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THE MINOR LEAGUE: TAKING CARE OF JUNIOR – SETTLEMENT AND CLOSURE OF MINOR'S CLAIMS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

THE MINOR LEAGUE: TAKING CARE OF JUNIOR – SETTLEMENT AND CLOSURE OF MINOR'S CLAIMS

Settling a claim involving a minor can be a confusing and frustrating process. This is especially true where the amount of the settlement is relatively small. Presenting a proposed settlement to the court and obtaining approval can take multiple hearings and several months. While it would be appealing to dispose of these claims by simply asking the parents to sign a release, or obtaining some kind of promise that a lawsuit will not be filed, that convenience is outweighed by the risk associated with taking the "quick and easy" route on a minor's settlement.

Obtaining court approval of a minor's settlement is a multi-step process, but it does not need to be confusing. If you understand the procedure for presenting and seeking approval of a proposed settlement, you can manage the expectations of the claimant and his or her parents. Understanding this process will also help you make an informed decision about when to explore an alternative to court approval and when to deny and defend a claim made by a minor claimant.

I. HOW AND WHY ARE MINORS PROTECTED?

In Illinois, any person who has not attained the age of 18 is considered a minor. 755 ILCS 5/11-1. Illinois public policy dictates that minors and their property must be protected from the consequences of dealing with others. As a result, Illinois courts have made it a priority to consistently and assiduously guard the rights of minors. *Iverson v. Scholl, Inc.*, 136 Ill. App. 3d 962 (1st Dist. 1985). Every minor plaintiff is a ward of the court when involved in litigation, and the court has a duty and broad discretion to protect a minor's interests. *Villalobos v. Cicero School District 99*, 362 Ill. App. 3d 704, 712 (1st Dist. 2005). Specifically, in the case of a minor plaintiff, the court carries out this duty by requiring approval for any settlement, regardless of the value.

Generally, a minor cannot bring a civil suit in his or her own name. Instead, a civil suit is usually brought by, and in the name of, a guardian or parent, a "guardian *ad litem*" or by a "next friend." Each title is accompanied by different relationships and requirements, but the intent is to ensure that the person bringing the lawsuit will have the best interests of the minor in mind, without any conflicting interest.

Illinois law also provides extended statutes of limitation for claims involving minors. Generally, a personal injury lawsuit includes a two-year statute of limitations. In the case of a minor, the statute of limitations is extended until two years after his or her 18th birthday. 735 ILCS 5/13-211. If a minor is four years old at the time of injury, Illinois law would allow a claim to be brought any time in the next sixteen years.

This rule is further altered for a couple of specific types of claims. In the case of medical malpractice actions, a minor may file a claim up to eight years after the act or occurrence giving

rise to the claim, but not after the minor turns 22 years old. 735 ILCS 5/13-212. Further, pursuant to recent legislation, a cause of action based on childhood sexual abuse can be commenced at any time, so long as the victim's claim is not already expired under a previous version of the statute of limitations. 735 ILCS 5/13-202.2.

II. APPROVAL OF SETTLEMENT REQUIRED BY STATUTE

The Illinois Probate Act specifically requires approval of settlements for a minor's claim, where the amount of the settlement exceeds $10,000. Specifically, Section 19-8 of the Probate Act dictates that a representative of a minor may settle a claim by leave of court, upon such terms as the court directs. 755 ILCS 5/19-8. By providing the court the authority to determine whether a settlement is in the minor's best interests, the intent is to provide extra protection for the minor. A parent or guardian might lack the knowledge or understanding to make an informed decision about a proposed settlement, and may not always have the minor's best interests in mind.

In general, courts have held that this section of the Probate Act requires the terms and conditions of any proposed settlement involving a minor to be submitted to, inquired into, and passed upon by the probate court. *Ott v. Little Company of Mary Hospital*, 273 Ill. App. 3d 563, 571 (1st Dist. 1995). The minor's parents play no role in evaluating the settlement, although they may be called upon for information and testimony. Further, absent court approval, any "settlement" would not be considered final and a claim could still be brought within the statute of limitations.

