

# SETTLING THE CLAIMS OF MINORS

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## I. Introduction.

Iowa law does not allow minors (persons younger than 18 years) to sue for his own injury. Iowa Rule Civil Procedure 1.210. Neither can they compromise, settle, or release a damage claim for his own injuries. Iowa Code §633.647(5), 633.648. Thus, a conservator must be appointed to settle their claims.

An exception exists, however, for settlements valued at less than \$25,000. Iowa Code §633.574 provides for a procedure in lieu of conservatorship. This section provides that the conservatorship, with its attendant procedural requirements and expenses, can be avoided in those situations where a minor is entitled to property not exceeding in the aggregate \$25,000. Such property must be delivered to the parent or other person entitled to custody of the minor, and it is for the use of the minor. A written receipt from the parent or other person constitutes an acquittance of the person making the payment or delivering the property.

## II. Conservatorships.

### A. History/What It Is.

1. A “conservator” is the person appointed by the court to have custody and control of the property of the ward. §633.3(7). Iowa Code §633.3(20) provides that the term “guardian of the property” shall be synonymous with the term “conservator”. Conservators can be distinguished from guardians, who are appointed by the court to have custody of the person of the ward. §633.3(19).
2. A conservatorship may be either voluntary or involuntary. If the minor is younger than 14, the conservatorship must be involuntary, however, if the minor is between 14 and 18 years old, the conservatorship may be voluntary. §633.552.

### B. Application/Creation of Conservatorship.

1. Who should be appointed?

The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as a conservator. §633.559 and §633.571. The presumption of parental preference as to custody of a minor child is rebuttable. *In Interest of Leehey*, 317 N.W.2d 513 (Iowa App. 1982). If there is a question as to who should be appointed conservator, courts apply a balancing test to determine the best interest of the child. See *A. G. Patton v. Patrick*, 276 N.W.2d 390 (Iowa 1979) (maternal grandparents preferred over natural father who is described as living a “Bohemian” lifestyle, and who opted to refer to the child as “Goober” until the child reached sufficient age to select his own name).

2. Standards for appointment.

The appointment of a conservator requires that the ward be either a minor or “a person whose decision-making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs.” § 633.566(2)(a).

3. Petition

A Petition for appointment of conservator must be filed with the probate court in the county where the minor lives. The petition will be filed by the persons seeking to be appointed conservators, usually the parents of the minor. The filing fee for the petition is \$80.

**C. Notice and Representation.**

1. If the proposed ward is a minor, the court shall determine whether, under the circumstances of the case, the proposed ward is entitled to representation. Whether or not notice is given to the proposed ward is in the discretion of the court. If the court does determine that the proposed ward is entitled to representation, the court shall appoint an attorney to represent that proposed ward. After the determination regarding representation, the court shall set a hearing on the petition, and provide for notice on the determination regarding representation and the date for hearing. § 633.561(1)(b).
2. The court may take action to appoint an attorney for the proposed ward prior to service of the Original Notice upon the proposed ward. § 633.56(1)(c).
3. If notice is given, the proposed ward must be notified that he or she may retain his or her own attorney (instead of the attorney appointed by the court). The court may discharge the attorney appointed by the court if it appears upon the application of the proposed ward or any other interested person that the ward has privately retained an attorney who has filed an appearance on behalf of the proposed ward. § 633.56(1)(e).
4. Notice must also be provided to the parents if the proposed ward is a minor, and to the spouse and/or adult children if the proposed ward is an adult. §633.554.
5. Prior to authorizing a compromise of a claim for damages on account of personal injuries to the ward, the court may order an independent investigation by an attorney other than the attorney for the conservator. The cost of such investigation, including a reasonable attorney fee, shall be taxed as part of the cost of the conservatorship. § 633.648.

