

## Settlements for Minors – 2009 Legislative Changes

The problem: A minor has a tort claim for personal injuries. Luckily, the minor's injuries are not severe, so the claim's value as determined by a jury is probably modest. A settlement can be reached with the defendant's insurer. However, minors are unable to contract.

Prior to the passage of ORS 126.725, the only certain way for an insurer to guarantee that the claim against its insured was discharged was the appointment of a conservator and the court approval of the settlement. This is time-consuming (entailing yearly reports to the court until the minor reaches majority) and expensive (including costs such as filing fees and attorney fees). It is an unpalatable solution when the minor's net recovery is only a few thousand dollars.

ORS 126.725 [passed in 2007 and amended in 2009] now solves this problem when the minor's **net recovery** is \$25,000 or less. This statute allows the parties to enter into a settlement agreement without court oversight and without the establishment of a conservatorship if the following conditions are met:

- There is not already a conservator for the minor;
- The total amount to be received by the minor (after payment of medical liens, attorney fees, and the like) is \$25,000 or less; and
- The person authorized by the statute to sign a settlement agreement and extinguish the minor's claim is "a person having legal custody of" the minor with the claim. The statute speaks in the singular. From a plain reading, it appears that when parents have joint legal custody but only one has physical custody of the minor, either parent can settle a claim of the minor under this

statute. However, practitioners should note that if the minor is in the physical custody of a relative such as a grandparent due to an informal arrangement with the parent or parents of the minor, mere physical custody does not, pursuant to the statute, confer the ability to settle a claim.

**Practice Tip:** When prosecuting a claim for a minor's injuries, determine the legal authority of the person with custody of the minor as soon as possible. It may be that one or both parents may need to be located to finalize a settlement and avoid the expense of a conservatorship proceeding. Conversely, defense counsel should consider demanding proof of legal custody as part of a settlement to ensure that the release obtained for the defendant is, in fact, binding on the minor and the minor's claim.

Once you are satisfied that the person seeking to settle the minor's claim has authority to do so and that the settlement is reasonable, the following steps are required to comply with the statute:

1. **Affidavit of Custodian.** First, the person having legal custody of the minor must sign an affidavit swearing:
  - To the best of that person's knowledge, the minor will be fully compensated by the settlement; **or**
  - Though the minor will not be fully compensated, there is no practical way to obtain more from the party with whom the settlement is being made.

The attorney for the minor's legal custodian must keep the affidavit **for two years after the minor reaches the age of 21**. **Caution:** This represents a departure from the usual practice of dis-

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posing of closed files after 10 years. Attorneys settling claims for minors pursuant to this statute may have to keep the original affidavit signed by the person having legal custody for as long as 23 years.

**2. Receipt and Disbursal of Funds.** The funds (whether by check or by cash) must first be deposited into the plaintiff's attorney's IOLTA account. After attorney fees, costs, and medical liens are paid, *the lawyer* must deposit the minor's net recovery into "a federally insured savings account that earns interest *in the sole name of the minor.*" (Emphasis added.)

If defense counsel is dealing with a person having legal custody of the minor who is also *pro se*, the statute indicates that defense counsel must deposit the funds directly into a "federally insured savings account that earns interest *in the sole name of the minor.*" (Emphasis added.)

If the funds are to be used to purchase an annuity, they must be paid directly to the annuity issuer, with the minor designated *as the sole beneficiary of the annuity.*

**Caution:** Note that the statute requires the account to be set up in the minor's name *only*. The parent(s) may not also be named on the account.

ORS 125.735, enacted in 2009, provides that minors may contract with banks or other financial institutions to establish a bank account, and that such contract is binding on the minor and may not be voided or disaffirmed by the minor based on the minor's age or minority.

**3. Notice.** Counsel must then provide notice of the deposit to the minor and the person who entered into the settlement on the minor's behalf, by personal service or first-class mail.

**4. Funds Remain Untouched.** The funds cannot be withdrawn or spent for any reason by any person, including the minor, unless under court order, the minor attains majority, or the minor dies.

The overriding theme is to avoid situations in which the person having legal custody of the minor has an opportunity to mis-deposit the funds, err in the creation of the account, or take the funds from the minor's account.

**Practice Tip:** Attorneys who represent the injured minor *and* the person having legal custody should document providing this important caution to the minor and the person having legal custody. It is not hard to envision claims against counsel and the person having legal custody if the minor's funds are misappropriated during the period of minority.

The statute also provides that the signature on a settlement agreement of a person in compliance with this statute

is binding on the minor. Defendant's attorney can assure the client that the claim is fully and completely extinguished. A person acting in good faith on behalf of the minor is not liable to the minor for any claim arising out of the settlement.

All in all, ORS 126.725 should assist attorneys in settling modest claims of minors without the expense and effort involved in the establishment of conservatorships.

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