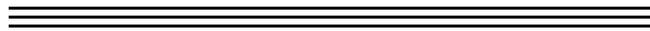


What Happens After
You Win:
Protecting Personal Injury
Awards for Elderly and
Disabled Plaintiffs

Written by
Emily S. Starr



Prepared by
The Law Office of
Ciota, Starr & Vander Linden LLP

625 Main Street
Fitchburg, MA 01420
(978) 345-6791
Fax (978) 345-6935

7 State Street
Worcester, MA 01609
(508) 754-8882
Fax (508) 754-3639

info@csvlaw.com

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The impact of the successful resolution of a personal injury claim on low income disabled or elderly persons, if not handled correctly, can be devastating: it can result in the loss of the two essential need-based benefits - SSI (Supplemental Security Income) and MassHealth. And the loss of those benefits can sometimes have a far greater impact than just the loss of the cash and medical coverage. Often these benefits are the key to accessing crucial supplemental services and placements in the community. Arguably, counsel is obligated to alert clients to these issues and failure to do so may be considered negligent representation.¹

Eligibility of disabled individuals for need-based benefits is generally dependent upon satisfying an income test and sometimes also dependent upon satisfying an asset test. The receipt of any but the smallest personal injury award can increase the disabled individual's income and assets above the eligibility thresholds and result in the loss of benefits unless a strategy is developed and implemented, ideally before the matter is settled.

SSI is the most commonly received income benefit that has both an income and asset limit.

MassHealth for institutionalized persons or persons over 64 years of age also has both eligibility criteria.

MassHealth for non-institutionalized persons under age 65 has only an income limit.

MassHealth eligibility for children living with a parent, who require a nursing home or hospital level care, is evaluated independent of the parent's financial status but depends upon the child having both limited income and limited assets.

Housing subsidy programs generally have only income limits.

In general, when an application for a need based benefit is filed, the applicant signs an agreement to notify the agency within ten days of any change in financial circumstances. A MassHealth application, for instance, requires notification of any claim or lawsuit filed and, within 10 days of receipt, to report receipt of any money received. It is crucial, therefore, before receipt of a settlement or judgment, to have determined whether the Plaintiff will continue to

¹ See Doucette v. Kwait, 392 Mass 915 (1984) in which the Court found that the discharge of unchallenged liens was a service that should be provided as part of personal injury representation.

need support from benefits programs and, if so, how ongoing eligibility will be maintained.

Implementation of a successful strategy immediately upon receipt of the award can minimize disruption caused by a loss of benefits. For example a personal injury award is considered, by the Social Security Administration, as income in the month received. If it has not been spent or transferred in conformity with the rules within that calendar month, in the next month it would be considered a resource. 20 CFR 416.1207(d). A well designed plan will result in the award being spent down or transferred before the first day of the calendar month following receipt of the funds.

I. HAVE PERSONS OTHER THAN THE DISABLED INDIVIDUAL SUFFERED AN INJURY?

Planning to preserve benefits must be considered from the outset of litigation. For instance, in some cases persons other than the disabled person have also suffered as a result of the injury to the disabled person. Unless the other person's assets and/or income are taken into account in determining the disabled person's eligibility for need-based benefits, a personal injury award on behalf of that person will not impact the disabled person's benefits. Thus, it is important when commencing litigation to consider naming plaintiffs in addition to the disabled individual.

Allocating a portion of a settlement to someone other than the disabled person may produce a dual benefit: not only may the allocated portion of the settlement not be counted as income or an asset of the disabled person, but liens on the allocated portion of the recovery may also be avoided.

II. WHO CAN COMMENCE AND SETTLE A PERSONAL INJURY ACTION?

Competent individuals eighteen years of age or older can commence personal injury claims. Persons under age eighteen or incompetent persons cannot commence actions on their own behalf. A personal injury claim of a minor or incompetent person may be brought by a court appointed guardian or conservator. If the minor or incompetent person does not have a guardian or conservator, a claim may be brought by a person acting as *next friend* or *guardian ad litem*. See Rule 17(b) of the Massachusetts Rules of Civil Procedure and G.L. c. 201 §34.