III. UNDER $10,000 WITHOUT COURT APPROVAL? NOT ANYMORE

The Probate Act also includes a provision that would seemingly make it possible to resolve a small minor's settlement without obtaining court approval. Specifically, Section 25-2 of the Probate Act allows for the settlement of a minor's claim without court intervention when both the amount owed to the minor and the minor's personal estate do not exceed $10,000. 755 ILCS 5/25-2. Pursuant to this procedure, a parent or other person acting in the minor's best interests would produce an affidavit establishing that the value of the minor's estate does not exceed $10,000. Upon receipt of that affidavit, an insurance carrier could settle a claim for up to $10,000 without further proceedings. Unfortunately, the appellate courts have held that this does not preclude a later lawsuit by, or on behalf of, the minor.

In *Smith v. Smith*, the appellate court held that Section 25-2 of the Probate Act would allow the payer to discharge its obligations pursuant to a properly filed affidavit, but it does not obviate the need for the court to approve the minor's settlement. *Smith v. Smith*, 358 Ill. App. 3d 790, 793 (4th Dist. 2005). The court concluded that a settlement entered pursuant to Section 25-2 on behalf of a minor was not binding on the minor, because it was not approved by the court. *Smith,* 358 Ill. App. 3d at 794.

IV. SETTLEMENT APPROVED BY PARENT IS NOT BINDING ON MINOR

The appellate court has made it clear that a minor's claim cannot be settled without court approval, regardless of the nature of consent obtained from the minor's parent or guardian. In *Villalobos v. Cicero School Dist. 99*, 362 Ill. App. 3d 704 (1st Dist. 2005), the appellate court considered a case where a minor was injured in an automobile accident. Before a lawsuit was even filed, the defendant's insurer contacted the injured minor's parents, and exchanged a signed release for a settlement of $3,000. The release was not reviewed or approved by the court.

After the release was executed, a lawsuit was filed on behalf of the minor. The trial court granted the defendant's motion for summary judgment, based on the release signed by the parents. On appeal, the plaintiff argued that there was a question of fact as to whether the parents understood the release and its impact on the minor's claim. There was also an allegation that the insurance company made misrepresentations to induce the parents to sign the release.

The appellate court held that the release signed by the parents was unenforceable, and did not preclude the minor plaintiff's lawsuit. Because the settlement was not approved by the court, the minor's lawsuit was allowed to proceed. Notably, the appellate court did not limit the scope of this holding. Essentially, court approval of a minor's settlement is always required, regardless of the amount of the settlement.

V. THE LONG HAUL – WHEN A MINOR IS NO LONGER A MINOR

The only sure fire method for settling a minor's claim without court approval is to wait until the claimant turns 18 years old. At that point, the plaintiff can execute a release and settle his or her claim, without the need for court approval. This is true even if the injuries or damages that form the basis of the claim occurred well before the plaintiff reached 18 years old.

VI. KNOW YOUR COURT AND YOUR JUDGE

Many judicial circuits in Illinois have local rules that pertain specifically to the consideration and approval of minor's settlements. These rules change fairly frequently, and they vary significantly from circuit to circuit. It is important to know the requirements of the local court before petitioning for approval of a settlement. Failure to strictly comply with these local rules can result in a settlement being rejected.

Several circuits require a statement from a treating physician establishing the nature and extent of the minor's injuries, as well as an explanation of further anticipated treatment. The local rules in the Tenth Judicial Circuit (Peoria, Tazewell, Marshall, Putnam, and Stark Counties) are generally consistent with the same rules in other circuits:

> No settlement on behalf of a minor . . . will be authorized unless a report of the attending physician or surgeon is filed with the petition stating the nature and extent of the injury, and in case of minors, the minor appears in open court unless excused by the court for a good cause shown.

10th Cir. R. 78(d) (2013).

