an officer of a bank, blocking the account from use absent further Order of the Court. Any use of funds must be made by application to the Court.

When there is no parent and natural guardian, a legal Guardian may be appointed for an infant, pursuant to SCPA 17. This appointment is made regardless of his/her intellectual abilities, without any finding of disability other than age. This appointment lasts until the infant reaches the age of 18. The use of the infant's funds will be subject to the jurisdiction of the Surrogate's Court. After the infant reaches the age of 18, the assets

will be paid to him/her unless the child is incapacitated at that age. In that case, the court order will direct that the parents apply to a court of competent jurisdicition for the appointment of a guardian when the child is 18.

Pursuant to SCPA 17-A a legal Guardian may be appointed for a person or infant with intellectual or developmental delays. Use of funds of the ward will be subject to the jurisdiction of the Surrogate's Court. This Guardian may be appointed for an infant or adult and lasts for life, unless a court determines that the ward no longer is intellectually or developmentally delayed.

A Guardian appointed pursuant to Article 81 of the Mental Hygiene Law to manage the funds of an Incapacitated Person will be subject to the jurisdiction of the Supreme Court. That court will oversee the use of the funds.

Because MAUDE will be enrolled in the Fund, she will not need Medicaid during her lifetime. For her to continue to receive SSI, however, she may maintain the assets in blocked bank accounts until she is 18, meaning that they may not be available for her use and benefit. In the alternative, she may fund a SNT, have access to the funds as authorized by the court, and not lose SSI.

As discussed above, the Medicaid lien has been compromised for $666,666.64 less than the actual amount paid out. That amount not reimbursed upon lawsuit settlement will be subject to reimbursement upon her death if she establishes a Special Needs Trust. 42 U.S.C. 1396p(d)(4)(A); N.Y. Soc. Serv. L. 3662(b)(2)(iii)(A). Moreover, the use of the trust will be subject to reporting requirements set by the government.

If she retains her lawsuit proceeds in a blocked account in order to continue SSI, she will not be able to use the funds. If she maintains the funds in bank accounts but obtains withdrawal orders, without an SNT, she will lose SSI but will be able to continue

to receive her health care through the Medical Indemnity Fund. Obtaining withdrawal orders is cumbersome and time consuming, and there is no investment discretion afforded the parent. What to do?

G. An SNT: To Do or Not to Do

1. Supplemental Needs Trusts have Extensive Payback to Medicaid

The payback provision of a Supplemental Needs Trust requires reimbursement from remaining trust assets for all Medicaid provided to the beneficiary. Id. The State is not limited to reimbursement for Medicaid paid after the effective date of the trust. The trust assets must be used to repay the State for all Medicaid provided to the beneficiary, even when a lien has been satisfied for less than the full amount of Medicaid provided at the time of the lawsuit.

The payback to the State upon the death of the trust beneficiary can be much greater when there is an SNT than when there is no SNT. When an individual who received Medicaid for reasons unrelated to a lawsuit brought on his/her behalf establishes an SNT, there will be a payback to the State upon death from remaining trust assets for an amount inclusive of all Medicaid provided to him/her during lifetime. A prior condition will not insulate noncausally related Medicaid from recovery. If a lien against a personal injury lawsuit has been compromised, the unreimbursed Medicaid will remain subject to payback upon the termination of the SNT. The payback will occur even if the beneficiary is survived by a spouse or child with a disability, cf. N.Y. Soc. Serv. L. 369, and may extend to a home owned by the SNT in which a caregiver child or sibling with an equity interest or disabled or minor child resides.

2. Factors to Consider When Deciding Whether to Establish an SNT

The decision to establish an SNT for an infant enrolled in the Fund will be made by weighing the benefits of the SSI program with the payback provisions of an SNT and the continuing involvement of government agencies in monitoring the use of the SNT. Although the Fund eliminates the need for Medicaid for the qualified plaintiff, the funds held by or for the infant will preclude his/her eligibility for SSI. There is no payback to the State for SSI benefits provided to the beneficiary of an SNT upon his/her death. However, if a Medicaid lien imposed against a lawsuit has been greatly compromised, the unpaid portion of the lien will be subject to payback to the State upon the plaintiff's death if s/he has established a Supplemental Needs Trust.

If there is no SNT, and the plaintiff foregoes SSI, upon his/her death there will be no reimbursement to the State from the nonfund portion of the assets if there has been no further Medicaid provided. See N.Y. Soc. Serv. L. 369, limiting estate recovery to Medicaid provided after the age of 55 from the Medicaid recipient's probate estate. Homes purchased for an infant plaintiff will not be subject to estate recovery so long as purchased outside of an SNT. The unpaid amount of Medicaid and the nature and amount of assets owned by the qualified plaintiff will be factors to consider when comparing the benefits of SSI with a payback upon death to the State for all Medicaid ever provided from remaining trust assets if a trust is established.

H. Establishing a Settlement Trust in an Infant Compromise Order: CPLR Article 12

Is there any way to hold the funds so that they may be available to be used and yet not subject them to a payback for all Medicaid provided upon the death of the plaintiff? The CPLR, Article 12, lists individuals to whom an infant's lawsuit proceeds may be paid.

CPLR §1206 directs that an infant's lawsuit proceeds be paid to a Guardian of the Property, a Conservator or Committee to be held for the use of the infant.

CPLR §1206(c) further directs the manner in which an infant's funds may be invested. These authorized investments are limited to insured banks or trust companies or savings banks or state or federal credit unions or specified accounts in insured savings and loan associations, insured savings certificates or an insured money market account, or insured or guaranteed U.S. treasury or municipal bills, notes or bonds. In addition, a court may order that a structured settlement agreement be executed. CPLR does Not allow investments pursuant to the Prudent Investor Act.

Notably absent from the CPLR is any authority for the Infant Compromise Order to direct that funds be paid to a trustee of any type of trust. Consistent with CPLR, then, some courts require that if there is to be an SNT or investment discretion, this may be given only when there is a legal Guardian of the Property appointed either pursuant to SCPA 17, SCPA 17 A or Article 81 of the Mental Hygiene Law.

Other courts, however, routinely authorize both SNTs and "settlement trusts" to be funded with the proceeds of an infant's lawsuit. They will appoint an independent trustee and either a Referee or Court Examiner to review annual accountings.

QUERY: IS IT TIME FOR THE STATUTE TO CATCH UP TO THE PRACTICE SO THAT TRUSTS MAY BE ESTABLISHED WITHOUT A LEGAL GUARDIAN FOR AN INFANT SO LONG AS THE TRIAL COURT WILL PROVIDE COURT OVERSIGHT?

ISSUE: When the infant will be incapacitated after age 18, may/should the Supreme Court Infant Compromise Order establish a trust that will last past the 18th birthday of an infant without a finding by a guardianship court of incapacity? What if the

child will always have a physical disability and thus need Medicaid (no "Fund" case) but is not mentally incapacitated? Should such a trust be revisited upon the infant's turning 18, giving him/her the choice of continuing the trust or dissolving he trust?

I. Plan for MAUDE

If MOM receives $200,000, MAUDE will lose eligibility for SSI. In addition, if MAUDE retains her assets and is able to access them, she will also lose SSI unless she has an SNT. As a goal is to purchase a home in which MOM and MAUDE will reside, if an SNT is established, solely to keep the SSI, upon MAUDE's death the home owned by the SNT would be subject to estate recovery.

SO HERE IS THE PLAN:

1. MAUDE will forego SSI.

2. PAUL will request that the court establish a Settlement Trust to hold the assets. This trust will be revocable and authorize a court to allow it to become an SNT if, in the future, the SSI becomes more important;

3. PAUL will ask the court to give TO MOM each month $750.00 to replace the lost SSI PLUS an additional $1000/month for MAUDE's living expenses.

4. The court will appoint an independent trustee to serve as Trustee, with broad discretion to use money for the benefit of MAUDE, and to account annually each year to a Referee appointed by the Court.

5. MOM will be directed to apply for legal guardianship of MAUDE when MAUDE reaches 18.

6. The Trust will provide that it will be subject to the jurisdiction of either the trial court or a court having jurisdiction over the legal guardian of MAUDE.

7. If MAUDE passes away with assets in the Settlement Trust, including the home, there is no payback to Medicaid, because assets would not pass by probate or intestacy and because she will not have received Medicaid after the age of 55. As MAUDE will have the Fund pay for her medical care, no Medicaid would be expended after age 6. Hence, the Ahlborn allocation will permit MAUDE to have $666,666.64 to use during her lifetime and not have a payback upon her demise.

III: MEET MARK AND MAGI MEDICAID

A. MARK'S Situation

MARK is on SSI and Medicaid as a person with a disability receiving SSI, meaning he can have no more than $2,000.00 in countable assets. He was injured in a motor vehicle accident when he was 27. At that time he was working part time, off the books, as a waiter, and going to school part time. He is now 30 and paralyzed from the waist down. He has a home attendant paid for by the Medicaid program. He has been living back home with his parents and can't wait to get his own place and get on with his life. He hopes to marry some day and maybe go back to school or even work. He isn't sure. But he definitely wants his independence AND to keep his Medicaid, of course.

PAUL has settled his case for $3,000,000. He will pay back Medicaid $150,000.00 of the $600,000 they have expended to date. The net to PAUL will be approximately $1,850,000.00.

B. MAGI Medicaid

As part of the Affordable Care Act, New York State expanded Medicaid eligibility to those whose income is less than $138% of the federal poverty level. See N.Y. Soc. Serv. L. 366(1)(a).

At this time, 138% of the Federal Poverty Level for a household of one is $1,397.00 per month. If one's income exceeds that amount, he or she will not be eligible for Medicaid at all. Excess income may not be spent down on medical needs the way it can be with traditional non-MAGI Medicaid called "Benchmark Medicaid" because it establishes the services that will be provided for Medicaid, regardless of the manner in which eligibility is computed. N.Y. Soc. Serv. L. 366(1)(a)(1). Those with a disability who are under 65 and are not eligible for Medicare may be eligible for either Medicaid Program. See id. at (1)(b)(1)(i)-(iv). Home health aides are available with either MAGI or traditional non-MAGI (benchmark) Medicaid.

