ETHICAL ISSUES WHEN REPRESENTING MINORS AND INCOMPETENT PERSONS

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I. BACKGROUND INFORMATION

A. The Courts Will Protect the Rights of Minors and Incompetent Persons

A minor is an individual under the age of 18 who is neither married nor emancipated.[2] N.C. Gen. Stat. § 35A-1202(12). "It is well settled that the conventional contracts of an infant, except those for necessities and those authorized by statute, are voidable at the election of the infant and may be disaffirmed by the infant during minority or within a reasonable time after reaching majority."[3] *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C. App. 580, 582, 269 S.E.2d 320, 321 (1980). This is because minors lack legal capacity to enter into most contracts. *Creech ex rel. Creech v. Melnik*, 147 N.C. App. 471, 476-77, 556 S.E.2d 587, 591 (2001); *see Kelly v. United States*, 809 F.Supp.2d 429 (2011) (holding that a liability waiver signed by a minor was not enforceable). The North Carolina courts "have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. The court looks closely into contracts or settlements materially affecting the rights of infants." *Sigmund Sternberger Found., Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968).

An incompetent adult is an individual "who lacks sufficient mental 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, inebriety, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7). A person who has been adjudicated incompetent becomes a ward of the court. *Perry v. Jolly*¸ 259 N.C. 305, 130 S.E.2d 654 (1963). The North Carolina courts have "complete supervision and direction of all matters and things affecting the estates of incompetents." *In re Edwards*, 243 N.C. 70, 71, 89 S.E.2d 746, 747 (1955).

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[2] North Carolina case law often refers to minors as "infants."

[3] A minor is bound by, and may not disaffirm, the rights and liabilities imposed upon motorists under G.S. § 20-279.21 of the N.C. Financial Responsibility Act. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 444-45, 238 S.E.2d 597, 605-06 (1977) (holding that the insurer could pursue a minor for reimbursement of a property damage settlement under G.S. § 20-279.21(h)).

B. Minors and Incompetent Persons Must Prosecute or Defend a Civil Case Through a Personal Representative

Minors and incompetent persons lack the capacity under North Carolina law to prosecute or defend a case. As a result, they must appear in a civil action by a "general or testamentary guardian, if they have any within this State or by guardian ad litem…." N.C. Gen. Stat. § 1A-1, Rule 17(b).[4] A judgment entered against a minor who is not properly represented by a guardian is voidable unless the judgment is rendered in the minor's favor and is not prejudicial. *Gillikan v. Gillikan*, 252 N.C. 1, 8-9, 113 S.E.2d 38, 44 (1960); *United States v. Ruger, Model 223 Mini Rifle, Serial No. 1842495*, 2009 WL 2591145 at p. 1, No. 1:09-cv-197 (W.D.N.C. 2009) (*quoting Williston on Contracts*, § 9.25).

1. General or Testamentary Guardian

A general guardian is a guardian of the estate and the person who has been issued letters of appointment by the clerk of court. N.C. Gen. Stat. § 35A-1202(7). A general guardian may be appointed for a minor or an incompetent ward. The general guardian has the authority to: (1) manage the property, estate, and business affairs of the ward, and (2) perform duties relating to the care, custody, and control of the ward. N.C. Gen. Stat. § 35A-1202(9)-(10), § 35A-1241, § 35A-1251, § 35A-1252.

The statute of limitations begins to run against a minor or incompetent person who is represented by a general guardian when a cause of action accrues.[5] "If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. s. 1-17, whichever shall occur first." *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962). Once the statute commences, "it continues to run" and "nothing stops it." *Rowland v. Beauchamp*, 253 N.C. 231, 235, 116 S.E.2d 720, 723 (1960). However, the statute of limitations on a medical malpractice case for a minor does not begin to run when a general guardian is appointed and may be pursued within the time limitations set forth in G.S. § 1-17(b)-(c).[6] *Osborne by Williams v. Annie Penn Memorial Hosp., Inc.*, 95 N.C. App. 96, 101-02, 381 S.E.2d 794, 796-98 (1989).

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[4] In federal court, a minor or an incompetent person may appear through a general guardian, committee, conservator, or a like fiduciary, or, if a representative has not been appointed, through a next friend or a guardian ad litem. Fed. R. Civ. P. 17(c).

[5] If a minor is represented by a guardian, "the statute of limitations for a breach of fiduciary duty claim begins to run when the guardian knew or should have known of the facts giving rise to the claim." *Toomer v. Branch Banking and Trust Co.*, 117 N.C. App. 58, 69, 614 S.E.2d 328, 336 (2005).

[6] N.C. Gen. Stat. § 1-17(c) was added by Session Law 2011-400 and applies to causes of actions arising on or after October 1, 2011. Under § 1-17(c), "if the time limitations in G.S. §1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time

An adult does not need to be adjudicated incompetent in order for the statute of limitations to be tolled under G.S. § 1-17. Rather, an adult needs to be "incompetent within the meaning of G.S. § 35A-1101(7)" when a cause of action accrues for the statute to be tolled. The limitations period will commence once the adult is no longer incompetent or a guardian is appointed. *Leonard v. England*, 115 N.C. App. 103, 445 S.E.2d 50 (1994); *Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 709 S.E.2d 496 (2011).

A testamentary guardian does not exist under Chapter 35A of the General Statutes (Incompetency and Guardianship). A parent by a last will and testament may recommend a guardian for his or her minor children upon the parent's death. "In the absence of a surviving parent, such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the minor's best interest." N.C. Gen. Stat. § 35A-1225(a); *see Buchanan v. Buchanan*, 207 N.C. App. 112, 118-19, 698 S.E.2d 485, 489 (2010). However, "a will may not create a guardianship for an adult heir who has not been declared incompetent through the provisions of Chapter 35A" and "a last will and testament cannot operate to appoint a guardian for an adult child regardless of the disability." *In re Efird*, 114 N.C. App. 638, 640-42, 442 S.E.2d 381, 382-83 (1994).

