<u>Using Structures in a Special Needs Trust</u>

With Roger Bernstein, Esq.

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COHEN: Welcome to Ringler Radio. I'm Larry Cohen, head of Ringler Associates' New England operations, and we're glad you can join us once again today. Ringler Radio, as you know, focuses on information about the settlement industry through a series of interviews with high profile industry experts, attorneys, and other guests. And you can find all the Ringler Radio shows on our Website, at RinglerAssociates.com, or the Legal Talk Network at LegalTalkNetwork.com.

Well, today we're going to talk about a very interesting topic – how to integrate structured settlements with special needs trusts in those cases when you need a special needs trust to protect the ongoing receipt of Medicaid and other asset-sensitive governmental benefits. And we have two people on the show today who know an awful lot about this. First, I'd like to introduce my Ringler colleague, Gerry Greger. Gerry's an associate in our South Florida office in Fort Lauderdale and Miami. That's right, Gerry, isn't it?

GREGER: Yeah.

COHEN: Two offices down there.

GREGER: Well, actually, we're in Weston.

COHEN: Oh, you're in Weston?

GREGER: Yeah.

COHEN: All right, so there you go. They tried to class it up a bit with Fort Lauderdale and Miami, I see. And before joining Ringler in 1987, Jerry was a settlement annuity specialist at English & Associates, and prior to that he was the president of Design Settlements, Inc., a structured settlement firm which he established in Fort Lauderdale back in 1980. Well, Gerry, thanks for being on the show today.

GREGER: Well, thank you, it's my pleasure. I'm looking forward to this. It'll be enjoyable and educational at the same time.

COHEN: Well, it's great to have you on the show with us. This is the first time you've been on, isn't it?

GREGER: Yes, it is.

COHEN: Well, great, welcome. And we'd also like to welcome Attorney Roger Bernstein, of the Bernstein Law Office in Coral Gables and Key West, Florida, concentrating in the areas of personal injury settlements and for aging, illness, and incapacity planning. A substantial part of attorney Bernstein's practice consists of trust planning for tort settlements for disabled clients of all ages. He's a frequent lecturer on subjects relating to planning for aging, illness, and incapacity. In fact, as Gerry points out, Roger is the go-to guy on special needs trusts on a national level. He's an advocate and an expert on our topic, and Roger, welcome to Ringler Radio.

BERNSTEIN: Larry, it's a pleasure to be part of this.

COHEN: Well, let's get started with some of the basics here. A special needs trust is designed essentially to financially protect a person with a disability. And in our discussion today, we're going to be talking about structured settlements as they relate to special needs trusts. So Gerry, why don't you give us an example, some kind of a real life case that helps explain this whole issue?

GREGER: Well, I'm going to do more than that. I'm going to talk about a case that Roger came to me about a good 15 years ago, or maybe more. The case had already been settled, in fact. It had been settled part in cash and part in an annuity. But the claimant had run out of eligibility, I do believe – Roger, you can correct me on all these introductory statements here. But it was a case that had to have a requalification or be qualified for Medicaid in order to maintain some sort of care for this person. And the case had to be pulled out of the file and the annuity had to be redirected into a special needs trust, and this is where my experience began with Roger, and he was on the cutting edge of this concept. And at that point, Roger, I'm going to let you take over, and you can talk about the case a little bit here, because it really sticks out in my mind as the first that was done down in this area.

BERNSTEIN: I think it was, Gerry. And what happened was I was actually contacted by the facility where this adult child had been living. She should have been paid for by Medicaid, but she had in her guardianship a structure whose monthly payment was more than the income limit for Medicaid. That's a point to begin with right there. Medicaid is a means-tested program. Medicaid looks at your income, it looks at your resources, and if you're a child under 18 living at home, it looks at your parents' income and resources. If you're over that limit, then the planning gets to be kind of creative.

