IN BRIEF

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MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

SMALL SETTLEMENTS FOR MINORS

Attorneys who wish to settle "small" claims (typically under $10,000) on behalf of minors face considerable uncertainty and even risk. These claims are a frequent source of confusion and potential malpractice. While some attorneys assume that the legislature has provided guidance and protection in these circumstances, the reality is otherwise.

CONSERVATORSHIPS

Under Oregon law, only a conservator has the power to settle a minor's claim without court approval and hold the funds on behalf of the minor. ORS 125.445(21); ORS 125.420. Contrary to popular understanding, Oregon law does *not* expressly authorize a parent or guardian ad litem to settle claims for less than $10,000 without court approval. A guardian can obtain court approval of a settlement, but the court may insist that any funds be placed in the hands of a conservator. (Some courts have developed forms for this purpose. See Multnomah County SLR 9.055(1)). The Uniform Transfers to Minors Act, ORS 126.805 et seq., allows a "custodian" to hold certain funds on behalf of minors, but it does not grant authority to settle and does not provide safeguards for the preservation of the minor's funds. Thus, a conservatorship is the most appropriate vehicle.

Oregon probate judges are increasingly requiring that a conservator be appointed any time settlement proceeds for a minor are involved. Multnomah County SLR 9.055(2) states, "a conservatorship on behalf of the minor . . . generally will be required for any case where personal injury or wrongful death settlement proceeds are at issue."

REPRESENTATION ISSUES

Attorneys handling the claims of minors need to consider a variety of issues before undertaking representation, including:

- Who is the client? (See *Protecting Minors' Money* on page 1 of this issue.)
- What are the respective roles of the parent, guardian, and conservator?
- What form of release will be required by the paying party, and who will sign it?
- How will the settlement funds be handled?

The attorney needs to answer the first question at the beginning of his or her involvement in the claim. In most circumstances, the first contact comes from a parent. The attorney must be watchful for situations in which an actual conflict develops. In that instance, the attorney must withdraw. More common are "likely" conflicts that would require the attorney to obtain informed consent from both parties before proceeding. DR 5-105(A)(2). Obtaining informed consent from a minor may be difficult, if not impossible, so the safer practice may be to represent only the parent or other fiduciary.

WHO HAS AUTHORITY?

Another source of difficulty is a frequent misunderstanding of the roles of parent, guardian, and conservator. A par-

ent generally lacks the legal capacity to enter into a release agreement on behalf of the child. *Ohio Casualty v. Mallison*, 223 Or 406 (1960). Thus, an insurer or other entity paying settlement funds to a parent runs the risk that the child will bring a claim on his or her own behalf. Traditionally, some liability insurers have been willing to take this chance where very small amounts (often less than $1,000) are involved. But in larger claims, the insurer will want an enforceable settlement agreement.

A guardian ad litem is a person appointed by the court to stand in the place of the child solely for the purpose of litigation. ORCP 27A. While that person may seek court approval of a settlement, such approval does *not* carry authority for the guardian to receive or maintain the settlement funds after the claim is resolved.

The role of a conservator is set out in Oregon Revised Statutes section 125. Note that the express powers of a conservator stated in ORS 125.445 include the settlement of claims for protected persons. Thus, a conservator is not required to obtain approval from the court before settling. However, some attorneys desire such approval of a proposed settlement. If the parties wish court approval, they must present the proposal to the probate court for consideration prior to agreeing to a settlement. The probate judge may not be willing to act where the parties have already reached a settlement before seeking court approval. The attorneys should also understand that there is no express statutory vehicle for this procedure.

PROTECTING FUNDS

Assuming that a settlement is reached by the appropriate person on behalf of the minor, the attorney must advise the client about options for how the funds can be held. As noted above, the general rule is that the courts will require that the funds be maintained by a conservator, whether or not the settlement receives court approval. The probate court will likely scrutinize plans for managing the funds controlled by the fiduciary. Holding the large sums in an account that bears little or no interest for a long period might not be considered a "prudent" investment. Both the fiduciary and the attorney could be exposed to liability if the minor later discovers any mismanagement.

Some courts are willing to approve very small settlements without a conservator when the funds are held in a restricted account. To date, however, these decisions seem to be made on a case-by-case basis and without specific statutory authority. At a minimum, the attorney proposing such an approach should be prepared to demonstrate to the court why a conservator is inappropriate. The attorney using this method should carefully document the reasons for recommending this approach in case the minor later claims harm caused by a failure to implement the more typical forms of protection.

It is unfortunate that Oregon has not expressly adopted a more cost-effective method for resolving claims of small value. Until such a procedure is adopted, however, attorneys involved in such claims must act with special care both to prevent harm to the protected person and to avoid subsequent claims of professional negligence.

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