2. Guardian Ad Litem

Although an incompetent adult will often have a general guardian, a minor rarely does. It is therefore common for a guardian ad litem to be appointed for a minor in a civil case. "A guardian ad litem is appointed as a representative of the court to act for the minor in the cause, with authority to engage counsel, to file suit and to prosecute, control and direct the litigation." *Ruger*, 2009 WL 2591145 at p. 2 (*quoting Williston on Contracts* § 9.25). Upon appointment, a guardian ad litem is authorized to file and serve pleadings, and the court may proceed to final judgment, order, or decree against the minor or incompetent party as if the party was under no legal disability. N.C. Gen. Stat. § 1A-1, Rule 17(e). The fees of a guardian ad litem are recoverable as costs under G.S. § 7A-305(d)(7).[7]

A guardian ad litem must be appointed either before or at the time of the filing of a civil action upon the written application of a relative or friend of the minor or incompetent person, or by the court on its own motion. N.C. Gen. Stat. § 1A-1, Rule 17(c). The appointment is customarily handled by the clerk of court and involves (1) the filing of an application or petition for appointment of a guardian ad litem by a relative or the minor's attorney, (2) a signed consent

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before the minor attains the full age of 10 years." This is subject to two exceptions for abused or neglected juveniles, and children in the legal custody of the government or a foster care agency.

[7] The guardian ad litem's fees must be reasonable and necessary. A guardian should not "review all discovery motions and depositions and … participate in all pre-trial, discovery and sanctions hearings without regard to their relevance, or irrelevance, to the minor's interests." *Goodyear Dunlop Tires North America, Ltd. v. Gamez*, 151 S.W.3d 574 (Tex. Ct. of App. 2004) (vacating a trial court judgment that awarded approximately $430,000 to six guardians ad litem in a personal injury case).

to the appointment by the prospective guardian, and (3) a proposed order.[8] If a person has not consented to the appointment, the clerk of court will appoint someone from the office's list of guardians. The same requirements for the appointment of a guardian ad litem exist under Rule 17 of the Federal Rules of Civil Procedure and Local Civil Rule 17.1 of the United States District Courts for the Eastern and Middle Districts of North Carolina.[9] Sample forms for the appointment of a guardian ad litem are attached to this manuscript.

A guardian ad litem may represent the minor or incompetent person *pro se* or employ counsel. *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981). If the guardian ad litem chooses to be represented by legal counsel, the guardian should permit counsel to make decisions about the strategy for the litigation. Even though the guardian ad litem may be a lawyer, the guardian is not "co-counsel" with the retained attorney in the litigation of the case. 2002 FEO 8 (January 24, 2003).

Once a guardian ad litem is properly appointed, the statute of limitations begins to run against the minor or incompetent person. *Jefferys v. Tolin*, 90 N.C. App. 233, 235, 368 S.E.2d 201, 202 (1988); *Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281 (4th Cir. 1979); *Simmons v. Justice*, 87 F.Supp.2d 524 (W.D.N.C. 2000). The power of a guardian ad litem "is strictly limited to the performance of the precise duty imposed upon him by the order appointing him, that is, the prosecution of the particular action in which he was appointed." *Teele v. Kerr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964). Upon the entry of a judgment in the minor's favor, the guardian ad litem's authority ends unless the judgment is attacked under Rule 60. A guardian ad litem is not required to collect a judgment for the minor. Accordingly, the ten year statute of limitations for renewing a judgment does not begin to run until the minor becomes an adult or has a general guardian appointed. *Id.*, 261 N.C. at 150-52, 134 S.E.2d at 128-29.

When an attorney acts purely as a court-appointed guardian ad litem for a parent with diminished mental capacity in a termination of parental rights case and not as the lawyer, an attorney-client relationship does not exist. As a result, the guardian ad litem does not owe the parent a duty of confidentiality. 2004 FEO 11 (January 21, 2005). The guardian ad litem may disclose communications with the disabled parent in a court proceeding without violating any testimonial privileges.[10] *In re Shepard*, 162 N.C. App. 215, 226-30, 591 S.E.2d 1, 8-10 (2004). The State Bar cautioned that "it may be prudent for the GAL to explain fully to the parent, to the

[8] In federal court, filings should only include the minor's initials, the year of the individual's birth, and (if necessary) the last four digits of the social security or taxpayer identification number. Fed. R. Civ. P. Rule 5.2(a).

[9] If a guardian ad litem has been appointed in state court, the U.S. District Court for the Eastern District of North Carolina will not require a new appointment unless the court finds that the interests of the minor or incompetent are not being adequately protected. Local Civil Rule 17.1 (E.D.N.C.).

[10] Although *Shepard* and 2004 FEO 11 concern a termination of parental rights action, these principles should apply to any proceeding where a statute requires the appointment of a guardian ad litem to satisfy procedural due process, such as in an incompetency case.

extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer." 2004 FEO 11.