Neither a guardian nor a conservator appointed by the probate court, nor a person acting as *next friend*, is required to obtain judicial approval of the settlement. However, without judicial approval of a settlement, the representative

is exposed to the risk of a claim by or on behalf of the minor or incompetent that the settlement was inadequate or inappropriate. Faced with such a claim, a representative who did not have court approval would have to prove that the compromise was made in good faith and in the exercise of sound judgment. *Jones v. Jones*, 297 Mass 198 (1937).

There are two Massachusetts statutes that authorize the court to approve compromises of claims of this nature. G.L. c. 204 §13 pertains to guardians or conservators appointed by the probate court. G.L. c. 231 §140C1/2 pertains to approval of a settlement by the trial court. Anyone settling a claim on behalf of a minor or incompetent should seriously consider availing themselves of the protection afforded through these statutes. Defendant's counsel will often require such approval although, in the 1941 case of *O'Rourke v. Sullivan*, the Supreme Judicial Court held that a compromise by a fiduciary who did not have court approval would be binding on the parties thereto if made in good faith. *O'Rourke v. Sullivan*, 309 Mass 424 (1941). The remedy for an inadequate settlement would be a claim against the fiduciary.

There are differences in the procedures involved in obtaining approval by the Probate Court and approval by the Trial Court.

A. Probate Court Approval

G.L. c. 204 §13 provides that "[t]he probate court *may* authorize ... guardian, conservator...to adjust by arbitration or compromise any demand in favor of or against the estate by him represented". A claim seeking such authorization is commenced by the filing of Form AC67, the standard petition for compromise/arbitration. The Registry will issue a citation but, if all persons interested have filed a written assent to the petition and/or signed a written compromise agreement, notice is not necessary. The court will frequently appoint a guardian ad litem to represent the interests of the ward in regard to a petition to compromise.

B. Trial Court Approval

G.L. c. 231 §140C1/2, a statute first enacted in 1991, pertains to approval of a settlement on behalf of a minor or an incompetent by the trial court. It provides that the trial court may review and approve a settlement for damages because of personal injury in any case before the court or even in a case where the claim is not in suit. The statute authorizes the trial court to make such orders and take such action as it deems necessary to effectuate the disposition of a settlement approval including, but not limited to, the appointment of a guardian, the appointment of a guardian ad litem, or the holding of an evidentiary hearing.

In a case already before the trial court, a party to the matter may seek approval by filing a petition for settlement approval signed by all the parties. If the claim is not in suit, any party to the settlement may initiate an action by filing a complaint and petition for settlement approval.

C. 231 §140C $\frac{1}{2}$ is exceedingly broad in ways that are both problematic from some perspectives and useful from others. By amendment in 1994, the statute provides that a guardian or guardian ad litem appointed pursuant to this statute shall have the same authority as if appointed pursuant to a proceeding under Chapter 201. Apparently a guardian appointed pursuant to this statute has all of the power accorded to a fiduciary appointed pursuant to the traditional guardianship statute without many of the protections afforded to a ward under a traditional guardianship proceeding. For instance, it does not require that notice of the petition be given to both parents of a minor nor to the heirs or spouse of a mentally ill or retarded individual, the individual him or herself, or, in appropriate cases, the Veteran's Administration or the Department of Mental Retardation. It does not mandate the filing of a fiduciary bond nor does it require the guardian to file an inventory. It is not even clear what court has jurisdiction over the guardian once the settlement has been approved. There have been no reported cases involving this statute so clarification will have to await further legislative action or judicial interpretation.

However, though the probate court can allow the guardian of a mentally ill or retarded person to undertake estate planning for the ward, it cannot authorize such planning by the guardian of a minor whereas the trial court has no such restriction. G.L c. 201 §38. In addition, the probate court's authority to authorize the management of a ward's assets ends when the otherwise competent minor reaches age eighteen. In these authors' experiences, the trial court is generally more paternalistic and often allows the ward's assets to remain under management until a much older age.

