

NOTES

PROBLEMS OF ATTORNEYS' FEES, SETTLEMENTS, AND PROTECTION OF THE ESTATE ARISING FROM A MINOR'S TORT CLAIM

I. INTRODUCTION

At common law, and in Missouri today, "A 'minor' is any person who is under the age of twenty-one years. . . ."¹ All forty-eight states have adopted legislation granting minors certain special rights and privileges and imposing on them certain disabilities² to protect the immature and inexperienced³ minors from their own improvident acts, and to guard them against exploitation by those of more mature years.⁴ Despite the exceptional safeguards generally afforded minors by state statutes, in many instances the interests of these persons are not adequately protected. Most members of the Missouri Bar believe this to be true in Missouri. Considering the Missouri provisions relating to the guardianship of minors, the prosecution of minors' suits, and minors' contracts, certain statutory "gaps" are thought to exist when a minor has a tort claim which he wishes to settle or prosecute to judgment.⁵

Assume *M*, a minor, has a tort claim against *T*, tort-feasor. Three distinct problems are raised by this basic situation: (1) *M*, or *M* and his parent, may wish to enter into a settlement with *T* rather than prosecute the claim to judgment. But *T* will be reluctant to settle because *M* is not bound by his contracts unless he affirms them after reaching his majority.⁶ *M* may therefore effectively avoid a release given to *T* and collect from *T* a second time. (2) When *M* seeks to employ an attorney, the attorney, like *T*, may be reluctant to deal with the minor because of the latter's power to avoid his contractual obligation to pay the attorney's fees. (3) If *M* is awarded a judgment, a further problem arises in regard to the preservation of the proceeds of the judgment for the minor until he reaches his majority. The belief held by some judges and attorneys—that the existing law

1. MO. PROB. CODE § 475.010(4) (1956).

2. 5 VERNIER, AMERICAN FAMILY LAWS 3 (1938).

3. West St. Louis Trust Co. v. Brokaw, 232 Mo. App. 209, 102 S.W.2d 792 (1937).

4. Fenn v. Hart Dairy Co., 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

5. While similar or other problems may exist in some other areas of the law concerning minors, this note considers only the problems relating to the minor's tort claim.

6. MO. ANN. STAT. § 431.060 (Vernon 1949).

is inadequate to deal with these problems—has led them to adopt various practices to bridge the statutory gaps.⁷ During the course of this discussion the existing law will be examined to determine whether such practices are justified, and if so, whether they are acceptable means to accomplish the desired ends. Corrective legislation will be suggested in those areas in which it is believed that either the existing law or the present practices are not satisfactory.

II. EXISTING LAW⁸

The existing law relating to the problems presented will be considered in three groups: probate jurisdiction of minors and minors' estates, rights of parents, and the method by which a minor may prosecute his suit, including the powers of his representative in that suit.

(a) *Probate Jurisdiction of Minors and Minors' Estates*

"A guardian is *one appointed by a court* to have the care and custody of the person or estate, or of both, of a minor. . . ."⁹ (Emphasis added.) The Missouri Constitution confers on the probate court jurisdiction "of all matters pertaining to . . . the appointment of guardians and curators of minors. . . ."¹⁰ Complementary to this constitutional provision is the statute defining the general jurisdiction of the probate court, which also provides that the probate court shall have jurisdiction over all matters pertaining to the appointment of guardians.¹¹ These provisions have been construed as vesting in the probate court *exclusive* original jurisdiction to appoint guardians.¹² Section 475.130 provides that the duties of guardians shall be performed "upon such terms as may be prescribed by the probate court,"¹³ thereby subjecting the control and management of minors' estates to the supervision of the probate court.¹⁴ Since the probate court also has exclusive original jurisdiction to appoint guardians,

7. During the course of this note, and especially in the section entitled *Present Practice*, reference will be made to various attitudes, practices, and procedures of courts and attorneys which currently exist. As authority for all such statements, the writer consulted several attorneys and judges.

8. Unless otherwise indicated statutes under which various cases have been decided were, as far as is pertinent to this discussion, essentially identical to statutes in force today.

9. Mo. PROB. CODE § 475.010 (1956). This definition is expressly made applicable to all code provisions relating directly to guardians unless the context of a particular section indicates otherwise.

10. Mo. CONST. art. V, § 16 (1945).

11. Mo. PROB. CODE § 472.020 (1956).

12. *Ross v. Pitcairn*, 179 S.W.2d 35 (Mo. 1944); *In re Estate of Mills*, 349 Mo. 611, 162 S.W.2d 807 (1942).

13. Mo. PROB. CODE § 475.130 (1956). The predecessor to this section used the word "authorized" in place of the word "prescribed." See Mo. REV. STAT. § 457.420 (1949).

14. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

and has the power to control them in the performance of their duties, the court indirectly acquires exclusive original jurisdiction in the control and management of minors' estates.¹⁵

Among the powers of a court-appointed guardian is one which enables him, with the approval of the probate court, to bind the minor's estate contractually.¹⁶ With this power the guardian, upon approval of the probate court, can settle a minor's claim and execute a release to the tort-feasor which is binding on the minor. Similarly, the guardian can contractually bind the minor to pay the attorney's fees. Since the guardian of the minor's estate is the proper person to prosecute the minor's claim,¹⁷ he has the right to receive the proceeds of any judgment. The funds in the hands of the guardian are adequately protected, for the guardian is constantly under the supervision of the probate court and is required to execute a bond before entering upon the duties of his office,¹⁸ the bond being conditional on the faithful administration of the estate.¹⁹

In light of these guardianship provisions, the problems relating to settlements and attorneys' fees are capable of easy solution. But it is contended by some attorneys that the provisions, although protecting the minor from any malfeasance of the guardian, still do not adequately insure that the proceeds of the judgment will be available for the minor when he reaches his majority.