Modified Adjusted Gross Income is calculated as per Section 36B(d)(2)(B) of the Internal Revenue Code. Id. at (1)(a)(7). Modified Adjusted Gross Income (MAGI) includes income from all sources, other than Veteran's benefits, Workers Compensation and child support. Interest on tax free investments is also included in MAGI. The receipt of an inheritance or insurance proceeds or lawsuit proceeds is not considered income for purposes of MAGI Medicaid, as these are tax free payments. In addition, structured settlements, which provide periodic tax free payments to a Plaintiff, are not counted as income for Modified Adjusted Gross Income.

Once eligible financially for MAGI Medicaid, one is also eligible to receive home care provided by home attendants and paid for by Medicaid, if the individual's medical needs require such care.

C. Structured Settlements

1. Statutory Authority for Structured Settlements

The Internal Revenue Code exempts amounts received as compensation for physical injuries or physical sickness from federal income tax, regardless of whether such amounts

are received in a lump sum at settlement or paid over time in a structured settlement. IRC 104(a)(2). They are also exempt from New York State and local income tax. N.Y. Tax Law 612.

2. Basic Process

A structured settlement agreement must be entered into PRIOR to the plaintiff's or plaintiff's attorney's receiving the funds. Typically, an annuity is purchased and owned by an insurance company that will then assign to a subsidiary the obligation to make periodic payments as agreed upon by the plaintiff.

3. Your Role in Choosing the Structure

A structured settlement broker will meet and present various scenarios as to how money that is structured will be paid out. When should the payments begin? Should there be a Cost of Living Adjustment? What is the guaranteed period? Should the payments be made for life? What is the rated age (i.e, in the case of MARK, does he have a shortened life expectancy due to his paralysis?) Although 30, he may be rated as medically already being 40 years old. The higher the rated age, the shorter the life expectancy and therefore the larger the return on a structured settlement that is guaranteed to make payments for the life of the Plaintiff.

You will also advise how much money should NOT be structured. If there is money to be set aside for a home and car, that money should be paid in up front moneys. Although back-ending the payments may produce a better financial return, because the annuity company is retaining the funds and not paying them out for a longer period of time, very often the needs of a Plaintiff are immediate.

4. Structured Settlements and SNTS

What happens when a plaintiff with a structured settlement dies and guaranteed future payments remain? If the settlement agreement provides that guaranteed payments shall be made to the estate of the plaintiff, these future payments will not be trust assets upon the death of the beneficiary available to satisfy a Medicaid claim. Paid to the estate of the beneficiary, they will escape reimbursement to the State if the beneficiary is under the age of 55 at the time of his/her demise. N.Y. Soc. Serv. L. § 369. Paid to a named beneficiary, they will also escape estate recovery.

In Sanango v. NYCHHC, 6 A.D.3d 519, 775 N.Y.S.2d 343 (2d Dep't 2004), the Appellate Division held that the use of the structured settlement with guaranteed payments to the estate rather than to the SNT altered the terms of the settlement and should not provide a means to thwart a payback to Medicaid upon the death of the plaintiff whose periodic payments were sheltered in the SNT during his lifetime. Absent conflicting appellate division authority, then, the Structured Settlement Agreement paid into an SNT must reflect that guaranteed payments shall be made to the SNT rather than to the estate of the beneficiary of an SNT upon the death of the plaintiff.

D. Plan for MARK with MAGI Medicaid:

MARK will be able to convert his benchmark Medicaid to MAGI Medicaid without creating an SNT, by applying for that change on line. His income must not exceed the MAGI income limit of $1,397 per month, or $16,764.00/year.

If he creates an SNT, he will continue to receive both SSI and Medicaid. However, because controlling his money is very important to him, he will be able to continue to receive Medicaid based on his Modified Adjusted Gross Income so long as the interest or

dividends earned on his funds and periodic payments that accumulate will not exceed the MAGI income limits. The periodic payments will not count as income.

SO in this case:

1. He will discontinue his SSI.

2. He will keep $750,000.00 in cash in the bank. 2% interest = $15,000/year or $1,250/month.

3. He will choose a structure that will pay monthly $3,800.00/month, guaranteed for his life and 30 years.

4. He will currently name his parents as the remainder beneficiaries of the structure, but can change that to a spouse or someone else in the future.

5. He will control his funds.

6. If he passes away with assets solely in his name, there will be recovery for long term care services (i.e. home care or nursing home care) paid out for him after the age of 55 but not while he is survived by a spouse or minor children or a child with a disability and not if he avoids probate, under current law. N.Y. Soc. Serv. L. 369.

7. If he ever feels that SSI will be important to him, OR if this expansion of Medicaid is ended and not grandfathered in, he can create an SNT and change the payee on the structure to his trust. He would not have to place a home that he might have purchased while on MAGI Medicaid into the SNT, as it is an exempt asset so long as he is living there.

IV: MEET ANNNIE AND THE ABLE ACT

A. ANNIE'S Situation

ANNIE is a 10 year old who was born with many congenital conditions, including hydrocephalus, intellectual disabilities and spinal malformations that make it impossible for her to walk. She is totally dependent upon her mother. PAUL has retained medical experts who advised that there was no malpractice when she was born. She has a very shortened life expectancy due to her condition.

ANNIE was scalded in the bath, due to a faulty water heater in her apartment. PAUL brought suit against the landlord and settled the case for $250,000. Medicaid has already expended more than $1,000,000.00 on her care. She receives home attendants from 3 pm – 11pm and from 11 pm -7 a.m. She then attends school. She receives SSI and Medicaid. MOM has not been able to work outside the home, due to ANNIE's medical needs and because she has 2 other minor children. Medicaid waived the lien, because the medical treatment was small on this case. The net recovery will be $180,000.00.

It is important to MOM that ANNIE continue to receive her benefits. She has heard about a Special Needs Trust and has been told that this is the best way to proceed. PAUL very much would like to protect ANNIE's assets for MOM if ANNIE should pass away. He knows that if ANNIE's funds are placed in an SNT, that Medicaid will be reimbursed whenever she passes away from all remaining money in her trust. He wants to know if you have any other ideas that would let ANNIE keep her SSI and Medicaid but limit Medicaid's estate recovery.

B. ABLE Act

The ABLE Act of 2013 is a federal statute that amended 26 U.S.C. 529 by adding Section 529-A to create tax-free savings accounts for individuals with disabilities.

Discussed for years as a tool to allow families of people with disabilities to set aside funds for his/her use in a way similar to funds set aside for college expenses, the federal statute, in its final version, vastly limited the initial purpose of the statute. Pursuant to the federal law, each state shall establish funds to be administered by independent fiduciaries for persons whose disabilities began prior to the age of 26. Contributions to the fund of each individual may not exceed the gift tax exclusion, $15,000/year in 2018, AGGREGATE FROM ALL SOURCES. The assets accumulating in the fund up to $100,000.00 will not count as an asset for SSI and up to a certain amount fixed by each State will not affect Medicaid. Assets may be used for designated disability expenditures. However, upon the death of the account beneficiary, there will be a payback to the State for Medicaid provided to the individual from remaining account assets for Medicaid provided after the account was funded. See N.Y. Mental Hyg. L. 84.05 for New York State's implementing legislation.

ABLE accounts may be used for qualified disability expenses of the account holder, i.e., the person with a disability. These include housing, educational expenses, living expenses, transportation, personal assistance services, assistive technology and health care not covered by insurance, Medicaid or Medicare. The intent is that these accounts will supplement rather than supplant government entitlements and serve as an easier way to provide for the qualified disability expenditures of a person with special needs than a Special Needs Trust. It allows the person with a disability or his/her parent if the person with a disability is a minor, or agent with a Power of Attorney or Guardian to control the funds in this account. See CMS September 7, 2017 CMS letter confirming that moneys placed into the ABLE account are not countable assets and that Trustees may fund these accounts. However, for SSI purposes, money received by the SSI recipient and then

paid into the ABLE account remains countable income for SSI in the month received. There is no transfer penalty for SSI or Medicaid when funds are placed into the ABLE Account. See SI 01130740, www.ssa.gov, detailing the qualified disability expenses and www.mynyable.org for enrollment forms and investment options in New York State.

The great advantage in using an ABLE account comes from a Social Security interpretation that if funds are paid from an ABLE account to pay for food and shelter of an SSI recipient, these expenditures will NOT result in a 1/3 reduction of the SSI. So, in-kind income from an ABLE account used to pay for food and shelter will NOT affect SSI, while making the same payments from an SNT or by a third party will reduce the SSI by 1/3.

Upon the death of the designated beneficiary, there will be a payback to the State for all Medicaid provided after the establishment of the account from remaining account assets. This is much less onerous than the payback for a first party SNT, which is for an amount up to the total Medicaid expended. N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(A). However, if a supplemental needs trust contains only someone else's funds, there would be no payback had a third party SNT been used. See E.P.T.L. 7-1.12.

C. The Plan for ANNIE:

ANNIE's funds will be structured, providing $15,000 once a year during the next 4 years, with MOM directed to fund an ABLE account with the annual payment. The rest of the funds will be paid out annually, $15,000/year once a year, to MOM as Guardian of ANNIE beginning on ANNIE's 18th birthday, and guaranteed for 12 years. The Infant Compromise Order directs that the payments be made to MOM as parent of ANNIE while ANNIE is under the age of 18, but directs MOM to become ANNIE's legal guardian after age 18. At that time, the funds subject to the Infant Compromise Order will be subject to

the jurisdiction of the Guardianship Part. The Infant Compromise Order authorizes MOM to use the ABLE account for Qualified Disability Expenses of ANNIE, and to account to the Court showing how the funds have been used until ANNIE's 18th birthday.

By having the ABLE account funded annually, but with the payments made to MOM as parent and natural guardian of ANNIE, the annual payments will affect ANNIE's SSI once a month each year. However, that amount is arguably less than the cost of maintaining an SNT with an independent Trustee and commissions. Moreover, if ANNIE passes away, only remaining assets in the ABLE account would be subject to the payback. Remaining guaranteed payments will be paid to her estate, NOT to an SNT with a payback for the lifetime of Medicaid. This alleviates Paul's concern that ANNIE might not survive even until age 18, and that if all assets are placed in an SNT, that the payback would preclude any inheritance for MOM.

V. DRAFTING TIPS:

A. SETTLEMENT TRUSTS

1. Settlement trusts in which the infant will be enrolled in the Medical Indemnity Fund must indicate that the funds may be used ONLY for items that the Fund will not provide – like the customary language in an SNT that the trust should be used to supplement and not supplant government entitlements.