But in this case that Gerry's talking about, it was the income that made the girl ineligible, and as a result, the facility where she was staying had run up about a $100,000 bill by paying the difference between the structure and the actual cost of care. We went to the court and got a court order to establish a special needs trust and direct the life company to make the annuity payments payable to the trustee of the trust, and she then became eligible for Medicaid. The facility got paid by Medicaid, and the money that was coming into the structure was now available for other things that could help her life.

COHEN: Roger, what – you mentioned this means-tested Medicaid benefit. What kind of an income can an individual earn and still be qualified for Medicaid?

BERNSTEIN: It's a grid-like calculation, Larry, because it depends whether it's a child or an adult, it depends how many people are living in the home and how many are on Medicaid. The highest case I'm working on now where someone is on Medicaid, there are lots of kids in the house and they're getting $4900 a month, and they're still eligible for Medicaid. But I would say normally you're probably looking at somewhere in the $1750 to $2200 a month range.

COHEN: That's not very much. And so when someone gets a settlement in a personal injury case, and even if we structure it, we've got to be very cognizant of not disqualifying that individual for these asset-sensitive benefits.

BERNSTEIN: Exactly. The structure paying, let's say, $2000 a month would almost certainly knock them off if it came to them directly or even to a guardianship for their benefit, because a guardianship does not insulate the payments from being deemed available for Medicaid.

GREGER: But what this really means is if you're looking at a case that can't settle without Medicaid and you have a marginal amount of money that's available to settle the case, for various reasons, and between the special needs trust and what the annuity can provide for needs, then you can piece it together. That's how I look at this.

COHEN: Well, of course, when you have a special needs trust, Roger, you have an independent trustee that stands in the place – in that trust to which these payments are made. Is it right that that person cannot be a family member? It has to be someone independent?

BERNSTEIN: There's no legal bar to their being a family member, but practically speaking, this is a very difficult trust to administer and you really should have an independent professional or a bank trust company that specializes in this to do the job right.

COHEN: It's interesting, I had a case once where the funds in the settlement itself were very substantial, and a discussion took place about a special needs trust, even in light of the fact that the funds were substantial. And the deciding factor was that they were not going to do a special needs trust, they were going to give up their Medicaid benefit, because they didn't want to lose control of the funds themselves. And I guess that becomes a part in those questionable cases, where you either have the control issue or the actual asset problem and the Medicaid shut-off.

BERNSTEIN: Well, it is, but there's another factor here, which is the cost of medical care, that really ought to drive the analysis in most cases. Someone who is catastrophically injured is likely not to have health insurance and likely never to get health insurance after the injury. So perhaps the only source of a negotiated rate structure for them is Medicaid. In Florida, Medicaid enjoys about a 60%-70% discount over the private pay rate for medical care drugs, durable equipment, and so on. Someone who is in that system is getting a tremendous discount, akin to what someone would get with a health insurance policy. If you decide to go off Medicaid, it's not just that you're giving up the benefit, but more important, you're now paying at private pay rates, and that money is going to go pretty fast.

COHEN: Roger and Gerry, we have a lot of different kinds of cases where special needs trusts have been utilized. And they run the gamut, but we have the injured children or a child, for whom the parents might set up annuity payments that would flow into the trust. We have cases involving elderly individuals, sometimes in nursing homes, where you need those kinds of – the medical issues to be taken care of. And of course, the whole issue of age 65 comes into play, and we'll talk about that in a few minutes. And also we have workers comp cases, where annuity payments go into special needs trusts for ongoing medical care. Gerry, what are some of the criteria that have to be met in cases, like the ones I just described, for these special needs trusts to really work?

GREGER: Well, before we get into that, Roger, do you want to talk about the elders and the workers comp cases involving special needs trust? That was the pooled trust for the elders.

BERNSTEIN: Well, there are two types of trusts that we basically use. One is called the A trust and the other is called the C trust. The A trust has to be for a person who is under 65 at the time the trust is established. That works for most cases that we would normally see. But in the case of, for example, a nursing home abuse case, it's very likely that the person is over 65 before the case even starts, and for that type of case, we would use the C trust, which is also known as a pooled trust. Most states have at least one pooled trust established by a nonprofit organization, and that trust then becomes the recipient of the cash and the structure in the case of an injured person over 65.