When a guardian is appointed there are certain costs of administering the estate which are chargeable to the estate.²⁰ The bonding companies charge a minimum annual premium of ten dollars for the required bond. Attorneys' fees for filing the necessary annual reports render the estate liable for a minimum of twenty-five to fifty dollars annually. With other incidental fees probate attorneys estimate the annual minimum cost to a small estate is from sixty-five to seventy-five dollars. If the minor were age five and his claim produced \$1,500, approximately \$1,000 to \$1,200 would be expended on these administration costs before he reached majority; if ten years of age,

15. *Campbell v. Campbell*, 350 Mo. 169, 165 S.W.2d 851 (1942); *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (1937).

16. MO. PROB. CODE § 475.135 (1956) provides that, "No contract shall bind the estate of any minor . . . unless the same is made by the guardian with the approval of the probate court or made by the ward with the consent of the guardian and approval of the court." See *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935); *Houck v. Bridwell*, 28 Mo. App. 644 (1888).

17. MO. PROB. CODE § 475.260(1) (1956); *id.* § 475.130(3). See also *Arn v. Arn*, 264 Mo. 19, 173 S.W. 1062 (1915); *Clark v. Crosswhite*, 28 Mo. App. 34 (1877).

18. MO. PROB. CODE § 475.100 (1956). The bond must be double the amount of the estate, unless there is a corporate surety in which case the bond required is equal to the size of the estate.

19. *Id.* § 475.157(2).

20. *Id.* § 475.100.

21. *Id.* § 475.100.

approximately \$700 to \$800. Adding to these costs the initial attorney's fee for prosecuting or settling the claim, it becomes apparent that if the claim is small, securing the appointment of a guardian is not feasible despite annual interest the proceeds may earn, for all or a large part of the estate may be consumed by administration costs. This defeats the very purpose of requiring a guardian, *i.e.*, to protect and preserve the ward's estate.²² Of course this objection becomes invalid if the parent, who is generally appointed guardian, is willing to pay all the expenses of administration. Some lawyers have stated that there are many instances in which the parent feels unable to pay these expenses, or declines to pay them because he feels he should not be required to do so. In fact, many times the parent is more interested in devising means to procure money from the estate (commonly called "milking" the estate) than in paying money to maintain it. At any rate the law should provide means for maintaining the estate independent of the attitudes or means of the particular parent.

The larger the claim the more feasible it becomes to have a guardian appointed, since a large estate can bear the costs of administration. The remainder of this note is concerned with the smaller claims which would be absorbed wholly or to a great extent by administration costs.

It has also been suggested that the guardian-probate-court route is not used by attorneys because the fee they will be awarded by the court will be a "reasonable fee"—which may be as low as 10 per cent of the claim. On the other hand, if the attorney can work through some procedure outside the probate court he will receive the usual 25-33 per cent contingent fee. If this is true it is submitted that probate judges are taking an unrealistic attitude in regard to the fees they award an attorney representing a minor in a personal injury case. The contingent fee is justified on policy arguments quite familiar to members of the legal profession. It is submitted that these policy arguments are just as strong whether the attorney is prosecuting or settling a tort claim for an adult, or prosecuting or settling a tort claim for a minor under the supervision of the guardian and probate court.

Since the appointment of the guardian is not feasible because of the diminution of the estate by costs and fees, and, possibly, also because of the attorney's refusal to enter the probate court because of the reduction in his fee, there remains to be considered whether some other representative of the minor exists who has the power to eliminate all or some of the problems presented.

22. See *id.* § 475.130.

(b) Rights and Powers of Parents

In most instances there is no occasion to have a guardian appointed for a minor. The law recognizes parents as natural guardians²³ of their children and they have the right to the care and custody of their children's persons.²⁴ The parent has the power to control and manage the estate of the minor which is derived from the parent,²⁵ but the law requires a guardian to be appointed when the minor acquires an estate from a source other than the parent.²⁶ Therefore the parent has no authority to control or manage the minor's estate *derived from a tort claim*. It is quite generally believed that this authority is withheld from the parent because of the lack of any assurance that the estate will remain intact for the benefit of the minor. Nor does the parent have the power to bind the minor's estate by contract.²⁷ Therefore, the parent can neither execute to the tort-feasor a release binding on the minor,²⁸ nor make a contract for the attorney's fees which will bind the minor.²⁹

(c) Powers and Rights of a Minor's Special Representative in a Particular Suit

So that a minor is assured of having the benefit of adult agency and judgment in the prosecution of his law suits,³⁰ the law provides that: "Suits by infants may be commenced and prosecuted, either: First, by the guardian or curator of such infant; or second, by a next friend appointed for him in such suit."³¹ Therefore, when the minor has no guardian³² his suit may be prosecuted by another representative—a "next friend."³³ The appointment of the next friend is to

23. Henceforth the term "guardian" refers to a guardian appointed by the probate court and the term "parent" refers to the natural guardian.

24. Mo. PROB. CODE § 475.025 (1956).

25. *Ibid.* See also *Oehmen v. Portmann*, 153 Mo. App. 240, 133 S.W. 104 (1910) (parent as natural guardian can sue for injury to minor's estate which estate was derived from the parent).

