

### **Parens Patriae and Infants' Funds**

Grandma left \$25,000.00 in her last will & testament to each of her six grandchildren, all minors at the time of her death, living in different states. She left the bulk of her residuary estate to her husband. This should be a very simple probate proceeding, but, alas, it is not.

The legislature and the Courts carefully guard the funds of persons under disability, including "infants," persons under the age of majority. SCPA 2220 (1) provides that a bequest of \$10,000.00, or a distributive share, or the proceeds of an action for wrongful death or personal injury, may be paid to the infant's parent, but funds exceeding this amount must be paid to the Guardian of the infant's property. The posting of a bond, otherwise required, may be avoided under certain circumstances. [1]

If the infant resides in the jurisdiction where the decedent's Will was probated or the estate was administered, counsel for the fiduciary usually files a Petition for the appointment of the custodial parent as Guardian of the infant's property. If the infant resides in another jurisdiction, the Guardian must be appointed in the jurisdiction of the infant's residence and the Court will direct payment of the infant's property to the foreign fiduciary. [2]

SCPA Article 17, which addresses guardians and custodians, and SCPA Article 17-A, concerning guardianships of Mentally Retarded and Developmentally Disabled Persons,

intersect where it pertains to management of infants' funds. SCPA §1761 specifically provides that the provisions of Article 17 to the extent "that the context thereof shall admit," are equally applicable to proceedings under Article 17-A.

### **Withdrawal of Infants' Funds**

Titled "Administration of Infants' Property," the statute and cases provide guidance about permissible withdrawals. [3]

The underlying principle of the Court's management of infants' funds is the preservation of the funds and ultimate, in fact, delivery to the infant upon attaining majority. [4] Permission to withdraw is within the sound discretion of the Court which must exercise its power with care. [5]

As parents have a primary duty of support, the guardian should not use the child's money for his support and education. However, where the parents' income and assets are insufficient to adequately provide for his needs, the guardian may be permitted to use the funds for higher education or unusual surgical, medical or dental expenses. [6]

Maternal great-grandmother, appointed as guardian of the ward, whose mother died in the World Trade Center disaster, petitioned for a stipend for herself and monthly withdrawals for the infant's support. The Court appointed a guardian ad litem for the infant; reiterated its duties with respect to the infant's funds; denied the stipend and permitted monthly withdrawals in reduced amounts. Attorneys must be mindful of the duty imposed by the Court upon counsel for the guardian of the property to insure that the guardian abides by Court orders and seeks approvals before going forward. There, counsel for the guardian had failed, inter alia, to instruct the client to have an Investment Advisory Agreement approved by the Court in accordance with SCPA §1708 (2) (c). [7]

Occasionally, requests for withdrawals involve expenditures which would benefit the entire family. A petition by the infant's father for the infant's funds for the purchase of a family home was denied on the grounds that the petition had not demonstrated to the Court's satisfaction that he was without adequate means of his own to finance the purchase. [8] The guardian may be directed to contribute part of her own funds to pay for items both her ward and her other children will enjoy. [9]. The Court acknowledged the problem of maintaining peace in a family with disparity between an infant with guardianship funds and other children in Matter of Curry, holding "It is probable that the vast disparity in wealth between Gregory and his two younger brothers, not to say his parents, bids fair to create stresses within the family. Nevertheless, the law is clear that the funds must be preserved for the infant's benefit when... he attains majority." [10].

Petitions for withdrawals may come in the form of requests for regular withdrawals for a specific purpose. [11] Needless to say, meticulous support for every expense is required. [12]

Finally, the amount sought to be withdrawn and the purpose for which it is intended must be weighed against the funds available. Petitioner/Guardian of the infant petitioned for withdrawal of \$15,081.53 for pre-paid funeral arrangements; a headstone and funeral flowers while the infant was very much alive. The Court, reiterating the purpose of the statute, denied the request. The entire guardianship fund amounted to \$20,858.34 and the proposed expenses were not reasonable given the value of the guardianship estate. "Virtual exhaustion of the estate account for funeral expenses is unreasonable," the Court held. [13]

### **Permissible Investments**

\_\_\_\_\_ SCPA §1708(2)(b) authorizes the guardian to invest in United States Savings Bonds, treasury bills, treasury bonds and notes, or bonds and other State of New York government obligations. A security bond may then be dispensed with, wholly or in part. In addition, a bond may be dispensed with if the property is deposited into a federally insured account with a named bank, trust company or credit union, jointly with the depository institution, and subject to Court order. [14]. The Court may also direct that an account be established jointly with the Guardianship Clerk. Joint custody arrangements clearly limit the guardian's withdrawal powers. Nevertheless, often, the account will not be properly titled from the inception, permitting unauthorized withdrawals. Where a guardian failed to establish the account as directed, the Court restrained the depository institutions from permitting withdrawals; suspended the Letters of Guardianship; and appointed a guardian ad litem for the infant to commence proceedings to protect the infant's interest. [15] Counsel involved in these cases, in whatever capacity, should insure that the account is properly titled.

