SETTLING CLAIMS ON BEHALF OF MINORS, INCOMPETENTS, AND IN WRONGFUL DEATH ACTIONS

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I. INTRODUCTION

Court approval is necessary to finalize certain settlements. These include settlements involving (1) a minor; (2) an incompetent person; and, (3) a wrongful death action in which one or more of the statutory beneficiaries have not consented to the settlement in writing. This manuscript will review the applicable law and ethics opinions and provide some practical advice to assist the practitioner with obtaining judicial approval of a settlement.

II. THE SETTLEMENT OF A CASE INVOLVING A MINOR PLAINTIFF

A person within the age of 18 years is considered a minor (also referred to as an "infant") under North Carolina law. N.C. Gen. Stat. §1-17 (2005). A minor does not have the capacity to sue or to be sued and must therefore appear in a civil action by and through a general or testamentary guardian or a guardian *ad litem*. N.C. Gen. Stat. §1A-1, Rule 17(b) (2005).

A. APPOINTMENT OF A GUARDIAN *AD LITEM*.

Since most minors do not have a general or testamentary guardian, it is common for a guardian *ad litem* to be appointed for the purpose of prosecuting the action. A guardian *ad litem* must be appointed either before or at the time of the filing of the action upon written application by a relative or friend. N.C. Gen. Stat. §1A-1, Rule 17(c). The appointment is customarily handled by the Clerk of Superior Court and involves the submission of a Petition for Appointment; a Consent to Appointment (signed by the prospective guardian); and, a Proposed Order. (Appendix at pages 1-5) If a specific individual has not consented to the appointment, then the Clerk will appoint someone from the Clerk's list of guardians.

[1] The author thanks Bill Mills for his guidance and insight into this topic.

1. Use of a parent as guardian *ad litem*

A parent may serve as guardian *ad litem* for his or her child. Before you recommend to a parent that he or she serve as guardian, you must consider the ethical issues which may arise during the litigation. Under North Carolina law, two claims arise when a minor is injured by the actions of another. The minor has a claim for his or her damages (i.e., pain and suffering, scars or disfigurement, permanent injury) and the parent has a separate claim for the loss of the child's services (until the child reaches age 18) and the medical expenses which were reasonably necessary to treat the minor's injuries. *Bolkhir v. North Carolina State Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988)(*citations omitted*). If the parent serves as guardian *ad litem* and does not assert a separate claim for lost services and medical expenses, then the parent has waived these claims and allowed the child to recover them. *Id.*; *Shields v. McKay*, 241 N.C. 37, 40-41, 84 S.E.2d 286, 288-89 (1954). Under this scenario, no ethical problems exist. However, the situation is different when the parent serves as guardian *ad litem* and asserts a separate claim for damages.

2. Ethical considerations which may arise when the parent serves as guardian *ad litem* and files a separate claim for damages.

In 1992, the North Carolina State Bar issued an ethics opinion which held that a lawyer may not represent parents as guardians *ad litem* for their injured child and as individuals concerning their related tort claim after receiving a joint settlement offer which is insufficient to fully satisfy all claims. In RPC 109, issued January 17, 1992, the State Bar ruled that there was an irreconcilable conflict between the parent acting as guardian and the parent pursuing his or her personal claim. Any attempt by the attorney to resolve this conflict would be to the benefit of one client and at the expense of the other. As a result, the State Bar decided that:

> Under the circumstances, law firm A must withdraw from representing both clients. The attorneys may not continue representing either of their clients unless their continuing participation is intelligently consented to by the other client, and this is impossible under the facts stated.

Fortunately, the State Bar also issued RPC 123, which was "intended to address in a broader way the issues raised in RPC 109. It is offered for the general guidance of the bar and is not intended to contradict the advice given in response to the specific facts recited in RPC 109."

In RPC 123, the State Bar opined that an attorney could represent the parents on their individual claim for medical bills and the child in a personal injury action. However, the attorney must insist upon the appointment of an independent guardian *ad litem* for the child when a lawsuit is filed. The State Bar ruled that since the interests of both the child and the parents are aligned in establishing the tortfeasor's liability, it is unlikely that any actual conflict will arise before the receipt of a settlement offer. Moreover, the receipt of a single settlement offer to settle both claims does not automatically disqualify the attorney. The attorney may attempt to assist the clients in evaluating the claims and reaching an amicable agreement as to

how to divide the proceeds. But, under no circumstances is the attorney permitted to advocate for one client over the other. If a dispute does arise, the attorney would be permitted to withdraw from the representation of one client upon the consent of the other.

