
E-80-14 Attorney's fees charged to ward's estate

Question

May an attorney, who has been appointed as guardian of an incompetent, charge for services rendered as attorney for the guardian?

Opinion*Propriety of Attorney Serving as Guardian*

(The Ethics Committee concluded it is not improper for an attorney to serve in the dual capacity of guardian and attorney for the guardian.)

Allowance of Attorney's Fees

Wis. Stats. sec. 880.24(1) provides:

Every guardian shall be allowed the amount of his reasonable expenses incurred in the execution of his trust including necessary compensation paid to attorneys, accountants, brokers and other agents and servants. He shall also have such compensation for his services as the Court, in which his accounts are settled, deems to be just and reasonable.

Under Wis. Stats. sec. 880.24(1), the ward's estate may be charged for both the guardian's fee and necessary and reasonable attorney's fees. No Wisconsin Statutes or cases have addressed directly the issue of the propriety of charges when guardian's and attorney's services are performed by one person. Thus, it appears that under Wisconsin law charges for the dual role are not prohibited.

While not prohibited under Wis. Stats. sec. 880.24(1), the statute implicitly provides court supervision of the guardian's employment of an attorney (necessary compensation) and of the amount allowed in payment (reasonable expenses). In *Guardianship of Schott*, 23 Wis. 2d 213, 127 N.W.2d 19 (1964), the court said:

While a guardian may employ an attorney to collect funds belonging to the estate of the ward, which attorney may be of the guardian's choosing, the necessity of the attorney's services and the amount of his fee are subject to the determination of the court having jurisdiction of the guardianship. Attorney's fees under sec. 319.24, Stats. (now Sec. 880.24, Stats.) are considered an expense of the guardian

and are allowed in a reasonable amount in his account if the legal services were necessary for the proper performance of the guardian's duty.

Wis. Stats. sec. 880.24(1) also provides explicitly for court supervision of the allowance for guardian's fees. Moreover, in *Guardianship of Messer*, 242 Wis. 66, 7 N.W. 2d 584 (1943) the court said:

In Wisconsin we have no rigid rules as to the basis of guardian's fees in handling the estates of wards. Neither the legislature nor this court has a fixed schedule of fees. In each case, depending upon all the facts and circumstances, the court in which the guardian's accounts are settled must determine what fees are just and reasonable.

The Committee of the American Bar Association on Ethics and Professional Responsibility in its Informal Opinion 863 dated May 31, 1965, addressed the following question:

"If counsel performs legal services for a client for an agreed-upon fee and client is adjudicated incompetent during the progress of the cause, and counsel has been appointed to act for said incompetent (client), may counsel arbitrarily deduct the agreed-upon fee from incompetent's (client's) property, or does the County Judge have a duty to set a fee for legal services performed prior to the incompetency?"

The committee answered the question as follows:

It is the duty of both the appointing Judge and the counsel for the incompetent client to protect the interest of the incompetent, and this duty would extend to the legal service performed by counsel and to the fees charged therefor, whether earned before or after the incompetency incurred. In such a case, the attorney dealing with such a client owes a special duty not to overreach the client.

Under the circumstances set forth in the question, the committee believes that counsel should submit to the appointing court the proof of the performance of the legal services and of the agreed-upon fee and request that the court approve counsel's payment to himself of such fee.

The dual role of guardian of the person and attorney is not prohibited under Wisconsin law. Nor is the collection of fees for professional legal services while serving as guardian prohibited by Wisconsin law. However, the committee is of the opinion that the factual situation places an ethical burden upon the lawyer to accept only a reasonable fee for all services performed. The ethical question is, does the acceptance of both the attorney's fee and the guardian's fee make the

E-80-14

WISCONSIN ETHICS OPINIONS

total compensation excessive? The reasonableness of the fees collected is subject to the approval of the court.