III. PUBLIC BENEFITS REIMBURSEMENT

SSI does not impose a lien on, or expect to be reimbursed from, a personal injury award. MassHealth, on the other hand, not only expects reimbursement in appropriate cases, but is generally unwilling to compromise. The last page of a MassHealth application sets forth the recipient's obligations relative to (1) notifying the Office of Medicaid (OM) of any claim or lawsuit filed; and (2) repayment. The OM has the right to be reimbursed when the injury for which an award is paid caused medical expenses which were financed by MassHealth. In that case, before any funds are paid to the disabled individual, the OM has the right to assert a claim for reimbursement for all Medical Assistance paid out on

behalf of the MassHealth recipient which were caused by the injury. This is the case even if the disabled individual proposes to use the award to fund a trust from which the OM will be reimbursed following the disabled individual's death. 130 CMR 520.024 (D) provides:

An individual who has received or will be receiving payments from a third party as a result of an accident, injury, or other loss must first repay the Division for medical assistance under G.L. c. 118E §22 and 42 U.S.C. 1396a(a)(25)(A) and (B) and the Department of Transitional Assistance for financial assistance under G.L. c. 18 §5G, even if such third -party payments have been or will be placed in a special-needs or pooled trust in accordance with 42 U.S.C. 1396p(d)(4). (See the section on trusts, below.)

There is a right to a hearing to test the correctness of the amount of the lien, i.e., to determine whether the medical expenditure is related to the accident or injury for which the third party claim was brought. *Whelan v. Division of Medical Assistance*, 44 Mass. App. Ct. 663 (1998). The *Whelan* case contained a suggestion that the Commonwealth might be required to reduce its lien by the costs of recovery, but this *dicta* has been expressly disavowed by the Supreme Judicial Court's decision in *Pierce v. Christmas Tree Shops, Inc.*, 429 Mass. 91 (1999). As is the case with private insurer's liens under G.L. c.111 §70A, the attorney for an injured party should attempt to negotiate a voluntary reduction in the Commonwealth's lien before a case is actually settled.

The amount of the Commonwealth's reimbursement may be further limited as a result of a 2006 decision by the United States Supreme Court in *Arkansas Dept. Of Health and Human Servs. v Ahlborn*, (547 US 268 [2006]). In that case the Court addressed the issue of what amount of the proceeds of a settlement can be used to satisfy a Medicaid lien and held that the anti-lien provision contained in 42 USC § 1396(p)a bars states from imposing liens against the property of Medicaid recipients prior to their deaths, and that the statutory exception to that provision, which permits states to enforce statutory liens on settlements, judgments or awards of monies to Medicaid recipients, applies only to the *portion* of the settlement, judgment or award allocated to past medical expenses. (42 USC §§ 1396[a][a][25] and 1396k[a].) In *Ahlborn*, plaintiff suffered brain damage as the result of a car accident. The case was settled for \$550,000.00, which represented 1/6th of the full value of the case, which was estimated at \$3,040,708.12. The Arkansas State Agency asserted a lien on the settlement proceeds for \$215,000.00, which was the amount incurred for plaintiff's medical expenses. The Supreme Court agreed with the plaintiff that since her claim was settled for 1/6 of its value, Arkansas State Agency could only collect 1/6th of its claim for medical expenses, or \$35, 581.47.

IV. PRESERVING BENEFITS AFTER THE PERSONAL INJURY MATTER IS RESOLVED

The receipt of a settlement or judgment is generally considered income in the month of receipt. Typically, for that month, the plaintiff will be ineligible for any public benefits. If the funds are not spent down in that month, then they are counted as a resource for the following months, continuing to preclude eligibility for benefits programs that impose an asset limit. Even if a program does not have an asset limit, retention of the funds in the name of the Plaintiff could be detrimental to eligibility because of the income generated by the funds.

A personal injury award received by a disabled person need not affect public benefits eligibility beyond the month in which the settlement is received if the settlement is managed correctly. The three strategies for managing a settlement are:

spending the funds;

transferring the funds to a trust in compliance with the rules of the particular government benefit program that is sought to be preserved; and

giving away the funds altogether.