Therefore, whenever a potential conflict exists in your representation of a parent and child, an independent guardian *ad litem* must be appointed. The independent guardian will help ensure that any settlement is in the best interests of the child and not tainted by the parent's own claim for relief. In addition, if an existing guardian *ad litem*, typically a parent, has an obvious conflict of interest, then an attorney may seek the appointment of an independent guardian for the child. Formal Ethics Opinion, R.P.C. 163 (April 15, 1994).

B. EVERY SETTLEMENT INVOLVING A MINOR MUST BE APPROVED BY THE COURT.

Settlements of claims involving minors must be approved by court order. This applies regardless of whether settlement is reached before or after filing suit. A minor cannot be bound by a proposed compromise and settlement of a minor's personal injury claim unless it is properly approved by a judge. *Gillikan v. Gillikan*, 252 N.C. 1, 113 S.E.2d 38 (1960); *Creech v. Melnik*, 147 N.C. App. 471, 556 S.E.2d 587 (2001), *review denied by*, 355 N.C. 490, 561 S.E.2d 498, *reconsideration denied by*, 355 N.C. 747, 565 S.E.2d 194 (2002) (holding that a covenant not to sue on behalf of a minor is invalid without court approval).

The courts of this state have inherent authority over the property of a minor and will exercise this jurisdiction whenever necessary to preserve and protect a child's estate and interests. *Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 161 S.E.2d 116 (1968). The courts will look closely into contracts or settlements which materially affect the rights of a minor. *Redwine v. Clodfelter*, 226 N.C. 366, 38 S.E. 2d 203. In examining a minor settlement, the child's "welfare is the guiding star in determining its reasonableness and validity." *Id.* at 370, 38 S.E.2d at 206 (*citing*, *In re Reynolds Guardianship*, 206 N.C. 276, 173 S.E.789 (1934)). In addition, the court should "lend its wisdom, experience, and circumspection to the infant, who legally wants these faculties and is therefore a likely victim of overreaching." *Payseur v. Rudisill*, 15 N.C. App. 57, 63, 189 S.E.2d 562, 566, *cert. denied by*, 281 N.C. 758, 191 S.E.2d 356 (1972)(*citation omitted*).

1. Procedure for obtaining court approval.

If a settlement is reached after the lawsuit has already been filed, the guardian *ad litem* or general guardian needs to file a Petition for approval of the minor's settlement and obtain a Judgment approving the settlement. (Appendix at pages 6-18) The Judgment must contain sufficient findings of fact and conclusions of law.

Frequently an agreement to settle is reached before any action is filed. In such a case there are two ways to proceed. First, a special proceeding may be instituted under N.C. Gen. Stat. §1-400 with the consent of all parties. A judgment may then be submitted to the senior resident superior court judge for approval of the minor settlement under N.C. Gen. Stat. §1-402. The use of a special proceeding for this purpose was expressly sanctioned in *Gillikan v. Gillikan*, *supra* at p. 3.

The second, and more common, procedure for obtaining court approval is to file a friendly civil action with the issuance of a Summons and Complaint in either District or Superior Court, depending upon the amount in controversy. In this situation, the procedural aspects of the case are greatly expedited since counsel for the defendant(s) cooperates in the process. The documents necessary to consummate the settlement of a minor's claim include a Petition for Appointment of Guardian *ad litem*; an Order Appointing Guardian *ad litem*; a Summons and Complaint; a Petition for the Approval of a Minor's Settlement; and, a Judgment Approving the Minor's Settlement.

Depending on the method of investing and holding the minor's funds, there may be additional proceedings required as discussed hereinafter. It is not uncommon to have the Summons, Complaint, Acceptance of Service, Answer and Petition for Approval of Minor's Settlement to all be filed simultaneously. In the case of a "friendly suit" all that remains is to schedule the hearing for purposes of obtaining the judge's signature on a Judgment approving the settlement.

The procedure to be followed by a particular judge in obtaining approval of a minor's settlement varies greatly. There are judges who will approve such settlements based upon a Consent Judgment signed by all parties having an interest in the matter. In this situation, the court is obviously giving great deference to the guardian *ad litem* or general guardian and their counsel in ensuring that the interests of the minor are protected. Other judges require that the minor be present in court with a parent or parents. Additionally, many judges insist on a structured settlement with an insurance company which has the highest possible rating according to Standard & Poor's, or a surety bond from an insurance company which insures the obligation of the company issuing the annuity contract.

