

The Maze of Government Benefits:

When Your “Simple” Case Is Anything But

by Amanda M. Buzo



What do you do when you are retained to represent an executor in an estate only to discover that one of the beneficiaries receives Medicaid and the distribution would render him financially ineligible for his in-home care, medications, therapies, and health insurance? Or the personal injury settlement you successfully negotiated for a minor has now caused her to lose her Medicaid and Supplemental Security Income benefits?

An April 2010 press release from the U.S. Census Bureau estimates that 45 percent of U.S. residents lived in households in which at least one individual received government benefits during the third quarter of 2008. The Bureau also reports that 32.5 million, or 12 percent of the total population, have a severe disability. If you think it is unlikely that you will encounter a case involving public benefits or disability, you may need to think again.

The first step is to revise your intake process to ask if the prospective client, family member, or beneficiary has ever received public ben-

efits such as Medicaid, Medicare, Home and Community Based Services (HCBS) Waiver, Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), food assistance, subsidized housing, etc. If the answer is yes, you should confirm by requesting a recent letter from the governing agency to ensure your client isn't saying "Medicare" when they receive "Medicaid." While the spelling of these programs is similar, the eligibility requirements and impact of the receipt of funds are vastly different.

Medicaid and Medicare provide health insurance. Medicaid is available to low-income individuals 65 or older and to people with disabilities of any age. There are several types of Medicaid programs, such as Aged, Blind, and Disabled (ABD) Medicaid, nursing home Medicaid, and HCBS Waiver, and each program has its own rules. Generally speaking, there is a limit on the amount of resources and income, both earned and unearned, that a person may have and still be eligible for Medicaid; therefore, Medicaid is one example

of "means-tested" government benefits. The Ohio Department of Job and Family Services administers the Medicaid program and has its own definitions for resources and income. These definitions are not necessarily consistent with the Internal Revenue Code.

Parents resources and income "deem" to the minor disabled child, which may cause an otherwise medically eligible child to be financially ineligible for Medicaid. HCBS Waiver is an exception and does not impute the parents' resources and income to minors. Healthy Start and Healthy Families provide health insurance for financially eligible children and families with minor children even if no one in the assistance group has a disability. Healthy Start and Healthy Families are income-based and do not have a resource test.

Medicare is for people 65 or older, SSDI recipients of any age, and people of any age with certain medical conditions, such as end-stage renal disease. Medicare is not means-tested; the individual's income and resources are ir-

relevant. It is administered by the Centers for Medicare and Medicaid Services.

SSI and SSDI provide a monthly cash benefit. SSI is for low-income individuals 65 or older or people of any age with disabilities who have not accrued enough work credits to be eligible for SSDI. SSI is means-tested and the parents' resources and income deem to minor children.

SSDI provides a cash benefit to people with disabilities who have accrued the necessary number of work credits. While SSDI is not means-tested, a person may lose the disability status if he or she is able to engage in substantial gainful activity, meaning able to earn \$1,000 or more per month in 2010. An adult child with a disability may be eligible for a cash benefit and Medicare based on their parent's work history.

There may be a duty to report if your client receives Medicaid or Medicare. Medicaid and/or Medicare may have a subrogation claim for the medical expenses paid prior to settlement or award. If your client is not receiving means-tested benefits, but receives or will receive SSDI, you should determine if a Medicare Set-Aside account should be established to pay for injury related care after the settlement or award.

A person on means-tested benefits has a duty to report any change, including income, within 10 days. Additionally, if you represent an estate and the decedent was over the age of 55 and received Medicaid, the fiduciary has a duty to notify Ohio Estate Recovery pursuant to R.C. 2117.061 (Cuyahoga County Probate Court Form 7.0).

If the injured party or beneficiary is a minor or an adult incompetent, and receives assets of more than \$25,000, a guardian of estate will need to be appointed pursuant to R.C. 2111.05. It may be necessary and beneficial for a guardian to be appointed prior to initiating litigation. In most Ohio counties, if a guardian is required, then it is also necessary to seek probate court approval of the settlement or award prior to distributing funds, including payment of attorney fees and expenses.

