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When do you really need to worry about the impact of a settlement on your client's eligibility for public benefits?

By Bridget O'Brien Swartz

You've settled your client's case, and money is sitting in your trust account. You've just discovered that your client is eligible for and receiving public benefits, namely, Supplemental Security Income (SSI)¹ and/or medical assistance through the Arizona Health Care Cost Containment System (AHCCCS)². What do you do? You do what should have been done well in advance of settlement. You consult with an attorney knowledgeable and experienced in public benefits eligibility planning, prepared to answer the following questions:

- For what public benefits is the client eligible?³
- On what date was the case settled?
- Are there any contingencies, e.g., must obtain court approval?
- On what date was the settlement paid out?
- Who is/are the claimant(s)?
- Have you determined the allocation if more than one claimant?
- What are the attorneys' fees and costs, and have they been paid?
- Are there any liens or claims against the settlement and, if so, have they been compromised and paid?
- Is the claimant a minor or adult and, if adult, does he have capacity?

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When do you really need to worry

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The Social Security Administration (SSA) and the Arizona Health Care Cost Containment System (AHCCCS) vary somewhat in *when* they treat a resource as available for eligibility purposes. Note, if the client is eligible for and receiving SSI benefits, then he is categorically or automatically eligible for AHCCCS benefits, and the SSI rules are the only rules of concern. If the client is eligible for SSI benefits and ALTCS benefits through AHCCCS, then different rules apply.

For SSI eligibility purposes, resource determinations are made as of the first of the month, and are based on what assets an individual "has."⁴ If an individual who is eligible for SSI acquires additional resources during the month, then they are counted under the resource counting rules as of the first of the *next* month.⁵ However, receipt of additional resources during the month will first be evaluated under the income counting rules.⁶ Thus, receipt of a settlement may result in an overpayment of SSI benefits for one month, which will require the client to refund the benefit paid out in that month to the SSA.⁷ However, it will not result in a disqualification from AHCCCS benefits for that month.

If the settlement funds can be used for the client's support and maintenance thereafter, then they constitute a resource.⁸ If the individual is eligible for and receiving ALTCS benefits, then the rules differ, and the resource is considered available in the month of receipt, rather than the first of the next month.

So, how about sitting on the funds in your trust account until such time as the client is ready for receipt of the funds? Unfortunately, that will not work in most instances. For both SSI and AHCCCS purposes, a resource is defined as cash and any other personal property, that an individual owns; has the right, authority, or power to convert to cash (if not already cash); and *is not legally restricted from using for his support and maintenance*.⁹ The fact that an "owner" does not have physical possession of the property doesn't necessarily mean that it is not his resource if he has the legal ability to spend or convert the property and apply it towards his support and maintenance.¹⁰ Actions of "agents," such as the fiduciary or attorney for the client, are the equivalent to an action on the part of the individual *unless* a legal restriction against access and the use of funds or property for the individual's support and maintenance

exists.¹¹ If a settlement or award is expressly limited to use other than for support and maintenance, even if the individual owns the funds and has direct access to them, then they are neither income nor resources for eligibility purposes.¹²

So, in what instances is it safe to sit on the funds in your trust account, without it impacting the client's eligibility for public benefits? If an allocation among claimants has yet to be determined, then the entire amount of funds cannot be considered available to the client; however, an allocation must be determined within a reasonable amount of time. If liens and claims against the settlement have yet to be determined and compromised, then funds held back to pay the liens and claims will not be considered available because the net amount due the client is unknown; however, if the liens and claims do not exceed the amount of settlement, and a portion can be immediately paid out to the client, that amount is available barring other restrictions.

If the client is a minor, or incapacitated adult, then the funds arguably aren't available until such time as a conservator has been appointed for him, and the probate court has approved the settlement and its disposition. In such instances, you may control the timing of the availability of the funds by incorporating into the settlement agreement the contingency upon probate court approval. Although the settlement will not be considered available until such time as the probate court enters an order appointing a conservator and approving the settlement and its disposition, a petition must be filed within a reasonable amount of time.

If funds must be held back for purposes of negotiating liens or claims, that can be specified by court order, and you can buy additional time by requiring an additional court order to approve the compromise and payment of liens and claims. If additional time is required to find a home and/or vehicle to purchase, and/or establish a special needs trust, then a court order holding back funds for that express and sole purpose, i.e., "any amount remaining is to be made payable to a special needs trust," then you may not need to have everything in place when the appointment of a conservator and approval of the gross settlement is initially approved. This may buy you time, but is no excuse to sit on things!

First lesson to be learned is to identify whether or not your client is eligible for needs-based public benefits and to plan

accordingly well in advance of a settlement conference or mediation. Second lesson to be learned is that, if the client is a minor or incapacitated adult, the appointment of a conservator and probate court approval of the settlement and its disposition will be required before anything is "available" to the client. Third lesson to be learned is that, to the extent allocation among claimants, and liens and claims must be compromised, the settlement is not considered "available" to the client. In the end, the foregoing buys time, but is not an excuse for failing to plan ahead or for sitting on things. After all of your hard work in obtaining a recovery for your client, you don't want him or his family to have to make important decisions in haste, nor be upset by hearing after settlement that he may lose his benefits if the funds aren't either spent down or deposited to a special needs trust. ■

- 1 SSI is a cash assistance program for those who qualify as "disabled," i.e., unable to engage in substantial gainful activity, and who are financially needy, i.e., have limited income and resources.
- 2 AHCCCS administers many medical assistance programs, some of which are for the indigent and others for the disabled. Each program has its own eligibility criteria. If eligible for and receiving SSI, the individual is categorically or automatically eligible for AHCCCS. If the individual requires long term care assistance, and meets the medical and financial requirements, then he may be eligible for Arizona Long Term Care System (ALTCS) benefits through AHCCCS; otherwise, the individual likely qualifies for medical assistance through AHCCCS by meeting applicable income limits. Go to www.ahcccs.state.az.us/site/ for more information.
- 3 Do not rely on your client to provide you with accurate information concerning the public benefits for which he is eligible. You must independently verify such information with copies of award letters and/or notices from the Social Security Administration (SSA), copies of notices from AHCCCS, and/or copies of notices from the Arizona Department of Economic Security /Family Assistance Administration (ADES/FAA).
 - 4 20 C.F.R. § 416.1207(a).
 - 5 Id. at § 416.1207(b); POMS Section SI 01110.600.B.1.
 - 6 Id.; POMS Section SI 01110.600.B.3.
 - 7 POMS Section SI 00810.015.A.3.
 - 8 20 C.F.R. § 416.1208(a).
 - 9 POMS Section SI 01110.100.B.1.
 - 10 Id. at SI 01120.010.
 - 11 Id. at SI 01120.020.
 - 12 Id. at SI 01120.010.D.5.