Before you appear before a judge for the purpose of obtaining a minor's settlement, inquire as to what information the judge will want at the hearing and the people whose appearance will be required. You can examine the local rules,[2] speak to the judge's clerk or the trial court administrator, or confer with other lawyers. By making a simple inquiry, you will save yourself and your client much time and potential embarrassment.

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[2] For example, see Local Rule 17.1 for the United States Middle District Court of North Carolina.

In the process of approving the settlement, the judge should consider the following:

- The strength of the plaintiff's case and the existence of any viable defenses;
- The nature and extent of the minor plaintiff's injuries;
- The amount of insurance coverage and, if applicable, the defendant's ability to contribute money to a settlement or to satisfy a judgment;
- Whether the minor's representative and parents think the settlement is fair and reasonable;
- The exact amount that the minor will receive as a result of the settlement and whether this amount is fair and reasonable;
- The propriety of any proposed payments from the settlement funds;[3] and,
- The nature of the proposed release.

The court should also consider the reasonableness of the attorney's fees. Since the minor is unable to enter into a binding contract, it is essential that the amount of attorney's fees be approved by the court. In passing on the amount, the judge is not bound by any fee contract signed by the parents and the attorney. Rather, the court is required to make an independent inquiry. Generally, in a minor's claim, the attorney should maintain a record of the hours spent in handling the claim and be prepared to offer an Affidavit in support of the proposed fee, depending on the judge's requirements. In a case involving a substantial recovery, it is wise to obtain an Affidavit from another attorney supporting the proposed fee. Any such affidavit should address the various factors to be considered as outlined in Rule 1.5 of the Revised Rules of Professional Conduct.[4]

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[3] For example, if the minor child does not have a claim for medical expenses, the settlement proceeds cannot be used to pay any outstanding medical bills because those are owed by the parents, and not the child. *See generally, Harris-Teeter Supermarkets, Inc. v. Watts*, 98 N.C. App. 684, 392 S.E.2d 123 (1990).

[4] These factors include (1) the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

2. Disbursement of the minor's settlement proceeds

The proceeds of a minor's settlement can be disbursed in the following three ways:

a. To the Clerk of Superior Court

The simplest and most conservative approach to the disbursement of the settlement funds is to have them paid into the Clerk of Court for the county in which the Judgment was approved. *See*, N.C. Gen. Stat. §35A-1227. When this is done, the Clerk invests the funds for the benefit of the minor child in very secure conservative investments. The investment then grows until the child reaches the age of 18, at which time the minor may apply for receipt of the funds upon proof that he or she has obtained the age of 18 years. This method eliminates the need to obtain a bond, to monitor the investments, and to complete an annual accounting.

b. Invested in an annuity pursuant to a structured settlement.

When the settlement contemplates the purchase of an annuity, there are no funds to be deposited. Instead, the attorney or parent of the minor will receive a copy of the annuity contract. Some superior court judges may not approve of a structured settlement unless they are satisfied that the insurance company which issued the annuity is sound, or that there is an additional surety behind the annuity contract. It is therefore recommended that if the insurance company issuing the annuity is not a well known company, counsel should be prepared to provide the credit rating from Standard and Poor's.

c. To a guardian of the child's estate.

If a parent or a financial advisor is to be the guardian of a minor's estate for the purpose of investing settlement funds, that person must be appointed by the Clerk of Court and bonded under N.C. Gen. Stat. §§35A-1230-31. When the funds are to be paid to a guardian, the Judgment approving the settlement should reflect that the payment of the minor's funds should be made directly to the Clerk of Court and that the Clerk should hold the funds for payment to the guardian upon appointment. The Judgment may also direct that the funds be paid directly to the guardian if the person has already been appointed.

You may then arrange to have the insurance company's agent appear with you and the guardian at the Clerk's office for the appointment of a guardian. At that time, the bond can be issued and all of the paperwork can be completed. The premium for the bond can be paid from the minor's funds.

Once the guardian of the minor's estate has been appointed, his or her powers are delineated in N.C. Gen. Stat. §35A-1252. Generally, this includes investing the assets of the ward in a reasonable and prudent manner. Also, this would include the payment on the ward's behalf of any necessary expenses incurred in handling the settlement funds. You must stress to the guardian of the estate that the child's funds may not be used to pay for the child's ongoing

needs, since that is a parental obligation. In addition, court approval should always be obtained before expenditures are made from estate principal.