2. Settlement trusts should be revocable, at the discretion of the trial court OR guardianship part so that they may become first party SNTS if there is a need in the future.

3. Indicating proposed types of expenditures (recreation, transportation, clothing, tutoring) , for an independent trustee to make will limit applications to the court for expenditures after the case has ended.

4. The Infant Compromise Order should direct that the parents bring a Guardianship application for an infant upon his/her reaching 18 if there is any question as to whether or not the infant will have capacity at that time.

5. The Settlement trust should provide for annual accountings and a mechanism to review those accountings while the beneficiary is a minor.

6. The Settlement Trust should direct that if a Guardian is appointed for the plaintiff, that the Guardianship Part will have ongoing jurisdiction over the trust.

7. The Trustee should be given the authority to fund an ABLE account if in the best interest of the beneficiary.

Sample Provisions Annexed hereto.

B. SNTS: FIRST PARTY OR THIRD PARTY

1. Provide that the Trustee may fund an ABLE account;

2. If established within an Infant Compromise Order, should provide what court oversight, if any, will be needed after the beneficiary reaches the age of 18.

VI CONCLUSION

The federal law authorizing individuals with disabilities to fund their own trusts is now 25 years old. Revolutionary at the time, we now have other planning options that may better meet the goals of some clients with personal injuries who wish to keep Medicaid but also want control of their assets and/or want to pass their assets to their heirs.

SETTLEMENT TRUST PROVISIONS

1.1 - CREATION AND EFFECT; SETTLOR AND TRUSTEE(S)

This Agreement made the _____ day of _____, 2016, between MOM, as Parent and Natural Guardian of MAUDE, as Settlor, and BANK as Trustee, is established pursuant to Order of the COURT. The Grantor and the Beneficiary reside at --. Trustee BANK maintains offices at ---.

1.2 - REVOCABILITY

This Trust may be amended or revoked at any time upon Order of the Supreme Court, , which shall retain jurisdiction over this Trust. .

1.3 - PURPOSE AND INTENT OF SETTLOR

It is the intent of the Settlor that this Trust shall constitute a plan to provide asset management and to authorize expenditures in categories as set forth in the Infant's Compromise Order settling ---. Expenditures shall include …. No expenditures shall supplant the Medical Indemnity Fund. If a Guardian has been appointed for the beneficiary, use of trust assets shall be as required by the court having jurisdiction over the Guardian of the beneficiary.

1.4 - USE OF INCOME AND PRINCIPAL

The Trustees shall hold, invest and reinvest the trust estate, receive monthly income to the Trust and pay, distribute or apply the principal and income for the benefit of MAUDE as set forth in the Infant's Compromise Order. Any purchase or sale of real property to be owned by

this Trust shall be made pursuant to RPAPL 17, If a Guardian has been appointed for the beneficiary, use of trust assets shall be as required by the court having jurisdiction over the Guardian of the beneficiary.

1.5- TERMINATION OF TRUST

This Trust shall terminate upon the first to occur of the death of the beneficiary or of an application to the Supreme Court, ounty, to terminate the trust, upon the beneficiary's reaching the age of 18.

1.6- REMAINDERMEN

Upon the termination of this Trust, the Trustee shall distribute all remaining Trust corpus and accumulated income to MAUDE or to the legal representative of her estate appointed by the Surrogate's Court if she should not survive the term of the Trust.

1.7 - Powers of Trustees

In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Settlor hereby confers upon the Trustee all those discretionary powers mentioned in §11 of the E.P.T.L. or similar statute or statutes governing the discretion of Trustees so as to confer upon the Trustees the broadest possible powers available for the management of the trust assets.

1.8- COMMISSIONS OF TRUSTEE

The Corporate Trustee shall be entitled to such Commissions as set forth in its published rates in effect from time to time, including any minimum annual fee.

1.9 - Resignation of Trustee

Any Trustee may resign by delivering notice of such resignation to the Settlor, to the Beneficiary and to the Supreme Court, which shall have ongoing jurisdiction over this Trust. The Supreme Court, shall appoint a Successor Trustee until the beneficiary has reached the age of 18. After the beneficiary has reached the age of 18, the court having jurisdiction over the Guardian of the beneficiary shall appoint a successor Trustee. If no Guardian has been appointed for the beneficiary, then the beneficiary may appoint a Successor Trustee.

1.10 - ANNUAL ACCOUNTINGS

Until the beneficiary has reached the age of 18, the Trustee shall file with the Supreme Court, SUFFOLK County, annual accountings in the form of SCPA 1719 in the month of May for the preceding year. _____, maintaining offices at _____, telephone _____ be and hereby is appointed Referee until the beneficiary has reached the age of 18 to examine such Annual Accountings and to file a written report concerning these accountings with the Court. The fee for any such Court appointed Referee shall be paid, upon Court Order, by the Trustee, from the Trust income or accumulated principal. Upon the beneficiary's reaching the age of 18, the Trustee shall deliver annual accountings to the beneficiary if no guardian has been appointed for MAUDE or shall comply with the directives in the Order and Judgment Appointing Guardian if a Guardian has been appointed for the beneficiary. .

SCHEDULE A

Proceeds of lawsuit settling MAUDE LAWSUIT

ELDER LAW AND SPECIAL NEEDS SECTION:

SUMMER MEETING: JULY, 2018

ADVANCED SPECIAL NEEDS PLANNING: NEW STRATEGIES

TRACK 10

MSA FACT PATTERNS

I. MEET ALEX

Alex is 50. He has been receiving SSDI due to advanced and debilitating diabetes. He receives $1500/month. He has been covered by Medicare for 4 years and also by Medicaid. He has a home attendant. He owns his own home, and has an IRA of $150,000.00 from which he is taking distributions of $500/month. He has been spending down this excess income each month.

Alex underwent a below the knee amputation and is the plaintiff in a medical malpractice action. The action was for failure to timely diagnose and treat his infection in his leg. He will net $900,000.00.

His physicians say that he will have to be monitored for life, and that he may need additional surgeries in the future.

How does Alex consider Medicare's future interest in this case?

Alex knew about a Special Needs Trust and asked his girlfriend, a CPA, to be his trustee.

How does one establish an MSA within the Special Needs Trust?

Who will be managing the MSA portion of the Trust?

What are the obligations and tasks of the MSA administrator?

How does the MSA administrator get paid?

Can Girlfriend administer the MSA?

II MEET UMA

Uma is 67 years of age. She has been in a nursing home, in a semi-conscious state since her injury during "routine" surgery 4 years ago. Her long time companion is her legal guardian. He has consented to a settlement of a lawsuit that will net her $1,500,000.00. She receives Social Security retirement of $800/month that is paid to the nursing home to offset the cost of Medicaid. Medicaid pays for her care at the facility where she is sometimes on a ventilator. The actual cost of her care varies between $14,000.00 - $26,000.00 depending upon the number of ventilator days/month.

Uma will be a private paying patient for 5 years. After that time, she will be on Medicaid. She will be using a structured settlement providing periodic payments for 5 years that will cover the cost of her care.

An analyst determined that UMA's future medical care that would have been paid for by Medicare were it not for this lawsuit is $90,000. It is being paid in up front moneys of $20,000 and then annual payments of $8000/year for 8 years guaranteed.

1. Is an MSA a free-standing trust or part of a Pooled Trust or simply a separate account in UMA"S name?

2. What documents does UMA'S Guardian have to sign to implement the plan?

3. What approval must her guardian obtain from the Court in order to implement the plan?

4. To whom will the structured settlement payments be paid?

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Torts, Insurance & Compensation Law Section Journal

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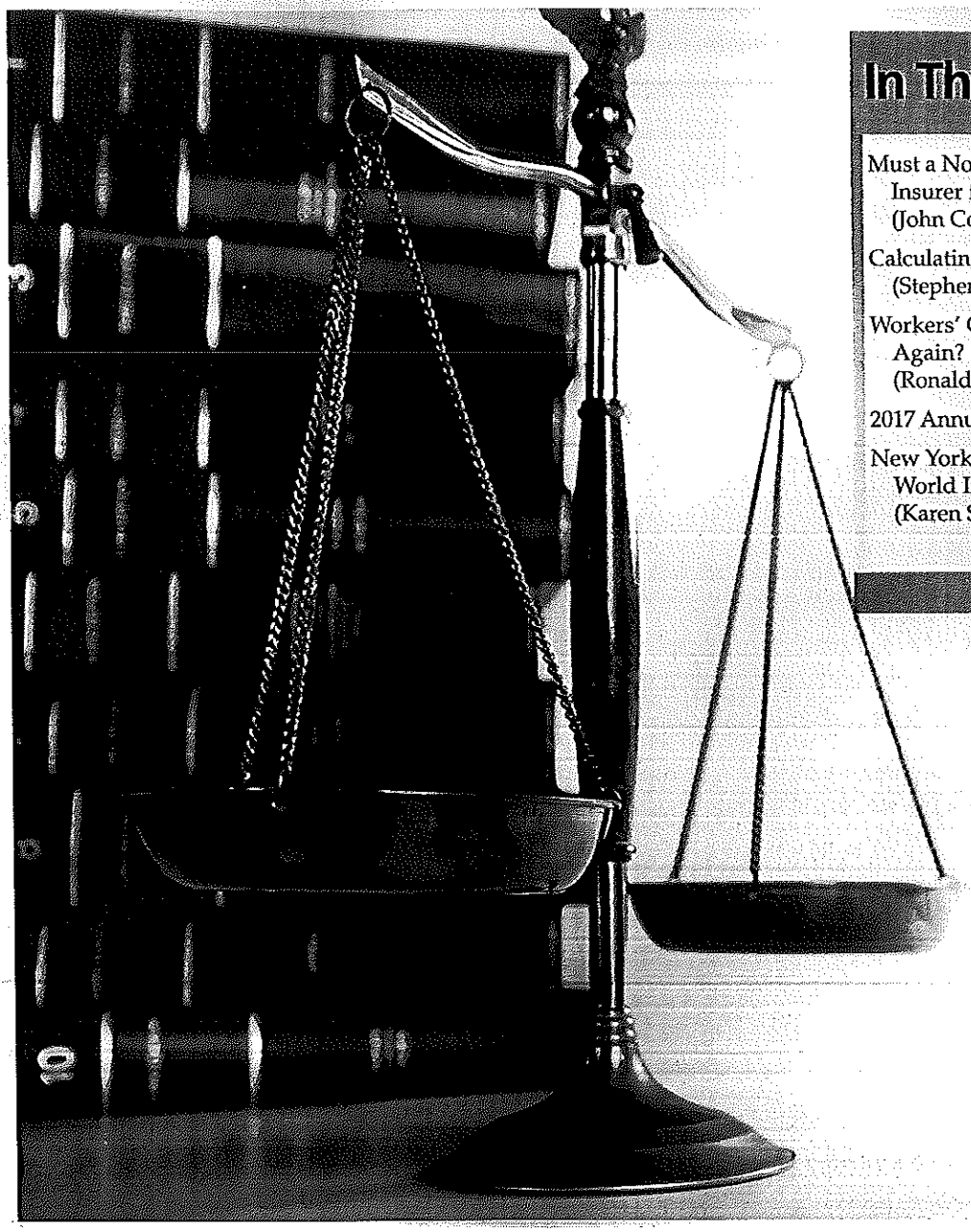

