

# **SPECIAL NEEDS TRUST NEWSLETTER**

**MARCH 2009**

BY: A. Kel Long, III, Esq.

3060 Peachtree Road, Suite 1725  
Atlanta, GA 30305

404-238-0174  
WWW.AKELLONG.COM

## **Improvements in SNT Review Process by State of Georgia**

In the past, the Special Needs Trust (“SNT”) review process by the Georgia Department of Community Health for the purpose of Medicaid eligibility could take months if not years. Approvals were difficult to obtain. For example I have several trusts that had been in the review process for over 10 years. The beneficiary continued receiving Medicaid benefits during that time, but the trust was never officially approved.

That has now changed. The Georgia Department of Community Health has hired an outside firm to perform the SNT reviews. The reviews now are being completed timely and information is being exchanged in a positive working environment. This is good news and is eliminating the delays in having trusts approved before a settlement is completed. In several cases I have been involved with now, the trust was in effect “pre-approved” before the final settlement with the defendant was entered into. Final Medicaid approval cannot be given until the trust is court approved, but at least now we know that it will be once court approval has occurred.

## **Ahlborn Allocations**

Settling a personal injury case in today’s world has many legal aspects, one of which is often creating a Medicaid exempt Special Needs Trust. In addition to addressing future Medicaid issues, the plaintiff’s lawyers must also deal with the existing Medicaid lien. No defendant insurance company will make payment until the existing lien has been identified and payment arranged. Payment of the Medicaid lien is also required in order for the Special Needs Trust to be approved. Specifically, the Georgia Department of Community Health will not approve the Special Needs Trust without a lien release from the Georgia Medicaid Department.

In the past it has been the position of the Georgia Medicaid Department that the Medicaid Lien is payable in full, regardless of the amount of the settlement actually allocated to past medicals (vs. future medicals or pain and suffering, etc.). Medicaid agencies in other states interpreted the federal Medicaid the same way as Georgia, thereby attempting to receive full reimbursement even though the injured party was not made whole. The U.S. Supreme Court changed that with the decision in Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006). In Ahlborn, the court held that the state could only receive its proportionate share of the dollars awarded for past medical expenses, versus other claims that the plaintiff had.

However, even with the benefit of the Ahlborn decision, the plaintiff still must show the value of all claims in order to determine the proper allocation. In some cases I have been involved with

the Georgia Medicaid Department has accepted the plaintiff's allocation method and in others they have refused to accept it, instead demanding a larger reimbursement. In those cases, it is then necessary to have the trial court approve the allocation of the settlement among the various classes of claims, such as pain and suffering, future medicals, parent's loss of services, spouses loss of consortium, etc. The plaintiff's allocations must also be substantiated. Once substantiated by strong evidence, we have found that the trial court will likely approve the allocations. Also, we are finding that the Georgia Medicaid Department does not come to court with independent evidence.

### **Speaking Engagement for GTLA**

I will be speaking at the GTLA convention in Atlanta on April 16, at 1:00 as part of the Ethics lunch hour. I hope to see you there.

### **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.*