COHEN: It's very interesting you should bring that up. We get e-mails here from time to time, and there was an e-mail from a lawyer in New Jersey that mentioned a case that they had where the claimant had just reached age 65 about six months prior to the settlement of his case and had a big – they had a big problem trying to deal with this special needs trust because of the age 65 issue. Are you aware of anything in New Jersey, for example, where a pooled trust, this trust C you mentioned, would work?

BERNSTEIN: There are pooled trusts in New Jersey, and there are in most other states. A pooled trust in one state can, in fact, administer funds in another state, so that shouldn't be a problem.

Just let me explain the Medicaid payback, because it's an important point. In order to do a special needs trust, you're making an agreement with Medicaid that as the quid pro quo for allowing the injured person to remain on Medicaid, even though they're receiving a significant settlement, and to stay in the Medicaid-negotiated rate system, you agree that upon the death of the person, Medicaid's lien gets paid back from what is in the trust first. If there's anything left, it can then go on to be inherited. That's the A trust. In the C trust, the money doesn't go to Medicaid, it goes to the charity that's running the trust.

COHEN: I see. Well, Gerry, we talked about these government programs, these SSI Medicaid type programs. They're important for people with disabilities. But there are restrictions, as we said, on the income levels, right, for people who can qualify for this. And as we know, these structured settlement payments are designed to be tax-free. So there's an issue here as to whether payments from structured settlements are considered income, and what effect, if any, do they have in terms of a plaintiff qualifying for government programs. Gerry, why don't you talk about what Roger has been doing with the Social Security Administration to try to get some of those answers?

GREGER: Well, there had been some issues raised down here in the Florida venue about special needs trust and structured settlements, and there had been some interpretation that the annuity in the structured settlement could be, at some point in time, collapsed and paid to the recipients, and therefore interpreted as potential income. And what effect, if any, does that have in terms of to a plaintiff qualifying for these government programs?

Roger, you have been actively working to get a clear reading from the government on this, and I'd like you to tell the story, including your letter with questions posed to the structured settlement administration and their recent answer. And I know you spent a lot of time getting this done, and we're really thankful that you got this letter from the administration. So I'll let you take it from here about that letter.

BERNSTEIN: The questions that had been raised had to do with the ability to fund a special needs trust with structured payments. And there was a certain amount of confusion about whether Medicaid would allow this to be acceptable. We'd gotten informal guidance from Social Security, which really was making the decision on this, but I had to press them for an actual clear statement in the form of a letter. And that letter, dated January 31, 2006, really answers the questions.

The first question is can you fund a special needs trust, either an A trust or a C trust, with a structure? And the answer is, yes, you can definitely do that. The structure has to be irrevocably assigned, it has to be made payable to the trustee of the trust, and then it works. The other question was – since a special needs trust, an A trust, cannot be established for anyone after 65, the question was raised, what happens if you establish this payment stream for a 63-year-old person and two years later they're 65 and the structured payments are still coming in? Is that OK? The answer is, yes, it's the fact that the payment stream was established before 65 that makes it clear.

The other nice thing about this letter is that it says this has always been Social Security policy for trusts established on or after January 1, 2000, which is when Social Security began to exercise oversight on this. Larry, would it be possible for you to post this letter on the Ringler Website?

COHEN: Well, absolutely, and I think it would be a big help to not only the structured settlement industry, but also all the attorneys who are dealing with these issues from time to time themselves. So I think that would be a big help, and thank you for allowing us to do it. That's great.

Now, does the government – and we call the government Social Security in this instance – do they have to approve the way the settlement is actually structured, or the actual structure itself going in is simply permissible at this point? They don't get involved in the actual structuring of the case, do they?

BERNSTEIN: They do not.

COHEN: Good.

BERNSTEIN: The only thing we're told is that the assignments should be irrevocable to the special needs trust.

COHEN: That's great. We want to keep the government out of our hair as much as we can, right? Well, that's good. Listen, this is a complicated issue. We know that there are an awful lot of things that we need to talk about here. We are going to do that. We're going to take a short break and be back with our guests in just a minute. So, stay tuned.

