

# **SPECIAL NEEDS TRUST NEWSLETTER**

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## **COURT APPROVAL OF A MINOR'S SETTLEMENT**

### **WHICH COURT – TRIAL OR PROBATE?**

The statutory procedures for the approval of a Georgia minor's settlement, including the use of a trust are set out in O.C.G.A. Section 29-3-3. While the statute on first blush may look straight forward, one question that often arises is which court is to approve the settlement in cases where a lawsuit has been filed: Is it the Trial Court or the Probate Court?

In my experience, the answer has been either and both! What I mean by that is different Judges have had differing opinions or positions on the approval process. To review, 29-3-3(e) states that when a lawsuit has been filed, that the Trial Court is to approve the settlement. When a lawsuit has not been filed, the Probate Court is to approve the settlement, per 29-3-3(d). Probate Court approval may also be sought even if a lawsuit was filed, but only with the permission of the Trial Court (29-3-3(e)).

A couple of examples highlight the needless confusion:

In one central Georgia case I was involved with, the Probate Court, when approving the mother as Conservator, required as a condition of the issuance of letters of Conservatorship that the Probate Court approve the settlement notwithstanding that a lawsuit had been filed. To comply with the statute, we first obtained the trial court's approval of the settlement and then filed a petition to have the compromise approved by the Probate Court. The Probate Judge also approved the compromise. Query, what would have happened had the Probate Judge not agreed with the settlement as already approved by the Trial Court?

In other cases I have been involved in, the defense counsel has declared that approval of both Trial and Probate Courts was required – or checks would not be released. After obtaining Trial Court approval, I have then gone to the Probate Court with a petition. In one metro Atlanta case, the Probate Judge questioned the appropriateness of my petition, but also understood that the defense counsel would not release funds without the Probate Court's approval. We crafted an order where the Probate Court acknowledged the Trial Court's Order and that the Probate Court did not object. As that Probate Judge stated: "I don't think I have the authority to approve another court's order" - and I believe that she is correct! The end result was that we satisfied the defense attorney's overly zealous requirements and got the check.

In those cases, why didn't we just ask the Trial Court to allow the Probate Court to approve the settlement? The answer is simple: Strategy. Most of the trial courts that I have been involved with have not had many specific opinions about the terms of the settlement or the use and terms of trusts for the minor. The Trial Judge is already familiar with the case and not likely to challenge the settlement amount. Whereas, a Probate Judge is unfamiliar with the case and may require testimony and evidence justifying the amount of the compromise, expenses and attorneys' fees. Probate Court approval also takes longer, as it is a new case for that Court. A Trial Judge on the other hand will often schedule a hearing on short notice in order to remove the case from the docket.

## **MEDICARE SET-ASIDE TRUSTS**

### **EXTENSION OF MEDICARE REPORTING REQUIREMENTS FOR INSURERS**

January 1, 2010 is now the extended starting date for insurers to notify the Center for Medicare and Medicaid Services ("CMS") of claimants who are entitled to Medicare benefits. The original start date of July 1, 2009 was extended by CMS memorandum on May 11, 2009.

Under these new rules, the insurer must determine whether any claimant who files a claim against the insurer is entitled to Medicare benefits. If the claimant is entitled to Medicare benefits, then the insurer must provide Medicare with that claimant's identity and other information to be required by the Secretary of Health and Human Services. Failure to comply results in a \$1,000 per day penalty imposed against the insurer. The CMS alert issued on May 11, 2009 can be found at:

[http://www.cms.hhs.gov/MandatoryInsRep/03\\_Liability\\_Self\\_No\\_Fault\\_Insurance\\_and\\_Workers\\_Compensation.asp#TopOfPage](http://www.cms.hhs.gov/MandatoryInsRep/03_Liability_Self_No_Fault_Insurance_and_Workers_Compensation.asp#TopOfPage)

*NOTE: While these requirements and penalties are imposed on the defense side, we do expect that defense counsel will require information from the plaintiff side as they deem necessary, such as the plaintiff's Social Security Number or Health Care Identifying Number*

### **ASSISTANCE WITH SPECIAL NEEDS TRUSTS**

Please let me know if I can assist you with any of the following:

- *Special Needs Trust preparation*
- *Settlement Trust preparation to provide long-term asset management*
- *Court approval of a minor or incapacitated adult ward's claim*
- *Appointment of conservator*
- *Medicaid Deeming waiver ("Katie Beckett" waiver)*
- *Medicare set-aside trust/arrangements*
- *Ahlborn allocations and Medicaid lien releases*
- *Trust administration issues or a Change of Trustee*
- *Trust amendments necessary to qualify for governmental benefits*