26. Mo. PROB. CODE § 475.030(2) (1956).

27. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935). See also note 16 *supra*.

28. *Kirk v. Middlebrook*, 201 Mo. 245, 100 S.W. 450 (1907).

29. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

30. *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (1937).

31. Mo. ANN. STAT. § 507.110 (Vernon 1949).

32. Mo. PROB. CODE § 475.260(1) (1956) (actions between the ward and third persons are to be prosecuted and defended by the guardian); *Clark v. Crosswhite*, 28 Mo. App. 34 (1877) (statute requiring infant to sue by next friend does not apply where he has a duly appointed guardian).

33. It does not appear to be settled whether the minor can sue through his parent as natural guardian without the parent being appointed next friend. Earlier cases held that a minor may sue through his parent where the minor had no appointed guardian. *Brandon v. Carter*, 119 Mo. 572, 24 S.W. 1035 (1894); *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (1937). The more recent case of *Cox v. Wrinkle*, 267 S.W.2d 648 (Mo. 1954), in dictum stated where there is no duly appointed guardian the statute requiring the ap-

be made by the court in which the suit is intended to be brought³⁴ and no proceedings are to be had in the cause until a next friend is appointed.³⁵

The function of the next friend is to aid the minor in the prosecution of the particular suit and his authority continues only to the final determination of the cause.³⁶ When the judgment is paid and the next friend enters satisfaction, the "next friend" status is terminated. The court loses jurisdiction over both the minor and his representative.³⁷ The next friend, however, has the right to receive the proceeds of the judgment at the conclusion of the suit.³⁸ In *Stephens v. Curtner*³⁹ and *West St. Louis Trust Co. v. Brokaw*,⁴⁰ the courts reasoned that since a court can, if it desires, require the next friend to execute a bond at the commencement of a suit,⁴¹ and as the purpose of the bond is to assure the court that the funds will be safeguarded for the infant, the legislature must have intended that the next friend receive the proceeds.

pointment of a next friend is applicable and a next friend must be appointed as representative of the minor.

From the point of view of the infant it makes little difference whether the parent can represent the minor without being appointed next friend. MO. ANN. STAT. § 511.260 (Vernon 1949) provides that:

When a verdict shall have been rendered in any cause, the judgment therein shall not be stayed . . . reversed, impaired or in any way affected by reason of the following imperfections, omissions, defects, matters or things, or any of them, namely:

(7) For any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him.

The cases have given full effect to this provision. *Jones v. Steele*, 36 Mo. 324 (1865) (failure to appoint a next friend was an error that could be cured even after the rendition of a jury verdict as the law is very liberal in upholding proceedings where the infant has derived a benefit), approved in *State ex rel. Missouri Pac. R.R. v. Cox*, 306 Mo. 27, 267 S.W. 382 (1924). The defendant should be cautious, however, and require that the next friend be appointed, for if an infant proceeds without a next friend the minor *will not be bound by the judgment* if the result is unfavorable to him. *Hanlin v. Burk Bros. Meat & Provision Co.*, 174 Mo. App. 462, 160 S.W. 547 (1913). The defendant may be required to defend the action a second time if no next friend is appointed and it is determined that a parent cannot represent the minor without being appointed next friend.

Also, attorneys should be sure an infant's special representative is appointed where the attorney is prosecuting a suit against an infant. Where no guardian ad litem, infant defendant's special representative, is appointed a judgment against the minor is voidable by the minor. *Reineman v. Larkin*, 222 Mo. 156, 121 S.W. 307 (1909); *Gamache v. Prevost*, 71 Mo. 84 (1879).

34. MO. ANN. STAT. § 507.120 (Vernon 1949).

35. *Id.* § 507.170.

36. *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (1937).

37. *Id.* at 214, 102 S.W.2d at 795.

38. *Ibid.*; *Stephens v. Curtner*, 205 Mo. App. 255, 222 S.W. 497 (1920) (dictum).

39. 205 Mo. App. 255, 222 S.W. 497 (1920) (dictum).

40. 232 Mo. App. 209, 102 S.W.2d 792 (1937).

41. MO. ANN. STAT. § 507.150 (Vernon 1949).

Since the next friend has the right to receive the proceeds and the circuit court loses jurisdiction over him after the suit, the question arises whether the statutes and case law adequately safeguard the funds in the hands of the next friend for the benefit of the minor. The court *may, if it desires*, require the next friend to execute a bond conditioned upon the next friend's accounting to the minor for all money received.⁴² The courts feel, however, that to require a bond in every case would often put "a lion in the way of the infant securing his rights in court"⁴³ because the next friend, generally the parent, may not be able to meet the requirements of the bonding companies. In fact, the court in *Aley v. Missouri Pac. R. R.*,⁴⁴ suggested that the legislature did not make the bonding requirement mandatory for this very reason. The result is that the minor may be precluded from entering court because of the next friend's failure to secure a bond, or, if the court requires no bond, the next friend may leave court with funds of the minor which are not safeguarded. It seems, however, that all the next friend has the right to do with the funds is to hold them. He has no right to make any disposition of the funds, for such authority rests in the guardian and probate court.⁴⁵ Of course, if the funds are expended by the next friend and are not made available to the minor, the minor will have a cause of action to recover them. Just what this cause of action may be worth depends on the financial responsibility of the next friend. If he is so destitute the court feels it cannot require bond of him, it hardly seems likely the infant has much hope of recovery if the funds are dissipated.

