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Expert Analysis

SCPA Article 17 Guardianships: How To Invest for a Minor

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Protect, preserve and manage. Those are the duties imposed on a guardian of an infant's property, to be carried out in the best interest of the infant. N.Y. Sur. Ct. Proc. Act Law (NY SCPA) §1723. Preservation of guardianship property is of paramount importance to the Surrogate's Court. From an investment perspective, a guardian may satisfy these requirements by passively depositing guardianship funds in an FDIC-approved bank account. N.Y. Sur. Ct. Proc. Act Law §1708. However, a guardian seeking to take more of an active role in management of guardianship funds may enter into an investment agreement to obtain a higher rate of return on those funds. Id. With court approval, a guardian can jointly control guardianship funds with a bank, credit union, or other financial institution (collectively referred to as "financial institution"), somewhat easing the Surrogate's Court's involvement. This type of investment agreement can significantly benefit the infant, while also providing the Surrogate with security in knowing that an established financial institution is a party to the agreement and subject to the Surrogate's oversite.

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Guardian's Duties

While the manner in which a property guardian carries out her duties varies, the larger purpose of her role is to continually protect and advocate for the best interests of her ward. Surrogate's Court Procedure Act (SCPA) Article 17 governs the appointment, duties and authority of a guardian of an infant. The guardian of an infant's property is responsible for routine administration of the property, and must keep records of all transfers, deposits and withdrawals of such property and funds. NY SCPA §1723. The Surrogate will review these records in the guardian's annual account. NY SCPA §1719. Generally, the Surrogate will defer to the guardian's judgment, guided by a more intimate knowledge of the needs of the infant, and will not substitute its judgment for that of the guardian unless unusual circumstances are shown. *Latterman v. Guardian Life Insurance Co. of America*, 280 N.Y. 102 (1939). However, the

jurisdiction of the court over the property of infants is unlimited, and the court may address every legal and equitable question which may arise in connection with the regulation of guardians and wards. NY SCPA §1701; see also *In re Bryant*, 188 Misc.2d 462 (Sur. Ct. Broome Cty. 2001).

As directed by Article 17 of the SCPA, preservation and protection of guardianship funds are of paramount importance to the property guardian and Surrogate. The property guardian must consider how the guardianship funds will be protected and invested, including whether the funds will be deposited into an FDIC-approved checking or savings account, or more actively invested in the market or other investments.

Like other fiduciaries, the guardian must post a bond set by the court upon her appointment, unless stated otherwise in the instrument appointing her. NY SCPA §801(1)(b). However, when a guardian enters into an agreement with a financial institution, the guardian may invest without having to post a bond. NY SCPA §1708(c); see also New York Estate Administration, Turano, Radigan 9.04[b][1][5]. The option to invest guardianship funds with a financial institution comes with some natural constraints meant to protect the infant's property. Still, investment is worthy of consideration for a property guardian who wants to manage the funds in a way which will ultimately increase the payout to the infant when they reach majority. Although there are many benefits to permitting a guardian to invest guardianship funds with a financial institution, the courts review these proposed agreements with abundant scrutiny.

Investment Parameters

The Surrogate will carefully analyze a proposed investment agreement before its approval, ensuring that the agreement conforms with both statutory and any additional requirements set forth by the court. Further, "it must appear [to the court] that the guardian has exercised [her] judgement and determined that the action [she] seeks is for the best interest of the infants. *Latterman*, 280 N.Y. at 105-06.

> With the right investment advisor and a willing Surrogate, guardianship funds can transform from a passive collection of monies to an active source of funding for an infant one she achieves majority.

