

## **BBA Ethics Opinion 92-1**

Summary: A lawyer retained to prosecute a personal injury action on behalf of a minor represents the minor, not the parent or guardian. The lawyer should give great deference, however, to the judgment of the parent or guardian with respect to the disposition of any settlement proceeds from the action. If the lawyer suspects that the parent or guardian will squander or spend the money, the lawyer should counsel the parent or guardian that the settlement proceeds should be used for the benefit of the minor. If after so doing the lawyer reasonably believes that the parent or guardian nonetheless will squander or spend the money in a way not for the benefit of the minor, the lawyer should see court approval for a guardian ad litem to be appointed for the minor.

Facts: A lawyer is retained to represent a seven year old minor who is severely injured when bitten by a dog. The lawyer's fee agreement is with the mother (who is a single parent) as "parent and guardian" of the minor. The minor has a sister and a brother, and all three children and the mother are dependent upon public assistance. An offer by the insurer of the dog's owner to resolve the case with a structured settlement was rejected by the mother, who stated that she would rather have an immediate lump sum settlement for the minor. The lawyer believes that the matter will be resolved shortly by way of settlement in a substantial sum but is concerned with what the mother will do with the settlement proceeds. Specifically, the lawyer is concerned that the mother will squander or spend the money and the minor will never receive the benefit of the settlement proceeds. The lawyer has the following questions:

1. What is the lawyer's ethical obligation to both the child and mother with respect to the disbursements of the settlement proceeds?
2. Who should receive the settlement proceeds and in what manner?
3. What are the lawyer's ethical obligations under the circumstances to the mother and minor?

Discussion: Ethical Consideration 7-11 states in relevant part that:

"The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client,

Ethical consideration 7-12 provides that:

"Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf cast additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interest, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer

to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Canon 6 also states that: "A lawyer should represent a client competently." Where a guardian manifests a greater interest in obtaining money for herself than in serving the interest of her ward, counsel would not be justified in withdrawing unless some other attorney had been retained to handle the guardianship. In Re Fraser, 523 P.2d 921, 928 (Wash. 1974). In that case, the court also found that discipline of a lawyer was warranted where the lawyer neglected to file an accounting required by statute. The court did not find persuasive the lawyer's excuse that the guardian was unwilling to sign the accounting unless it provided for payments to which she thought she was entitled. *Id.* at 928. The Washington Supreme Court stated that the lawyer should have presented his accounting to the court and explained the situation. Also see Fickett v. Superior Court of Pima County, 558 P.2d 988 (Ariz. App. 1976) (summary judgment in malpractice action brought by conservator of incompetent's estate against former guardian and attorneys reversed where factual questions were presented as to whether a lawyer was negligent in failing to discover the guardian had embarked on a scheme of misappropriation, conversion, and improper investment), and Note, "What Constitutes Negligence Sufficient to Render Attorney Liable to Person other Than Immediate Client," 61 A.L.R. 4th 464, 509.

Since the minor has no legal capacity to act, suit must be brought on her behalf by a parent or guardian. Where a parent has custody of the minor, that parent is ordinarily the most logical and suitable person to bring suit. Nonetheless, the lawyer's client is the minor, not the parent or guardian. This does not mean that the lawyer should substitute his judgment for that of the parent or guardian with respect to the disposition of settlement proceeds. In the usual case, the lawyer should give great deference, particularly to the judgment of the parent. On the other hand, where the circumstances indicate, as here, the possibility that the parent or guardian may squander or spend the money in a way so that the minor will never receive the benefit of the settlement proceeds, the lawyer has an affirmative obligation to counsel the parent or guardian that the settlement proceeds should be used for the benefit of the minor. If after doing this the lawyer reasonably believes that there is a substantial likelihood that the settlement proceeds would nonetheless be squandered, the lawyer should seek instructions from the court which may include appointment of a guardian ad litem. See, e.g., G.L. c. 231, § 140C 112 as enacted by St. 1991, c. 470.