Guardianship funds may also be invested pursuant to an investment advisory agreement with a financial services entity. The guardian of the property must present the proposed agreement to the Court for approval. [16] Unfortunately, few brokerage companies have any notion of such an agreement. Counsel may suggest that the company add a rider to its standard client agreement, as it must provide that the funds be invested in accordance with the Prudent Investor Act. [17]

### **Required Accountings**

\_\_\_\_\_ The guardian of an infant's property within the counties of the City of New York and within the counties of Nassau, Orange, Suffolk and Westchester must account annually

within 30 days after the anniversary of his appointment and within every other county in the month of January. Accountings are formal in nature; must list property received; disbursements made; income earned and the balance in the guardian's hands. Guardians of infants' funds invested pursuant to SCPA §1708 may be excused from annual accountings, as the Court, when the account is established jointly with the Clerk of the Court, or the depository as joint tenant, has records and regularly produced statements [18]. Accountings are examined and, as most are routine, approved without more. If a nettlesome question arises, or the guardian made unauthorized withdrawals, or the account demonstrates that the guardian has a conflict of interest, the Court may appoint a guardian ad litem for the infant. Decisions generated often do not appear in the official reporter, but, instead, will be published in the New York Law Journal.

Failure to file the account may result in the suspension or revocation of Letters of Guardianship. [19]

### **Gifts to Infants - Avoiding the Appointment of a Guardian of Property**

Unfortunately, there is little counsel can do, after the fact, to obviate the problems surrounding safeguarding an infant's funds. A guardian of the property must be appointed; investments approved; withdrawals need to be navigated; accountings are time consuming and costly. Attorneys familiar with Article 17-A guardianship proceedings in the Surrogate's Court for Mentally Retarded or Developmentally Disabled Persons appreciate the bewildering array of forms required to create the guardianship: the petition; form DSS-3909, Request For Information Guardianship Form, which sets forth the members of the proposed guardian's household, as well as addresses where the proposed guardian previously resided and which is sent to the State Central Register of Child Abuse and

Maltreatment to inquire if the proposed guardian was ever the subject of this type of proceeding; a Joinder and Statement of Preference to be signed by an infant over the age of 14; waivers and consents from persons entitled to notice as they are equally entitled to guardianship.

Surprisingly, many attorneys fail to include in Wills and Trusts the most rudimentary provisions to direct how infants' funds are to be administered, even where a testator has a family, or where payments to infants are anticipated. Where assets are modest, and a formal trust is not desirable, the testator may direct the Executor to manage the infant's bequest until the infant reaches majority. The Executor is the "donee of a power during minority." [20] The Executor/donee is a fiduciary for the infant, and is therefore subject to the Prudent Investor Act. [21] Title to the funds nevertheless vests in the infant and the Executor's prayer to transfer the infant's funds to a trust for the infant's benefit must be denied, as the donee of a power during minority has no title to convey. [22] But an Executor/donee who petitioned the Court for permission to pay a \$5,000.00 bequest to the infant's mother, residing in Greece with the infant, was granted. The bequest was modest and the transfer appeared to be in the best interest of the infant. [23] Care in drafting is essential if a donee of a power during minority is desired. Extensive powers given the fiduciary may create a trust and vest title to the property in a Trustee. [24]

While a bequest not exceeding \$10,000.00 may be paid to the parent, this may not be a desirable option, where the testator has expressed distrust of the custodial parent. Counsel could consider drafting a provision giving the Executor discretion to either make payment to the parent or to establish a Uniform Transfers to Minors Act account for the infant. [25]

There appears to be no limit on the amount constituting the gift. Personalty and real estate may be included. [26] Annual accounts are not required. There is no Court oversight. The fund must be used for the benefit of the minor, who may have access at age 21(or 18). [27] The custodian may not discharge his duty of support of the minor by means of the fund. The statue does permit a suitable alternative to the creation of a formal trust and may be preferable to making the Executor a donee of a power during minority. An infant who has attained the age of 14, his guardian, an adult member of his family, a transferor of the gift which established the account, a transferor's legal representative, as well as a successor custodian, may petition the Court to compel the custodian to account. [28] The sheer number of persons who may bring this petition may present a sufficient safeguard to proper conduct by the custodian. It is best to avoid naming the parent as custodian of a Uniform Transfers to Minors Act account, as there are significant risks that the property may be included in the parent's estate for estate tax purposes.

