

PROTECTING PERSONAL INJURY RECOVERIES FOR PLAINTIFFS WHO RECEIVE PUBLIC BENEFITS

NEW YORK STATE BAR ASSOCIATION: MARCH 15, 2019

Joan Lensky Robert, Esq.

John Tomsy, Esq.

JUDICIAL PANEL

ISSUES TO BE DISCUSSED:

1. With an infant, may a court order a trust – an SNT or a settlement trust – to hold assets of an infant?
2. If so, may the trust continue past the 18th birthday of an infant without a finding of incapacity?
3. May/must/should an Infant Compromise Order require that an application for Guardianship be brought before an infant's 18th birthday when the capacity of the infant is in doubt?
4. Will a trial court appoint a parent who is bondable as trustee of an infant's trust or must there be an independent trustee?
5. Will a guardianship court have ongoing jurisdiction over a trust established in an Infant Compromise Order for items such as bonding, investments, accountings, use of funds?
6. Will a trial court apply RPAPL 17 when an application is brought to use of an infant's funds to purchase real property?
7. Will a trial court order distributions from a trust or give discretion to the trustees?
8. Will a trial court retain jurisdiction over a trust after an infant has reached 18?
9. When a lawsuit has been initiated by a Guardian ad Litem, will the trial court allow the case to be settled by the GAL? Will the trial court allow the case to be settled pending an application for legal Guardianship? Will the trial court require the appointment of a legal Guardian to settle the case?
10. If a Guardian has been appointed and a lawsuit initiated, will the Guardianship Part require that it approve any settlement or will that authority be given to a trial part?
11. If a case settles with a Guardian, is a Compromise Order needed?
12. Which court, a trial court or a Guardianship Part, will determine personal injury attorneys

legal fees, structured settlements, and liens?

13. Which court, a trial court or a Guardianship Part, will decide on the allocation of lawsuit proceeds between a plaintiff's personal injuries and a loss of consortium?

14. Which court would decide on planning such as transfers of assets, SNTs, bonding and use of funds?

15. What language is recommended in orders for each court as to ongoing jurisdiction?

SCENARIO I: INFANT

Plaintiff Paula, 12 years of age, was struck by a car when she was a pedestrian at age 8. She suffered a traumatic brain injury and a spinal cord injury. She needs total care. She is wheelchair bound and speaks with great difficulty. Medicaid provides for a home attendant and she receives services such as OT PT and Speech Therapy at school. Paula receives SSI of \$733/month. Mom uses that to pay for their living expenses. They live in public housing and have food stamps (SNAP). Mom also receives Medicaid. Prior to her injury, Mom worked as a cashier at Macy's. She is a high school graduate. She is a single parent.

Mom's greatest need is for good housing. Mom has to carry her up the stairs whenever the elevator in the building is broken (and that occurs pretty frequently).

Medicaid has expended \$400,000.00 on Paula's care. They have agreed to reduce that amount to \$200,000.00.

Defendant Dora has offered her full insurance policy of \$1,000,000.00. Mom has accepted the offer, with the advice of her attorney, as Paula had run out into the street to catch a ball when she had been hit. It was dusk, 6 pm, and she was outside alone at the time.

The Attorney Affirmation in support of the Infant Compromise Order detail that they did a complete asset search on Defendant Dora, and no other assets were located. She is retired, has Social Security and a pension, savings of \$30,000.00, an IRA of \$200,000.00. She rents her apartment. The Affirmation also asks the Court to have an Ahlborn allocation hearing for a further reduction of the Medicaid lien.

The Infant Compromise Order asks that the court approve a Special Needs Trust.

The hearing will be held today.

1. How does the Court satisfy itself as to the sufficiency of the settlement?
2. Will the trial court address the Medicaid lien, and if so, have an Ahlborn hearing?

3. ISSUE: Pursuant to the CPLR, 1206, an infant's lawsuit proceeds must be paid to a Guardian of the Property, A Conservator or Committee, to be held for the use of the infant. A Trustee is not one of the payees pursuant to CPLR. Nonetheless, many courts authorize trusts to be formed within an Infant Compromise Order.

A. In this case, will the Court authorize a Special Needs Trust?

B. If so, will the Court require that there be an independent Trustee?

C. What if the parent is bondable?

4. ISSUE: Pursuant to CPLR 1206(c), authorized investments for an infant are limited to insured banks or trust companies or savings banks or state or federal credit unions or specified accounts in insured savings and loan associations, insured savings

certificates or an insured money market account or insured or guaranteed U.S. treasury or municipal bills, notes or bonds.

A. If the Court authorizes a Trust, what investments will the Trustee be authorized to make?

5. ISSUE: CPLR 1211: Withdrawal Orders for the Use of an Infant's Funds: A Petition for the use of an infant's property for support, maintenance or education must detail the amount and nature of the property and the parent's ability to support the infant. CPLR 1211(a). An application must include the explanation for the purpose of the withdrawal, the nature of the infant's injuries and a statement that the family is unable to afford the proposed expenditures. 22 NYCRR 202.7(f)(7). No authorization to release funds will be made where the parents are financially able to support the infant. 22 NYCRR 202.67(g).