Similarly, an attorney who is the guardian ad litem for a child in an abuse or neglect case, but not the child's attorney, may communicate with the child's mother without obtaining the consent of the mother's attorney. The guardian ad litem is not subject to the prohibition in Rule 4.2 on communications with a represented person because she is not acting in the course of her representation of a client. 2006 FEO 19 (January 19, 2007). Nevertheless, an attorney who serves as guardian ad litem "must fulfill the responsibilities of the guardian ad litem in a manner that is consistent with the requirements of the Rules of Professional Conduct. This means that the lawyer must be honest, avoid conflicts of interest, and exercise professional judgment in making decisions about matters that are within the purview of the guardian ad litem such as whether a settlement proposal should be accepted." 2002 FEO 8 (January 24, 2003).

II. ETHICAL ISSUES ARISING FROM THE REPRESENTATION OF A MINOR OR AN INCOMPETENT PERSON.

A. Attorney-Client Relationship

"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 client-lawyer relationship with the client." N.C. Rev. Rules of Prof. Conduct, Rule 1.14(a). The attorney represents the minor or incompetent client and the guardian in his or her representative capacity and owes them a duty of confidentiality. 2006 FEO 9 (July 21, 2006).

Despite the dual representation, the attorney's primary duty is to represent the interests of the minor or incompetent client, who is the real party in interest. 2006 FEO 9; CPR 15 (July 12, 1974). The attorney's duty of loyalty is to the minor or incompetent person and not the guardian, "particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client." 98 FEO 16 (January 15, 1999). When this occurs and the legal guardian has an obvious conflict of interest, the attorney may seek the appointment of an independent guardian ad litem to prosecute an action.[11] RPC 163 (April 15, 1994). If the guardian ad litem acts outside the scope of his or her official capacity as legal representative, the information learned by the attorney may be disclosed, even over the objections of the guardian, if necessary to represent the client. 2006 FEO 9.

A minor's parents will often consult with an attorney about legal matters concerning their child. If legal representation is declined, the attorney still owes the parents a duty of confidentiality and generally cannot disclose confidential information learned during the consultation. 2005 FEO 4 (April 21, 2006); N.C. Rev. Rules of Prof. Conduct, Rule 1.8(b).

[11] A guardian may be removed by the clerk under G.S. § 35A-1290(b)(7) upon a showing of a potential conflict of interest between the ward and guardian. *In re Armfield,* 113 N.C. App. 467, 439 S.E.2d 216 (1994).

If the Attorney agrees to represent the minor, the parents will frequently be present during discussions with the client and will inquire about their child's case.[12] On occasion, a minor client may not want the attorney to disclose certain information to his or her parents or guardian. "A lawyer representing a minor may disclose confidential information to the minor's legal guardian, over the minor's objection, if the disclosure is necessary for the guardian to make a legally binding decision about the subject matter of the representation. However, the lawyer may withhold confidential information from the legal guardian if the lawyer believes that the guardian is acting adversely to the interests of the child or the information is not necessary to make a decision about the representation." 98 FEO 18 (January 15, 1999).

B. Deciding Whether to Use a Parent as Guardian Ad Litem

A parent may serve as guardian ad litem for a child . Before recommending that a parent serve as guardian, the attorney should consider the ethical issues that may arise during litigation. Under North Carolina law, two claims arise when a minor is injured by a third-party. The minor has a claim for his or her personal injuries (i.e. pain and suffering, scars or disfigurement, permanent injury) and the parents have a claim for the loss of the child's services and the medical expenses reasonably necessary to treat the child's injuries. *Bolkhir v. North Carolina State Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988).

The parents waive their claims for medical expenses and lost services when a parent serves as guardian ad litem and allows the child to assert these claims. By doing so, the parent treats the child as emancipated for the purpose of recovering the medical expenses and/or lost services, and the child may recover all damages flowing from the injury.[13] *Bolkhir*, 321 N.C. at 713, 365 S.E.2d at 902; *Shields v. McKay*, 241 N.C. 37, 84 S.E.2d 286 (1954). Under this scenario, no ethical problems exist from the parent's service as guardian ad litem because the attorney only represents the parent in a representative capacity. The ethical considerations are different when the attorney represents a parent on an individual claim and as guardian ad litem for the child.

[12] When necessary to assist in the representation, the presence of family members or other persons at the client's request during discussions with an attorney "generally does not affect the applicability of the attorney-client evidentiary privilege." N.C. Rev. Rules of Prof. Conduct, Rule 1.14, Comment [3].

[13] Parents may also assign their claims for medical expenses and lost services to the child. Whether the claims are waived or assigned, they must still be pursued within the three-year statute of limitations and are not tolled while the child is a minor. *Vaughan v. Moore*, 89 N.C. App. 566, 366 S.E.2d 518 (1988).

1. The Existence of an Irreconcilable Conflict of Interest When Representing the Parents Individually and as Guardians Ad Litem for a Minor.

In RPC 109, the State Bar was asked to give an ethics opinion under the following facts:

1. Y, the infant son of Mr. and Ms. X, received serious injuries during the course of his birth;

2. Y was profoundly brain damaged as a result of his injuries and will always require institutional care;

3. Mr. and Ms. X were appointed as guardians ad litem for Y and they employed Law Firm to represent Y's interests in a medical malpractice case against the obstetrician;

4. Mr. and Ms. X also employed Law Firm to represent them in connection with a claim for negligent infliction of emotional distress against the obstetrician;

5. The liability insurance company agreed to settle for a lump sum and told Law Firm to disburse the funds between the child and parents as the attorneys see fit.

Due to the lump sum offer to the parents individually and as guardians ad litem for the minor, the attorneys in the Law Firm represented conflicting interests which could not be reconciled. A division of the settlement offer would benefit the interests of one client over the other. The State Bar concluded:

> The parents have a conflict of interest between their personal claims and the claims of the child for whom they are fiduciaries. An attorney may not ethically assist clients in putting themselves in a position where there is a conflict of interest between their personal claims and their fiduciary responsibilities. When, as here presented, the claims are in a conflict situation, the attorney may not ethically represent both claimants and may not divide up a joint offer.
>
> Under the circumstances, [the Law Firm] 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.