To be approved by the Surrogate, the investment agreement must, inter alia, conform with the requirements under New York Estates, Powers and Trusts Law (EPTL) §11-2.3 (also known as the Prudent Investor Act), and ensure that there is no mechanism for the release of funds absent a court order. *Matter of Goldstein*, N.Y.L.J., March 28, 2011, at col.4 (Sur. Ct. New York Cty.). The Prudent Investor Act outlines a standard of conduct for fiduciaries implementing investment and management decisions for property held in a fiduciary capacity. The Act requires a fiduciary to, inter alia, pursue an overall investment strategy in accordance with objectives reasonably suited to the entire portfolio. New York Estates, Powers and Trusts Law (NY EPTL) §11-2.3(3)(A). The Act also sets forth a requirement specific to fiduciaries with "special investment skills" (i.e., a financial institution that is party to an investment agreement) which requires that the institution exercise diligence in investing and managing assets as would customarily be imposed by "prudent investors of discretion and intelligence having special investment skills." NY EPTL §11-2.3(6). The Act ensures that both the appointed property guardian, and more importantly the potential investor, remain under the control of the court. The importance of the Surrogate's oversight cannot be understated, as the court will ensure that, inter alia, there are no carve-outs indemnifying the financial institution from its responsibilities under the Prudent Investor Act.

With this in mind, there is not much flexibility for a financial institution that might otherwise wield significant bargaining power when entering into investment agreements with other individuals or businesses.

In addition to conformance with the requirements set forth in the EPTL, the proposed investment agreement must ensure that no action to release funds, or otherwise amend the agreement, is permitted without prior court approval. *Matter of Goldstein*, supra. This requirement provides the infant with a safeguard against amendments to the agreement that may not be in her best interest.

When assessing a proposed investment agreement, the court's primary consideration is to preserve funds for use and benefit of the infant until she attains majority; the desire to obtain a higher rate of return of the infant's investments is of secondary importance. *Matter of Estate of Mede*, 177 Misc.2d 974 (Kings Cty. 1998).

For example, the court in *Matter of Bryant* found that petitioner's proposed investment agreement was beneficial, but ultimately denied the petitioner's request because in the court's analysis, the risk outweighed the reward for the infant. *Bryant*, 188 Misc.2d at 469. In *Bryant*, petitioner was property guardian and mother of her ward, her 15-year-old son. Petitioner sought to invest $25,000 of the ward's funds pursuant to an agreement with Manufacturers & Traders Trust Co. (M&T Bank). Id. at 462. M&T Bank submitted information to the court indicating that it had a state-wide investment program for guardians, active in 10 counties in upstate New York. The court denied the petition for three reasons.

First, the court highlighted that the agreement provided for certain additional fees on top of regular compensation to be paid out of the guardianship funds to M&T Bank. It found these proposed fees to be excessive. Id. at 467. Second, it noted that the proposed agreement provided that M&T Bank could change its fee schedule at any time on thirty days' notice. The court asserted that any change in the fee schedule must be subject to court approval, otherwise the court's decision as to the reasonableness of M&T Bank's fees could be circumvented. Id. at 468. Last, it stated because the ward was already 15 years old, the investments in the short term were too risky for guardianship funds. The court not only took issue with the investment agreement, but with the potential benefits and value of the investment itself.

On the other hand, the court in *Matter of Goldstein* found that petitioner's proposed investment agreement was acceptable to the court and approved the same. *Matter of Goldstein*, supra. In *Goldstein*, ING Financial Partners (ING) was the proposed investment advisor to serve as custodian of the assets. ING agreed to terms requiring that it invest and manage the property in accordance with the Prudent Investor Act, and confirmed that there would be no release of funds without court order, nor a unilateral increase in ING's fees. Id. The investment agreement itself made no attempt to indemnify ING from the duties imposed by the Prudent Investor Act, and did not provide any means of divesting the court of continuing jurisdiction. The guardian was authorized to enter into the investment agreement and ING Financial Partners was appointed as co-guardian of the infant's assets. Id.

The Surrogate's Courts are diligent in reviewing investment agreements to ensure safety of minors' assets. As with other fiduciary appointments, the court's primary concern is ensuring that the infant's property be preserved until he or she attains majority. However, investment of those funds rather than deposit of the assets in low interest bank accounts may benefit an infant greatly. With the right investment advisor and a willing Surrogate, guardianship funds can transform from a passive collection of monies to an active source of funding for an infant one she achieves majority.