In This Issue:

www.nysba.org/TICL

Must I Set Aside? Part One

By Robert P. Mascali

Like Alice starts her journey through Wonderland, many attorneys involved in third-party liability litigation feel they are descending the rabbit hole into chaos and confusion when confronted by the question of whether a Medicare Set Aside Account/Arrangement (MSA) is required for future medical expenses as part of a potential settlement. And for the most part their wariness is justified because of the lack of firm guidance on this issue from the Centers for Medicare and Medicaid Services (CMS). The basic premise underlying the MSA is that once a claimant has received settlement funds from a third-party carrier that covers in part the costs of future medical treatment, the Medicare program wants to make sure that those funds are used to pay for those expenses before Medicare starts paying for them.

"However, CMS has promulgated several memos on the issue of the need for a MSA in worker's compensation cases and while not binding, they are clearly instructive in the third-party liability realm."

Some historical context is enlightening. Prior to the adoption of the Medicare Secondary Payer (MSP) Act,[1] Medicare was in fact the primary payer of all services covered by Medicare except where there was worker's compensation. Then in 1980 this new law made Medicare a secondary payer to certain insurance plans and programs for beneficiaries, including auto and other third party liability insurance plans. Enforcement did not begin until 2001 following the issuance of the Patel Memorandum[2] which set forth that compliance with MSP was required *in workers' compensation* cases. Thereafter in 2007, legislation was enacted[3] that required insurance companies and other payers to provide information to CMS in any settlement payment situation in which Medicare was, or could become, the secondary payer. This legislation got everyone's attention because if reporting was required, then CMS would have the mechanism in place to track who received settlement funds and whether Medicare's interest as a secondary payer was being protected.

In any third-party liability-based personal injury settlement where the claimant is on Medicare for whatever reason, some of the available settlement funds are used to reimburse Medicare for injury-related "conditional payments" that were made for *past* medical expenses. It then follows that if part of the settlement funds are to cover *future* medical expenses for which Medicare would, or may be, responsible, that there be a system in place to ensure that the funds are used for that purpose so that Medicare is not in effect paying for something for which the claimant already was compensated. Enter the MSA.

Recent years have seen many fits and starts from CMS as it grapples with how to implement and enforce this mandate, and many in the field now feel that the well-known financial pressures on the Medicare system and the obvious need to generate revenue to shore up the system suggests a strong possibility that CMS will look to third-party litigants for some monetary relief. In fact, CMS recently signaled that it will start taking a closer look at enforcing the MSP Statute on liability cases similar to what it does in workers' compensation claims. A CMS directive issued on February 6, 2017, effective October 1, 2017, provided that Medicare contractors will be able to deny payment for items and/or services that should instead be paid from some form of an MSA. Essentially Medicare has now made known its intention to amend its internal processes so that it can receive and track data related to liability cases. Simply stated, CMS is finally starting to build some teeth behind enforcement of the statute on liability cases, just like it has on workers' compensation claims. Therefore, for the personal injury bar the "do nothing" strategy is certainly no longer a viable option.

What are attorneys to do in the face of no formal guidance from CMS on these situations when confronted with the successful claimant who may have future medical expenses for which compensation has been received and who may incur medical expenses in the reasonably foreseeable future that will be submitted for payment to Medicare because of the age or status of the claimant?

This article will attempt to dispel some of the chaos and confusion and provide a ready source of information for the personal injury bar when determining whether a MSA is advisable, even if not currently required.

CMS Guidance in Workers' Compensation Matters

As stated above, there are no rules or regulations under the Medicare Secondary Payer Act for either third-party liability or workers' compensation cases. However, CMS has promulgated several memos on the issue of the need for a MSA in workers' compensation cases and while not binding, they are clearly instructive in the third-party liability realm. Specifically, in a workers' compensation case there is no MSA required where it is clear the award is only for past medical expenses, the treating doctor can certify that to a reasonable degree of certainty there will be no need for Medicare-covered expenses in the future, and that there is no attempt by the claimant to maximize other portions of the settlement to the damage of Medicare's

interests. On the other hand, CMS has established certain review thresholds which are only workload guides and do not mean a MSA is not required even if the threshold is not met in a particular situation. Those thresholds for review are as follows:

A. The gross settlement amount exceeds $25,000 and the claimant is currently eligible for Medicare; or

B. The gross settlement is for more than $250,000 and the claimant can reasonably be expected to become eligible for Medicare within thirty (30) months.

In these situations, it is the total amount of the settlement that is determinative and not merely the portion attributed to future medical expenses. In those cases where there is a structured settlement it is the stated value of the settlement, and not the actual cost of the structure, that is determinative. Finally, it is important to note that a claimant may not attempt to waive a right to future Medicare coverage to avoid the requirement to establish a MSA—at least in workers' compensation cases.

"The wise personal injury attorney should take this into consideration when discussing a prospective settlement and should advise the client of the pros and cons of establishing a MSA where there is reasonable likelihood that there will be future medical care that would be covered by Medicare."

Since 2002 there have been various policy pronouncements from federal officials in a series of conference calls with the insurance industry, handouts and policy memoranda, in which CMS has stated its position on the issue of how Medicare's interest are to be considered and protected in liability cases, while conceding that there is no formal guidance in place at the current time. In addition, there have been several reported decisions that have addressed the question of whether a MSA or some other arrangement is required in liability cases—with differing conclusions.

Cases of Interest

The 2015 case of *Aranki v. Burwell*[4] from the U.S. District Court in Arizona caused a considerable amount of discussion and possibly some unwarranted encouragement for those who continue to assert that MSAs are not necessary and that they are used by overly cautious attorneys for no reason. The court held in response to a petition from a plaintiff's counsel who could not get a response from CMS that the question of whether a MSA is necessary in a medical malpractice case not ripe for review as MSAs are not *required* for future medical expenses in third party liability cases. According to the Court:

> To comply with the provisions outlined in the MSP [Medicare Secondary Payer statute, in worker's compensation case CMS Mandates the creation of a 'Medicare Set Aside' account (41C.F. R.Sec.411). The purpose of a MSA is to allocate a portion of a worker's compensation award to pay potential future medical expenses resulting from the work-related injury so that Medicare does not have to pay. However, no federal law or CMS regulation requires the creation of a MSA in personal injury settlements to cover potential future medical expenses...There may be a day when CMS requires the creation of an MSA in personal injury cases, but that day has not arrived.

But is that really the "final answer"? Not really and here's why

It is beyond dispute that there is a clear federal mandate that parties to a personal injury settlement must consider the interests of Medicare [42 U.S.C. 1395y(b)(2)]. Furthermore, and possibly most importantly, there are potential penalties and the looming malpractice suit for an attorney who fails to set up a MSA when one is found to have been required and the client's future medical expenses are rejected by Medicare and there are now no funds available to pay them. While arguably penalties would not be assessed against an attorney, nor would a claimant prevail in malpractice where no firm guidance is in place on the issue, certainly no attorney wants to be that "test case."

In addition to *Aranki, infra*, other cases from state and federal district courts in recent years do offer some guidance for the personal injury bar. Specifically, the following issues have been considered and ruled upon:

1. If medical providers can attest there will be no future medical expenses related to the injury for which compensation is paid and Medicare acknowledges it has been reimbursed for all conditional payments related to the injury, no MSA is necessary (*Berry v. Toyota Motor Sales, U.S.A., Inc.*).[5]
2. If past and future injury-related expenses have been, and reasonably will be, paid by private insurance and considering the lack of CMS policy or guidance on the issue, no MSA is required (*Tye v. Upper Valley Medical Center*).[6]
3. Since currently Medicare does not require or approve MSAs they are not *required* as part of a personal injury settlement (*Warren Frank v. Gateway Ins. Co.*).[7]

4. While a court has held MSAs for future medical expenses are not required in a personal injury settlement, a court can also determine that a MSA is still appropriate for future medical expenses (*Big R Towing, Inc. v. Trans Am Trucking, Inc.*).[8]

5. A court has not only opined on the necessity for a MSA in a liability but went so far as to apply a percentage formula to determine a specific part of the settlement that should be set aside for future medical expenses (*Benoit v. Neustrom*).[9]

Conclusion

Given the inherent difference between workers' compensation cases which are based on a rigid formula for damage calculation and traditional third-party litigation which is much more flexible in allocation of damages, adherence to the experience in the workers' compensation field can go only so far. However, that is all we have at this time, and at some point it seems likely that the federal government will start to enforce compliance with the MSP in liability cases. The wise personal injury attorney should take this into consideration when discussing a prospective settlement and should advise the client of the pros and cons of establishing a MSA where there is reasonable likelihood that there will be future medical care that would be covered by Medicare.

The second part of this article will deal with the evaluation of the funding amount, the aspects of the administration of a MSA and other practical advice.

The opinions and statements in this article are those of the author only and do not necessarily reflect the views of his employer, The Center for Special Needs Trust Administration, Inc.

Endnotes

1. 42 U.S.C. § 1395y(b)(2); 42 CFR 46(d)(b).
2. *Medicare Set Aside Arrangements Transmittal* (Patel Memo) July 23, 2001.
3. 42 U.S.C. § 1305 (*Medicare, Medicaid and SCHIP Extension Act of 2007*).
4. 151 F. Supp. 3d 1038 (D. Ariz. 2015).
5. 2015 WL 158889.
6. 2014 WL 2957037 (Ohio S.C. 2014).
7. 2012 WL 868872.
8. 2011 WL 43219.
9. 2013 WL 1702120.