RPC 109 (January 17, 1992). The State Bar's opinion did not change in response to an inquiry about whether the attorneys could petition the court to divide the funds after hearing evidence concerning the separate claims of the parents and child. *Id.*

The attorneys in RPC 109 could not file a motion to remove the parents as guardians ad litem for the minor client. This is because the attorneys represented the parents in their personal capacity and the filing of a removal motion would be directly adverse to the parents-clients in violation of Rule 1.7(a). 2006 FEO 9 (July 21, 2006). The attorneys also could not withdraw

from the representation of the parents in their personal capacity and file a motion to remove them as guardians ad litem. This would violate Rule 1.9(a) which prohibits an attorney from representing a person whose interests are materially adverse to the interests of a former client in the same or a substantially related matter. The only course of action available to the attorneys was to move to withdraw from representing all parties due to the irreconcilable conflict of interest between the parents and the child. *Id.* (applying this principle when the parent/guardian insists on pursuing a frivolous claim and the attorney jointly represents the parent individually and as guardian for the child).

2. Avoiding Potential Conflicts of Interest Through the Use of an Independent Guardian Ad Litem.

In RPC 123, the State Bar addressed in a broader way the issues raised in RPC 109. The State Bar noted that, even though the clients' interests are potentially in conflict, the attorney may still represent the parents on their negligent infliction of emotional distress claims and through them the child in negotiating with the physician or his insurer before filing a lawsuit. "Once a lawsuit is commenced, the attorney should insist upon the appointment of an independent guardian ad litem for the child. If it appears that the interests of the parents and the child will not necessarily conflict, the attorney may undertake to represent both with the intelligent consent of the parents and the child's independent guardian ad litem." RPC 123 (January 17, 1992). "To be independent, a guardian ad litem should have no separate claim of his or her own to pursue, including a claim for medical expenses for a dependent child." RPC 251 (July 18, 1997).

An actual conflict of interest between the parents and the child exists once a defendant makes a joint offer requiring the plaintiffs to divide the proceeds. When an independent guardian ad litem represents the child, this conflict would not automatically disqualify the attorney from representing the parents and child because the clients are family members and their economic interests would not be necessarily antagonistic. The attorney may assist the parents and independent guardian ad litem in evaluating their respective claims and in amicably agreeing to a division of the settlement funds which could then be presented to the court for approval.[14] "Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other." RPC 123. If placed in an advocacy role, the attorney must withdraw from the representation of all clients unless the former client gives informed consent in writing to the attorney's continued representation of the other client(s).[15] RPC 123; RPC 251; N.C. Rev. Rules of Prof. Conduct, Rule 1.9(a).

[14] In addition, the attorney may recommend an equitable division of the settlement funds for the clients' consideration if the attorney can do so impartially. RPC 251.

[15] "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances." N.C. Rev. Rules of Prof. Conduct, Rule 1.0(f).

A similar conflict of interest exists when an attorney represents multiple clients and the available insurance proceeds are insufficient to satisfy all claims. The attorney may represent multiple clients, including parents and children, provided that there are no potential crossclaims between them.[16] In order to do so, at the beginning of the representation, each claimant and/or the claimant's parent or legal guardian must give informed consent to the multiple representation. After litigation is commenced, an independent guardian ad litem must be appointed for each minor and the guardian must also give informed consent to the multiple representation. "The disclosure at the beginning of the representation, and to the guardians ad litem, must include an explanation of the consequences of limited insurance funds and the possibility of a dispute among the claimants as to the division of the insurance proceeds." RPC 251.

When representing multiple clients, an attorney "shall not participate in making an aggregate settlement of the claims of or against the clients … unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims … involved and of the participation of each person in the settlement." N.C. Rev. Rules of Prof. Conduct, Rule 1.8(g). This rule protects each client's right under Rule 1.2(a) to have the final decision about whether to settle a matter. *Id.*, Rule 1.8(g), Comment [13]. Sample forms concerning the multiple representation of clients, the division of lump sum settlement offers, and aggregate settlement demands are attached to this manuscript.

Evaluating the potential claims of a minor is important when the parent (or another relative) may be the at-fault party. In RPC 163, the attorney agreed to represent a 17-year-old child who was injured in a motor vehicle collision but not the mother who was driving the car. The father retained the attorney as guardian for his child. After investigating the case, the attorney concluded that the mother was most likely negligent, although the other driver may have also been negligent. When the attorney disclosed this information to the father, the parents insisted that the attorney not sue the mother because their insurance rates would increase. The attorney believed that the parents were not acting in the best interests of the minor client and that he had an ethical and moral duty to proceed with the case against the mother. Under these circumstances, it would be permissible for the attorney to seek the appointment of an independent guardian ad litem to represent the minor's interests. RPC 163 (April 15, 1994). If the attorney had represented the mother, the attorney would have been required to withdraw from representing both clients unless the mother gave informed consent to the attorney's continued representation of the daughter.[17] N.C. Rev. Rules of Prof. Conduct, Rule 1.9(a).

[16] Under Rule 1.7, the attorney cannot represent any individuals with directly adverse interests that would require the attorney to advocate for the interests of one client over the other. 2001 FEO 6 (July 27, 2001) (multiple clients with competing claims to workers' compensation death benefits).

[17] If the mother gave informed consent in writing, the attorney could not use confidential information from his representation of the mother to her disadvantage or reveal confidential information unless permitted by Rule 1.6. N.C. Rev. Rules of Prof. Conduct, Rule 1.9(c).