The guardianship of estate will remain open until there is a reason to terminate the guardianship, such as the minor attaining the age of 18 or the depletion of guardianship assets. In my practice, I often close guardianships

because the funds have been transferred to a special needs trust and will not be retained in the guardianship. A special needs trust, also known as a Medicaid Payback Trust or d4A, referring to 42 U.S.C. § 1396p(d)(4)(A), may be necessary when a person with a disability will receive assets, and the receipt of those assets would cause the person to become ineligible for means-tested public benefits, e.g., Medicaid and SSI. Retaining Medicaid or SSI eligibility may be more important to the person with disabilities than the funds they are to receive. The state will be reimbursed from the trust assets at the beneficiary's death for the Medicaid expenses paid during their lifetime, even if the beneficiary is younger than 55 at death.

Most special needs trusts may only be established by a parent, grandparent, guardian or court; however, a pooled Medicaid payback trust, also known as a d4C, may be established by a competent adult with a disability as well as by a parent, grandparent, guardian or court. A pooled Medicaid payback trust is managed by a non-profit that provides the beneficiaries with their own sub-accounts, but pools the assets for investment purposes. Some pooled trusts only accept liquid assets; they will not accept title to real property or stock. The probate court may retain jurisdiction over pooled and non-pooled special needs trusts funded with guardianship assets. In those instances, the trustee must follow reporting requirements applicable to a guardian of estate, although many probate courts will dispense with accountings and/or the filing of applications for authority to expend funds.

Regardless of the type of special needs trust, the agency administering the means-tested benefits should be notified of the establishment of the trust and be provided with a copy of the trust agreement.

A special needs trust can be used in combination with a structured settlement. While the purchase of a structured settlement may remove the funds from the resource calculation, Medicaid and SSI include the future payments as unearned income when received. Therefore, it may be advantageous to establish a special needs trust and assign the future income stream or lump-sum payments to the special needs trust to preserve eligibility for means-tested public benefits.

Returning to the examples at the beginning

of this article, if the estate beneficiary is competent, he could enter into a pooled Medicaid payback trust and transfer his share to the trustee. If the estate beneficiary has a parent or grandparent living, the family member may establish a special needs trust for his benefit. The executor or administrator of the estate may petition the probate court to establish a special needs trust for the beneficiary. The beneficiary's share may be transferred from the estate directly to the trustee. If the beneficiary is incompetent, a guardian would need to be appointed and then the guardian could petition the probate court to establish the trust. Regardless of the method, the estate beneficiary or his or her guardian must transfer the property to the special needs trust before the last day of the month to retain eligibility for means-tested benefits. As a side note, this problematic estate could have been avoided if the decedent had proper special needs estate planning in place at their death.

With respect to the injured minor, her guardian may petition the probate court to establish the special needs trust. The means-tested benefits will not be interrupted as long as the guardianship assets are transferred to the trust in the month they are received. Many probate courts will order the settlement proceeds to be paid directly to the trustee, thereby circumventing the need to temporarily open a guardianship bank account.

While these types of cases are comparable to a Rubik's cube, with each twist having the potential to move you farther away from resolving it, it is also rewarding to know that in the end you have provided your client with immeasurable peace of mind and the retention of much-needed benefits. ➔



Amanda M. Buzo is an associate at Hickman & Lowder Co., L.P.A. Her areas of practice include probate, settlement services for personal injury attorneys, special needs trusts, and estate planning with a focus on families who have special needs children. The firm's website is www.hickman-lowder.com. She would like to thank attorneys Elena A. Lidrbauch and Mary B. McKee for their assistance with this article. She can be reached at abuzo@hickman-lowder.com.

¹ 2009 WL 4280734(N.D. Ohio), 187 L.R.R.M. (BNA)2758, 158 Lab.Cas. P 10, 152.