



# The Advocate

KENTUCKY JUSTICE ASSOCIATION

**Negligent and  
Intentional  
Tortfeasors**

**Auto Wreck  
Property Damage**

**2021 Trucking  
Updates**

**Trailblazing in a  
Male-Dominated  
Industry**

**Handling a  
Minor or Disabled  
Person's Personal  
Injury Claim**



By Jeff Yussman and Seth Todd

## Best Practices for Opening and Settling a Minor or Disabled Person's Personal Injury Claim

There seems to be confusion in the Bar about when, where, and how a personal injury claim should be brought and settled on behalf of a minor (a person under age 18 in Kentucky) or a disabled person (as defined in KRS 387.500 *et. seq.*). This article attempts to answer those questions and discuss a substantive topic for a disabled person who is receiving government benefits.

### Initiating the Personal Injury Action

#### For a Minor:

KRS 387.125 (6) provides that “A guardian [of a minor] may institute or defend actions, claims, or proceedings in any jurisdiction for the protection of the ward’s estate.” KRS 387.020 provides that the district court has jurisdiction over guardians (of the minor person) and conservators (of the minor’s finances), and that venue lies in the county where the minor resides. The statute further provides where venue lies if the minor does not live in Kentucky or has property or claims in more than one county.

Assuming the minor is not disabled, the probate court is the division of district court where the application should be brought. The application for the appointment of a conservator to settle or compromise claims may be initiated by any interested person or entity. The line-by-line requirements for filing the petition are set forth in KRS 387.025 and in AOC Form 852. Once the conservator is appointed, the conservator may pursue a claim on behalf of the minor.

KRS 387.025 sets forth the notice requirements for a hearing on the petition and KRS 387.032 provides that the district court “shall” appoint any person or entity whose appointment is in the best interests of the minor.

#### For a Disabled Adult:

Like a minor, KRS 387.520 (2) provides that the district court has the exclusive jurisdiction over the appointment of a guardian or conservator of a disabled adult and the management and settlement of their accounts. Section (2) of the statute states that venue lies primarily in the county where

the disabled person resides, with some minor exceptions. The conservator of a disabled adult must “prudently manage” the financial resources of the disabled ward subject to the conservatorship.<sup>1</sup> Most importantly, KRS 387.700 provides:

It is the *duty* of the conservator to protect and preserve the estate, to retain, sell and invest it as hereinafter provided, *prosecute, or defend actions, claims or proceedings* in any jurisdiction for the protection of the estate’s assets, to account for it faithfully [and] to deliver the assets of the ward to the persons lawfully entitled thereto. (*Emphasis added*)

While somewhat beyond the scope of this article, the statutory procedures for filing a petition for guardianship or conservatorship of a disabled adult are set forth at KRS 387.530, *et. seq.* The forms for doing so may also be found at AOC Forms 740, 745 and 747 (emergency appointment).<sup>2</sup> The requirements for a full guardianship proceeding under these statutes can be avoided by filing AOC Form 777: “Verified Petition for the Voluntary Appointment of a Guardian or Conservator and Standby Guardian and Order.” It is recommended that, if the trial attorney does not have experience in the guardianship court, that he or she consider consulting an attorney (or the County Attorney) who does have such experience.

### Settling the Minor’s or Disabled Person’s Claim

#### Settling a Minor’s Claim:

KRS 387.125(6) states that “If the action, claim, or proceeding has not been filed in any court, the district court of the county where a guardian qualified shall approve the settlement or compromise.” So, clearly if a lawsuit was not filed in court, the guardianship court (i.e., probate court for a minor) must approve the settlement or compromise. Query whether district court approval is required when a lawsuit has been filed and the circuit court has approved the settlement or compromise. We believe it is debatable, unless the settlement includes provisions (like trusts, structured settle-

ments, etc.) that last after the minor turns 18. In such cases, we recommend that district court approval always be obtained and that a guardian ad litem<sup>3</sup> be appointed to represent the minor's interests in the settlement. Failure to do so could result in a legal action (including a malpractice action) to "bust" the settlement terms once the minor reaches majority age. We believe it is the best practice to obtain district court approval of a settlement or compromise in all cases—whether a lawsuit has been filed or not. The settlement proceeds will be held as approved by the district court after the order is entered.