In 2006 FEO 9, the minor was a passenger in a car driven by his grandmother. The minor was severely injured when his grandmother's car collided with a truck. The mother of the child hired an attorney and she was appointed guardian ad litem for her son in a lawsuit against the truck driver. During discovery, the evidence established that the grandmother was negligent and the truck driver was not. The attorney determined that the lawsuit should be dismissed and a new lawsuit should be filed against the grandmother, who had substantial assets. When the attorney gave this advice to the mother, she insisted that the attorney continue to prosecute the case against the truck driver.

The attorney in 2006 FEO 9 believed that the lawsuit against the truck driver was frivolous. If the guardian ad litem refused to dismiss the frivolous lawsuit, the attorney was required to either (1) file a motion to withdraw, or (2) if the guardian ad litem is not fulfilling her fiduciary duties, file a motion to remove the guardian and replace her with an independent guardian ad litem. In a motion to withdraw, the attorney may only disclose the reasons for the request under Rule 1.16 (entitled, Declining or Terminating Representation). In a motion to remove and replace the guardian, the attorney may only disclose information to establish that the mother was violating her fiduciary duties to the minor. 2006 FEO 9 (July 21, 2006).

C. Communications with Minors and Guardians

In a criminal case, a defense attorney may not communicate with a child who is the prosecuting witness without first ascertaining whether the child has a guardian ad litem or attorney. If the child has a guardian ad litem or attorney, the defense attorney must obtain the consent of the guardian or the attorney before talking with the child. During communications with the child, the defense attorney must be careful to ensure that the child "is not intimidated or induced to believe the attorney is disinterested or representing the interests of the witness." RPC 61 (July 13, 1990). An attorney may not attempt to avoid obtaining the consent of the guardian or attorney by instructing an agent to interview the child. These same principles apply to communications with a child in a civil case.[18] RPC 249 (April 4, 1997).

D. Representing an Incompetent Adult Who Has Not Been Adjudicated Incompetent.

"Where a party in a civil action has been judicially determined or is conceded to be mentally incompetent, the law is clear; he must be represented by a guardian or guardian Ad litem." *Rutledge v. Rutledge*, 10 N.C. App. 427, 431, 179 S.E.2d 163, 165 (1971). "Either party, or the court upon its own motion, may initiate proceedings for the appointment of a guardian *ad litem* before any hearing on the merits." *Bell v. Smith,* 262 N.C. 540, 138 S.E.2d 34 (1964).

A court may determine, in its sound discretion, during the course of a civil case that a substantial question exists as to whether a party, who is not represented by a guardian, is

[18] If the guardian ad litem is represented by an attorney, "opposing counsel must comply with Rule 4.2 and respect the decision of the guardian ad litem's trial counsel to deny a request to communicate privately with their client, the guardian ad litem." 2002 FEO 8 (January 24, 2003).

incompetent. The trial judge should normally conduct a voir dire examination and, if the evidence is conflicting, make findings of fact to support a decision about whether a substantial question of competency has been raised. If a substantial question exists, "it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the right of such party." *Rutledge*, 10 N.C. App. at 432-33, 179 S.E.2d at 166.

The trial judge has the authority under Rule 17(b) to determine whether a party is incompetent and entitled to a guardian ad litem. N.C. Gen. Stat. § 1A-1, Rule 17(b); N.C. Gen. Stat. § 35A-1102. The judge must comply with the procedures in Chapter 35A for determining incompetency. *In re J.A.A.*, 175 N.C. App. 66, 72-73, 623 S.E.2d 45, 49-50 (2005). "The trial court should always keep in mind that the appointment of a guardian *ad litem* will divest the [party] of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *Id.*, 175 N.C. App. at 71, 623 S.E.2d at 48-49 (*citing Hagins v. Redevelopment Comm. of Greensboro*, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969)).

"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." N.C. Rev. Rules of Prof. Conduct, Rule 1.14(b). "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." *Id.*, Rule 1.14(c). The attorney may seek the appointment of a guardian for the client with diminished capacity even if the client objects. RPC 157 (April 16, 1993).

E. Determining Whether a Minor is Competent to Testify.

In cases with a minor plaintiff, defense counsel may ask to depose the minor. This requires the attorney, with the assistance of the guardian ad litem and parents, to evaluate whether the minor is competent to testify. If the attorney believes that the minor is not competent and defense counsel insists upon a deposition, a motion for protective order should be filed to allow the court to determine the minor's ability to testify.

"A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601. "There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide." *State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966). "Competency is to be determined at the time the witness is called to testify." *McCurdy v. Ashley*, 259 N.C. 619, 622, 131 S.E.2d 321, 323 (1963).

When determining a minor's competency to testify, the court must conduct a voir dire examination of the child. This allows the court to personally observe the child's demeanor and to intelligently evaluate the child's responses to questions. *State v. Fearing*, 315 N.C. 167, 173-74, 337 S.E.2d 551, 555 (1985); *see* N.C. Gen. Stat. § 8C-1, Rule 104(a). The court's ruling on the competency of a witness to testify "is a matter which rests in the sound discretion of the trial judge in light of his examination and observation of the particular witness." *State v. Kivett*, 321 N.C. 404, 414, 364 S.E.2d 404, 410 (1988). The North Carolina courts have permitted children to testify at age 4; age 5 about events which occurred at ages 3 and 2½; and age 6 about a motor vehicle collision which occurred at age 4½. *State v. Kivett, supra*; *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984); *State v. Meadows*, 158 N.C. App. 390, 581 S.E.2d 472 (2003); *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994); *McCurdy v. Ashley, supra*.