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Administrating The Medicare Set Aside

Administration of the Medicare Set Aside Arrangement

Medicare Set Aside allocations may be administered by the claimant. Several stringent guidelines however, must be followed if this option is utilized. In fact, beneficiaries are essentially held to the same standards to which a professional custodian is held with regard to what may and may not be paid from the set-aside account. In addition, the same reporting requirements must be met. MSA funds can only be used to pay for the claimant's future injury-related medical expenses that would otherwise be covered by Medicare. This will require that the individual handling the MSA administration have some expertise in medical claims administration. Sufficient experience and knowledge to be able to make reasonable determinations about whether individual medical expense claims are injury related and about which expense claims would be covered under Medicare is crucial.

Medicare Set Aside Administered by Professional

Medicare Set Aside allocations may also be administered by a professional or a custodian. Indeed, if the amount of the set-aside is significant, it is often advisable to utilize a custodian for the administration of the fund. Medical providers covered by a Medicare set-aside may send bills for their services directly to the custodian. The custodian pays the medical bills in accordance with either the applicable state fee schedule or the Medicare fee schedule, depending upon which fee schedule the settlement agreement indicates or the allocation was based on. The custodian is limited, however, in what may be paid from the set-aside account with regard to medical expenses. First, the custodian may only pay for treatment that Medicare would cover. In addition, the fund must only be used to pay for medical expenses connected with the accident-related injury.

At least on an annual basis, the custodian must send reports to the appropriate Medicare regional office. This report must indicate all of the expenditures from and deposits made into the fund for that period of time. When the fund is exhausted, the custodian must then forward a report to the appropriate Medicare regional office detailing all expenses paid from the fund and all deposits for the life of the fund. Upon approval of the report, the custodian's duties end. Should the beneficiary die before the custodial fund is exhausted, the money will usually revert to his/her estate. In such a case, the custodian must ensure that the appropriate transfers are made before being released from obligations in connection with the Medicare set-aside.

THE CENTER

For Medicare Set-Aside Administration

MSA Administration Case Information

Name:_____
Last First M.I. Gender

Address:_____
Street Address City State Zip Code

Phone: _____ Date of Birth:_____ Social Security Number:_____

Medicare: ☐Yes ☐No If yes, Medicare Number:_____
If no, eligible within 30 months of the settlement: ☐Yes ☐No

Accident/Injury Information

Type of Case: ☐Workers Comp. ☐Liability Description of Accident:_____

Case Jurisdiction (State):_____ Date of Accident:_____

Description of Injury:_____

Pre-existing Conditions:_____

Date of Settlement:_____ Gross Settlement Amount: $_____

MSA Approved by CMS: ☐Yes ☐No ☐Expected

Medicare Set-Aside Account Funding

Amount Administered: $_____

Public Benefit Information

Is the claimant expected to receive, or currently receiving any of the following benefits?

Social Security Retirement (SSR) or Disability (SSDI)	☐Yes	☐No	☐Expected
Supplemental Security Income (SSI)	☐Yes	☐No	☐Expected
Medicaid	☐Yes	☐No	☐Expected

Referring Party or Law Firm

Name:_____ Phone:_____ Email:_____

Firm Name:_____

Address:_____

Firm Contact:_____ Email:_____

Residual Beneficiary Information (Please use additional sheets if needed)

Name:_____
Last First M.I. Gender

Address:_____
Street Address City State Zip Code

Relationship: _____ Social Security Number:_____ Date of Birth:_____
(If a minor)

THE CENTER

For Medicare Set-Aside Administration

Warranty

The above information is being provided to The Center for Medicare Set-Aside Administration, LLC (The Center) for the purpose of creating a Medicare Set-Aside Account which will be professionally administered by The Center. I hereby affirm and warrant by my signature that all of the information herein is accurate and complete to the best of my understanding. I further affirm and agree that I shall hold The Center harmless and indemnify it from any detrimental result that may occur from its reliance on any information provided by me that may later prove to be inaccurate or incorrect.

Signature:_____ Date:_____

Prior to administering please provide us with a copy of the allocation and CMS approval letter, if applicable. Please provide us with a list of treating physicians (name and address) as well as medications related to the injury.

Fee Schedule

$2,000 One-time account set-up fee

$1,000 Yearly administration fee

Internal Use Only:

_____

_____

_____

_____

_____

_____

4912 Creekside Drive Clearwater, Florida 33760 Phone (877) 433 8853 or (727) 497-4330 Fax (727) 471-1853

THE CENTER

For Medicare Set-Aside Administration

ADMINISTERING YOUR MEDICARE SET-ASIDE ARRANGEMENT (MSA)

Medicare regulations are found in Title 42 of the Code of Federal Regulations §411.46, state that Medicare will not pay for Medicare-covered medical expenses related to your liability injury until the MSA funds have been exhausted. Your MSA funds must be used to pay for all Medicare-covered medical services and supplies related to the liability injury. Once the lead contractor has confirmed that the MSA funds have been exhausted appropriately, Medicare will begin paying for Medicare-covered services related to the liability-related injury, illness, or disease.

Instructions for establishing and administrating a MSA account are listed below. If you have any questions regarding these requirements, please contact the CMS lead Medicare contractor at the following address:

BCRC-Liability MSA

PO Box 138899

Oklahoma City, OK 73113

Establishing and Using your Medicare Set-Aside Account

- MSA funds must be placed in an interest-bearing account, separate from any personal savings or checking account.
- Any funds and interest not used in a given year must remain in the account.
- MSA funds may only be used to pay for medical services related to your liability-related injury that would normally be paid by Medicare.
- Examples of some items that Medicare **does not** pay for are: Acupuncture, routine dental care, eyeglasses or hearing aids and therefore, these items cannot be paid from the MSA account. You may obtain a copy of the booklet “Medicare & You” from your local Social Security Office for a more extensive list of services not covered by Medicare.

Establishing and Using your Medicare Set-Aside Account (continued)

- If you have a question regarding Medicare's coverage of a specific item or service to determine if you pay for it from the MSA account call 1-800-MEDICARE (1-800-633-4227) or search the following CMS Websites:

www.medicare.gov

www.cms.hhs.gov/medicare.asp

Please note: If payments from the MSA account are used to pay for services other than Medicare allowable medical expenses related to the medically necessary services or supplies, Medicare will not pay injury related claims until these funds are restored to the MSA account and then properly exhausted.

(The balance of this page intentionally left blank)

Record Keeping

- As the administrator of the account, you will be responsible for keeping accurate records of payments made from the account. These records may be requested by CMS' lead Medicare contractor as proof of appropriate payments from the MSA account.

- You may use the MSA account to pay for the following costs that are directly related to the account:

  - Document copying charges
  - Mailing fees/postage
  - Any banking fees related to the account
  - Income tax on interest income from the set-aside account

- When you have exhausted your set-aside, send a notice to:

  NGHP

  PO Box 138832

  Oklahoma City, OK 73113

- Include your name and Medicare health insurance claim (HIC) number

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When To Take Medicare's Interests Into Account

Based upon CMS regulations, the following guidelines are recommended when taking Medicare's interest into account when contemplating settlement with a primary source of the future medical care resulting from an accident or injury that Medicare would otherwise cover.

Medicare Payments Made While Claim is Open

Medicare insists, without question or doubt, that any payments it makes for medical services in an open claim are to be reimbursed as part of the settlement of the claim. There is no controversy about this issue. If the parties are settling a claim, they must ensure any Medicare payments for medical services related to the injury are reimbursed as part of the settlement. If you fail to do this, Medicare will pursue reimbursement, including the attorneys.

Current Medicare Beneficiaries

If the claimant is a current Medicare beneficiary at the time of settlement, Medicare requests that the settlement and allocation be submitted for approval only if the settlement is for more than $25,000. While Medicare recognizes that there is no statutory basis for the mandatory request, the stated benefit to the Medicare beneficiary is that once an allocation is approved, future Medicare coverage is assured after the approved allocation has been exhausted.

Medicare Eligible Within 30 Months of Settlement

If the claimant is not yet a Medicare beneficiary, but can reasonably be expected to become Medicare-eligible within 30 months of the settlement and the settlement is above $250,000, Medicare expects that its interests will be taken into account by making a reasonable allowance for the future projected costs. If such an allowance is not made in the form of an allocation or set-aside arrangement for future medicals, Medicare may claim the entire settlement amount as an allowance for medicals. And, Medicare will pay no benefits to the claimant for any medical services that may be linked to the injury until the entire settlement amount is exhausted.

No Expectation of Becoming Medicare Eligible

If the Claimant is not a current Medicare beneficiary, is not expected to become a Medicare beneficiary within 30 months following the settlement, and the total settlement amount is less than $250,000, Medicare's position is that they waive any interest in the settlement. However, Medicare officials have warned that this waiver is always subject to the Office of General Counsel review and change.

THE CENTER

For Medicare Set-Aside Administration

MSA Allocation Case Information

Name:_____
Last First M.I. Gender

Address:_____
Street Address City State Zip Code

Phone: _____ Date of Birth:_____ Social Security Number:_____

Medicare: ☐Yes ☐No If yes, Medicare Number:_____
If no, eligible within 30 months of the settlement: ☐Yes ☐No

Accident/Injury Information

Type of Case: ☐Workers Comp. ☐Liability Description of Accident:_____

Case Jurisdiction (State):_____ Date of Accident:_____

Description of Injury:_____

Pre-existing Conditions:_____

Has the case settled: ☐Yes ☐No Date of Settlement:_____ Gross Settlement Amount:_____

Public Benefit Information

Is the claimant expected to receive, or currently receiving any of the following benefits?

Social Security Retirement (SSR) or Disability (SSDI)	☐Yes	☐No	☐Expected
Supplemental Security Income (SSI)	☐Yes	☐No	☐Expected
Medicaid	☐Yes	☐No	☐Expected

Referring Party or Law Firm

Name:_____ Phone:_____ Email:_____

Firm Name:_____

Address:_____

Firm Contact:_____ Email:_____

Warranty

The above information is being provided to The Center for Medicare Set-Aside Administration, LLC (The Center) for the purpose of creating a Medicare Set-Aside Allocation. I hereby affirm and warrant by my signature that all of the information herein is accurate and complete to the best of my understanding. I further affirm and agree that I shall hold The Center harmless and indemnify it from any detrimental result that may occur from its reliance on any information provided by me that may later prove to be inaccurate or incorrect. I further give permission to my attorney to retain the services of The Center to prepare an allocation of future medical expenses and agree to pay a fee of $3,000 out of my settlement as a cost to the case.