One major exception to an ongoing guardianship administration relates to a minor's settlement under \$10,000. In such cases, either the court in which the action was pending, or the district court, may order that the settlement proceeds be paid to the person having custody of the minor.<sup>4</sup> The court must first hear evidence by affidavit or oral testimony that the adult being awarded possession of the minor's settlement can manage the money like a trust for the minor and that they will use it for the minor's support, maintenance or education until the minor reaches majority. *Id.* In such cases, no ongoing court oversight is required.

#### **Settling a Disabled Adult's Claim:**

Like for a minor, KRS 387.280 implies that a settlement for a person under disability may be approved by the court in which the underlying action is brought and that a settlement under \$10,000 may be distributed in a manner similar to a minor. It is submitted, however, that this statute should not be so broadly construed to include disabled adults. That is our opinion since KRS §§ 387.010 – 387.330 are primarily focused on minors, while KRS §§ 387.500, *et. seq.*, are exclusively directed at disabled adults.

As previously stated, the district court (in this case the disability division) has exclusive jurisdiction over the management of conservators and guardians and the management and settlement of their accounts.<sup>5</sup> It is the duty of a ward's limited conservator to perform the duties specifically assigned by the court<sup>6</sup> and, specifically, to:

Manage or assist in managing those financial resources placed under his supervision and/or control as would a prudent person managing his own resources, including establishing or placing resources in a trust....<sup>7</sup>

KRS 387.700 specifically provides that:

It is the duty of the conservator to protect and preserve the [conservatorship] estate ... [to] prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate's assets [and] to account for it faithfully....

Unless under a voluntary guardianship mentioned above, the County Attorney who prosecuted the disability case, and the disabled ward's guardian ad litem (who represented the ward in the disability case), should be given notice of any petition to settle the ward's case and the terms under which the proceeds should be held. For example, in a trust or special needs trust, pursuant to a structured settlement, etc.

#### **Special Circumstances to Consider**

When the plaintiff's attorney is representing a minor or disabled adult who is receiving government benefits of any kind, counsel should consider whether the form of settlement will disqualify their client from continuing to receive those benefits. Where one's client is receiving such benefits, if they have "countable" resources over \$2,000 they will lose any "means-tested" government benefits.<sup>8</sup>

In many such cases, a "special needs trust" may be created to protect the client's government benefits.<sup>9</sup> The special needs trust may be used to supplement those benefits, but if there are any funds left in the "first party" special needs trust at the ward's death, that money must first be used to repay any state that provided Medicaid benefits to the ward throughout the ward's lifetime.<sup>10</sup>

Authority for using a special needs trust when settling a case to protect means-tested government benefits may be found at 42 U.S.C. §§ 1492p(D)(4) (a) and (c) and for an ABLE (Achieving a Better Life Experience) account under IRS § 529A. Specific authority for establishing a special needs trust when settling a personal injury claim, for unplanned inheritances, etc., may be found at KRS 387.860 – 387.910. Likewise, the trial attorney should keep KRS 387.875(2) specifically in mind when settling a case and seeking to establish a special needs trust:

*Continued on following page*

---

### **Have you moved, changed phone numbers, added an e-mail address? Let us know.**

Don't miss a single publication, KJA legislative alert, or opportunity to be kept informed of the most current issues facing you in your practice. Please call to update your information.

**Phone: 502/339-8890**

**E-mail: [Info@KentuckyJusticeAssociation.org](mailto:Info@KentuckyJusticeAssociation.org)**



## Handling Disabled Person's Personal Injury Claim

*Continued from previous page*

If there is litigation pending which involves the special needs person, the petitioner shall submit a brief statement describing the litigation, the expected amount or finally determined amount of the recovery, the existence and amount of any liens or charges applicable to the recovery, including any applicable Medicare or Medicaid liens, and the name and address of the payor of the recovery, and

(3) If the special needs person lives in a nursing home or other

supervised living arrangement and is receiving, or expected to receive, public assistance benefits, then the petitioner shall inform the court of the nature of the benefits and the amount thereof.