A. Spending the Award

A personal injury award can be spent in order to use it up and preserve eligibility. Even if the public benefits program counts assets, the funds can be used to purchase non-countable assets. All government benefit programs which have an asset eligibility limit exclude some assets from counting for eligibility purposes. The most common are a home of any value; a car; a prepaid irrevocable burial contract; clothing; and household goods (up to a certain value). It is prudent to study the list of non-countable assets in advance of receiving the funds so that the expenditures can be planned and executed quickly.

B. Transferring the Award to a Trust

The transfer of the award to a trust is generally the best approach for preserving a settlement which cannot be fruitfully spent but can be most fraught with danger if the trust is not drafted in accordance with the particular rules of the public benefits program for which eligibility is sought to be maintained.

The transfer of an award to a trust involves two sets of rules:

transfer of asset rules; and

countable asset rules.

(1) *Transfer of Assets*

With regard to the transfer of asset rules

Some public benefits programs deny eligibility to persons who have given away their assets in order to achieve eligibility. Included among those are long term care MassHealth but (not community based MassHealth) and Supplemental Security Income (SSI).

There is no transfer of asset penalty in community based MassHealth program.

Section 8 housing subsidy rules do not deny eligibility due to a transfer but do assume that for several years after the transfer, the transferor is receiving income generated by the transferred assets.

Even where there is a transfer of asset rule, there are often exceptions. In the long term care MassHealth and SSI programs, there are exceptions for assets transferred to disabled children, to trusts for the sole benefit of disabled children, to certain types of qualified special needs trusts often referred to as (d)(4)(A) trusts, and to certain qualified pooled trusts. A (d)(4)(A) trust, as described below, is a type of qualified special needs trust which can be established for a disabled person under age 65 but which must reimburse the state government for medical benefits paid on behalf of the disabled person after that individual's death.

(2) *Non-Countable Trusts*

The fact that a personal injury award received by a disabled person has been transferred into a qualified trust does not necessarily shelter the award. The trust must comply with the particular rules of the public benefits program of concern. Certain rules are common to all trusts of this nature:

The trust must be irrevocable;

The beneficiary cannot have authority to make distributions. In other words, the beneficiary cannot be the Trustee;

The trust should be completely discretionary. If the Trustee is required to distribute income, the income will be considered available to the beneficiary and, could, thus, affect eligibility for benefits. If the Trustee is required to distribute principal, the Trust itself will be considered an asset; and

In most cases the trust should indicate that its purpose is to supplement, but not replace, public benefits.

There are also rules unique to each public benefit program that must be explored before establishing a trust. It is crucial that the trust drafter is acquainted with these rules.

(3) *Traditional Supplemental Needs Trusts and Pay Back Trusts*

Historically, before the use of trusts to achieve eligibility for public benefits became so widespread, so long as a trust complied with the rules set forth above, the trust would not be seen as an asset for public benefits purposes. In the Medicaid arena, both the Omnibus Budget Reconciliation Act of 1985 and the Omnibus Budget Reconciliation Act of 1993 restricted the types of trusts that would be non-countable for Medicaid purposes. In the SSI arena, restrictions were reintroduced by the Foster Care Independence Act of 1999.

OBRA of 1993, while making it more difficult for most individuals to establish trusts for themselves and still achieve MassHealth eligibility, created some exceptions for trusts established with the funds of disabled individuals. That statute essentially authorized the establishment of two different types of trusts: pay back trusts and pooled trusts. Those federal provisions have been implemented in Massachusetts by regulations found at 130 CMR 520.023.

Before discussing those regulations it merits mention that these rules do not apply to trusts for MassHealth recipients under 65 unless they require long term care. That is because, since July of 1997, there has been no asset limit in the MassHealth program for non institutionalized younger individuals. Therefore, even if a trust must be used to prevent the *income* generated by the personal injury award from making the under age 65 Plaintiff ineligible for MassHealth, that trust need only be a discretionary supplemental needs trust as described above. It need not be one of the two OBRA mandated trusts. If, however, the

Plaintiff requires SSI benefits for support, or expects to need MassHealth benefits after age 65, the trust must be one of two OBRA approved trusts.