A. If the Court authorizes a Trust, what factors will the Court weigh in authorizing expenditures for the infant from the trust? What discretion will be given to the Trustee? Will a court order always be required to make expenditures?

6. Will the Court appoint a Referee to review annual accountings of an SNT, or is the presentation of annual accountings to the Department of Social Services sufficient?

7. What factors will the court considering when weighing an application for the purchase of real property?

8. Will the trial court retain jurisdiction over the trust after the infant has reached the age of 18?

9. Will the trial court require legal guardianship of the infant upon her reaching the age of 18?

10. If the trial court denies the request for an SNT, will the Guardianship Part accept jurisdiction over an infant and establish a trust?

11. Are the factors that the Guardianship Part will weigh in authorizing expenditures for an incapacitated infant the same as those under the CPLR?

12. What factors will the Court consider in the application for the purchase of a home?

13. Will the Guardianship Part consider appointing a parent of a minor as the legal guardian and trustee if s/he is bondable?

14. If a Guardianship is brought upon Paula's reaching 18, will the Guardianship Part assume jurisdiction over the trust?

SCENARIO II: ADULT

PAUL, 53 years of age, fell down the steps of a catering hall during a Christmas party. He suffered a traumatic brain injury. He has been in a skilled nursing facility for 3 years now. He had been on a ventilator but has been weaned from the ventilator most days. He cannot speak but but WILMA, his wife of 25 years, believes that he recognizes her and can understand some simple statements and commands. They have 4 children, all of whom live with Wilma. The children are 23, 21, 18 and 16.

WILMA works full time as a nurse. She earns \$100,000.00/year. PAUL had had a spotty work history due to his alcoholism. He was a wonderful father and was a stay at home dad for much of the time.

The case is ready for trial. WILMA had been appointed the Guardian ad Litem.

1. ISSUE: CPLR 1201 provides that a Guardian ad Litem may be appointed by a court at any stage of an action in which an individual is incapable of adequately prosecuting or defending his or her rights. CPLR 1201.

May the case proceed to trial with WILMA as Guardian ad Litem?

2. ISSUE: A Guardian ad Litem may be appointed to represent such an individual even absent a formal finding of incapacity. Matter of Lugo, 197 N.Y.S.2d 740. However, the Guardian ad Litem may not receive the proceeds of a settlement. CPLR 1206. The Guardian ad Litem is not authorized to approve a proposed settlement of the case for an incapacitated adult. CPLR 1207.

On the eve of trial, Defendants have offered \$1,500,000 of their \$3,000,000 liability policy. The banister was faulty, but PAUL was noticeably intoxicated at the party and the stairway was behind a door marked “Emergency Exit Only” WILMA was at the party with PAUL, and many attendees heard her castigating PAUL immediately after the incident that he caused all of this by drinking too much.

Medicaid has paid in excess of \$700,000 for PAUL’s care.

Does WILMA, as GUARDIAN AD LITEM, HAVE THE LEGAL AUTHORITY TO ACCEPT THE LAWSUIT SETTLEMENT AND SIGN RELEASES OR MUST SHE BE APPOINTED GUARDIAN OF THE PROPERTY?

1. Will you as trial judge require a Compromise Order?

2. Will you as trial judge allow a Guardian ad Litem to settle the case, subject to the appointment of a full legal Guardian?

3. Will the trial judge suspend proceedings until a full Guardian has been appointed?

WILMA APPLIES TO THE GUARDIANSHIP PART to be appointed the Guardian of her husband.

1. Which court, the trial part or the Guardianship Part, will approve the settlement?

2. Is a Compromise Order needed to approve the settlement in this case?

If so, which court, the trial part or the Guardianship Part, will grant a Compromise Order?

3. Which court, the trial part or the Guardianship Part, will grant legal fees to PAUL's attorneys?

4. Which court, the trial part or the Guardianship Part, will approve the terms of a structured settlement?

5. Which court, the trial part or the Guardianship Part, will rule on the amount of the Medicaid lien.

The Medicaid lien is resolved at \$200,000.

WILMA wishes to implement a plan for prudent Medicaid planning. In particular, of the net amount of \$800,000, she asks the court to gift to her \$600,000, She asks that the outstanding mortgage of \$100,000.00 on the home owned by PAUL and WILMA be paid

from PAUL'S proceeds, that a prepaid funeral be purchased for PAUL and WILMA from PAUL's proceeds, and that the rest of the funds (\$70,000) be placed in a Special Needs Trust. And that she be the Trustee.

1. Which court, the trial part or the Guardianship Part, will decide these applications?

2. What factors will the court consider when weighing the gifting of the money to WILMA? The satisfaction of the mortgage? The funerals? The SNT?

3. Will the Guardianship Part retain jurisdiction over the SNT?

4. Will the Guardianship Part require preapproval of expenditures from the SNT?

Upon the death of PAUL, if any funds remain in the SNT, will the Court require the judicial settlement of a Final Accounting prior to WILMA's turning over funds to the Department of Social Services? Will the court direct that funds first be paid to PAUL's estate prior to being turned over to the Department of Social Services?