The next friend, like the parent, has no power to bind the minor's estate by contract.⁴⁶ Nor does he acquire such power by obtaining the trial court's approval of the contract,⁴⁷ for it will be recalled that the control and management of the minor's estate is in the exclusive original jurisdiction of the probate court. Therefore, the next friend cannot bind the minor's estate for attorneys' fees,⁴⁸ nor does he have the power to effect a settlement of the minor's claim.⁴⁹

42. *Ibid.*; *Aley v. Missouri Pac. R.R.*, 211 Mo. 460, 111 S.W. 102 (1908); *Henderson v. Kansas City*, 177 Mo. 477, 76 S.W. 1045 (1903).

43. *Aley v. Missouri Pac. R.R.*, 211 Mo. 460, 478, 111 S.W. 102, 107 (1908).

44. *Ibid.*

45. See text at note 15 *supra*.

46. *Campbell v. Campbell*, 350 Mo. 169, 165 S.W.2d 851 (1942); *Dillon v. Bowles*, 77 Mo. 603 (1883).

47. *Campbell v. Campbell*, *supra* note 46; *Gilliland v. Bondurant*, 332 Mo. 881, 59 S.W.2d 679 (1933); *Robison v. Floesch Constr. Co.*, 291 Mo. 34, 236 S.W. 332 (1921).

48. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

49. *Campbell v. Campbell*, 350 Mo. 169, 165 S.W.2d 851 (1942); *Gilliland v. Bondurant*, 332 Mo. 881, 59 S.W.2d 679 (1933).

III. PRESENT PRACTICE

As noted previously, the guardian with the approval of the probate court has the right to deal with the problems of settlements and attorneys' fees; also the minor's funds are theoretically protected in the hands of the guardian, but costs may in effect dissipate a large part of the estate. The parent, not being appointed by the probate court, lacks the power to give a release or make a contract for attorneys' fees which will be binding on the minor; nor does the parent have the authority to control the minor's estate unless such estate is derived from the parent. The next friend, like the parent, cannot contractually bind the infant, though he does have the right to receive the proceeds, in which case the funds may not be adequately protected for the minor. While all these problems are not present in all cases, e.g., the parent may pay administration costs of guardianship, or pay the attorney and execute bond as next friend, they have recurred frequently enough for attorneys and courts to adopt certain practices to avoid them; the practices have since become standard procedure in most cases.

(a) Settlements

If during the course of a lawsuit in which the plaintiff is an infant the parties reach a settlement, it is generally conceded that the circuit court has the power to approve the settlement and bind the minor by a judgment.⁵⁰ The court should, however, ascertain whether the settlement is fair and reasonable, having due regard for the interests of the infant.⁵¹

When the parties have reached a settlement before a suit is instituted, several methods are employed to protect the alleged tort-feasor against any further liability. The most common procedure is the so-called "friendly suit."⁵² The mechanics of the friendly suit are simple. After settlement is reached the minor's parent makes application to be appointed next friend, consents to act as such, and is appointed by the court. Then suit is instituted by filing a petition; the defendant is served with summons (defendant may waive summons and enter a voluntary appearance), appears and answers. The defendant generally denies liability, but "offers a judgment" which the plaintiff accepts; or the plaintiff asks for a judgment which the defendant accepts. In either event the suit is a sham. The amount has always been previously agreed upon and judgment is entered

50. STATE OF NEW YORK, JUDICIAL COUNCIL'S THIRTEENTH ANNUAL REPORT AND STUDIES 195 (1947) (hereinafter referred to as JUD. COUNCIL REP'T).

51. *Campbell v. Campbell*, 350 Mo. 169, 165 S.W.2d 851 (1942).

52. JUD. COUNCIL REP'T 195, 204-05; Dixon, *Settlement of Minors' Tort Claims*, 92 TRUSTS & ESTATES 728 (1953).

accordingly.⁵³ The friendly suit is a mere procedural device used to invoke the jurisdiction of a court⁵⁴ so that the settlement already agreed to by the parties can be approved as though it had been arrived at during the course of a bona fide lawsuit.

Unfortunately, the term "friendly suit" carries with it a connotation of fraud or corruption. As stated by the Missouri Supreme Court in *Robison v. Floesch Construction Co.*,⁵⁵ the friendly suit is not a suit in fact but merely a screen "contrived to conceal the real transaction, the contract of settlement . . . having for its purpose the foreclosure of the plaintiff's rights to disaffirm and repudiate his folly" While it is true the whole transaction is to prevent a subsequent disaffirmance or repudiation of a settlement, it is not necessarily true that the settlement is folly—in fact it may be a just and reasonable settlement of the minor's claim without an expensive and lengthy trial. The objection is not to the friendly suit as such, but to the procedure followed by the court between the time its jurisdiction is invoked and the time judgment is entered. The practice in this respect may vary considerably from state to state. In some states the "defendant's" counsel may represent both parties;⁵⁶ the whole proceeding may be nothing more than the exchange of legal papers; perhaps only the lawyers appear and make representations to the court; a brief hearing may be held; or the proceedings may approach a real trial with witnesses being called.⁵⁷

The procedure followed in the *Robison* case noted above was highly objectionable. While the minor plaintiff was in the hospital, the "defendant's" lawyer effected a settlement with him. The defendant's counsel prepared both sides of the case. A next friend was appointed who was a stranger to the infant, who never saw the infant, and who did not attend the "trial." A justice of the peace entered judgment at the infant's bedside for the agreed amount without inquiring into the extent of the plaintiff's injuries, how he was injured, or other pertinent facts. The supreme court of course held the minor was not bound by the judgment. Such a friendly suit cannot be tolerated as it strips the infant of all the safeguards the law has established for his protection.