With regard to the OBRA approved trusts, 130 CMR 520.023(D)(1) implementing OBRA '93 provides that the following trusts are not subject to the income and asset countability rules of MassHealth otherwise imposed upon trusts.

a. Qualified Special Needs Trust (d)(4)(A).

created for a disabled individual under age 65,

established for the sole benefit of the individual by the individual's parent, grandparent, legal guardian, or a court, and

provides that the State will receive amounts remaining in the trust upon the death of the individual up to the amount paid by the Division of Medical Assistance for services to the individual.

b. Qualified Pooled Trust (d)(4)(C)

trust created by a nonprofit organization,

in which a separate account is maintained for each beneficiary but in which the assets are pooled for investment and management purposes,

the account was created for the sole benefit of the individual by the individual, the individual's parent or grandparent, legal guardian, or court acting on behalf of the individual,

the individual was disabled at the time his or her account in the pool was created, and

the trust provides the State will receive amounts remaining in the trust upon the death of the individual up to the amount paid by the Division of Medical Assistance for services to the individual except that the trust can retain reasonable and appropriate amount a determined by the Division of Medical Assistance.

(4) Court Approval of Trusts for Incompetent Plaintiffs Under Guardianship

If a case is resolved by a settlement, the plaintiff is under guardianship, and the plan is to place the settlement in a trust, there are theoretically two courts - the trial court and the probate court - that have jurisdiction relative to approval of the trust. One interesting question raised by this statutory scheme is whether, even if the trial court approves the settlement and trust under G.L c. 231 §140C ½, the probate court must also review the guardian's actions. There is no law on this issue but it seems rather onerous to have two separate courts review the same proposal. One way to approach the analysis is to view any trust established for the plaintiff with trial court approval under the c. 231 §140C ½ as a trust *created*

by *order of the court* rather than a trust *created by a guardian*. Under this analysis it could be argued that the guardian would not have to seek probate court approval of the trust and the transfer thereto as the funds would not have come into his/her possession *as guardian*. Accordingly, the guardian would not be required to report the receipt and distribution of this settlement on the probate court accounting as, again, the funds would never have come into the guardian's possession.

(5) Distributions from Non - Countable Trusts

Even if a trust is drafted correctly, distributions from the trust can jeopardize ongoing benefits eligibility if the trustee has not been counseled as to how to best distribute the trust's income and assets. Cash distributions to the disabled public benefits recipient are always problematic. Purchases for the beneficiary are preferable though it is important that the trustee understand any in-kind income rules as well as the program's asset rules. MassHealth does not recognize in-kind income so where a trust beneficiary is receiving MassHealth, only, the trustee need not be as careful about the purchases made with trust assets as where a trust beneficiary is receiving SSI. 130 CMR 506.004(D) and 520.015 (C).

C. Giving Away Assets

Unfortunately, disabled persons who do not have good counsel often give the assets to a relative to "hold" as it appears to be the least complicated approach. Even if this does not result in loss of eligibility due to the imposition of a transfer of asset penalty, it can lead to a loss or reduction of the award due to the circumstances or actions of the transferee. Among the more likely problems are the expenditure of the settlement by the transferee for his/her own benefit; the division of the settlement with the transferee's spouse if the transferee is involved in a divorce; or the loss of the settlement to the transferee's heirs if the transferee dies before the disabled person or to estate taxes on the transferee's estate. Even in the most stable and financially secure family, this should be the approach of last resort.

V. Conclusion

The responsibility of counsel handling litigation of a personal injury matter on behalf of a disabled public benefits recipient goes way beyond simply handling the claim itself. It requires knowledge of the rules of the relevant public benefits programs so that the claim, and settlement thereof, can bring the greatest benefit to the client.

The receipt of a personal injury award by a disabled person need not adversely affect the individual's public benefits. If planned correctly, the award can supplement, but not replace, the disabled person's public benefits and allow the injured disabled person more opportunities and a better quality of life.

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