TOP 10 TIPS

Leading to Settlement Approval in Probate Court

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She received her Bachelor of Arts degree from the University of Notre Dame (cum laude). Bridget worked in the field of mental health with children and adolescents. She then returned to school to pursue her law degree at Arizona State University, where she received her juris doctor in 1995 and Masters in Public Administration in 1997.

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After years of litigating a personal injury or medical malpractice case, the last thing anyone wants is approval of a settlement in probate court to be inordinately delayed or fail. So, in this issue we share some pointers, what we might refer to as "the top ten tips," to arrive at a favorable and timely outcome in probate court—an order approving the settlement that seals the deal!

Note, these top ten are not discussed in any particular order and, if any of our readers would like to learn more about any of them, please let us know so that we can elaborate on some of these tips in later issues. We have already identified a few that merit greater attention and that will be the subject of discussion in subsequent columns.

10. Make the judicial officer's job easier by doing the math for him or her!

The bottom line, that is, the net settlement to the protected person often gets lost in a petition's discussion about the gross settlement, attorney's fees and costs, and medical liens. Conclude your petition with a summary of the math—gross settlement less attorney's fees less costs less liens equals net settlement. As for the net settlement, summarize how much is going where-structured settlement annuity and lump sum cash which may include a special needs trust and/or Achieving a Better Life Experience (ABLE) account. If the net settlement is to be allocated among multiple claimants, delineate that in the summary as well.

9. Provide notice to each and every interested person!

Review the notice provisions in A.R.S. § 14-5405 to determine when personal service is required or notice delivered by mail will suffice. And that parent who is alleged to be "out of the picture" or uninvolved with the minor/protected person, unless his or her parental rights have been legally terminated, he or she is entitled to notice. Moreover, if his or her whereabouts are unknown, you must demonstrate efforts were made to identify his or her address and at a minimum, provide notice by publication. Notice by publication can be tricky to ensure that sufficient notice is provided in advance of the hearing.

8. Be prepared for Plan B!

What if you get to the hearing only to discover that something is missing, incomplete, or notice was not accomplished. You might propose to the court that it hear the matter allowing for the presentation of testimony and evidence in support of the petition, then take the matter under advisement until the "errors" are cured. Request the court set another hearing to allow sufficient time to remedy the issues, a hearing at which no one is required to appear and, if all is in order, the court may at that time enter the desired order.

TOP 10 TIPS

7. Be sure to address any and all liens!

Be prepared to state in your petition and at the time of hearing that all known liens have been resolved and what efforts were made to compromise or reduce the liens. If a lien has not yet been fully resolved, in some circumstances, the court may approve the settlement and permit the attorney to hold back sufficient funds from the gross settlement in the attorney's trust account until such time as the lien is resolved, with a status report to be filed with the court.

6. Have the fiduciary training certificate!

If the petitioner is seeking to be appointed conservator, he or she must undergo fiduciary training prior to letters of appointment being issued effectuating his or her appointment. So, be sure to have the fiduciary training certificate in hand to present to the Clerk of the Court to have the letters of appointment issued. An order alone does not give a conservator legal authority to act so you'll need letters of appointment for the conservator to have the authority to sign off on a settlement.

5. Lodge the Order at least 5 days prior to hearing!

The rules require it and it will put you in the judicial officer's good graces. The judicial officer then has adequate time to compare the proposed form of Order with the petition in advance of the hearing. Also be sure to lodge the Order to Conservator signed by the nominated conservator. Bring extra copies of ALL of the orders to the hearing!

4. Utilize the appropriate Proof of Restricted Account from Financial Institution (PORA) form!

Oftentimes, it is contemplated that the net settlement proceeds or some portion of them will be held in a restricted conservatorship account for which proof of such restriction must be filed with the court. Recent rule changes modified the PORA form which is now known as Probate Form 10. This Form cannot be modified without a court order. So, if settlement funds will be deposited to other than an FDIC-insured account (such as a brokerage account), you will need to incorporate modification of Probate Form 10 in the petition. Be sure to run Probate Form 10 by the legal department of the financial institution at which the client intends to deposit the settlement proceeds prior to hearing to ensure that it will sign the form upon entry of an order. It's frustrating to all involved to get an order approving a settlement and deposit of the net settlement proceeds to a restricted conservatorship account only to find out that the designated financial institution will not sign the form, necessitating seeking an amended order.

3. Prepare a comprehensive affidavit in support of attorney's fees!

Start by reviewing Rule 33 of the Arizona Rules of Probate Procedure and *In re Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984). The judicial officer relies on the foregoing in exercising his or her discretion in determining the reasonableness of attorney's fees. Should you keep track of your time? YES, but if you do not you need to be prepared to reconstruct your time if requested by the court. Note, time is not all that matters. What also matters is the complexity of the underlying matter, challenges with which the attorney was met, the additional time and efforts expended to negotiate liens favorably, the amount of the attorney's fees in relation to the net settlement amount for the protected person, etc. Stay tuned for a more in-depth discussion regarding approval of attorney's fees in our next column.

2. Family members are not the only option to serve as a fiduciary!

How many of your clients may not be best suited to serve in the role of conservator for the protected person? Don't answer that question as it is rhetorical in nature. Whether alternatives to a family member serving in such capacity exist is oftentimes a function of the dollars at issue. Smaller sums do not justify the fees related to a corporate or private fiduciary serving. In that event, your best bet may be a structured settlement annuity for which payout is deferred until the minor is age 18 or a restricted conservatorship account. But for more substantial sums that require a level of management and protection your client may not be able to provide, nominating a corporate trustee or licensed private or professional fiduciary may be the way to go and much to your surprise, it may be the more cost effective option in the long run.

1. Consider the public benefits for which the protected person is eligible!

If the protected person is disabled, then he or she may be eligible for public benefits that are potentially impacted by a settlement. If he or she is financially needy, ditto. And do not overlook the impact of a recovery on other members of the protected person's family or household if they are also financially needy. Where there is an AHCCCS lien, it is a needs-based benefit to consider. And where there is an AHCCCS lien, there may be other needs-based benefits at play! Don't try to tackle these issues yourself but know enough to spot them and engage the assistance of a probate, elder law or special needs law attorney knowledgeable about such matters. ■