Contrasted to the *Robison* case is the procedure examined by an intermediate Missouri appellate court in the recent case of *Ebenreck*

53. Dixon, *supra* note 52, at 728.

54. JUD. COUNCIL REP'T 204.

55. 291 Mo. 34, 236 S.W. 332 (1921).

56. See Ed. Note, *Compromise of Claims Based Upon Personal Injuries to Minors*, 32 W. VA. L.Q. 235 (1926). This does not seem to be the practice in the St. Louis area. The writer is not familiar with the practice in other parts of the state.

57. Dixon, *supra* note 52, at 728.

*v. Union Service Co.*⁵⁸ The infant's parents were appointed next friends and each party was represented by independent counsel. The parents testified as to the extent of the boy's injuries, what the doctors had reported, and the apparent condition of the boy. The infant himself was examined by the court. The agreed facts concerning how the injury occurred were submitted to the court. In a later suit the court's judgment for the infant plaintiff was held to be binding on the infant because the court in the friendly suit proceeding had made a judicial ascertainment of the facts, and the judgment was reasonable when entered. The *Ebenreck* case does not represent a change of policy in Missouri, nor a refusal to follow the Missouri Supreme Court. Even in the *Robison* case the supreme court noted that where the judgment is based on a *real and not a perfunctory hearing* it will bind the infant. Again, the supreme court in *Gilliland v. Bondurant*⁵⁹ stated that an *agreed judgment* will be permitted to stand if the minor is represented by his own counsel, who in good faith has protected the rights and interests of his immature client, and if the court has made a real judicial ascertainment of the facts.

At least in the St. Louis area the present practice meets the requirements of the doctrine of the above cases. The courts probe into the facts until they feel sure the settlement is just and reasonable. At times affidavits and medical reports are required and doctors or other parties may be called as witnesses. Actually the defendant himself is anxious to have all the pertinent facts put before the court because he fears the judgment may be set aside at a later time for failure of the court to make a sufficient judicial determination of the facts. This attitude is best evidenced by the *Ebenreck* case, where the defendant called to the attention of the court the possibility that the minor may have had a basal skull fracture, a fact the parents failed to mention. Since the supreme court has sanctioned the practice, there seems to be no jurisdictional objection, though technically, approving the settlement of a minor's claim is in the jurisdiction of the probate court through a guardian.⁶⁰ It should be noted that this jurisdictional problem has not been clearly presented to the court. If it were, the court would perhaps take a different attitude toward the friendly suit procedure. As recognized by the supreme court, and as actually conducted in at least the St. Louis area, however, the friendly suit is the same as, or so nearly like, a trial that an appellate court would be hard put at times to draw a line between a judgment rendered in such a suit and a judgment resulting from a bona fide lawsuit.

58. 276 S.W.2d 607 (Mo. App. 1955).

59. 332 Mo. 881, 59 S.W.2d 679 (1933).

60. See text at note 15 *supra*.

Because of the procedure required by the supreme court, there seems to be no valid objection to the friendly suit in Missouri insofar as the interests of the parties are concerned. The infant is adequately protected and the defendant obtains a release which is binding on the minor.⁶¹ However, the whole proceeding is a fiction and requires a great deal of wasted motion and time in filing all the papers necessary to give the appearance of a bona fide lawsuit.

Another method frequently employed by attorneys to effect a settlement is entirely extrajudicial. The tort-feasor, or frequently his insurance company, will write a check payable to the minor and his parent. In return the minor executes a release and the parent promises to indemnify the maker of the check if, in the future, the minor seeks to avoid the release and collect an additional amount. This transaction is believed to be beneficial to the tort-feasor in two respects: (1) if the minor does avoid the release, the tort-feasor may be able to recover the amount of the settlement by suing the parent, if he is not judgment proof; (2) the minor upon reaching his majority probably will not avoid the release and seek to collect an additional amount knowing his parent will be liable for the sum already paid by the tort-feasor.

From the minor's point of view such agreements are clearly in derogation of every safeguard the legislature has sought to afford, unless the infant feels free to avoid the release upon reaching his majority, which, as pointed out above, is doubtful. First, there is no assurance the amount of the settlement is adequate compensation for the injuries sustained. Often a sum may seem rather large to the parent who is of average means, when in fact the sum may be wholly inadequate in light of the minor's injuries. Secondly, the check is probably indorsed by the minor at the parent's direction and the disposition of the proceeds cannot usually be ascertained. It may be expended for the minor in matters where the parent has no legal duty to expend sums for him. It may be spent on the fulfillment of such duties, or may be expended for the benefit of the entire family with or without an intention to replace the amount at a future time. It is not the writer's purpose at this time to judge the relative merits of these agreements, but only to point out objections to them which have been suggested to the writer. It is not entirely beyond the realm of possibility that if presented in a proper case—one in which the settlement was inadequate and the court believed the purpose of the indemnifying agreement was to coerce the minor into not avoiding the release—the court may hold such agreements void as against

61. For valid criticisms of the friendly suit as practiced in other states see Dixon, *supra* note 52, at 728; Ed. Note, *Compromise of Claims Based Upon Personal Injuries to Minors*, 32 W. VA. L.Q. 235 (1926).

public policy. Of course, the question would be presented by a parent defending a suit on such an agreement after the infant had previously avoided the release.