III. THE SETTLEMENT OF A CASE INVOLVING AN INCOMPETENT PERSON.

An incompetent adult is "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. §35A-1101(7). Article I, Chapter 35A of the North Carolina General Statutes "establishes the exclusive procedure for adjudicating a person to be an incompetent adult...." N.C. Gen. Stat. §35A-1102. However, a trial judge is authorized to appoint a guardian *ad litem* for a litigant under Rule 17(b) of the North Carolina Rules of Civil Procedure if circumstances are brought to the judge's attention which raise a substantial question as to whether the litigant is *non compos mentis*. *Id.* (as amended, effective December 1, 2003); *In re J.A.A.*, ___ N.C. App. ___, 623 S.E.2d 45, 49 (2005). When conducting a competency hearing under Rule 17, the trial court must comply with the procedures for determining incompetency under Chapter 35A. *In re J.A.A.* at 49.

A person who has been adjudged incompetent becomes a ward of the court. *Perry v. Jolly*, 259 N.C. 305, 130 S.E.2d 654 (1963); *In the Matter of the Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994). The incompetent person cannot sue or be sued and must appear in a civil action by and through a general or testamentary guardian or a guardian *ad litem*. N.C. Gen. Stat. §1A-1, Rule 17(b); *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971). Although represented by a guardian, the court continues to have complete supervision and direction of all matters and things affecting the incompetent's estate, including settlements. *In the matter of Edwards*, 243 N.C. 70, 71, 89 S.E.2d 746, 747 (1955). As a result, it is generally recognized that a guardian may compromise a pending suit, provided that the court determines the settlement to be in the best interests of the incompetent. 57 *C.J.S.*, Mental Health §170 (2005); *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, ___, 93 S.E. 374, 376 (1917).

A. REPRESENTING AN INCOMPETENT ADULT WHO HAS NOT BEEN ADJUDGED INCOMPETENT.

A guardian *ad litem* may be appointed to represent a person who has been adjudicated incompetent. The procedure is the same as articulated above, *supra* at page 1, and a relative or friend must simply file with the Clerk an appropriate petition in writing. The Clerk will then appoint a guardian who will appear in the action on behalf of the incompetent person.

1. The client who is clearly incompetent.

How do you proceed when there is no dispute that the plaintiff is an incompetent adult, but has not been formally adjudicated? Do you have to first initiate an incompetency proceeding before filing a lawsuit? According to *Rutledge v. Rutledge*, the answer is no. If a party is conceded (although not formally adjudicated) to be mentally incompetent, then he or she must appear in the proceeding by a guardian or guardian *ad litem*. *Id* at 431, 179 S.E.2d at 165; *also see, Bell v. Smith*, 262 N.C. 540, 138 S.E.2d 34 (1964). Therefore, as a practical matter, you may initiate an action on behalf of an incompetent adult with the simple appointment of a guardian *ad litem* pursuant to Rule 17. However, it is important to remember that this appointment is not an adjudication of incompetence under N.C. Gen. Stat. §35A-1101 *et. seq.* Therefore, before a settlement can be disbursed, it will be necessary to have an adjudication of incompetency and the appointment of either a general guardian or a guardian of the estate, pursuant to Chapter 35A.

If there is no reasonable dispute that your client is incompetent, then you (or the family members) should move forward early in the litigation with an adjudication of incompetence. A form petition is attached hereto at Appendix pages 19-21.

2. The client who becomes incompetent during the course of litigation.

Let's assume that you have been hired by a client whom you believed was competent. However, during the course of the litigation, you have concluded, in large part based upon private confidential communications with your client, that the plaintiff is no longer competent to manage his or her affairs. You attempt to discuss this with your client, but your client insists that he or she is competent and tells you to not proceed with an action for the appointment of a guardian or an adjudication of incompetency. What should you do?

Fortunately, Rule 1.14 of the Revised Rules of Professional Conduct provides some guidance. The rule provides as follows:

Client with Diminished Capacity

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem* or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [Confidentiality of Information]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

You must continue to treat the client as you would any other client without regard to his or her mental impairment. In addition, you should continue to involve the client in all essential discussions, including those which concern settlement. However, in an appropriate case, you are permitted to seek the appointment of a guardian even if the client objects to your course of action. *See* Formal Ethics Opinion, R.P.C. 157 (April 16, 1993).

If you are approaching a settlement with an incompetent adult who resists the appointment of a guardian, you must tread very carefully. Any person may file a petition to declare another incompetent. N.C. Gen. Stat. §35A-1105-06. Any person may also file a petition to be appointed the guardian of an incompetent. N.C. Gen. Stat. §35A-1210. Hopefully if this situation arises, a medical care provider or family member will share your concerns regarding the client's competency and will initiate the appropriate proceedings.

