

## **Welcome to the inaugural article of our new Probate and Public Benefits Corner!**

*Over the years, it has become apparent that a cross over between the personal injury practice of our members and the areas of probate and public benefits exists. Our very own Bridget O'Brien Swartz has volunteered to spearhead this new column that will highlight issues of relevance and importance in these areas to our members. We trust and hope our members will find this information helpful to their practices!*

*If you have issues of particular interest you would like addressed, please notify Bridget at [boswartz@dbfazlaw.com](mailto:boswartz@dbfazlaw.com).*

# Settlement Options Other Than a Conservatorship-Thank You, New A.R.P.P. Rule 53!

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You have arrived at a settlement for a minor or an adult in need of protection and now are faced with having to go to probate court to have a conservator appointed to finalize the settlement. Not so fast as the recently amended Arizona Rules of Probate Procedure (A.R.P.P.), specifically, Rule 53, provide for alternatives to a conservatorship.

Note, the threshold question is whether court approval is required for the settlement of claims for minors and adults in need of protection.<sup>1</sup> This has been debated over the years specifically with regards to the settlement of a minor's claim that is less than \$10,000.00. Why? Because of the perceived conflict between A.R.S. § 14-5103 and *Gomez v. Maricopa County*.<sup>2</sup> The former suggests that a settlement of a claim for a minor for less than \$10,000.00 does not require court approval while the latter stands for the proposition that court approval is required for any amount and that A.R.S. § 14-5103 merely provides for "facility of payment or delivery" of the settlement proceeds, as its title suggests. As for the adult in need of protection, unless

an individual otherwise has legal authority to settle a claim on behalf of such an adult, for example, pursuant to a valid financial power of attorney, court approval of the settlement of a claim regardless of the amount is required.

Thankfully, new Rule 53 of the Arizona Rules of Probate Procedure, which became effective January 1, 2020, provides clarity as to when court approval of the settlement of a claim for a minor or adult protected person is required. Rule 53(a) addresses when court approval is required, Rule 53(b) who may approve, and Rule 53(c) permissible orders. If there is no conservator, court approval of the settlement of a claim for a protected person is required in ALL instances; however, for those protected persons who already have a conservator,<sup>3</sup> claims NOT involving personal injury or wrongful death are permitted to be settled without court approval.<sup>4</sup>

So, court approval is required for settlement of a personal injury or wrongful death claim for minors and adults in need of protection but not any other claims where a conservator exists. As for who

may approve the settlement of a claim, any superior court judge or judge *pro tem* has such authority for minor's claims that do not exceed \$10,000.00;<sup>5</sup> otherwise, court approval must be obtained in a probate proceeding, meaning minor's personal injury or wrongful death claims in excess of \$10,000.00 and an adult protected person's personal injury or wrongful death claim of any amount.

You may be wondering what the good news is at this point. There is something to be said for clarity as to when court approval is required and by whom even if one would rather forego the process if possible. These requirements protect many a lawyer from the settlements he or she has spent years litigating to compromise from later unraveling. They also ensure that the settlement is in the protected person's best interest when he or she cannot otherwise determine that for him or herself.

But the best news is yet to come! Rule 53(d) provides for "permissible orders" the

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# Settlement Options

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court may enter after considering a variety of factors—“the amount and nature of the settlement proceeds, the age and sophistication of the minor or adult in need of protection and that person’s living arrangements and ongoing needs.” Beginning with the obvious, one permissible order is to appoint a conservator.<sup>6</sup> The other permissible orders include a variety of options, some of which pre-existed the rule change in Title 14, such as a structured settlement<sup>7</sup>, establishment of an appropriate trust<sup>8</sup>, and distribution of proceeds to an appropriate person under A.R.S. § 14-5103 (remember the “facility of payment or delivery” statute?).

Other less obvious and new permissible orders include establishment of an appropriate trust, including a special needs trust, without continuing court supervision under appropriate circumstances as authorized by A.R.S. § 14-5409 (“single transaction authority”). Add to the foregoing deposit or funding of the proceeds to a qualified tuition account, Achieving a Better Life Experience (ABLE) account, dignity account or pooled special needs trust.<sup>9</sup> Some of these accounts cannot be restricted by court order and, if the amount of monies deposited to the arrangement is not substantial or independently managed by other than a lay person, bond may be waived as well as continued court supervision such as the requirement to file annual accountings. Throw into the mix distribution of settlement proceeds to a custodian of a Uniform Transfer to Minors Act (UTMA) account which is not legally available to a minor until age 18<sup>10</sup> and, along with a special needs trust (individual or pooled) and ABLE account, is excluded or exempt for purposes of an individual’s financial eligibility for governmental assistance programs such as Supplemental Security Income (SSI) and the Arizona Long Term Care System (ALTCS), the long term care program of the Arizona Health Care Cost Containment System (AHCCCS).

If one of the vehicles or arrangements now identified in Rule 53(d) is an option in a particular case, and, as mentioned above, the amount at issue is not substantial or the arrangement will be managed by other than a lay person, the attorney may relay on obtaining “single transaction authority”<sup>11</sup> to obtain approval of the settlement, authority for a designated individual to sign all settlement documents, as well as authority to deposit the proceeds to the arrangement without having to seek the appointment of a conservator or subject the matter to the ongoing oversight of the probate court. Now, isn’t that good news worth waiting for?! ■

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## Endnotes

1 See A.R.S. § 14-5101.10.

2 175 Ariz. 469, 857 P.2d 1323 (App. 1993).

3 Or an agent/attorney-in-fact under a valid power of attorney for an adult.

4 See A.R.P.P. Rule 53(a)(1) and (2).

5 See A.R.P.P. Rule 53(b)(1).

6 See *id.* at 53(d)(1).

7 See A.R.S. § 14-5424.D.

8 See *id.*

9 A.R.P.P. Rule 53(d)

10 See A.R.S. §§ 14-7656(B) and 14-7670.2.

11 See A.R.S. § 14-5409.