(b) *Attorneys' Fees*

There should be noted at the outset certain theories which have been advanced in an attempt to solve the problem of attorneys' fees, but which have been rejected by the Missouri courts. It was thought that since a minor is liable for services which are "necessaries," attorneys' fees for prosecuting the minor's claim could be so classified, thus rendering the minor's estate liable. How could the minor prosecute without counsel? In *Fenn v. Hart Dairy Co.*,⁶² this theory was rejected. The court adopted the test of an old Vermont case⁶³ stating that necessaries are only those things which are of "necessity" to the minor. The court then proceeded to give "necessity" its narrowest meaning, stating that since the minor is not brought into court under compulsion, and the statute of limitations does not begin to run on his cause of action until he reaches majority, the suit is not a necessity. Therefore, attorneys' fees arising from the prosecution of the suit are not necessaries, even though the services are beneficial to the minor⁶⁴ and it is thought to be desirable and in the best interest of the minor to prosecute the suit.⁶⁵

The *Fenn* case was indeed an unfortunate decision, for the court created a situation in which attorneys representing minors can only hope the minor does not disaffirm his contract and either refuse to pay or recover the attorney's fees. Attorneys could refuse to take minors' tort claims, in which case the minor could only prosecute his own suit or wait until he reached his majority to prosecute the suit. In either case an inequitable situation is present. Another avenue open to the minor and attorney is the appointment of a probate guardian, which presents the difficulties previously noted. The only

62. 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

63. *Thrall v. Wright*, 38 Vt. 494 (1865).

64. See *Rhodes v. Frazier's Estate*, 204 S.W. 547 (Mo. App. 1918).

65. It is interesting to note that § 475.265 of the 1956 Missouri Probate Code, which provides for the compensation of guardians, states that: "He [guardian] may also be allowed compensation for *necessary* expenses in the administration of his trust, including reasonable attorney fees *if* the employment of an attorney for the particular purpose is *necessary*." (Emphasis added.) Will the doctrine of *Fenn v. Hart Dairy Co.* be read into this new provision? Such a result would be absurd because the guardian, with the approval of the probate court, could no longer bind the minor's estate for reasonable attorneys' fees for prosecuting the ward's suit. The portion of the section above quoted was taken verbatim from the MODEL PROB. CODE § 232 (1946). A reading of the comment to § 232 makes it obvious the authors did not consider the peculiar rule of the *Fenn* case. The section was drafted with primary concern for guardianships arising out of decedents' estates. However, an application of the *Fenn* rule to the new code provision is possible.

other course would be to secure a third party, such as the parent, to pay the fees. But it is hard to comprehend why such a burden should be cast on the parent. It is hoped that if the question is presented in the future, the supreme court will overrule the *Fenn* case, a court of appeals decision, and rule that attorneys' fees are necessities. There is no sound reason for not so holding—the trial judge can control the amount of the fee to insure that it is reasonable and attorneys should receive compensation for services rendered whether they are representing adults or minors.

Nor does the attorney's lien statute of Missouri⁶⁶ bind the infant. The attorney's lien on a client's judgment is based on an express or implied agreement; therefore, there must be a contract debt existing between the client and attorney before the statute applies.⁶⁷ Since the minor can avoid his contract, there is no contract debt between him and his attorney and the statute is inapplicable.⁶⁸ In addition, the minor is not liable for costs.⁶⁹ Therefore attorneys' fees cannot be charged to the infant as a cost of bringing suit.

The practice employed to make sure the attorney receives his fees presents a much more serious problem than that encountered in the area of settlements. Usually, the court merely orders the next friend to pay the attorney out of the proceeds of the minor's judgment. If the judgment is rendered in a friendly suit the court may allow the parent compensation for loss of services in the same proceeding. Factually the damages for loss of services suffered by the parent are generally nominal. A device sometimes used by attorneys is to make the parent's claim for loss of services large enough to absorb the attorney's fee, the parent then paying the attorney. Another method is to enter judgment for the infant, the defendant agreeing to pay the plaintiff's attorney. Both of these latter methods reduce the minor's judgment by the amount awarded to the attorney, for the defendant will not settle if he is required to make a fair and reasonable settlement with the minor and in addition pay another one-third or one-fourth to the attorney.

No one knows what will be the consequences of these practices. The point has never been considered by an appellate court. Certainly there are strong policy arguments favoring a holding sanctioning these practices. To hold them invalid would subject many attorneys to liability for past fees earned while representing minors. Such a ruling would also put the minor in jeopardy of not being able to retain

66. MO. ANN. STAT. § 484.130-.140 (Vernon 1949).

67. *Mills v. Metropolitan Street Ry.*, 282 Mo. 118, 221 S.W. 1 (1920); *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W. 120 (1935).

68. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935).

69. MO. ANN. STAT. § 507.180 (Vernon 1949).

counsel unless some adult contracted to pay the attorney. On the other hand, rulings upholding the practices would not be free from severe criticism in light of existing law. For in the first practice related, it seems clear the court and next friend are exceeding their powers. Neither has the power to dispose of the funds constituting the minor's estate.⁷⁰ In the second and third situations mentioned, it also seems clear the court is exercising a power of disposition over the minor's estate though the method is somewhat indirect. If the supreme court did uphold these practices it is hard to conceive what theory it would adopt, unless it expressly overruled previous cases stating that fees are not necessities. It is indeed surprising that the practices have prevailed so long without ever having been adjudicated. Perhaps this is due to the ignorance of the minors and parents as to the validity of the methods employed to pay the attorney.