III. SETTLEMENT OF CLAIMS INVOLVING MINORS AND INCOMPETENT PERSONS

The settlement of a claim involving a minor or incompetent person is effective and binding upon court approval. *Creech ex rel. Creech v. Melnik*, 147 N.C. App. 471, 477-78, 556 S.E.2d 587, 591-92 (2001); *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 93 S.E. 374 (1917). The settlement will be approved by the court if it is in the best interests of the minor or incompetent person. *Wagner v. Honbaier*, 248 N.C. 363, 369, 103 S.E.2d 474, 479 (1958); 57 C.J.S. Mental Health § 198 (2015).

In examining a settlement, the minor's "welfare is the guiding star in determining its reasonableness and validity." *Redwine v. Clodfelter*, 226 N.C. 366, 370, 38 S.E.2d 203, 206 (1946). 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, 63-64, 189 S.E.2d 562, 566 (1972). Without court approval, a settlement is not enforceable against a minor even if agreed to by the minor's parent, attorney, or guardian ad litem. *Sell v. Hotchkiss*, 264 N.C. 185, 191, 141 S.E.2d 259, 264 (1965); *Creech*, 147 N.C. App. at 478, 556 S.E.2d at 592; *State ex rel. Hagins v. Phipps*, 1 N.C. App. 63, 65, 159 S.E.2d 601, 603 (1968).

A. Factors to Be Considered When Approving a Settlement and the Payment of Attorneys' Fees.

Before approving a personal injury settlement for a minor or incompetent person, the court should consider:

- The strength of the claim and the existence of any viable defenses;
- The nature and extent of the 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 guardian and/or parents think the settlement is fair and reasonable;

- The amount that the plaintiff will receive as a result of the settlement;

- The propriety of any proposed payments from the settlement funds;[19] and

- The nature of the proposed release/settlement agreement.

The court must conduct an independent inquiry to determine whether the attorney fees to be paid from the minor or incompetent person's settlement are reasonable. *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 243-44 (4th Cir. 2010). In federal court, the reasonableness of a fee is determined by the following factors:

> (1) the time and labor required in the case, (2) the novelty and difficulty of the questions presented, (3) the skill required to perform the necessary legal services, (4) the preclusion of other employment by the lawyer due to acceptance of the case, (5) the customary fee for similar work, (6) the contingency of a fee, (7) the time pressures imposed in the case, (8) the award involved and the results obtained, (9) the experience, reputation, and ability of the lawyer, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship between the lawyer and the client, and (12) the fee awards made in similar cases.

Id., 605 F.3d at 244.[20] "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Id.*, 605 F.3d at 247.

The contingency of a fee is an important factor because a contingent fee agreement provides "access to the legal system" and "transfers a significant portion of the risk of loss to the attorneys taking a case." *Abrams*, 605 F.3d at 245-46. Affidavits from attorneys in the community are helpful for allowing the court to determine the customary fee arrangements in similar cases. "If [attorney] affidavits are to be disregarded in favor of contrary evidence, the trial court must explain why, without disregarding the contingent nature of the fee." *Id.*, 605 F.3d at 248. The court is not bound by the contingency fee in an agreement with the parents or guardian if the court determines that the fee is not reasonable. *See Gorham*, 2015 WL 2454261 at pp. 3-14 (rejecting a 33% fee and approving a 10% fee from a minor's settlement and a 25% fee from an incompetent adult's settlement when the case settled early for policy limits with limited dispute over liability and the attorneys poorly handled the court approval process).

B. Procedure for Obtaining Court Approval.

[19] These include the payment of case costs, medical expenses, liens and subrogation claims, and attorney's fees. *Gorham v. Amusements of Rochester, Inc.*, 2015 WL 2454261 at pp. 3, 14, No. 1:14-cv-386 (M.D.N.C. 2015).

[20] These factors are materially indistinguishable from the factors to be considered in evaluating whether a fee is "clearly excessive" under Rule 1.5 of the N.C. Revised Rules of Professional Conduct.

If a settlement is reached before the filing of an action, a "friendly lawsuit" may be filed to obtain court approval. The attorney for the minor or incompetent client may be paid by the liability insurance company to file the friendly lawsuit for court approval of the settlement. The attorney "is bound by the duty of loyalty to represent the best interests of his clients without regard to who is actually paying for his services or the interests of such other third party or entity." RPC 167 (January 14, 1994).

In a friendly lawsuit, once a guardian ad litem is appointed, the following documents are filed: a summons, complaint, acceptance of service, answer, and a motion/petition to approve the settlement. These pleadings are typically filed at the same time. A hearing is then scheduled to allow the court to review the proposed settlement and decide whether to approve it.

Although the lawsuit is "friendly," the attorney may not prepare an answer to the complaint or a waiver of the right to file an answer for an unrepresented defendant to file *pro se*. The attorney must treat the defendant as an unrepresented person under Rule 4.3 and cannot give legal advice to the person or state or imply that the attorney is disinterested. 2002 FEO 6 (January 24, 2003). An attorney may prepare the following documents for an unrepresented party: an acceptance of service, a confession of judgment, a settlement agreement or release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the party's rights, and a dismissal with or without prejudice pursuant to a settlement agreement or release. The attorney must also allow the party an opportunity to review and make corrections to the document before signing it. 2015 FEO 1 (April 17, 2015).