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COHEN: Welcome back to Ringler Radio. I'm glad you joined us again today. We're talking about special needs trusts and structured settlements, and we're happy to have Attorney Roger Bernstein, an expert and advocate for plaintiffs and an expert on this topic for sure, on the show, and along with my colleague at Ringler, Gerry Greger. And Roger, what can we expect from CMS on this issue and real case applications in the future? Are you expecting other questions to be directed to them? Are they going to be clarifying other issues around the whole area of special needs trusts?

BERNSTEIN: That's a very good question, Larry. The answer is we're not going to get a lot of guidance from the federal government on this. Special needs trusts were sanctioned by a law that came into place in 1993. There's one – been one basic release that took place the following year, and since then there have been no regulations on this and very little in the way of instruction, other than question and answer letters which are not really published anywhere.

On the Social Security side, their Bible, if you will, is something called a POMS, the Program Operating Manual System. That is about to be revised, I'm told, in the summer of 2006 to clarify a lot of the issues relating to trusts and special needs trusts. But as far as other questions, particularly those coming from CMS as opposed to Social Security, I expect that we're going to see increasing advocacy by the states as they administer their parts of the program, which means what happens in Arizona may be very different from what happens in Florida or Pennsylvania. And it's going to be very, very important for the attorneys and those people involved in the settlement process to have access to local experts who can advise them not just on the national issues, but on what in fact is happening in the state where the settlement occurs.

COHEN: Well, if somebody had a case in a jurisdiction they weren't familiar with, could they contact someone like yourself who could maybe put them in touch with people in those jurisdictions, Roger?

BERNSTEIN: They could contact me or they could go to my colleagues at the Special Needs Alliance, which is a national organization of experts in this field. The Website there is SpecialNeedsAlliance.com.

COHEN: That sounds like a great resource. Gerry, you and I both know how important this issue is for the success of structured settlements in cases of disabled people and people of limited means. We all work hard to make sure that the long-term benefits of structures are available to all types of plaintiffs. And this is really an important issue, Gerry, and how do we make attorneys understand this? Oftentimes, as you know, and we've talked about this in the past, we'll be dealing with a settlement and the attorney hasn't even considered a special needs trust and aren't even aware of it. How do we make them more aware?

GREGER: Well, I think through efforts that we're using here today. It is really amazing, in my walks across the area in seminars and mediations, I still will find a practitioner that is not fully aware of what is available to protect their client for disqualification of Medicaid benefits. It still happens.

COHEN: No question. And sometimes I've even seen lawyers – and you know this, Roger – put their clients at risk, because they disqualify them from Medicaid and they haven't considered the special needs trust, and now they're caught in the abyss, as they say.

BERNSTEIN: The – it's really important that the trial attorneys, the structured settlement expert, and the special needs trust expert put their heads together early on in the process so that everything can be brought out and evaluated, so that you can get the best possible result for the client. And of course, the other reason to do this is if a trust is going to be used, it will put some limitations on the client's access to the money, and they'd better be conditioned to understand that rather than having it occur at the settlement table.

COHEN: That is a big issue, as we spoke of a little earlier in the program. I always like to get e-mails on these kinds of topics, and lawyers have been sending in – and other people as well have been sending in e-mails along the way, and here's one that's especially on point on this topic. And I think you addressed it earlier, but let's address it in the form of an answer to a specific question. Here's the question. He says, annuities that flow into a special needs trust often have guarantee periods, and if the claimant were to die, who gets the guaranteed future stream of payments – the claimant's designated beneficiaries or Medicaid to repay a lien? Roger?

BERNSTEIN: This is a very good question and one that I feel strongly about. The payee or the alternate payee on the annuity after the death should continue to be the trustee of the special needs trust. Not the claimant's beneficiaries, not the estate of the claimant, but the trustee of the special needs trust. And in that way, the trustee can carry out their obligation, which is to pay back Medicaid and then to distribute anything left, as it provides in the trust itself.