It would seem that prompt legislative action in this area is desirable. Attorneys cannot be expected to devote their time, energy, and skill to minors free of charge. Also, the possibility that fees presently earned will have to be repaid at some future time creates an inequitable situation. If the existing law were adhered to, it is likely the minor would not be able to retain counsel unless a third party contracted to pay the attorney because the attorney has no means to enforce a claim for his fees; or a probate guardian would have to be appointed with the attendant waste of the estate in paying costs of administration.

(c) Protection of the Minor's Judgment

The circuit courts in the St. Louis area have protected the minor's estate by ordering the next friend to deposit the funds in a bank. Agreements are in force with various banks, or a judge may obtain an agreement with a bank on each separate deposit, that such funds are not to be withdrawn except by order of the circuit court or by the minor upon reaching majority. Again it would appear the court is exercising control and management over the minor's estate which is in the exclusive original jurisdiction of the probate court. In *West St. Louis Trust Co. v. Brokaw*⁷¹ the precise practice came before an appellate court, which stated in no uncertain terms that the circuit court had completely exceeded its jurisdiction in exercising such control over the funds. Despite this case the circuit courts in the St. Louis area have persisted in the practice. Recently the practice in the city of St. Louis has been slightly altered. While the *circuit* court orders the funds to be deposited, it is only by order of the *probate*

70. *West St. Louis Trust Co. v. Brokaw*, 232 Mo. App. 209, 102 S.W.2d 792 (1937).

71. *Id.* at 213, 102 S.W.2d at 794.

court that the funds can be withdrawn. The circuit court is still exceeding its jurisdiction in ordering the deposit. The probate court, however, will not order a withdrawal of the funds unless an estate is opened for the minor in the probate court. This in turn requires the annual fees and reports with their concurrent expenses. This practice does have a very desirable feature, however. As long as no estate is opened in the probate court the funds can be withdrawn only by the minor when he reaches majority. Therefore, they stay in the bank accumulating interest. How long parents desirous of "milking" the estate, if possible, will allow the situation to exist will depend on the individual case. Quite possibly a parent anxious to "get his hands on the money" will have an estate opened for the minor in the probate court. If the probate court were to order withdrawals without an estate being open (without having a guardian appointed) it would, of course, be acting beyond its jurisdiction. The practice of ordering the funds deposited subject to withdrawal only by order of the probate court is not followed by the circuit courts of St. Louis County, however. The county courts continue to order the funds deposited subject to withdrawal on their own order. Thus, there is an indication of a lack of uniformity throughout the state. The *Brokaw* case could be considered dictum on the point, but if any presumptions are to be made it must be presumed the court would so hold today. In addition, circuit court judges do not deny they are exceeding their jurisdiction in continuing the practice of ordering the deposit of the funds.

Again the effect of this practice is not known. If the next friend fails or refuses to deposit the funds and dissipates them, is he in contempt for disobeying an order the court had no power to make? If so, does this do the minor any good? The next friend may be insolvent. Or suppose through error the bank allows the next friend to draw out the proceeds without an order of court. Is the bank now liable? Can the bank be held in contempt of court when the court lacked power to make the agreement? To whom should it be liable? True, the funds are the minor's, but the next friend must be trustee for the court cannot be—it has no power over the funds, and the next friend is the depositor. Would the judge who ordered the deposit be liable? Has he acted so far beyond his power that he is not protected by the cloak of judicial immunity? These are merely considerations intended to show the uncertainty of the situation. Fortunately these problems do not seem to arise.

While the research has not extended into areas beyond St. Louis it is thought pertinent to point out other practices which may exist

in other areas. A recent survey⁷² has shown that in some areas in the United States (not specifically denominated) the court merely turns the funds over to the next friend, who is generally the parent, without any effort to safeguard them. A court in Missouri would be legally justified in adopting this practice since in Missouri the next friend has the right to receive the proceeds and the court has no jurisdiction over the funds.⁷³ It is thought that perhaps in rural areas, where the judge knows the parent personally and knows he could use the funds, possibly for a new tractor, etc., such a procedure may be followed. Such a disposition of the minor's estate is not unlikely, for judges in St. Louis have in the past authorized withdrawals for new trucks, to pay the rent, to pay for the groceries, and other similar expenditures on the theory that the minor is indirectly benefited. It seems legislation in this area also is sorely needed. The method of protecting the minor's estate should be uniform throughout the state. The minor should be assured his estate is being adequately safeguarded. It is the minor who has sustained the injury and not his parents, or his brothers and sisters. Such protection should not be left to chance or to what the individual judge decides is best.

IV. CONCLUSION

The criticisms of the present practices are not intended to cast aspersions on the circuit courts, at least not on the circuit courts of the St. Louis area. As is sometimes the case, the judges have found themselves with a statutory scheme which seems adequate when read, but when applied to real situations is inadequate. The courts have done an admirable job in protecting the various interests involved. However, courts have enough responsibility without being put to the task of exceeding their jurisdiction in an attempt to do justice.