If a settlement is reached after a lawsuit has been filed, the guardian ad litem or general guardian should file a motion or petition to approve the settlement.[21] The motion/petition should be accompanied by supporting affidavits from the guardian or guardian ad litem, parent(s) (in the context of a minor settlement, and plaintiff's attorney. These affidavits should set forth sufficient facts to establish: (1) that the settlement is in the best interests of the ward; (2) that the ward's funds will be adequately protected upon distribution; (3) the validity and legality of any disbursements to medical providers, lienholders, or subrogation claims;[22] and (4) the reasonableness of the requested fees and case expenses, including the guardian's fee.

At the hearing, the attorney should submit a proposed order or judgment approving the settlement. The order/judgment should contain sufficient findings of fact and conclusions of law. In addition to counsel, the guardian and parents (in a minor settlement) will need to be present at

[21] There is no substantive difference between the issuance of an order versus a judgment approving the settlement. Even if the order or judgment is entered in the judgments docket book, it will not discharge any other tortfeasor from liability unless expressly agreed to in the settlement documents. *Payseur v. Rudisill*, 15 N.C. App. 57, 63-64, 189 S.E.2d 562, 566 (1972).

[22] Depending on the plan documents, an ERISA subrogation claim may need to be paid from a minor's settlement if not satisfied by the parents' recovery. *Rhodes, Inc. v. Morrow*, 937 F.Supp. 1202 (E.D.N.C. 1996). The amount of a Medicaid claim payable from a settlement may be contested under G.S. § 108A-57.

the hearing, and the minor or incompetent person may need to be present as well.[23] Some courts will question the guardian and/or parent(s) in the course of evaluating a settlement. Before the hearing, the attorney should examine any local rules or judicial preferences to determine how the settlement hearing will be conducted. *See* Wake County Local Civil Rule 12.0; E.D.N.C. Local Civil Rule 17.1; M.D.N.C. Local Civil Rule 17.1.

C. Distribution of Settlement Funds to Minor or Incompetent Person.

The order or judgment approving the settlement should specify how the settlement proceeds will be disbursed to the minor or incompetent person. Before seeking court approval, the attorney should confer with the guardian and parents (in a minor settlement) about how they would like to see the funds used and the different options that are available. If the minor or incompetent person is eligible for Medicaid and Supplemental Security Income (SSI) due to a disability under 42 U.S.C. § 1382c(a)(3), the attorney should confer with the guardian, parents, and the client's caseworker(s) about how to preserve the client's eligibility following a settlement. At the present time, the Medicaid and SSI resource limit for an individual is $2,000 and for a couple is $3,000.[24] There are also monthly income limits.

The various options that may exist for the disbursement of settlement funds to a minor or incompetent person are:

- Clerk of Court under G.S. § 35A-1227 and § 7A-111: The Clerk of Court will invest the funds conservatively on behalf of the ward. The Clerk will disburse the funds when the minor turns 18, the person is no longer incompetent, or upon request by a general guardian or guardian of the estate.

- General Guardian or Guardian of the Estate under Article 9 of Chapter 35A:[25] The Guardian must generally be bonded and must file annual accountings with the Clerk of Court. When administering a small amount of funds, the Clerk may permit the use of a receipt and agreement under G.S. § 35A-1232 where the funds are deposited in a bank upon the condition that the money will not be withdrawn except upon court authorization. Funds held under a receipt and agreement are excluded when calculating the bond.

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[23] A wrongful death settlement must be approved by a judge if any of the beneficiaries are not competent adults. N.C. Gen. Stat. § 28A-13-3(23). When a minor or incompetent person is a beneficiary, a guardian or guardian ad litem should represent the ward's interests at the settlement hearing.

[24] In determining resources, the value of a home, car, home furnishings, and clothing are not counted. A structured settlement annuity will not be counted as a resource until the money is received by the individual. A Medicaid/SSI beneficiary is entitled to spend down money, generally within a thirty day period, on certain items in order to stay below the resource limit.

[25] Under certain circumstances, a court may approve the use of a trust for a minor's settlement funds.

- Structured Settlement Annuity:[26] A structured settlement annuity must be purchased by the defendant/insurer for the benefit of the plaintiff under a qualified assignment authorized by Section 130 of the Internal Revenue Code, 26 U.S.C. § 130. The major benefits of a structured settlement are that the interest on the principal is not taxable and the payments can be structured in almost unlimited ways.[27] A structured settlement broker should be consulted to evaluate options. The major downside is that a competent adult can sell their structured settlement rights to a third party at a discounted rate under G.S. § 1-543.10, *et seq.*

- Special Needs Trust: A person who is physically or mentally disabled and entitled to SSI benefits from the Social Security Administration can establish a special needs trust for the settlement funds under 42 U.S.C. § 1396p(d)(4). A special needs trust can be used by the beneficiary for supplemental medical assistance while maintaining his or her eligibility for SSI and Medicaid. Upon the death of the beneficiary, Medicaid will be reimbursed from the special needs trust for up to the total amount of medical assistance benefits paid. To establish an individual special needs trust for a client, an attorney with expertise in this area should be hired. In a smaller case, the client may use a pooled trust under 42 U.S.C. § 1396p(d)(4)(C), like The National Pooled Trust established by the Center for Special Needs Trust Administration, Inc.

Sample forms for the approval of a minor settlement, including petitions/motions, affidavits, and judgments/orders, are attached to this manuscript.

D. Sealing a Settlement.

An attorney may decide that a settlement involving a minor should be sealed because it contains confidential financial and/or medical information that could harm the client.[28] Many defendants/insurers, especially in larger cases, request confidentiality provisions and will want the trial judge to seal the court filings for the approval of a settlement.