Finally, KRS 387.880 provides that the court may assign a guardian ad litem to advise the court with respect to the suitability of the special needs trust. Typically, this is the same GAL who represented the ward in the original disability proceeding.

### Summary of Recommended Best Practices

Based on the foregoing, we recommend that the plaintiff attorney follow these simple courses of action when settling a case for a minor or disabled adult:

1. Always get approval from the relevant district court, even if the terms of the settlement are approved by the circuit court;
2. Consider requesting the appointment of a guardian ad litem if the settlement or judgment proceeds will extend beyond a minor's 18<sup>th</sup> birthday;
  - a. Request that there be no ongoing reporting to the court for the trust after its establishment; and
3. Always consider whether the disabled client is receiving government benefits and steps that may be taken to preserve those benefits—unless there is sound support for not taking such action. In either situation, district court approval of the settlement terms should be obtained.



We recognize the **VALUE** of **STRUCTURED SETTLEMENTS**

But **LIFE CHANGES...**

And some annuitants **NEED to SELL PAYMENTS**

We can buy partial payments to preserve more of the structure.



Strategic Capital

# Strategic Capital HELPS

Call us if your clients need care and help after the settlement

1.866.256.0088

[www.StrategicCapital.com](http://www.StrategicCapital.com)

For more information or to refer to a case, please contact Sheila Thomsen at [Sheila.Thomsen@StrategicCapital.com](mailto:Sheila.Thomsen@StrategicCapital.com) or 1-866-241-6111

— Jeff Yussman is the founder of Yussman Special Needs Law. Jeff's practice has always concentrated in the areas of estate planning and administration, but the birth of his two special needs children led him into the sub-specialty of planning for individuals with special needs, where he now spends a great deal of his practice time.

— Seth Todd is an attorney in the Yussman Special Needs Law Office. He helps families plan for their disabled loved ones, while also advising trustees and other attorneys on situations that may affect those with special needs. In addition to his special needs practice, Seth also practices in the areas of estate, business, and charitable planning, including estate and trust administration.

- 1 KRS 387.690(1).
- 2 It should be noted that the guardianship courts (particularly in the more populous counties) tend to be very reluctant to grant emergency guardianship unless there is strong proof of immediate risk of harm to the adult's person or finances.
- 3 See KRS 387.305 The duties of the guardian ad litem are to advocate for the client's best interests in the proceeding and to make sure the terms of the settlement (particularly if continuing past age 18) are, in the GAL's opinion, in the minor's best interests.
- 4 KRS 387.280
- 5 KRS 387.520
- 6 KRS 387.680(1)
- 7 *Id.*
- 8 The major "non-countable" assets a disabled person may own are a home and one car, plus a few other stray things. Personal property (although not all) is also generally not countable.

- 9 Special Needs Trusts have been discussed in several KJA seminars and articles and may be consulted to learn more about some of the ins and outs of such trusts. The trial attorney may also want to consult [www.specialneedsalliance.org](http://www.specialneedsalliance.org) and pull down the Trustee's guide to administering a special needs trust, where many aspects of such trusts are outlined and summarized.
- 10 It is very important to advise the client that the Medicaid lien relates back to the ward's birth and applies to any Medicaid benefits paid on behalf of the ward during his or her lifetime, except those liens that were resolved and paid as a result of the personal injury action. It should also be noted that some states are also trying to obtain pay-back for any "discounts" that were negotiated in settling liens in the personal injury case. Query whether there is any legal authority for their doing so.

**Do you have clients eligible to receive disability benefits under an ERISA plan?**



*Let us help!*

**Put our ERISA experience to work for your clients!**

*Early representation is key, so call us today.*



**MEHR & FAIRBANKS & PETERSON**  
TRIAL LAWYERS

[www.mehrfairbanks.com](http://www.mehrfairbanks.com)

**800-249-3731** | 201 West Short Street, Suite 800 | Lexington, KY 40507 | This is an advertisement.