



# THE BEGLEY REPORT

## SETTLEMENT PRESERVATION TRUST WHAT IS IT AND WHEN SHOULD I USE IT?

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### ***CASE STUDY 1***

Billy, age 6, was injured at birth. He recovers \$1,000,000. Billy is not receiving any means-tested public benefits, such as SSI or Medicaid. Billy's options are to place the \$1,000,000 in the Probate Court, i.e., the Surrogate's Office in New Jersey or the Orphans' Court in Pennsylvania, and to request distributions either in accordance with a budget or on an "as needed" basis. Another option would be to place the money into a Settlement Preservation Trust, thus bypassing the deposit into the Probate Court.

### ***CASE STUDY 2***

Jill, a 32 year old adult with Down Syndrome, was injured in an automobile accident. She recovers \$200,000. Jill is not receiving any means-tested public benefits, such as SSI or Medicaid. Because Jill is not capable of managing money and has been adjudicated as incapacitated by a Court, her money must be placed in the Probate Court. Again, distributions would need to be made in accordance with a Court-approved budget or upon Court approval on an "as needed" basis. A more flexible option would be to place the funds in a Settlement Preservation Trust, rather than to deposit them in the Probate Court.

### ***CASE STUDY 3***

John is injured in a construction accident and receives a third party liability settlement in the amount of \$15,000,000. John has been receiving SSI in the amount of \$700 +/- per month, as well as some medical benefits paid by Medicaid. If John receives the money, he will lose SSI and Medicaid. An option is to place the money in a Special Needs Trust, but that would entail certain restrictions. A more flexible option is to establish a Settlement Preservation Trust.

### ***CASE STUDY 4***

Linda, age 28, is a competent adult. She is receiving \$2,000,000 from a personal injury settlement. One option is for Linda to receive the money outright. However, studies show that the average personal injury settlement lasts only three to five years. Another option would be for the court to establish a Settlement Preservation Trust for Linda to protect the monies from being expended too quickly. Linda and the Trustee would agree on a realistic budget, so that the funds will last for the length of Linda's lifetime, and distributions from the trust would be made in accordance with the budget. Adequate reserves would be maintained for emergencies.

## ***WHAT IS A SETTLEMENT PRESERVATION TRUST?***

### ***SUPPORT TRUST***

A Settlement Preservation Trust is a support trust designed to provide for the health, education, maintenance, and support of the beneficiary. Support would include buying a home, a vehicle, and arranging for a case manager as appropriate.

Settlement Preservation Trusts are generally used for plaintiffs who are not receiving means-tested public benefits. Means-tested public benefits include SSI, Medicaid, many Medicaid Waiver Programs, SNAP (Food Stamps), and federally-assisted Housing.

### **ADVANTAGES**

There are a number of advantages to establishing a Settlement Preservation Trust instead of having the injured party receive the money outright.

◆ **Asset Protection.** One of the major problems with personal injury settlements is that the average settlement lasts only three to five years. Many injured parties are unsophisticated in money management, or are subject to pressure from spouses, significant others, family, and friends. A Settlement Preservation Trust will ensure that the monies are used wisely and will hopefully last for the lifetime of the injured party.

◆ **Medical Insurance.** Many plaintiffs in personal injury cases are the victims of catastrophic injuries, which make it impossible for them to obtain private medical insurance on the individual market. However, large group health plans do not exclude coverage based on preexisting conditions. In many instances, it is possible for a Settlement Preservation Trust to hire a family member as a caregiver and pay the caregiver from the trust. The trust has an arrangement whereby the caregiver and the caregiver's family (including the injured plaintiff) can enroll in a large group health plan.

◆ **Money Management.** The Settlement Preservation Trust can arrange for expert money management. Most individuals do not have expertise in managing money, and certain financial advisors may put themselves ahead of their clients.

◆ **Structured Settlement.** If a structured settlement is involved, the Settlement Preservation Trust can be designed so that the payments from the structured settlement go into the trust, and the injured party would be prevented from selling the

structured settlement at a deep discount in the future. The result of these factoring transactions is that the client usually satisfies an emergency that would not have been created had there been a Settlement Preservation Trust in place, and then subsequently runs out of money when the funds received from the factoring transaction are exhausted.