COHEN: Well, it's interesting. We have a lot of these kinds of questions about who gets the guaranteed payments. I saw in one instance the – this is kind of interesting – the consideration for the parents releasing the claim of consortium on a bad baby case that required a special needs trust, that consideration was the receipt of the guaranteed payments on the annuity by contract. And they were trying to somehow overcome this Medicaid insistence that they receive those guaranteed payments. It was a very convoluted way to do it, but I see attorneys from time to time trying to do that and –

BERNSTEIN: I think that's a very dangerous way to do it. There was a case in New York State two years ago, in which the appellate court overturned the ruling of the trial court, where the trial court had made the estate of the beneficiary the – estate of the claimant the beneficiary of the annuity. And they said, nope, that doesn't comport with Medicaid. And what's wrong with something like that is once the state Medicaid agency gets wind of it, that person is off Medicaid now. It's not an issue that waits until they die. They haven't protected Medicaid's interest, they haven't held up their half of the bargain.

There's another point, I think, that needs to be brought to the attention of the listeners here, and that is the importance of the commutation provision in dealing with special needs trusts, particularly with sizeable guarantees. Gerry, could you explain what your experience has been with that?

GREGER: Well, that becomes a point of sale at the settlement conference. You have to have a guarantee in there for the reasons we're talking about, and then of course the guarantee helps pacify the family members as well. So it becomes a balancing act. Usually you're dealing with a rated age, and the longer the guarantee you have on a case, you're taking away from the effect of the rated age. So you have to just deal with it on a case-by-case basis.

COHEN: What about a commutation rider, Gerry, where the guaranteed payments might be flowing out for years, and there's a commutation rider that says we can actually get a lump sum in terms of this guaranteed benefit stream and get it lump-summed right away into one big piece? Is that helpful, Roger?

BERNSTEIN: It really is, because if you're dealing with a large guarantee amount, then you'd probably have a taxable estate if that person dies earlier rather than later. So now you have estate taxes, federal and state, to deal with, plus you have the payback to Medicaid, plus you have, after that, the family that might be getting some money out of this. And it would be a whole lot better to turn that into cash than it would be to wait ten, 20 years as the stream of payments come in.

GREGER: Did you – while we're on that point, did you see that ruling by the U.S. Supreme Court on that case in Arkansas today?

BERNSTEIN: Yes.

GREGER: It was interesting. They ruled that there was a limitation on what the Medicaid recovery could be in the state of Arkansas.

BERNSTEIN: Well, it's now going to have national implications, and it's something that I think the trial bar needs to be aware of, not only as they settle their cases, but even as they frame their complaints in cases.

COHEN: Well, Gerry, first I'd like to tell you I'm impressed that you're looking at the Supreme Court decisions. That's a good thing.

GREGER: But of course.

COHEN: Yeah, exactly. And what we've broached just briefly in the last part of this conversation really are subjects of other shows – the estate tax implications of structured settlements, and commutation riders, and of course the whole issue of what the courts are doing with some of these bigger decisions. So I think in the future we'll have some shows on this, and I think our audience would be wise to listen in on some of those issues as well.

Well, if someone wanted to contact you, Roger, to get some more information about special needs trusts and where to reach you, how would they do that?

BERNSTEIN: Telephone and e-mail would be best. Telephone is 305-445-8500. The e-mail is roger@2bernsteins.com.

COHEN: OK, great. And Gerry, how about yourself?

GREGER: But of course. I have a toll-free number that people can call in from anywhere, at 1-800-227-8342. And the e-mail is ggreger@ringlerassociates.com, all spelled out.

COHEN: Well, I'd like to tell our audience that any of the Ringler Associates can be reached by clicking into ringlerassociates.com. I can be reached, Larry Cohen, at 978-974-9922, or lcohen@ringlerassociates.com. And we've had a heck of a show here today, and glad you were here listening to it, and I'd like you to all go out now and have a great day. Thanks for listening.

GREGER: Thanks, Larry. Thanks, Roger.

COHEN: Thanks, Roger.

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