IN BRIEF

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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

PROTECTING MINORS' MONEY

Your friend, Trial Lawyer, has asked you to assist his clients John and Jane Smith. Their 14-year-old minor child was injured in a motor vehicle collision, and Trial Lawyer has settled the claim and obtained court approval of the settlement. Trial Lawyer has deposited the net funds payable to the child in his IOLTA account. John and Jane both work outside the home. They live a comfortable middle-class lifestyle but are certainly not wealthy.

At your initial meeting, John and Jane impress you as honest, conscientious parents who have their child's best interests at heart. They indicate their desire to invest the funds in part in a growth account to provide a down payment or nest egg for their child. They would like this account restricted so that their child cannot access it until he is at least age 28. They would like the rest of the funds placed into an accessible, liquid account that they can access to provide for their child's needs, such as school clothes and summer camp fees, with any remainder available to pay college tuition and expenses after their son graduates from high school.

How should the money be held? Who should be the account holder? Is court oversight required? Is court oversight advisable if not required? Can the parents restrict their child's access to the money after he becomes an adult?

PAYMENTS TO MINORS

At first blush it might appear that the UTMA (as adopted in Oregon, ORS 126.805 - 126.886) would provide a simplified process in which funds of $10,000 or less may be transferred to a "custodian" for the minor without the necessity of a conservatorship. However, a review of the statute reveals that it is directed at gifts, bequests, and other voluntary transfers to minors, not to settlements of litigation or payments of judgments.

Oregon Revised Statute 126.700 (formerly ORS 126.025) controls in circumstances such as the hypothetical in this article. *NOTE* - This act protects only the *transferor* of the funds. *See*, ORS 126.700(4). It does not shield John and Jane from liability for mismanaging the settlement funds, nor does it protect counsel. This raises the related question – whom do you represent?

WHO IS THE CLIENT?

A fundamental question to answer before determining what advice to give John and Jane is – who is your client? The money belongs to the child. It will be applied for the child's benefit. Ultimately, the child will suffer if the money is not administered wisely. It might seem obvious that the child – the final recipient of your services – is the client whose needs must be foremost in your mind. Although this is the obvious answer, it also is almost certainly wrong. In *Roberts v. Feary*, 162 Or App 546 (1999), the court held that the lawyer retained by the personal representative represents only the personal representative and does not have a lawyer-client relationship with the beneficiaries, creditors, or other interested persons of the estate. OSB Legal Ethics Opinion No 1991-119 opines that, with respect to a trust, the trustee's attorney represents only the trustee, not the beneficiaries. Also, Opinion No 1991-62 opines that, although the

personal representative of an estate owes fiduciary duties to the estate and the beneficiaries, the attorney for the personal representative is only the personal representative's attorney. This leads to the conclusion that you represent John and Jane and have duties only to them, while they, in turn, have duties to their child. However, *Hale v. Groce*, 304 Or 281, 744 P2d 1289 (1987) complicates this inquiry by holding that counsel for a deceased testator may be liable to the beneficiaries for her negligence in drafting the will. *Hale* seems to support the argument that counsel has at least some direct duties to the child and that counsel certainly could be liable to the child for negligence that results in depletion of the settlement funds.

CONSERVATORSHIP

At first glance it appears that the complexities of a conservatorship would be an unnecessary burden in this instance. However, this is the *only* mechanism by which counsel, parents, tortfeasor, and insurer all receive assurances that the funds are properly applied. Further, conscientious adherence to the statutes and rules governing conservatorships can limit or even eliminate the risk of malpractice.

For basic forms and procedures to establish a conservatorship, see *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000). Note that in this hypothetical the minor is 14 years of age. The minor is therefore entitled to notice of the petition and an opportunity to object.

A conservatorship usually entails a bond posted by the conservator and paid for with the protected person's funds. The conservator also usually has direct access to the protected person's funds, often in a checking account. Further, the conservator is required to file detailed annual accountings, which often necessitates the assistance of an attorney or CPA. All in all, this is not an ideal solution, especially if the child does not need the funds to live but instead the funds can be left to grow over time for the minor's use as an adult.

A modified form of conservatorship is a better choice. First, in the petition to establish the conservatorship, counsel should request that the conservator hold all funds in restricted accounts and ask that no bond be required of the conservator. A "restricted account" is one that the financial institution has agreed will be frozen and inaccessible to the conservator except as ordered by the court. A sample Acknowledgment of Restricted Assets can be found in *Guardianships, Conservatorships and Transfers to Minors* (OSB CLE 2000) and at www.osbplf.org, loss prevention, practice aids, guardianships and conservatorships.

Further, given that the funds will be restricted and no withdrawals will occur without court order, the petition also should request permission to use a simplified form of accounting. Ideally, this would be a short form accounting with copies of the account statements attached so that the court could verify that no withdrawals were made during the accounting period.

STRUCTURED SETTLEMENTS

It is entirely understandable that John and Jane would not want their child to suddenly receive a large sum of money the instant he turns 18. Although there is specific authority for such a restriction on a gift or transfer to a minor of $10,000 or less (ORS 126.872), a conservator of a minor child does not have any such authority. The conservatorship, and therefore the conservator's powers, necessarily terminate when the disability ceases. In this instance the minor's disability is simply his minority.

Many courts refuse to approve investments in annuities, structured settlements, and the like that have the effect of restricting the minor's access to the settlement funds after the age of majority. In addition, the foregoing analysis might differ greatly if the injury resulted in brain damage, permanent cognitive impairment, or similar condition.

SPENDING FOR NECESSITIES

Under the hypothetical presented, John and Jane wish to use some of the settlement funds to provide for the child's clothing, recreation, and so on. May they do so? As a conservator, John or Jane stands in a fiduciary relationship to the child. As a fiduciary, John or Jane has an obligation to place the child's interests and welfare above all else when dealing with the settlement funds. As parents, John and Jane have duties under ORS 109.010 to provide for the support of their children, so the conflicting roles create a conflict of interest. Generally it is improper for parents to use the child's settlement funds to defray the costs of raising the child. Certainly, one can envision circumstances in which a

family is so poor that use of the funds to improve the child's standard of living would be appropriate. However, use of the funds in this manner is likely to draw the ire of the probate court unless persuasively explained. Great care must be exercised to ensure that the child's interests remain paramount. Generally, the court will not permit a parent to retain funds without a bond and strict oversight. If a conservatorship has been established with a restricted account, the problem is lessened because funds cannot be withdrawn without court order.

PUBLIC BENEFITS AND SPECIAL NEEDS

If the family is receiving public benefits such as food stamps or the Oregon Health Plan, counsel should consider the impact of the settlement on the child's benefits. A discussion of these impacts is beyond the scope of this article. For an overview of the law, see *PI Settlements and Welfare*, *In Brief*, July 2002. (Available at www.osbplf.org, click on loss prevention, *In Brief*.)

CONCLUSION

It is vital to have open, detailed discussions with John and Jane about the limits of their ability to use the child's funds during his minority, their responsibilities as conservators, and the nature of their fiduciary duties. Use of the court's conservatorship mechanisms, modified by restriction of the funds, is the best way to ensure that the child's interests are protected along with those of the conservator and counsel.

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