◆ **Tax Preparation.** Usually the injured party can arrange for the trustee to either prepare or supervise the preparation of tax returns for the injured party.

◆ **Care Management.** Care management can be arranged. Many professional trustees will hire a care manager who will then perform an assessment and arrange for the appropriate level of care that is required and monitor the care, as well as modify the care plan from time to time as needed.

◆ **Navigating the System.** Many trustees are in a position to assist in buying/building/modifying a home, purchasing a vehicle, and obtaining proper care management.

### **DISTRIBUTIONS**

Under a Settlement Preservation Trust, distributions can be very flexible. In many instances, a budget is prepared, and the trustee simply writes the beneficiary a check every month to pay all of his or her monthly bills. In other instances, the beneficiary would prefer to submit the bills to the trustee, and the trustee then pays the third party provider of goods and services directly. If there are needs for money beyond that which is budgeted, arrangements can be made for the trustee to send the beneficiary additional money or to pay the additional bill directly to the third party. Generally, one of the objectives of the Settlement Preservation Trust is to ensure that the money in the trust lasts as long as possible. If there is sufficient money, the goal is usually to ensure that the money lasts for the lifetime of the injured plaintiff. Therefore, a discussion should be held as to some restrictions on distributions to ensure that the money is not squandered. In some cases, the injured plaintiff

might not be sophisticated with managing and preserving money. In other cases, a spouse or significant other might exert influence, and, in many cases, friends and family may take advantage of the person who recovered the settlement. The trust is designed to protect the settlement in these situations.

### ***WHEN TO USE A SETTLEMENT PRESERVATION TRUST***

#### ***MINOR OR INCAPACITATED PERSON – PLAINTIFF NOT RECEIVING MEANS- TESTED PUBLIC BENEFITS***

In these situations, a Settlement Preservation Trust is ideal. If there is a minor, the monies can be deposited into the Settlement Preservation Trust rather than the Probate Court. In some states, like New Jersey, monies can be held for the benefit of the minor even after attaining the age of 18. In other states, like Pennsylvania, the practice of whether to continue a trust beyond age 18 varies depending on the county or even the particular Orphans' Court Judge. In many instances, the trust can continue to age 30. In large settlements, the beneficiary may be given the right to withdraw money in stages, such as at age 30, 35, and 40. These provisions can be customized by the parents of the beneficiary.

In the case of an incapacitated person, the trust can last for the duration of the lifetime of the plaintiff. Again, the money is deposited into the trust, rather than the Probate Court, and the beneficiary enjoys the advantages of the trust discussed below.

With respect to distributions from the trust, in some states, such as New Jersey, there is no requirement for court approval of distributions of either income or principal. In other states, such as Pennsylvania, generally court approval is not required for distributions of income, but *is* required for distributions of principal. Some counties in Pennsylvania permit a unitrust distribution of approximately 4% per year, so that some principal can be distributed without court approval.

In cases involving a minor or incapacitated person, the establishment of the Settlement

Preservation Trust must be approved by the Court.

#### ***COMPETENT ADULT NOT RECEIVING MEANS-TESTED PUBLIC BENEFITS***

Where a competent adult is not receiving public benefits, both New Jersey and Pennsylvania allow distributions to be made from income and principal without Court approval. The beneficiary enjoys the advantages of the Settlement Preservation Trust outlined below, and the trust serves to protect the settlement from being squandered by the injured plaintiff, or being coveted by family members and friends.

#### ***LARGE SETTLEMENT – CLIENT RECEIVING MEANS-TESTED PUBLIC BENEFITS***

In many large settlements, the client may be receiving SSI and Medicaid. In some cases, the Medicaid benefit may be modest and, therefore, unnecessary. In other cases, the Medicaid benefit may be significant, but can be replaced by private insurance or a combination of Medicare and private insurance. In these cases, it is often beneficial to consider giving up the public benefits in exchange for greater flexibility. The alternative to the Settlement Preservation Trust would be a Special Needs Trust. The Special Needs Trust is required to maintain the means-tested public benefits; however, the requirements for a Special Needs Trust are rigid. For example:

◆ **Sole Benefit Of.** Monies from the Special Needs Trust can only be used for the sole benefit of the injured party. Other family members cannot benefit unless they pay a pro rata share. In a Settlement Preservation Trust, this restriction is avoided.

