

# GUARDIANS AND PERSONAL INJURY ATTORNEYS: ALIGNED INTERESTS

By Deidre M. Baker, Esq.

Guardians play an important role in the life of an incapacitated person, also known as a ward. The courts appoint guardians for various reasons, and so the scope and duration of the appointment varies dramatically from case to case. Whether a guardian is appointed to act indefinitely or for the purposes of representing an individual for the duration of a legal proceeding, the most basic function of a guardian is to assist and protect the interests of a person who is considered to be incapacitated under the law, either due to age or because some mental or physical condition has rendered him or her unable to manage his or her own affairs.

It is common that a personal injury attorney will petition a court for the appointment of a guardian for the plaintiff if the plaintiff's injuries are the subject of the action that resulted in the plaintiff's incapacity. The decision whether and when to seek such relief should be made early on, particularly if there is a concern that the plaintiff would be unable to answer questions at a deposition. Indeed, counsel would be hard-pressed to complain that his client suffered a traumatic brain injury, for example, if the client appeared for a lengthy deposition and succinctly answered all questions put to him or her.

The guardian serves as the personal representative of an individual subject to a disability. Even in situations where the guardian is also an attorney, a guardian does not provide legal counsel. So, in the context of a personal injury suit, the personal injury attorney's advice is invaluable to the guardian. While the court-appointed guardian reviews the facts of the case and makes recommendations on behalf of his or her ward regarding the appropriateness of the settlement, the guardian cannot effectively perform his or her job unless the guardian seeks input and advice from IP's personal injury attorney. Both must work together to ensure that the IP/plaintiff's need are met with the funds received. Typically, until the personal injury suit is resolved, the guardian and counsel for the IP share a unity of interests – seeking compensation for the injuries sustained (usually ones creating the need for the guardian in the first place) and ensuring that the IP's needs can be provided for in the future.

The settlement is a critical phase of the working relationship. Personal injury and Worker's Compensation claim settlements often come in the form of a "structured settlement." These types of settlements are typically used when the injury suffered is one of a permanent or particularly severe nature. In these scenarios, the insurance company will provide

the claimant a portion of the total settlement, generally enough to cover any outstanding medical expenses, and then the remaining settlement funds are used to buy the annuity.

The annuity will then pay a set amount of money to the ward or disabled individual at set times over a predetermined amount of years. While both the guardian and the attorney handling the personal injury matter have a right to be compensated for their work, the use of structured settlements is one example of how important it is for the guardians and the personal injury attorney to maintain a good relationship even after the matter has been resolved.

Most importantly, it must be determined what benefits or services the disabled individual is already receiving or may be entitled to in order to protect the settlement and maintain eligibility for critical benefits. Those clients who receive Medicaid, for example, need to ensure that their assets remain below the requisite resource level, and if they receive monthly income in excess of the Medicaid allowance, their guardian should seek the counsel of an elder law attorney to shelter as much of their income as possible.

When a plaintiff's recovery is subject to income tax, a structured settlement can result in deferral of the tax, both on the lump sum itself and the income earned in payment of the annuity. The tax-deferred investment growth can result in tax savings similar to that of a 401(k) or IRA. This is especially useful for clients who receive Medicaid benefits as tax-deferred assets are exempt when determining financial eligibility. This provides another example of why communication between the guardian, who will approve the settlement, and the personal injury attorney is key. All parties involved must be made aware of different options for the ward in order to best serve his or her interests.

Prior to reaching a settlement in the matter, the benefit of a collegial relationship between the guardian and personal injury attorney can make a potentially stressful situation more manageable. When navigating the complicated medical lien settlement process, for example, the personal injury attorney should, with the assistance of the guardian, try to anticipate the amount of the claims from Medicare and Medicaid, as well as other health insurance carriers. When possible, liens should be negotiated prior to reaching a third-party settlement. From the outset, the guardian must be made aware of potential claims and how they are paid prior to the attorney agreeing to the settlement as it will have a significant impact on the funds the ward actually receives.

The situation becomes more complicated when, after payment of liens, the remaining settlement funds are scarcely sufficient to cover the attorney fees and disbursements. While this is not an ideal result, if the attorney has clearly communicated to the guardian both the medical lien and his or her own fee, then the guardian was given all necessary information to determine whether or not the settlement was in the best interest of the IP.

When the funds remaining after the payment of medical liens and attorneys fees are either less than expected or effectively leave the IP with no money, it is important for the guardian to understand the breakdown of the settlement. First, was the defendant's liability or malpractice insurance enough to cover the damages? If there is a shortfall of insurance coverage, it is often not worthwhile for the guardian to sue a defendant with inadequate insurance as an individual, as he or she likely won't have the funds to pay the resulting judgment.

The type and amount of medical treatment the IP received is another factor to be considered when the settlement is less than anticipated. If the IP received treatment in excess of what was reasonable to treat the injury he or she sustained, the personal injury attorney may have success in negotiating with the medical provider to reduce the bill. So long as the treatment was performed at the advice of a physician, the guardian should also contact the provider directly to see if a reduction of the outstanding medical bills is possible.

When negotiating the personal injury settlement, the attorney is aware of all potential liability or comparative negligence issues and takes that into account when accepting a settlement offer. So although the IP suffered significant injuries, if his or her own actions contributed to the underlying accident, it is important that this is communicated to the guardian at the outset of the proceeding to ensure the guardian is aware that his or her ward may be entitled to a settlement less than the amount of the injuries actually sustained.

When explaining the retainer agreement at the start

of the professional relationship, it is worth noting that this should include an explanation of whether or not the attorney's contingency percentage includes the amount paid to settle medical claims. Again, while it is not ideal for the matter to be resolved without the IP receiving part of the settlement directly, if his or her past medical expenses have been paid and benefits remain in place, then the proceeding has been worthwhile.

Communication between the personal injury attorney and the guardian remains important well after the claim has been resolved. Although the nature of the personal injury attorney's relationship with the ward effectively changes once a settlement is reached, they should advise the guardian to consult with all of the professionals in the ward's life. This is an especially important step for situations involving a lay guardian since these non-attorney guardians may not be aware of tax issues, outstanding debts, or other financial obligations of the ward.

In addition to a good working relationship between the personal injury attorney and the guardian, it is critical that both of these individuals keep accurate records on behalf of the ward. The importance of exacting records is highlighted in several scenarios. The guardian must make an annual report to the court which includes all income and principal received, including interest income, and all disbursements made. Without proper records this already painstaking task becomes even more cumbersome.

While it may be tempting for a guardian and personal injury attorney to quickly wrap things up once a settlement is reached, it is beneficial to all parties involved for these professionals to keep open lines of communication and accurate records. This not only ensures that important benefits are maintained, but also that the attorney and guardian are on the same page in the event that someone claims the ward's best interests were not properly looked after.



## BIOGRAPHY

Deidre M. Baker is an associate attorney with Makofsky & Associates, P.C., located in Garden City, New York. She practices elder law with a focus on estate planning, guardianships, as well as estate and Medicaid planning. She has worked extensively in matters involving asset protection for the purposes of obtaining Medicaid benefits to finance long-term care.

She earned her J.D. in 2012 from the City University of New York and was admitted to practice law in the courts of New York in 2013.