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[26] If paid in a lump sum, an attorney's contingent fee should be calculated from the settlement's present value. RPC 141 (October 23, 1992). It is possible that an attorney could enter into a contingency fee agreement that allows for a fee to be paid on future structured settlement payments. "Attorneys must tread carefully in dealing with structured settlements to ensure that the timing of payment of their fee does not result in the collection of a 'clearly excessive fee'" in violation of Rule 1.5(a). *Robinson, Bradshaw & Hinson, P.A. v. Smith,* 139 N.C. App. 1, 17, 532 S.E.2d 815, 824-25 (2000)

[27] In the event that a life insurance company becomes insolvent, the payee of a structured settlement annuity who resides in North Carolina is covered up to a maximum of $1,000,000 by the North Carolina Life & Health Insurance Guaranty Association.

[28] Health information acquired during the representation of a client is covered by the duty of confidentiality and may only be disclosed as permitted under Rule 1.6. 2006 FEO 10 (July 21, 2006).

Court filings are public records under N.C. Gen. Stat. § 132-1, *et seq.* The trial courts have the inherent authority under Article IV, Section 1 of the N.C. Constitution to seal court filings. *In re Investigation into Death of Cooper*, 200 N.C. App. 180, 186, 683 S.E.2d 418 (2009). The trial court should only exercise its authority to seal court filings from the public "when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of government will be more harmful than beneficial." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999). The court must determine that the decision to seal a filing will protect a compelling public interest which outweighs the public's right of access to civil court proceedings. *Id.*, 350 N.C. at 476-77, 515 S.E.2d at 693. The trial court's decision should be supported by findings of fact and it will be reviewed under an abuse of discretion standard. *Id.; France v. France*, 224 N.C. App. 570, 577, 738 S.E.2d 180, 185 (2012). Once a document has been sealed, any person may assert a right of access to the record through a motion under G.S. § 1-72.1. The court must then decide whether to unseal the document.

Settlements made by or on behalf of public agencies, public officials, or public employees are generally public records and cannot contain confidentiality provisions. This does not apply to medical malpractice actions against a public hospital facility. N.C. Gen. Stat. § 132-1.3(a). In addition, a settlement with a public agency may be sealed if the court concludes that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. N.C. Gen. Stat. § 132-1.3(b). These circumstances may exist when a claim involves a minor, the settlement contains sensitive/confidential information, and the parties request that the settlement be sealed. *See Wittenberg v. Winston-Salem/Forsyth County Bd. of Educ.*, 2009 WL 2566959, No. 1:05-cv-818 (M.D.N.C. 2009).

In federal court, the public has a presumptive right to inspect and copy all court filings under the common law right of access. *Stone v. University of Maryland*, 855 F.2d 178, 180 (4th Cir. 1988). The common law right of access can be overcome if the parties' privacy interests outweigh the public interest in access to the filing. *Id.* "Courts have repeatedly held that minors' privacy interests in medical and financial information … overcome the common law right of access in granting motions to seal." *Mears v. Atlantic Southeast Airlines, Inc.*, 2014 WL 5018907, No. 5:12-cv-613 (E.D.N.C. 2014). However, the existence of a confidentiality provision in a settlement agreement or release, "standing alone, routinely has been rejected by courts within the Fourth Circuit as a basis for sealing." *White v. Bonner*, 2010 WL 4625770, No 4:10-cv-105 (E.D.N.C. 2010). The federal district courts in North Carolina have specific procedures that must be followed before the court will allow a document to be filed under seal. Local Civil Rule 79.2 (E.D.N.C.); Local Civil Rule 5.4 (M.D.N.C.); Local Civil Rule 6.1 (W.D.N.C.).

Appendix

The following forms are attached to this manuscript:

1. Petition for Appointment of Guardian Ad Litem, Consent to Appointment, and Order Appointing Guardian Ad Litem for Minor Plaintiff in a Personal Injury Case – Representation of Minor by a Parent (App 1-6);

2. Petition for Appointment of Guardian Ad Litem, Consent to Appointment, and Order Appointing Guardian Ad Litem for Minor Beneficiary to Approve a Wrongful Death Settlement – Representation of Minor by an Independent Guardian Ad Litem (App 7-14);

3. Consent to Joint Representation in a Wrongful Death and Personal Injury Case – Provision from Contract of Employment (App 15);

4. Family Agreement for the Division of a Lump Sum Settlement Offer (App 16-18);

5. Family Agreement for the Division of a Lump Sum Settlement Offer or Collection of Assets in a Personal Injury Case with Insufficient Insurance Coverage – Representation of Minor by an Independent Guardian Ad Litem (App 19-24);

6. Petition to Approve Minor Plaintiff's Settlement, Affidavits from Mother-Guardian Ad Litem, Father, and Attorney, and Order Approving Minor Plaintiff's Settlement – Personal Injury Settlement with a Structured Settlement Annuity (App 25-43);

7. Petition to Approve the Minor Plaintiff' s Settlement, Affidavits from an Independent Guardian Ad Litem, Mother, and Attorney, and Order Approving Minor Plaintiff's Settlement – Personal Injury Settlement with a Pooled Special Needs Trust (App 44-70);

8. Petition to Approve Wrongful Death Settlement, Affidavits from an Independent Guardian Ad Litem, Administrator-Grandmother, and Attorney, and Judgment Approving Wrongful Death Settlement – Minor Beneficiary with a Structured Settlement Annuity (App 71-90).

Mr. Mahoney may be contacted at 919-683-2135 or cmahoney@gmfm-law.com for additional sample forms concerning court approval of a confidential wrongful death settlement involving a minor beneficiary in federal court, and court approval of a confidential settlement involving an incompetent plaintiff in state court.