A basic feature of the Missouri statutory scheme is to vest the control and management of a minor's estate in the guardian appointed by the probate court. The incorporation of this concept into the present practice would provide acceptable solutions to the problems dealt with here.⁷⁴ The first recommendation is to require by statute that no minor's tort claim be settled or prosecuted to judgment unless a guardian has been appointed by the probate court. It is submitted

72. Dixon, *supra* note 52, at 728.

73. See text at notes 40, 73 *supra*.

74. A committee in New York made a recent study of similar problems existing in that state. Results of the study were published in the *State of New York Judicial Council's Thirteenth Annual Report and Studies*. The recommendations of the committee were subsequently enacted by the New York legislature. While some of the features of these recommendations have been adopted in the proposed legislation for Missouri, the bulk of the New York provisions are rejected. It is felt that as applied to Missouri's existing law the New York proposals would be unnecessarily long and involved.

that a minor's tort claim is a part of his estate—it is of potential value.⁷⁵ Therefore, the recommended provision would extend the concept of guardian control and management of the minor's estate to the minor's tort claim. A guardian can be appointed in a few minutes and with little expense.

Since a guardian would be required, the problems of attorneys' fees and settlements would be adequately provided for. The guardian, with the approval of the probate court, would bind the infant for reasonable attorneys' fees and, similarly, the guardian, with the approval of the probate court, would be able to effect a settlement and execute to the defendant a release binding on the minor. This, in fact, would abolish the friendly suit in the circuit court since the probate court would approve the settlement of the guardian. When a minor has a guardian and is subsequently injured, the guardian may enter into a settlement which is then presented directly to the probate court. No formal suit need be instituted as in the circuit court's friendly suit. The procedure of approving the settlement in the probate court is the same as that adopted in the circuit court; *i. e.*, the court may call witnesses and doctors until satisfied that the settlement is reasonable.⁷⁶

Thus far, by one simple enactment, the attorneys' fees problem has been dealt with and a binding release for the defendant has been secured, without resorting to the fiction and wasted motion of the friendly suit. There remains to be considered the protection of the funds for the minor. It will be recalled that the present objection to the appointment of a guardian in the area of small tort claims is that, in many instances, annual costs would consume all or a large

75. *Fenn v. Hart Dairy Co.*, 231 Mo. App. 1005, 83 S.W.2d 120 (1935) (statutes in Missouri are designed to subject the affairs of minors to the jurisdiction of the probate court through a guardian).

76. In New York it was thought best to allow the courts of general jurisdiction (circuit courts in Missouri) to retain control over the approval of settlements of minors' tort claims. The reasoning appeared to be that since these courts deal with the problems of tort claims daily they would be better qualified to determine the reasonableness of any given settlement. Out of nine states adopting procedures in this area similar to that of New York, only two have allowed the courts of general jurisdiction to retain this control. JUD. COUNCIL REP'T.

Although the New York position merits consideration, it is not necessary that circuit courts retain this power in order to protect the minor adequately. As the probate judge is a lawyer, the area of tort is not foreign to him. Approving a settlement of a minor's claim which will be fair and reasonable depends more on the exercise of common sense and the sense of duty possessed by a particular judge than it does on any technical knowledge of the law of torts.

The Missouri statutes have given the probate courts primary control over minors. It will be recalled that funds deposited by the circuit court are now made subject to withdrawal by order of the probate court if an estate is opened in the latter court. One of the reasons for this recent change was that some circuit court judges were too liberal in allowing the parent to make withdrawals. It was believed that since the probate court dealt more frequently with minors' estates, that court was better qualified to protect the interests of the minor.

part of the minor's estate. This can be corrected by authorizing both the probate court and the circuit court to order funds deposited subjected to a "limited withdrawal."

If the funds are awarded to the minor in a probate court settlement, the court would be authorized to order the guardian to deposit the funds subject to withdrawal only by order of the court. The guardian would merely sign necessary papers authorizing the deposit and, in fact, the court would deposit the proceeds. Since the guardian would never handle the funds or be able to withdraw them unless the court authorized such a withdrawal, the necessity for a bond and annual reports would no longer exist. The statute imposing these requirements would be amended to read that bond and annual reports are required unless otherwise provided for by law. The "limited withdrawal" provision recommended would specifically except the bond and report requirements where the court orders a limited withdrawal deposit.

If the minor realizes a judgment as a result of a bona fide lawsuit prosecuted by his appointed guardian in the circuit court, that court would have the power to order the proceeds deposited subject to "limited withdrawal" by order of the probate court. At first this may be thought to violate the probate court's exclusive original jurisdiction often referred to. It is to be remembered, however, that the probate court does not acquire such jurisdiction from the constitution, but from the construction of several statutes.⁷⁷ The constitution merely provides that the probate court shall appoint guardians. That requirement is fulfilled in the recommendations herein set forth. Since the *legislature* has conferred exclusive original jurisdiction to manage and control the minor's estate on the probate court, it can, in the limited withdrawal provision, create an exception to the probate jurisdiction by allowing the circuit court to deposit the proceeds of judgment subject to withdrawal only by order of the probate court.

Therefore, through one provision requiring the appointment of a guardian, and conferring power on the probate and circuit courts to deposit funds, and another amending the bond and annual report provision, the problems of settlements, attorneys' fees, and protection of the minor's estate would be adequately provided for by statute.⁷⁸

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77. See II (a) *supra*.

78. The protection of minors' estates other than those resulting from tort claims is beyond the scope of this note. However, if the legislature were to enact corrective legislation it would do well to consider the protection of small estates acquired in other ways, e.g., through wills. The corrective legislation proposed in the text as far as is applicable would seem to be equally desirable for any small estate which is under the supervision of the probate court through a guardian.