

On SOCIAL SECURITY DISABILITY: Making Things Right for YOUR Clients

Mary B. McKee

Some years ago, I got into an argument with one of my husband's MIT fraternity brothers. He was a brilliant high-tech inventor and entrepreneur, really down on 'big' government (I was with the OSHA Review Commission's General Counsel's office in D.C. at the time), and despised lawyers of all kinds. 'You and your ilk, Mary, you just drag us all down. Attorneys don't create anything. You write and talk and argue and stir up trouble - but you don't make anything.' My response (which really ticked him off): 'Yes, I do, Bill. I make things right.'

I help people get their Social Security Disability benefits. Other lawyers in our firm help children with special needs, adults with disabilities, the elderly, and their families. We deal with Social Security, SSI, Medicare, and Medicaid every day. If that's about as much as you care to read on this subject, you could stop right here.

Unless you practice personal injury law, medical malpractice, workers' compensation, domestic relations, estate planning or probate law. Because like it or not, understanding the basics of government benefits - or at least having someone to call or refer a client to - is becoming essential in order to represent your clients fully and avoid malpractice. For lawyers whose work does not revolve around people with disabilities, public benefits are often an afterthought. And instead of making things right, things can go wrong - sometimes irrevocably wrong - despite your good intentions. So please do ask, so that your clients do tell you whether anyone in the picture has disabilities.

Does child-support offset Child's SSI? What about SSD auxiliary benefits? Can a client get Workers' Comp and SSD at the same time? Does it matter if your client isn't disabled, but is married to someone who is? Don't all disabled kids get some kind of benefit? In a wrongful death action, or any estate, does it matter if one of the beneficiaries has disabilities? Does it matter whether a nursing-home resident became disabled before age 65? Can a person have both a Medicare set-aside trust and a Medicaid payback trust at the same time? Is it important to know whether your client has a minor or adult child, or even a grandchild, with disabilities?

Picture yourself in this predicament. Seventy year-old clients finally decide they'd better get their affairs in order. The twist is that they have an adult FTL child living at home. (FTL = failure to launch; in Oberlin this is what they affectionately call graduates of the College who never leave Oberlin, but I'm talking about a different kind of FTL situation here.) You talk with your clients and learn that Joey is 48 years old. Joey's sister is a surgeon in Boston and Joey's brother has a good job and a family in Kansas City. But Joey, well, Joey lives at home. Always has. No, he wasn't a good student, and yes, he went to some 'learner' classes back in the 60s. He did work for a time, yes. Before Dad retired, he did take Joey to work with him where he helped in the stock room or sweeping up, and yes, the company had him on the payroll.

But somehow, after Dad retired, Dad's employer didn't want Joey working there anymore. He just helps Mom with the laundry and walks the dog in the neighborhood. When Dad retired, nobody at Social Security asked Dad: 'Do you have a Joey?' Do you have a disabled adult child? Sometimes in Dad's generation, Dad doesn't even think of Joey as disabled. He's just Joey. He's pretty healthy. Dad pays his doctor bills out of pocket, or keeps up a health insurance policy for Joey. Feeds him, shelters him, gives him money to go to the movies or bowling. There's been no need for any government benefits. Or maybe someone at Social Security did ask, and Dad, out of pride, replied 'No one in our family needs any welfare benefits.'

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But now Dad and Mom are starting to get worried. What's going to happen to Joey if they die or become sick. No, he wouldn't be able to stay in the house by himself. He can't cook or pay the bills, and he wouldn't know when the roof or the furnace needs to be repaired. So all of a sudden, what you thought was a garden-variety estate planning case turns into a jungle. The week after the appointment, Dad falls, breaks his hip and lands in a nursing home. Your estate planning case morphs into a Medicaid planning case. (Did I remember to tell you this is based on a true story?) Maybe you recall that there are special rules for disabled children, and you're thinking, is Joey an adult disabled child, or not?

Those of you who have taken on a Social Security case know that there's a big difference between being disabled and just being unemployed. Whether Joey is ultimately found to be disabled under Social Security's standards will depend on a number of factors, sometimes including which judge you happen to get. Is Joey's IQ 57 or 73? Did he ever get a driver's license? Was his 'work' really subsidized? If the school records have vanished and the employer is out of business and you can't prove that Joey was disabled before age 22, what about current disability under the SSI program?

Oh, but wait, Dad and Mom put most of their money in his name a few years ago, in case something happened to them.. And Social Security won't process the medical eligibility determination until the financial eligibility determination is made. Then you contemplate Joey's capacity. Would he know what he's signing if you ask him to give the money back to his parents? Meanwhile, what, you're kidding, right, Mary - it could take three years for Joey to get an ALJ hearing and be found disabled? How to plan in the meantime? Is the worst case scenario that Joey is found disabled but you didn't draft for that, or is the worst case scenario that he isn't found disabled and you did draft for that?

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Now for you family law attorneys out there, if the parent of a child with disabilities gets a divorce, what's the best way to plan for the child's support? Unlike the typical scenario, the job of caring for a child with severe disabilities never ends. Are they a so-called Castle child? What can be done so that future 'support' payments actually benefit the child rather than simply offset the public assistance to which she may be entitled?

At the risk of drawing the attention of Howie Mandel and his intellectual property lawyers, let's play a little game: 'DEAL OR NO DEAL' Are there any benefits in the silver case? A young adult with cerebral palsy and severe physical and/or mental impairments. DEAL. Unless they're working, earning more than \$980/month gross. NO DEAL. Unless the work is subsidized, like some of the 'special' baggers at Giant Eagle. DEAL. Not working? Eligible for SSI. DEAL. Unless they still have the \$2,500 savings bond from grandma in their name. NO DEAL. Unless they have a dead or disabled or retired parent who contributed to Social Security. Then adult Child's Disability Benefits, on the parent's work record, may kick in and that program isn't income/asset-sensitive. DEAL. Unless they need to live in a group home. Medicare won't help, only Medicaid or MR/DD Waiver programs. NO DEAL. Unless they get a special needs trust set up. DEAL. See what I mean?

Second contestant. A quadriplegic carpenter. Fell off a scaffold and broke his neck. Only 33 years old. Disabled, yes, without a doubt. Entitled to government benefits? Maybe. Always worked for employers who paid his payroll taxes, and worked steadily? DEAL. Often worked under the table, or was self-employed and didn't pay the payroll taxes? NO DEAL. Why, can't he just get SSI (the needs-based program for those without a significant contributions to the Social Security system like those who've never been well enough to work and sandwich-generation women who've worked raising kids and caring for mothers-in-law, all for free? DEAL. But he just settled his Workers' Compensation case for \$280,000. NO DEAL. Unless he puts his settlement amount into a Medicaid-Payback trust. DEAL. But wait, if he does qualify for SSD and Medicare (not just SSI and Medicaid), and you get a Medicare Set-Aside Trust approved, will Medicaid count that pile of money as an available asset unless you put it in a Medicaid Payback Trust? DEAL OR NO DEAL?

As Socrates urged: Know at least what you don't know. Your client will thank you. And even if your client is already deceased, or suffering from dementia, or so developmentally delayed that he's unaware that you deserve to be thanked, you'll know yourself that you tried to make things right or put your client in the hands of someone who could. And that'll be enough.

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