Signature:_____ Date:_____

Prior to beginning work on your MSA allocation please provide the last 2 years of medical records related to the injury. If a workers' compensation case please also provide the last 2 years of claims payment history.

THE CENTER

For Medicare Set-Aside Administration

CMS Consent to Release Form

I, _____, authorize The Center for Medicare and Medicaid Services (CMS), its agents and/or contractors to release any and all records to the person or entity below.

The Center for Medicare Set-Aside Administration, LLC
4912 Creekside Drive
Clearwater, FL 33760
727-471-1850

By completing and signing this consent form, I recognize and acknowledge that this consent: a) is for release of information purposes only and will have no effect on any benefits to which I may be entitled under the Medicare and/or Medicaid Program; b) allows the release of Medicare and Medicaid claims and other information related to my injury and/or illness; and, c) authorizes the release of information to the person(s) named above upon their request and that any such released information may be re-disclosed by them and may no longer be protected by law.

I further understand that I have the right to revoke my consent and authorization at any time in writing, except to the extent that CMS has already taken action in reliance thereof. If not previously revoked by me, this consent will terminate automatically when all claims, if any, have been resolved and all Medicare Secondary Payer files have been closed.

_____ _____
Claimant/Legal Representative Signature Date

_____ _____
Date of Injury/Accident Medicare Number

If signed by your legal representative, a copy of the documents authorizing your representative to act for you must be attached to this consent. Examples of such documents would include a Durable Power of Attorney, Letters of Guardianship/Conservatorship, or any other document that establishes your representative's authority.

PRIVACY STATEMENT

The information to be collected in regard to this consent will be used in furtherance of, and to comply with, Section 1862(b) of the Social Security Act (42 U.S.C. 1395y). This information will be used to determine whether any medical services received are covered by Medicare or Medicaid, or whether a no-fault, automobile, liability insurer, or any other person(s) may be responsible for such payment.

A photocopy or facsimile of this Consent to Release form shall be valid and given the same force and effect as the original.

THE CENTER

For Medicare Set-Aside Administration

HIPAA COMPLIANT AUTHORIZATION

Authorization for the Use and Disclosure of Protected Health Information

1. Personal Information:

   Name: _____ Birth Date: _____

   ID Number: _____ OR Social Security Number:_____

2. I give permission to_____(hereafter "Entity") and its contract representatives to share the health information listed below with the following:

   The Center for Medicare Set-Aside Administration, LLC
   4912 Creekside Drive
   Clearwater, FL 33760
   727-497-4330

3. Indicate the purpose for which the disclosure is to be made:

   __X__To substantiate a claim relating to a lawsuit or claim
   __X__Other

4. Indicate the information that you want to be disclosed, related to the following:

   __X__ Any and all records requested.

5. Enter the specific date that you want this authorization to expire: (i.e., one year from date of release)_____ (If you do not enter a date, this authorization will expire in five years.)

   I understand that the information described above may be re-disclosed by the person or group that I hereby give Entity, its employees, and its agents permission to share my information with, and that my information would no longer be protected by the federal privacy regulations. Therefore, I release Entity, its employees, and its agents from all liability arising from the disclosure of my health information pursuant to this authorization. I understand that I may inspect or request copies of any information disclosed by this authorization if Entity, its employees, or its agents required the submission of this HIPAA Authorization in order to release information. I understand that I may revoke this authorization by notifying Entity through its employees and/or agents, in writing, knowing that previously disclosed information would not be subject to my revocation request. I understand that I may refuse to sign this authorization and that my refusal to sign will not affect my ability to obtain treatment, payment or eligibility for benefits.

6. Print Name_____Date_____

   Signature_____

   Or (please provide a copy of your letters of guardianship or conservatorship, durable power of attorney, etc., if applicable)

   Name of Legal Representative (Print)_____

   Relationship_____

   Signature of Legal Representative_____Date_____

THE CENTERS

Special Needs Trust Services • Lien Resolution
MSA Services • Structured Settlements

4912 Creekside Drive • Clearwater, FL 33760
(877) 766-5331 • www.centersweb.com

Medicare Set Aside Allocations and Approvals

The Amount Placed in Medicare Set Aside Arrangements

The amount of money placed in a Medicare Set Aside is not negotiable. Instead, allocation experts are consulted to determine such amount. These experts begin the allocation process by performing in-depth evaluations of the injured party's medical records. Inquiries are then made to medical providers to determine the future medical treatment anticipated for the claimant. Next, a review is conducted of Medicare regulations to determine what part of that treatment Medicare would normally cover, as that is the only treatment for which money must be set aside. A projection is then made of the likely expenses for the covered treatment based upon the applicable medical reimbursement fee schedule. This is the amount that should be placed in the Medicare set-aside.

Getting Center for Medicare and Medicaid Services Approval

Involving CMMS in the determination of the amount that will be allocated toward future medical expenses is the only way to insure Medicare eligibility after the funds are exhausted. Since a settlement figure can be rejected by Medicare because it may seemingly attempt to shift claims payment responsibility to Medicare, the only way to truly ensure ongoing and future coverage is to secure CMMS approval of the set aside amount. Otherwise, an unrecognized settlement can affect claimant's eligibility for Medicare services and all other parties' responsibilities regarding same.

In order to approve a Medicare Set Aside, CMMS must be provided with all of the relevant facts concerning the claimant's injury and his or her medical treatment, including the basis for Medicare entitlement, the type of injury or illness, the age of the beneficiary, including an evaluation of whether the beneficiary's condition would shorten his or her life span, prior and future medical needs of the beneficiary due to the injury or illness, prior and future medical needs of the beneficiary due to pre-existing conditions, the living arrangement of the beneficiary and the level of continued care required, as well as copies of relevant documentation, including a copy of the settlement agreement and recent medical records, and the proposed Medicare Set Aside allocation taking Medicare's interests into account, including information as to whether the MSA will be self-administered or administered by a professional.

If the personal injury plaintiff is receiving Supplemental Security Income, Medicaid, or other needs based governmental benefits that require a first party special needs trust compliant with the requirements of 42 U.S.C. §1396p(d)(4)(A), the MSA must be imbedded within a (d)(4)(A) trust.

The (d)(4)(A) might provide for a separate account as follows:

I. OPTION ONE

Medicare Set Aside Account Pursuant to 42 U.S.C. § 1395Y(b)(2)(A):

A. Notwithstanding any other dispositive provision of this trust applicable during the lifetime of [Beneficiary], the [Beneficiary] Irrevocable Trust shall contain a Medicare Set Aside account (MSA) which shall be segregated from other trust assets. As soon as practicable after the receipt of the trust assets described in Schedule A to this agreement, the Trustee shall segregate from the remainder of the trust assets those funds and structured settlement annuities listed on Schedule A that are intended to fund the MSA.

B. Distributions During the Lifetime of [Beneficiary].

1. During the lifetime of [Beneficiary], both the corpus and income of the MSA, including any payments that may be received in the future from any structure settlement annuity that is purchased to fund the MSA, shall remain segregated as a part of the trust estate and separately administered as a Medicare Set Aside arrangement. Payments may be made from MSA for the sole benefit of [Beneficiary] subject, however, to the limitations set forth in Subparagraph 2 below.

2. Payment of Certain Medical Expenses If and As Required for Medicare Benefits. During the lifetime of [Beneficiary] both the corpus and the income from the MSA may be paid for medical services and supplies that would otherwise be reimbursable under Medicare but only if (1) such payments are necessary to entitle [Beneficiary] to Medicare coverage under the Medicare Secondary Payer Statute and (2) such payments shall be prudent in the discretion of the Trustee after considering all other benefits to which [Beneficiary] shall be entitled. Such medical expenses and supplies are hereinafter referred to as "eligible injury related medical expenses".

3. Engagement of Experts and Consultants. The Trustee shall engage the services of experts, including but not limited to [Name of Medicare Advisor], a Medicare claims and payment administrator, to advise and counsel the Trustee with respect to eligible injury related medical expenses. The Trustee may rely upon the written instruction and advice of such experts regarding disposition

of the trust as to eligible injury related medical expenses, and payments and distributions from the MSA, made in accord with such instructions and advice of such experts, shall be conclusively deemed authorized and proper. The Trustee is specifically authorized to appoint, direct and/or remove [Name of Medicare Advisor], as an agent for the administration of the MSA and to authorize [Name of Medicare Advisor], to hold the MSA, or any portion thereof, as a part of the trust. For administrative convenience, the Trustee is authorized to revocably assign to [Name of Medicare Advisor] any payments intended to fund the MSA.

4. Administrative Fees, Costs and Expenses Related to Medicare Set Aside Account. Administrative fees, costs and expenses related to the MSA shall not be paid from the MSA or its income. Any such fees, costs and expenses associated with the maintenance, management, and administration of the MSA, including but not limited to the fees of the Trustee and of [Name of Medicare Advisor] or any other Medicare claims and payments administrator or advisor, shall be paid from trust assets not contained in the MSA. The fees, costs, and expenses of experts and consultants retained in connection with the administration of the MSA shall not reduce or be paid from or as part of the compensation due the Trustee.

5. Distributions After the Death of [Beneficiary]. After the death of [Beneficiary], the remainder of the trust estate shall be distributed in accordance with the provisions of [Paragraph providing for the disposition of the remainder of the d4A trust after the death of the beneficiary] below.

II. OPTION TWO

Article II
SETTLOR'S INTENT

2.3 Additional Purpose. Because some portion of the Trust estate may represent funds received by the Beneficiary as the result of injuries for which future medical services might reasonably be necessary that would otherwise be covered by Medicare, it is the further intent of the Settlor and purpose of the Trust that such portion of the Trust estate qualify and be administered as a Medicare Set-Aside Arrangement ("MSA") pursuant to the provisions of 42 U.S.C. § 1395y and 42 C.F.R. §411.20 and all related Memoranda issued by the Centers for Medicare and Medicaid Services (herein after referred to collectively as the "Secondary Payor Act"), as provided more specifically herein, and to the extent the Beneficiary becomes and remains eligible to receive Medicare.