**D. Administration/Conservator's Responsibilities.**

1. **Fiduciary Status:** Conservators are subject to all provisions of the Iowa Code applicable to fiduciaries governing appointment, qualification, oath and bond. § 633.633. As a fiduciary, all decisions the conservator makes must be based on the ward's best interests.
2. **Liability:** Conservators are not personally liable for their actions, except for breach of fiduciary duty or willful or wanton misconduct. §633.633(A). Conservators are not personally liable for damages for acts of the ward. § 633.633(B).
3. **Bond:** §633.169 specifically requires that every fiduciary shall execute and file with the Clerk a bond with sufficient surety as provided, unless the probate code otherwise states. §633.178 states that upon the filing of an oath of office and a bond is required, the clerk then shall issue letters of administration to fiduciary, giving the fiduciary the powers authorized by law. It would appear that the probate court does not allow a fiduciary to exercise any powers until letters of administration are issued, which cannot be issued until a bond is filed. On the other hand, Iowa case law unanimously states that the failure of a fiduciary to formally qualify for filing for a bond does not invalidate the fiduciary's acts in the absence of any mismanagement on the part of the fiduciary. *Lincoln Joint Stalk Land Bank of Lincoln, Nebraska v. Mitchell*, 239 Iowa 995, 33 N.W.2d 388 (1948).
4. **Oath:** The proposed conservators must sign an oath, acknowledging the following:

We, the undersigned, do solemnly swear that as a court officers and as Guardians in the above matter, we will support the Constitution of the United States, and the Constitution of the State of Iowa; that we will render a true account of our office and our duties herein to the proper authority when required by law; that we will properly pay over the person or officer entitled thereto all money which may come into our hands by virtue of our said office; that we will properly account for all balance of money remaining in our hands at the termination of our office; that we will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers and securities, or other property appertaining to our said office, and deliver them to our successor or to any person authorized to receive the same; and that we will faithfully and impartially, without fear, favor, fraud or oppression, discharge all duties now or hereafter required of our office by law according to the best of our ability; and if we are executing this oath as ancillary fiduciaries and, if the courts so order, we will pay all claims allowed to residence to the State of Iowa, and will pay all legacies and distributive shares coming to such residents, so far as the assets of the said estate shall extend.

After the oath is signed, the clerk issues letters of administration, giving the fiduciary the powers authorized by law.

5. **Powers of a Conservator Without Court Authorization:** Section 633.646 provides the powers of a conservator without order of court:
  1. To collect, receive, receipt for any principal or income, and to enforce, defend against or prosecute any claim by or against the ward or the conservators; to sue and defend claims in favor of, or against, the ward or the conservator.
  2. To sell and transfer personal property of a perishable nature and personal property for which there is a regularly established market.
  3. To vote at corporate meetings in person or by proxy.
  4. To receive additional property from any source.
  5. ... To continue to hold any investment or other property originally received by the conservator, and also any increase thereof, pending the timely filing of the first annual report.
6. **Powers of a Conservator Requiring Court Authorization:** Section 633.647 provides conservators shall have the following powers subject to the approval of the court after hearing and as the court may prescribe:
  1. To invest the funds belonging to the ward;
  2. To execute leases;
  3. To make payments to, or for the benefit of, the ward in any of the following ways;
    - a) directly to the ward;
    - b) directly for the maintenance, welfare and education of the ward;
    - c) to the legal guardian of the person of the ward; or
    - d) to anyone who at the time shall have the custody or care of the person of the ward.
  4. To apply any portion of the income or of the estate of the ward for the support of any person for who support the ward is legally liable;
  5. To compromise or settle any claim by or against the ward or the conservator;
  6. To adjust, arbitrate, or compromise claims in favor of or against the ward or the conservator; ...
  7. To do any other thing that the court determines to be in the best interest of the ward and the ward's estate.

**E. Reporting Requirements:**

1. Initial Inventory: A conservator is required to file an inventory within 60 days of the conservator's appointment. The inventory shall include all property of the ward that has come into the conservator's possession, or of which the conservator has knowledge.
2. Supplemental Report: When additional property comes into the possession of the conservator or to the knowledge of the conservator, a supplemental inventory shall be filed within 30 days.
3. Other Reports: Additional written verified reports and accountings must be filed (1) annually unless the court otherwise orders on good cause shown, (2) within 30 days following the date of removal, (3) upon filing resignation and before the resignation is accepted by the court, (4) within 60 days following the date of termination, (5) at other times as the court may order.
4. Annual Report Requirements: The annual reports are due 60 days after the anniversary date of the creation of the conservatorship and must include the balance of funds on hand at the close of the last previous accounting period and all amounts received during the period covered by the accounting, all disbursements made during that period, any changes in investments since the last report, the amount of the bond and the name of the surety on it, the residence or physical location of the ward, the general physical and mental condition of the ward, and such other information as shall be necessary to show the condition of the affairs of the conservatorship.
5. The clerk of court will notify the conservator in writing of the reporting requirements. Reports of conservators shall be reviewed and approved by a district court judge.

