Special Needs Planning and Personal Injury Settlements: Balancing the Protection of Public Benefits While Enhancing the Quality of Life of an Individual with Disabilities

By Adrienne Arkontaky

A Case Study

Last week a family arrived at our office in an attempt to understand how to manage a special needs trust set up as part of a medical malpractice action. The couple's son was injured at birth because of a delayed delivery. The child suffers from cerebral palsy, seizures and other related health issues. He is now nine years old, in a wheelchair, and will need full-time assistance for the remainder of his life. The settlement called for a one-time lump sum payment and ongoing annuity payments for thirty years guaranteed.

The family was in immediate need of purchasing a handicapped-equipped van and some other items that Medicaid and private insurance would not pay for. The family's desire was to retain our firm to assist with securing approval of the purchases and advise them on how to handle ongoing trust issues. It became apparent that the family needed long-term advice on how to enhance the quality of their son's life without jeopardizing his access to government benefits.

A. Assessing the Case

This type of case presents many challenges for the special needs planning attorney. When assessing the work that needs to be done, it is important for the special needs attorney to ascertain whether certain aspects of the case were previously handled by the personal injury attorney. For example, the special needs attorney should assess whether all Medicaid and Medicare liens were settled, and whether a special needs trust and/or guardianship is appropriate. It is extremely valuable for the special needs attorney to be involved early on in the process. We recommend that special needs attorneys work closely with personal injury attorneys so that the personal injury attorneys can focus on the litigation, while the special needs attorneys can identify potential government benefits, compromise any liens, and determine whether a special needs trust is needed. In most cases, the personal injury attorney's role ends when the personal injury action is complete, whereas the special needs attorney may play an ongoing role in the life of the person with disabilities.

B. Identifying Programs

The special needs attorney can help the family identify programs that may assist the person with disabilities in accessing appropriate services, both private and government-funded. The special needs attorney may explore eligibility for supplemental security income (SSI), Medicaid and Medicaid Waiver programs, social security disability (SSDI), veteran's benefits, housing entitlements and food stamps. Many special needs attorneys may also assist families secure proper special education services through local school districts and work with professionals to identify private programs to assist the person with disabilities to develop to her fullest potential.

It is important for the special needs attorney to gather as much information as possible regarding the personal injury action, assess the extent of the injuries of the person with disabilities and, if possible, estimate the amount of care the injured party will need long term. In many cases, where the injured party is a student under the age of twenty-one, it is prudent to request a copy of the Individualized Education Program (IEP) for the child. This document is available through the local school district and should give a broad overview of the educational needs of the student. It will also provide present levels of performance and in some cases, an overview of academic and developmental testing results of the student. In addition, the special needs attorney may request assessments and tests that were done to determine the needs of the child, such as a comprehensive neuropsychological examination, physical therapy, occupational therapy and speech and language evaluations.

C. Developing a Life Plan

Many special needs attorneys will develop a life plan that memorializes the individual's long term care needs and the estimated costs. The special needs attorney should take a comprehensive approach to planning, such as addressing the family's own estate planning to ensure that the plan takes into consideration the fact that the family member has disabilities, and may need to access government benefits for the remainder of the individual's life. Practitioners should provide the family with a "Letter of Intent." This non-legally binding document provides caregivers a guidepost so that everyone involved in the individual's life will know how to care for the individual. In many cases, it is important to obtain the disabled individual's input.

Once the practitioner has gathered all the information, it is important to ascertain what the immediate needs are and how to address those needs. For example, the family that I met with recently needed a handicapped-equipped van. They had located the van, placed a deposit on the van, but were unclear on how they could access the funds to pay the balance of the purchase. After reviewing both the order approving the settlement and the special needs trust set up for their son, it was clear that the family needed the approval of the court to purchase the vehicle. We prepared a petition addressing the need for the van, explored any contribution by Medicaid (the child received waivered services) and noticed the interested parties such as the local department of social services. The court quickly approved the purchase and the family was able to complete the transaction.

D. Annual Accounting

We also were able to assist the family with the annual accountings for the special needs trust. Many families are unaware that in many cases, there are annual reporting requirements for both trusts and guardianship cases. In addition, we have been able to advise the family on an ongoing basis as to whether expenditures are appropriate and whether the court needs to be involved in the approval of such purchases. It is extremely valuable to families to have an advisor on such matters.

Practitioners may consider whether it is appropriate to ask the court to approve a stipend for a family member caring for an individual with disabilities. It is extremely difficult for families to secure caregivers. Some family members forgo employment opportunities in order to care of their loved ones. Reasonable compensation for doing so is one option that may be considered. A well-thought-out request to the court substantiating the need for such expenditure may eliminate financial concerns of a family member committed to caring for a loved one at home, without having to resort to institutionalized care.

Special needs lawyers should consider whether the child may need the services of a professional such as an educational advocate in securing appropriate special education services for a child with special needs. This type of expenditure has been deemed appropriate.

It is important for practitioners to ascertain whether expenditures from a special needs trust or from a guardianship account are suitable. If there is any question, practitioners should seek out the guidance of the court and/or a court examiner if appropriate. They should review the original court documents to be sure of the requirements. Each case is different and each jurisdiction has very specific rules for expenditures.

Conclusion

In conclusion, every individual with disabilities has certain unique needs and "abilities." The special needs lawyer has the opportunity to develop a long term ongoing relationship with the family of a loved one with special needs by counseling the use of settlement funds to enhance the quality of the life of the individual. Administration of special needs trusts and guardianship can provide a unique way to make a difference in the life of a person with a disability. Working with families of individuals who receive settlements can be extremely rewarding and seal a long term relationship with good clients.

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