B. PROCEDURE FOR OBTAINING COURT APPROVAL AND DISBURSING THE SETTLEMENT FUNDS FOR AN INCOMPETENT CLIENT.

Once you have proceeded with an adjudication of incompetency and obtained the appointment of a guardian for the plaintiff, you are then prepared to obtain judicial approval of a proposed settlement and able to disburse the proceeds. The procedure is very similar to the procedure followed in obtaining judicial approval of a minor's settlement. You must petition the court for approval of the settlement by presenting a summary of the settlement to the court having jurisdiction over the matter. The petition should set forth the facts necessary to allow the court to evaluate the fairness of the settlement and the payment of any attorney's fees and expenses. The judgment should direct that the net recovery of the incompetent plaintiff be held in an interest-bearing account established by plaintiff's counsel as an officer of the court, or by the Clerk of Court pending an Order establishing any limitations and restrictions upon the general guardian's ability to expend those funds.

If the funds to be handled by the general guardian are substantial, it is recommended that an Order be entered pursuant to N.C. Gen. Stat. §35A-1215 setting forth any limitations and restrictions of the guardian's use of the ward's settlement proceeds. A guardian is required to be bonded and required to make annual reports to the Clerk. In addition, the Clerk of Court has broad authority to control the manner in which the guardian uses the ward's funds.

IV. THE SETTLEMENT OF A WRONGFUL DEATH CASE IN WHICH THE STATUTORY BENEFICIARIES REFUSE TO CONSENT TO THE SETTLEMENT IN WRITING.

The personal representative of an estate has the authority to file an action for the decedent's wrongful death. The representative also has the authority to compromise or settle a wrongful death claim whether in litigation or not. However, a wrongful death settlement is not valid until all of the competent adult beneficiaries have consented to it in writing. *Bowling v. Combs*, 60 N.C. App. 234, 298 S.E.2d 754 (1983). If any of the beneficiaries do not consent to the settlement in writing, then the settlement must be approved by a district or superior court judge under N.C. Gen. Stat. §28A-13-3(23). In addition, judicial approval of a wrongful death settlement is required if a beneficiary is a minor or an incompetent person.

Under North Carolina law, a wrongful death settlement is distributed in accordance with the Intestate Succession Act found in Chapter 29 of the General Statutes. N.C. Gen. Stat. §28A-18-2. The statutory beneficiaries are the real parties in interest in the wrongful death proceeding. *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958). As a result, their consent to a settlement is essential. If it has not been given in writing, then the trial court must determine that the settlement is in the best interests of the beneficiaries of the estate.

Once a settlement appears imminent, the attorney should contact each beneficiary and advise him or her of the likely resolution. If the beneficiaries are comfortable with the prospective settlement, then a written consent should be drafted and mailed to each person for his or her review. A sample consent document may found in the Appendix at pages 22-23.

Most beneficiaries will provide their written consent, especially when they will share in the settlement proceeds. However if a beneficiary does not sign and return the consent form, then the personal representative of the estate must file a motion to approve the wrongful death settlement. The motion should be filed in the court where the wrongful death action is pending and all of the non-consenting heirs should be served with notice of the hearing. A sample motion may be found in the Appendix at pages 24-27.

If none of the beneficiaries appear at the hearing, then a consent order, signed by all parties, may be submitted to the judge for his or her review and execution. (Appendix at pages 28-31) If any beneficiaries do appear, then you should be prepared to educate the court about the case and the proposed settlement. In particular, the trial court should be advised of the nature of the case; the existence of any viable defenses; the amount of actual damages; the relationship of the beneficiaries to the decedent; the amount of insurance coverage; and whether the defendant has any assets which could be used to pay a settlement or an excess judgment. The judge will then listen to any heirs who object to the proposed settlement. Most judges will approve a wrongful death settlement which is fair, reasonable, and in the best interests of the statutory beneficiaries. Please note that the disbursement of the wrongful death settlement will be audited and approved by the Clerk of Superior Court in the course of its review of the personal representative's accounting. N.C. Gen. Stat. §28A-18-2(a).

V. CONCLUSION

Settlements involving minors, incompetent persons, and wrongful death actions require a little extra work than the typical case. This manuscript was drafted in order to provide the practicing attorney with the essential skills needed for obtaining judicial approval of these settlements. Please feel free to use the forms which have been included in the appendix. Good luck!