◆ **Payback.** In a Special Needs Trust, on the death of the beneficiary or the termination of the Special Needs Trust during the beneficiary's lifetime, Medicaid must be repaid for all assistance paid on behalf of the injured party from birth. This includes assistance paid to the beneficiary whether related to the injury or not. Again, by utilizing a Settlement Preservation Trust, this restriction can be avoided.

◆ **Distributions to Third Party Providers.**

Under a Special Needs Trust, distributions must be made directly to the third party who provides the goods or services. Monies cannot be paid directly to the injured party. By utilizing a Settlement Preservation Trust, monies can be paid directly to the injured party, who then has the flexibility to pay all or part of his or her own bills.

**WHO SHOULD SERVE AS TRUSTEE?**

**PROFESSIONAL**

A professional trustee should always be considered for a Settlement Preservation Trust. The professional trustee has expertise in investment management, taxation, and navigating the system to support the injured party. Courts will usually not require any bond for a professional trustee.

**FEATURES**

**REMOVE AND REPLACE**

Either the injured party or a trust protector acting on behalf of the injured party should be given the authority to remove and replace the professional trustee, in the event that the injured party is not satisfied with the relationship. Knowing that the trustee can be removed is comforting to the beneficiary.

**COMPENSATION**

Each trustee publishes a Standard Schedule of Charges for the services of a trustee. It is usually a declining sliding scale based on the size of the trust assets under management. It should be noted that these trustee commissions are generally comparable to those charged by any investment manager or even mutual funds. A good trustee will provide personal attention to the trust beneficiary.

**LIMITED POWER OF APPOINTMENT**

The Settlement Preservation Trust should give a beneficiary who has capacity a limited power of appointment. This means that the injured party can execute a will disposing of the assets in the trust. It is better to give the injured party the limited power of appointment than to have the trust determine who will receive the funds on the death

of the beneficiary because the injured party can exercise the appointment from time to time and change the disposition of assets as he or she sees fit. It should be noted that estate planning is crucial in the settlement of a personal injury case, particularly where federal and state estate and inheritance taxes are involved.

**REVOCABLE/IRREVOCABLE**

The trust could be revocable by the injured party, if the party has capacity, or it could be irrevocable. If one of your goals is to protect against squandering assets, it is advisable to make the trust irrevocable

**GRANTOR TRUST**

The Settlement Preservation Trust is a grantor trust, which means that, for income tax purposes, it is ignored. The income tax treatment of the income and deductions pertaining to the trust are the same as they would be if there was no trust. The individual beneficiary picks up the income and deductions on his or her personal tax returns.

**SETTLEMENT PRESERVATION TRUST/SPECIAL NEEDS TRUST/MEDICARE SET-ASIDE ARRANGEMENT**

**SETTLEMENT PRESERVATION TRUST/SPECIAL NEEDS TRUST**

In many cases, an individual may not need public benefits or may not even be eligible for public benefits at the time the trust is established. However, the nature of the injury or the amount of the trust may indicate that public benefits could be required in the future. In most cases, consideration should be given to establishing a Settlement Preservation Trust with Special Needs Provisions. Under this arrangement, one trust document is established with two subtrusts. Initially, the Settlement Preservation Trust is funded with all of the flexibility outlined above. If, in the future, the injured party requires public benefits, the trustee can transfer the trust assets from the Settlement Preservation Subtrust to the Special Needs Subtrust. At that point, the injured party is willing to accept the restrictions required by a Special Needs Trust because of the

importance of the public benefits. That decision can be deferred until some future time.

At such time as the Special Needs Subtrust is funded, the Trust must be irrevocable.

#### ***MEDICARE SET-ASIDE SUBTRUST***

If there is any possibility that the assets in the Settlement Preservation Subtrust will be transferred to a Special Needs Trust in the future, and if there is a requirement for a Medicare Set-Aside Arrangement (MSA), the MSA must be wrapped into the Special Needs Trust. In those situations, the Settlement Preservation Trust should be designed with three subtrusts: one for the Settlement Preservation Trust, one for the Special Needs Trust, and a third subtrust for the MSA.

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