ARTICLE III

DEFINITIONS

3.1 "MSA Sub-account" means that portion of the Trust estate, if any, that is designated as a MSA because it represents funds received by the Beneficiary due to injuries for which future medical services can reasonably be expected to be needed that would otherwise be paid by Medicare but for the receipt of such funds. Just as with the entire Trust estate, no portion of the MSA Sub-account is available to the Beneficiary and shall not be considered or construed as being available for purposes of public benefits eligibility or otherwise.

ARTICLE VI
TAX PROVISIONS

6.6. Tax Attributable to MSA Sub-account. As provided by the CMS July 11, 2005 Policy Memorandum, the Trustee may pay any taxes owed on the MSA Sub-account from the MSA Sub-account as a, "cost that is directly related to the account."

ARTICLE VII
DISTRIBUTIONS DURING THE BENEFICIARY'S LIFETIME

7.11 Distributions for Medicare Related Expenses. Throughout the administration of the Trust and lifetime of the Beneficiary, the Trustee shall use the income and corpus of the MSA Sub-account to pay directly for medical services, supplies, prescriptions, and durable medical equipment, if any, that would otherwise be paid or reimbursed by Medicare, provided however, that any such direct payments are also: a) related to the injuries suffered by the Beneficiary for which damages for future medical services were paid to the Trust; and, b) made pursuant to an allocation or other pre-prepared plan identifying the Beneficiary's injuries and future medical costs otherwise payable by Medicare but for the receipt of such damages for future medicals (hereinafter "Qualified Expenses").

7.12 Engagement of Experts or Consultants. In addition to the Trustee's general authority to engage professionals, the Trustee is specifically empowered to engage the services of experts, including but not limited to, any entity engaged in the professional administration of MSAs. The Trustee shall be entitled to rely upon the advice and written instructions of such experts, including but not limited to an allocation or other pre-prepared plan identifying the Beneficiary's Qualified Expenses, and any distributions made from the Trust for the payment of such Qualified Expenses shall be conclusively deemed as proper, necessary, and authorized

ARTICLE IX
ADMINISTRATIVE PROVISIONS

9.3 MSA Sub-account Reports. The Trustee shall provide annual reports or accountings of the MSA Sub-account to the Centers for Medicare and Medicaid Services ("CMS") within thirty (30) days of the annual accounting period for the MSA Sub-account. The annual accounting period shall be the anniversary date of the funding of the MSA Sub-account unless otherwise provided in the allocation or other pre-prepared plan identifying the Beneficiary's Qualified Expenses. The Trustee shall also provide reports or accountings to CMS upon the exhaustion of the MSA Sub-account, whether such exhaustion of funds is temporary or permanent.

9.4 MSA Sub-account Reporting Fees and Other Costs. Any fees or costs that may be associated with filing annual reports of the MSA Sub-account with CMS shall be paid from that portion of the Trust estate not constituting the MSA Sub-account. Likewise, the Trustee shall not pay any administrative fees, including Trustee compensation, costs, or other expenses related to the MSA Sub-account from the MSA Sub-account but shall instead pay all such fees, costs or expenses from that portion of the Trust estate not constituting the MSA Sub-account.

OPTION THREE-SUPPLIED COURTESY OF ELDER COUNSEL, LLC AND NOT TO BE USED EXCEPT WITH WRITTEN CONSENT OF ELDER COUNSEL, LLC

Establishing the XXXX Special Needs Trust

The effective date of this Irrevocable Trust Agreement ("this agreement") is _____, 20___.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Trustee agrees to hold the trust income and principal ("Trust Estate" or "Trust Funds"), IN TRUST, for the following uses and purposes and subject to the terms and conditions hereinafter set forth.

YYYY ("Trustmaker"), XXXX mother, hereby creates this Irrevocable Trust for XXXX benefit as the beneficiary hereunder ("Beneficiary"). Beneficiary is under the age of 65 years and is a disabled person as defined in Section 1382c(a)(3)(A) of Title 42 of the United States Code. This Irrevocable Trust includes a Medicare Set-Aside Subtrust. The trust, including the Medicare Set-Aside Subtrust, is to enable Beneficiary to qualify for (i) the Supplemental Security Income ("SSI") Program; (ii) medical assistance under the Medicaid program as provided for by Section 1396p(d)(4)(A) of Title 42 of the United States Code as enacted by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"); or (iii) any other governmental program.

This Irrevocable Trust is established with Beneficiary's assets and Beneficiary is the sole beneficiary of the trust.

Pursuant to federal law, Medicare's interests must be considered in a personal injury award because Beneficiary is entitled to Medicare. In reasonable consideration of Medicare's interests and to meet the criteria under Medicaid laws regarding the exemption of self-settled trusts from countable resources, Trustmaker intends to create an Irrevocable Special Needs Trust with an Irrevocable Medicare Set-Aside Subtrust. For that purpose, monies payable pursuant to the personal injury award for the benefit of Beneficiary will be paid to the Trustee to be held in accordance with the terms of this agreement.

Trustmaker enters into this Irrevocable Trust Agreement with YYYY (the "Trustee").

Section 1.01 Identifying the Trust

The trust is called the "XXXX Special Needs Trust." The following format should be used for taking title to assets: "YYYY, Trustee of the XXXX Special Needs Trust, dated _____, 20___."

However, for assets held in the Medicare Set-Aside Subtrust, the following format should be used for taking title: "YYYY, Trustee of the Medicare Set-Aside Subtrust under the XXXX Special Needs Trust, dated _____, 20___."

Section 1.02 An Irrevocable Trust

This trust is irrevocable, and Beneficiary may not alter, amend, revoke, or terminate it in any way. No other party, except as otherwise provided herein, may alter, amend, revoke, or terminate it in any way.

Notwithstanding the above, the TP may amend this trust so as to—

(i) qualify and maintain Beneficiary's eligibility for benefits under governmental programs, including but not limited to the Medicaid program and the Supplemental Security Income ("SSI") program;

(ii) meet the requirements under OBRA 1993 and the Oregon implementing statutes and regulations promulgated pursuant thereto; or

(iii) comply with the regulations and policy memoranda applicable to and interpreting Medicare set-aside allocations, being Section 411.20 and following of Title 42 of the United States Code of Federal Regulations and memoranda issued by the Centers for Medicare and Medicaid Services (CMS).

Section 1.03 Transfers to XXXX Special Needs Trust

Beneficiary transfers to the Trustee the property listed on Schedules A and B. Beneficiary retains no right, title, or interest in the income or principal of this trust, or any other incident of ownership in any trust property. Beneficiary, his guardian, his agent, or any duly authorized person on Beneficiary's behalf, may add from time to time to the Trust Estate any property by deed, Will, court order, or otherwise.

The property listed on Schedule B is property of the Medicare Set-Aside Subtrust. The Medicare Set-Aside Subtrust is being funded with a cash deposit in the amount of $500,000.00. The set-aside amount is listed on Schedule B (set-aside amount).

By execution of this agreement, the Trustee accepts and agrees to hold the trust property described on Schedules A and B. All property transferred to the trust after the date of this agreement must be acceptable to the Trustee. The Trustee may refuse to accept any property. The Trustee will hold, administer and dispose of all trust property accepted by the Trustee for Beneficiary's benefit in accordance with the terms of this agreement.

Section 1.04 Statement of Trustmaker's Intent

Trustmaker is creating this trust as a means by which trust assets may be held for the sole benefit of Trustmaker's son, XXXX , on the terms and conditions set forth in this instrument.

It is Trustmaker's intent to create a Special Needs Trust that conforms to ZZZZ law.

This trust is created expressly for Beneficiary's benefit, to supplement, not supplant, impair, or diminish, any benefits Beneficiary otherwise receives or may receive from or be funded by any local, state, or federal government, or from any private agency, any of which provides or funds services or benefits to developmentally disabled, incapacitated, or disabled persons, or from any private insurance carriers covering Beneficiary.

It is Trustmaker's intent that the funding and administration of this trust will not subject Beneficiary to a period of ineligibility under Medicaid law pursuant to 42 U.S.C. section 1396p(d)(4)(A) and ZZZZ law.

The purpose of the Medicare Set-Aside Subtrust is to pay for Beneficiary's injury-related medical expenses that would have been paid by Medicare had Beneficiary not received a personal injury award, and to avoid disqualifying Beneficiary from receiving benefits from any means-tested public benefit program, including, but not limited to, Medicaid and Supplemental Security Income (SSI). All provisions of this trust must be construed accordingly.

The set-aside amount is intended to reasonably consider Medicare's interest in Beneficiary's personal injury award. Medicare's interest is an amount that Medicare would have paid over Beneficiary's lifetime for medical expenses related to the personal injury claim.

The Medicare Set-Aside Subtrust must be administered according to the provisions of Section 1395y of Title 42 of the United States Code, entitled "Exclusions From Coverage and Medicare as Secondary Payer," (codification of Section 1862 of the Social Security Act, as amended by the Medicare Prescription Drug, Modernization, and Improvement Act of 2003) and the regulations and policy memoranda applicable to and interpreting the same, being Section 411.20 and following of Title 42 of the United States Code of Federal Regulations and memoranda issued by the Centers for Medicare and Medicaid Services (CMS), which provisions, regulations, and policies are herein referred to collectively as the Medicare Secondary Payor Law.

However, neither the segregation of assets into the Medicare Set-Aside Subtrust, nor payment of medical expenses therefrom, shall limit or impair the Trustee's discretion, nor cause the trust to be held other than for Beneficiary's sole benefit, nor cause any portion of the Medicare Set-Aside Subtrust to be considered available to Beneficiary, nor subject to his control.

The Medicare set-aside amount must be held in the Medicare Set-Aside Subtrust for Beneficiary's benefit and distributed pursuant to the provisions of this agreement as set forth in 0.

It is also intended that this trust will be treated as a grantor type trust for federal and state income tax purposes and that the funding of the trust will not be subject to federal and state gift taxation.

The Trustee must interpret all provisions of this trust to best effectuate these purposes and intentions.

Distributions During Beneficiary's Lifetime

The Trustee will hold, manage, invest and reinvest the Trust Estate, and will pay or apply the income and principal of the Trust Estate in the following manner:

Distributions of Income and Principal

During Beneficiary's lifetime, the Trustee will make distributions of income and principal according the provisions of this Section.

