

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: DOW CORNING CORPORATION,

Reorganized Debtor.

Case No. 00-CV-00005-DT
Settlement Facility Matters
HONORABLE DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER

I. BACKGROUND:

Claimant Eileen A. Motherway filed a claim against Dow Corning Corporation for personal injuries sustained from a breast implant. Ms. Motherway is a woman under age 65 years of age who has been determined to be disabled by the Social Security Administration under 42 U.S.C. § 1382c(a)(3). Ms. Motherway receives government benefits, including Medicaid and will likely always be medically uninsurable for commercial available health insurance coverage. Ms. Motherway's claims under Class 5 have been approved by the Settlement Facility-Dow Corning Trust ("SF-DCT") and no liens have been asserted against the proceeds of these claims. Claimant's counsel believes that it is in Ms. Motherway's best interest for the net proceeds of her claims (nearly \$96,000) to be held in an irrevocable Special Needs Trust ("SNT") so that she may maintain her Medicaid benefits. SF-DCT has paid the claim and the funds are currently in an IOLTA account held by Claimant's counsel, Diana J. Lumsden, Esq..

Claimant's counsel requested the concurrence of the Finance Committee, Dow Corning and the Claimants' Advisory Committee for the entry of the Order. No party has objected to the establishment of the trust. David Austern, Claims Administrator of SF-DCT, indicated to Claimant's counsel that the Finance Committee is not authorized to stipulate to the establishment of the Trust.

The Debtor's Representative and the Claimant's Advisory Council have submitted a joint statement indicating that they do not object to the establishment of the Special Needs Trust and that the Amended Joint Plan of Reorganization is not affected by the establishment of the SNT. However, they do not take a position as to the validity of the request for the SNT under the statute, 42 U.S.C. § 1396p(d)(4)(A).

II. ANALYSIS:

In 1993, the Medicaid Act was amended to provide for the creation of supplemental or special needs trusts. 42 U.S.C. § 1396p(d)(4)(A). The statute provides that a disabled person under the age of 65 remains eligible for ongoing Medicaid Assistance in spite of funds or other property held in an SNT and that the SNT funds can be used as a supplement to enhance the quality of the person's life. *See Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328, 329 (8th Cir. 1998). The statute provides that the trust containing the assets of an individual under age 65 who is disabled (as defined in 42 U.S.C. § 1382(a)(3)) be established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court, and provided that the State shall receive all amounts remaining in the trust upon the death of such individual to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter. 42 U.S.C. § 1396p(d)(4)(A).

Claimant, although disabled, is a competent person of legal age and Mr. Thomas R. Mullen, Esq., currently serves as a Trustee for Ms. Motherway. Usually, trusts are created without the need for a court order, however, § 1396p(d)(4)(A) provides that "a court" may establish such a trust. Most of the cases involving the trusts under this provision have been created by an individual's guardian or by probate State courts. *See, e.g., Norwest Bank*, 159 F.3d at 329; *Hecht v. Barnhart*,

217 F.Supp.2d 356 (E.D.N.Y. 2002); *Singer v. Barnhart*, 2003 WL 22050775 (D.N.H. Sept. 2, 2003)(unpublished). Federal district courts have also ordered the establishment of a trust under this provision. *See Griffith v. Nance*, 2003 WL 21246068 (N.D. Tex. Mar. 6, 2003)(unpublished); *Gerow v. United States of America*, 1997 WL 538910 (N.D.N.Y. Aug. 26, 1997)(unpublished). The *Griffith* and *Gerow* cases involved individuals who had tort-related cases before a federal district court. Claimant, Ms. Motherway, submitted a Class 5 claim before the Settlement Facility-Dow Corning Trust, which was established under the Amended Joint Plan of Reorganization entered by the Court in the bankruptcy action. The Claimant's counsel seeks to establish the SNT so that the Claimant may continue to receive Medicaid benefits provided by the Commonwealth of Massachusetts. The Court grants Claimant's Motion for an Order Establishing and Funding Special Needs Trust pursuant to 42 U.S.C. § 1396p(d)(4)(A).¹

III. CONCLUSION:

For the reasons set forth above,

IT IS ORDERED that the Motion for an Order Establishing and Funding Special Needs Trust for Claimant Eileen A. Motherway (**Docket Nos. 350, filed March 29, 2006 and 376, filed April 20, 2006**) are GRANTED.

IT IS FURTHER ORDERED that an irrevocable trust with discretionary provisions shall be established by authority of this Court as authorized by 42 U.S.C. § 1396p(d)(4)(A) for the benefit

¹ The Court notes that the establishment of the SNT does not purport to be a "ruling" as to whether Massachusetts, and the appropriate Federal Agency, will conclusively hold that the SNT will in fact allow Claimant to continue with Medicaid benefits. Those determinations are made by the appropriate Massachusetts/Federal Agency (Social Security Administration) which then may be pursued to the appropriate Federal District Court. *See, e.g., Singer*, 2003 WL 22050775 at *1; *Frerks v. Shalala*, 848 F.Supp 340 (E.D.N.Y. 1994).

of Eileen A. Motherway, known as the “Eileen Motherway Supplemental. Needs Trust” to receive the net proceeds from the settlement of Eileen A. Motherway’s claims through the SF-DCT.

IT IS FURTHER ORDERED that Thomas R. Mullen, Esq. shall serve as Trustee of the Eileen Motherway Supplemental Needs Trust, established pursuant to the terms of this Order, and in that capacity, he is authorized to receive the net proceeds from the settlement of Eileen A. Motherway’s claims and to sign such documents as are necessary to effect this Order.

IT IS FURTHER ORDERED that Eileen A. Motherway, an adult individual, has been found by the Social Security Administration disabled as defined in the Social Security Act, 42 U.S.C. § 1382c(a)(3), shall not receive any proceeds from the settlement of her claims.

IT IS FURTHER ORDERED that Thomas R. Mullen, shall effectuate the terms of this Order by executing the Trust Agreement established for the benefit of Eileen A. Motherway, for and on behalf of this Court; and shall Administer this Trust in accordance with its terms.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Court

DATED: 05/04/2006