**E. Termination of Conservatorship.**

1. A conservatorship shall terminate when the ward reaches full age, upon the death of the ward, or upon determination by the court that the conservatorship is no longer necessary. §633.6705
2. In addition, when the assets of the minor ward's conservatorship are exhausted or consist of personal property only of an aggregate value not in excess of \$25,000, the court upon application or upon its own motion, may terminate the conservatorship. §633.681 The order for termination shall direct the conservator to deliver any property remaining after the payment of allowed claims and expenses of administration to a custodian, and have the same force and effect as if delivery had been made to the ward after obtaining majority.

**III. Persons Without Mental Capacity to Contract.**

The provisions in section II apply not only to minors, but also to those persons whose decision-making capacity is so impaired that they are unable to make, communicate or carry out important decisions

concerning their financial affairs. Thus, if there is some question that the claimant is not competent to settle their own claim, it is worth considering creating a conservatorship to ensure that the settlement and release signed by the claimant are enforceable.

#### **IV. Special Considerations.**

- A. **Costs.** Prior to finalizing a settlement, the costs associated with the conservatorship procedure should be considered. These include the \$80 filing fee, the cost of a bond, and the cost of the guardian ad litem fees. While we have been successful in having the bond requirement waived in certain situations, some judges take the position that a bond is required in all conservatorships and that the court has no authority to waive this requirement. If the insurance company is not willing to cover the cost of the bond, it should be made clear to the parent that this will be a cost for which they are responsible.
- B. **Reporting Requirements.** During settlement negotiations, the parents must be made aware of the annual reporting requirements. They are required to report to the probate court annually and request authority to use the funds until their child reaches majority or the conservatorship is terminated. While the reports are not cumbersome, they may wish to seek legal advice. If the insurance company is not willing to cover these costs, it should be made clear to the parents during settlement negotiations.
- C. **Fiduciary Duties.**
  - 1. It must be made clear to the parents that they are fiduciaries. This means that they must act in the best interest of the ward and use diligence to preserve and protect the funds in the conservatorship. They are responsible for the settlement funds, and they are liable to the ward for any mismanagement of those funds.
  - 2. It is very important that the parents understand that the settlement funds belong to the child. This means that the funds must be managed separately from the parents' money. For example, the funds must be in a separate bank account and the funds must be spent for the benefit of the child.
  - 3. **Court Approval.** The responsibilities and powers of the conservators are listed above. Note that spending the funds requires court approval. While it is possible to obtain court approval for payments made out of the funds after the payments are made, the Code does require pre-approval of such expenditures. It would be advisable to obtain an order from the court allowing certain expenditures to be made as soon as the conservatorship is created (for example, payments for medical expenses, school expenses, and/or special needs of the child). If expenditures are made without approval of the court, the conservator could be required to reimburse the child for those expenses if not approved by the court after they are made.
  - 4. The conservators must keep detailed records of their activities as conservators, including receipts and disbursements of funds.

5. Legal Remedies for the Child. If the conservator does not carry out his or her fiduciary duty, the ward has a legal remedy against them for their violation of these duties.

**D. Polk County v. Rural Counties.**

In all counties in Iowa, except for Polk County, probate matters are heard by the district court judges who also hear various civil and criminal matters. In Polk County, however, one judge hears all probate matters. As a general rule, the probate judge in Polk County enforces a philosophy that parents should be responsible for all expenses associated with raising a child unless there are exceptional circumstances (such as extreme poverty, substantial medical expenses). As a very general matter, judges in the other counties may take a more relaxed position with regard to such matters.

**E. Structured Settlements.**

1. Considering all of the special issues noted above, it is advisable to always consider a structured settlement in settling the claims of minors. By employing a structured settlement, the insurance company and the parents avoid many of the costs associated with a conservatorship.
2. When a structure arrangement provides that funds will only come into the possession of the child after the child reaches majority, courts do not require that a bond be posted. In addition, the conservatorship can be terminated immediately after the child's claim has been settled, because there are no assets in the conservatorship. The parent can avoid the reporting requirements that would be imposed if there was money in the conservatorship. Finally, the parents do not have to seek permission from the court to spend the child's funds.