Where there are substantial assets, a formal trust for minors should be included in the Will. The Trustee can be granted discretion to utilize the account for health, maintenance, education and support; to invade the trust to finance graduate education; to aid the infant in creating a business or buy a home. The possibilities are limitless. The trust should provide for the appointment of a Trustee, as well as the nomination of successors. It may be wise to include a provision to create a Supplemental Needs Trust if the infant is incapacitated.

Grandma, who wished to make a bequest of \$25,000.00 to each of her grandchildren residing in different states could have given that gift to her husband with the request, but without creating a trust thereby, that grandpa make a gift of \$25,000.00 to each of the

grandchildren. The gift to grandpa is deductible for estate tax purposes and grandpa could then make the gift to the grandchildren in any way he wishes, having his deceased wife join in annual exclusion gifts in the year of her death. In short, counsel's thoughtful approach in drafting planning documents may avoid a costly and time consuming guardianship proceeding.

### Endnotes

[1] SCPA §1708; c.f. EPTL §11-1.1(19)

[2] SCPA §2221; EPTL 13-3.4

[3] SCPA §1713

[4] Gaffney v. Constantine, 87 N.Y.S.2d 131 (S. Ct. Queens Cty., 1949)

[5] SCPA §1713 (1);(2); Matter of Esther Polinsky, 33 Misc.2d 1002 (Sur. Ct., Kings CTY., 1962); c.f. Ahders v. Southampton Hosp., 90 AD2d 508 (2d dept. 1982); Matter of the Guardianship of Antonio Osso, NYLJ 6/27/08, p. 40 col. 6 (Sur. Ct. Westchester Cty.)

[6] Matter of Curry, 128 Mis.2d 760 (Sur. Ct. Dutchess CTY., 1985)

[7] id. Matter of M.P.G., 24 Misc.3d 1232A (Sur. Ct. Kings CTY., 2009)

[8] Matter of the Petition of L.H., Guardian of the Property of T.C.H., Infant, NYLJ,12/16/2010, p. 34, Col. 4. (Sur. Ct. Kings CTY.)

[9] Matter of Alfaro, NYLJ 6/20/2000, p. 25, col. 5 (Sur. Ct. Suffolk CTY.)

[10] Matter of Curry, 128 Misc.2d 760, 762, op. cit.

[11] id.

[12] Matter of Esther Polinsky, 33 Misc.2d 1002 (Sur. Ct. Kings CTY., 1962)

[13] Matter of the Guardianship of Order Brian C, NYLJ 8/27/2009, p. 41, col. 1 (Sur. Ct. Richmond CTY.)

[14] SCPA §1708(2)(a)

[15] Matter of Guardianship of Gianni V., NYLJ 2/27/2013, p.22 col.5 ( Sur. Ct. Bronx CTY.)  
Letters may be revoked or suspended for misconduct or disqualification. SCPA §§719;  
711

[16] SCPA §1708(2) (c)

[17] EPTL §11-2.3; Matter of the Petition of Emily Ross Terry as Guardian of the Property of Lucy Hughes Kates, NYLJ 10/22/10, p. 30 Col. 5 (Sur. Ct. New York Cty.)

[18] SCPA §1719

[19] Matter of the Guardianship of Gianni V., NYLJ 2/27/2013, p. 22, col. 5 (Sur. Ct., Bronx Cty.) op.cit; Matter of Jessica Marie Strazzera, NYLJ 11/13/02 p.25, col. 2 (Sur. Ct. Richmond Cty.) (Guardian failed to file his annual account. He voiced his exasperation with the Court by returning, uncompleted, the forms the Court had sent to him to fill out, adding the handwritten words: “Drop dead.” Surrogate, John Fusco, brooking no nonsense, ordered the guardian to appear and “show cause” why the Public Administrator of Richmond County should not be appointed guardian of the property of the infant and why the guardian should not be found in contempt of court).

[20] SCPA § 103 (17); EPTL §11-2.3 (e) (1); Matter of Ruland, 18 Misc.3d 1136 (A) (Sur. Ct. Nassau Cty., 2008) NY Slip Op. 50331

[21] EPTL §10-3.1; Matter of Ruland, 18 Misc.3d. 1136 (A), op. cit.

[22] Matter of Zuckerman, 175 Misc.2d 974 (Sur. Ct. Nassau Cty., 1998)

[23] Estate of Antonia Coutros, 35 Misc.3d 1212 (A) (Sur. Ct. Bronx Cty.)

[24] In re Maleszewski, 42 AD3d 737 (3d Dept., 2007)

[25] EPTL §7-6.1 et seq.

[26] EPTL §7-6.1 (e); EPTL §7-6.9

[27] EPTL §7-6.20

[28] EPTL §7-6.19 (a);(b)

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