(a) Other Than From the Medicare Set-Aside Subtrust

Other than from the Medicare Set-Aside Subtrust, the Trustee will pay from time to time such amounts from the Trust Funds for the satisfaction and benefit of Beneficiary's Special Needs (as hereinafter defined), as the Trustee determines in the Trustee's discretion, as hereinafter provided. Under no circumstances may the Trustee distribute Trust Funds directly to Beneficiary. Any income of the trust not distributed will be added annually to the principal of the trust.

Notwithstanding the above paragraph, in no event may assets other than from the Medicare Set-Aside Subtrust be deemed available for payment of Beneficiary's Medicare reimbursable medical expenses.

(b) From the Medicare Set-Aside Subtrust

In making distributions of principal and income from the Medicare Set-Aside Subtrust, the Trustee is limited to making distributions to pay for Beneficiary's injury-related medical expenses, provided such medical expenses are ordinarily paid or reimbursed by Medicare. Distributions may be made from the income and principal as determined in the Trustee's discretion. The Trustee must make every effort to first ascertain those medical needs that would ordinarily be reimbursable or paid for by Medicare, and to pay for those medical expenses; however, the Trustee is not liable for making a distribution or payment for medical needs that are later determined to be a type that is not reimbursable by Medicare.

The Trustee has the power to make distributions from the Medicare Set-Aside Subtrust only for the purposes set out in this Article provided Beneficiary is currently entitled to Medicare benefits. The Trustee may not release the set-aside amount if Beneficiary loses his Medicare eligibility. However, the Trustee may

expend the set-aside amount for medical expenses for Beneficiary's benefit until Medicare entitlement is reestablished or the set-aside amount is exhausted. Any income of the Medicare Set-Aside Subtrust not distributed will be added annually to the principal thereof.

If the set-aside allocation is not sufficient to pay for Beneficiary's Medicare reimbursable medical expenses in any one year, the Trustee is authorized to submit such medical charges directly to Medicare for payment. In no event may assets other than from the Medicare Set-Aside Subtrust be deemed available for payment of Beneficiary's Medicare reimbursable medical expenses.

Administrative Expenses

The Trustee may use Trust Funds other than from the Medicare Set-Aside Subtrust to pay for any and all expenses necessary for the proper administration of the trust. Administrative fees, costs, and expenses related to the Medicare Set-Aside Subtrust may not be paid from the Medicare Set-Aside Subtrust or its income. Any such fees, costs, and expenses associated with the maintenance, management, and administration of the Medicare Set-Aside Subtrust, including, but not limited to, charges for fiduciary services of the Trustee or other ordinary and necessary trust administration expenses, including, but not limited to, the compensation of a Medicare Claims Administrator, must be paid or reimbursed, if at all, exclusively from Trust Funds other than from the Medicare Set-Aside Subtrust.

Medicare Claims Administrator

The Trustee has the authority to consult with and hire third-party administrators experienced in Medicare set-aside arrangements to comply with the investment, expenditure, reporting requirements, and any other requirements under Medicare laws. This Agreement shall be read to include the administrator's services in the event an administrator is retained. The fee for administrator services is a proper charge of the trust and may be paid in addition to the Trustee's fee. Notwithstanding any other provision of this Agreement to the contrary, in no event may fees for third-party administrators—and other fees and expenses of this trust, including Trustee fees—be paid from the Medicare Set-Aside Subtrust.

The Trustee is not liable for actions of an agent or administrator to whom a function is delegated under this Article if the Trustee exercises reasonable care in selecting the agent or administrator consistent with the purpose of this Agreement.

The Trustee may require that all requests for payment of medical benefits be submitted to the Trustee on a form approved by the Trustee. A request for payment of benefits may be submitted by Beneficiary or Beneficiary may authorize a provider of medical services or products to submit a request for payment directly to the Trustee.

Notwithstanding any other provision of this Agreement, the Trustee must invest the Medicare Set-Aside Subtrust assets in types of investments permitted under the Medicare laws and regulations

related to Medicare set-aside arrangements, such as FDIC-insured interest-bearing checking accounts, money market funds investing primarily in U.S. Treasury securities and repurchase agreements in respect thereof, and U.S. Treasury mutual funds, consistent with the investment objective of preservation of capital and maintenance of liquidity.

NYSBA ELSN SECTION
SUMMER MEETING
July 14 2018
ROBERT P. MASCALI, J.D.

MSA's and Medicaid, Administrative Issues

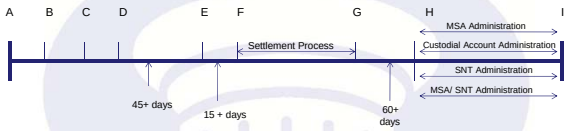
Public Benefits Generally

- SSDI / Medicare
  - Entitlement programs which individuals qualify for by a combination of age and/or the amount of calendar quarters worked.
- SSI / Medicaid
  - Needs based Federal and State programs that impose both income and asset limits.

Taking Medicare's Interest into Account

- Initial Reporting:
  - Carrier Responsibility
- Pre-Settlement:
  - Lien Status Verification, Conditional Payments, Dispute Unrelated Charges
  - Medicare Set-Aside Allocation Process begins
- Settlement:
  - Final Demand Letter and payment within 60 days
  - SNT / MSA Approval
- Post-Settlement:
  - MSA Administration
  - SNT Administration

Timeline of PI Case



A - Date of Accident
B - Mandatory Insurer Reporting
C - Investigation and Acceptance of Case
D - Notify CMS/ Medicaid/ Possible 3rd Party Lien
E - Get Conditional Payment Amount/ Identify what will need to be done with funds; MSA/Custodial Account/SNT/ Annuity

F - Begin to dispute false charges/ Mediation/ Begin MSA Allocation
G - Settlement/ Acquire Final Demand from CMS/ MSA Approval for CMS; Establish Trust/ MSA Custodial Account/ Fund Annuity or Other
H - Fund all vehicles and begin Administration of funds
I - Death and wrapping up of Affairs

Initial Reporting = Carrier Responsibility

The Medicare Secondary Payor Mandatory Reporting Provisions makes the Carrier responsible for reporting all payments over *$1,000.00** to the CMS Coordinator for Benefits Contractor.

Initial Reporting = Carrier / Attorney

Because of the Mandatory Insurer Reporting Requirements many Plaintiff firms are now receiving the ***FINAL DEMAND*** from MSPRC without ever requesting it.

When this happens the bill must be paid or interest could accrue.

Responsibilities of Attorneys

Upon taking a case where the beneficiary is a Medicare or Medicaid recipient the attorney is required to place the appropriate agency on notice.

Please note these agencies have no responsibility to contact the attorney or client.

Pre-Settlement
MSA / SNT or BOTH

- If a beneficiary is currently receiving Medicare and the gross settlement is over $25,000, or the total amount is over $250,000 and the beneficiary could be Medicare eligible within 30 months, or has end stage renal disease
- If a beneficiary is currently receiving Medicaid and chooses to preserve these benefits, a Special Needs Trust will preserve these benefits

Settlement = Attorney Responsibility

- MSA Allocation Submission* and Approval
  - Submit MSA Allocation to CMS with Final Settlement Agreement and a statement as to how the MSA will be Funded and Administered
- Establishment of a Special Needs Trust
  - Take into consideration age of beneficiary
  - Consider options for Trust Administration

Post Settlement = Attorney and Beneficiary

Self Administered MSA

- The Self Administered MSA requires the beneficiary to possess sound money management abilities, excellent judgment, keen organizational skills, and expertise in medical billing and fee schedules.

Self Administered SNT or Pooled SNT

- A Self Administered SNT is simply not an option. The beneficiary may never act as trustee of their own SNT. In addition it is not a wise decision to engage a family member for these fiduciary responsibilities.

Post Settlement = Attorney and Beneficiary

Professionally Administered MSA

- Safety, security and knowledge are all elements that a professional Medicare Set-Aside Administrator should possess, but be careful when choosing your MSA Administrator to ensure they have specific experience in MSA Administration.

Professionally Administered SNT or Pooled SNT

- Since Medicaid programs differ from state to state, the Trustee of a Special Needs Trust should have comprehensive knowledge of specific rules regarding program eligibility, otherwise the beneficiary could risk disqualification from these vital programs.

(d)(4)(A) Special Needs Trusts

Special Needs Trusts (SNT) must meet the following requirements:

- The beneficiary must be disabled as defined by law and under age 65;
- The beneficiary* or their parent, grandparent, legal guardian, or court may establish the SNT. **Special Needs Fairness Act 12/13/16*
- The SNT must be irrevocable, funded with the beneficiary's assets, be established and administered for the sole benefit of the beneficiary; and,
- Any funds that remain in the SNT at the beneficiary's death must be used to reimburse the State for all Medicaid benefits provided during the beneficiary's lifetime.
  - *The requirement to reimburse the State is commonly referred to as a payback provision.*

(d)(4)(C) Pooled Trusts

Pooled Trusts (PT) must meet the following requirements:

- The beneficiary must be disabled as defined by law
- Age >65 state by state. NY allowed for community Medicaid but issue for nursing home
- The PT account can be established by the beneficiary, the beneficiary's parent, grandparent, legal guardian, or a court.
- The PT account must be irrevocable, funded with the beneficiary's assets, be established and administered for the sole benefit of the beneficiary.
- PTs must be created and managed by a non-profit association.
- A separate account must be maintained for each PT beneficiary, but the trustee may "pool" the accounts for investment and management purposes.
- Any funds that remain in the SNT at the beneficiary's death ***must either be retained in the trust*** or used to reimburse the State for all medical benefits provided during the beneficiary's lifetime.

Post Settlement= Attorney and Beneficiary / Proper Administration

- In the event the beneficiary is a recipient of Medicare, Medicaid and or SSI those funds held in the MSA account can and will be counted as assets and will take the individual over their particular established asset limits. In this case, the MSA account must be held within a Special Needs Trust for the sole benefit of the beneficiary.

  Example:

  Claimant is currently receiving Medicare, Medicaid, and or SSI benefits and has received a settlement and needs to have a MSA established. If the funds were simply put into a MSA, the individual would be over asset limits. In this unique case, the MSA must be maintained within a SNT.

Email: Robert.Mascali@centersmail.com
877.766.5331 (office)
727.412.5760 (mobile)