Other circuits, such as the Fifth (Clark, Coles, Cumberland, Edgar, and Vermilion Counties) have rules limiting the amount and percentage of attorney's fees. Some courts will require the minor claimant to appear personally, while others will excuse that appearance depending upon the information contained in affidavits and other testimony.

In addition to complying with local rules, the procedure for seeking approval of a minor's settlement can vary from judge to judge. Anecdotally, some judges generally want to understand the facts of the case and the minor's damages. Other judges will require much more information and documentation. This is more problematic in instances where the minor's parents are no longer together, and particularly where one or both parents live outside of the county where the settlement is being considered. Some judges want both parents to appear in person to provide testimony about their child's injuries and their thoughts on the settlement. In the case of a relatively small settlement, the cost of transporting the parents could represent a large portion of the amount being allocated to the minor's injuries.

VII. THE "STANDARD CASE"

Variations in local rules, judges' preferences, and the facts of each claim make it difficult to identify a "standard case" for a minor's settlement. Where the minor is represented by an attorney, the majority of this work should be handled by that attorney to conclude the settlement. Where no lawsuit has been filed, and the plaintiff is unrepresented, there is a fairly standard set of pleadings to be submitted to the court to allow the judge to consider and approve a minor's settlement.

To start this process, a guardian must be appointed for the injured minor. Generally, this is accomplished by filing a Petition for Appointment of Guardian, listing one of the parents as the proposed guardian. The appointed guardian will need to appear in court for the hearing to approve the minor's settlement. In addition, that guardian will usually have the responsibility for depositing settlement funds in an appropriate account after the settlement is approved.

Assuming the minor is unrepresented, a Petition to Appoint a Guardian *ad Litem* is also filed with the court. Even where the minor has an attorney, the court may still appoint a guardian *ad litem* if that attorney represents multiple plaintiffs in the action. The guardian *ad litem* is an attorney who is tasked with assisting the minor and protecting the interests of the minor while reporting to the court about the injuries to the minor and the terms of the proposed settlement.

The guardian *ad litem* will meet with both the minor and his or her parents or guardians, and gather as much information as possible about medical bills, the need for further medical treatment, and the nature and extent of the minor's injuries. At the hearing to approve the settlement, the guardian *ad litem* will present this information to the court, to allow the judge to make an educated decision about whether the proposed settlement should be approved. In some counties, the guardian *ad litem* is selected by the judge, from the local members of the bar. In other counties, attorneys will formally apply to serve as a guardian *ad litem*, with a list created of those attorneys who are properly qualified and willing to serve in that capacity.

In conjunction with the guardian *ad litem*, the attorney representing the insurer will prepare a Petition to Approve the Minor's Settlement. This petition will include a description of the incident giving rise to the proposed settlement, a statement identifying all of the relevant parties, and a brief description of the injuries to the minor. In the counties where it is required, the petition may also include a medical note from the treating physician explaining the nature and extent of the injuries and the current prognosis.

After the guardian *ad litem* has had an opportunity to meet with the minor and his or her parents or guardians, he or she can begin working on finalizing the settlement. By that time, there is usually a good sense about whether the guardian *ad litem* believes the proposed settlement is adequate, and whether the guardian *ad litem* intends to object to any of the proposed terms of settlement. Assuming there are no objections to the proposed terms of settlement, a hearing can be set on the Petition to Approve the Minor's Settlement.

A hearing to approve a minor's settlement can be relatively lengthy, and there are a number of tasks to be completed at that time. The guardian *ad litem* will need to be present, along with the minor's appointed guardian. The injured minor will almost always need to be present, especially if there is any indication that there are ongoing physical problems related to the accident giving rise to the settlement. If one parent is serving as the guardian, the court will usually require an affidavit from the other parent explaining that there are no objections to the settlement. If the other parent can also be present, that can be helpful to resolve any concerns the court may have about approving the settlement.

With everyone in the courtroom at the same time, the judge will hear testimony from the guardian, the guardian *ad litem*, and the minor. Questioning can be led by either the judge or the attorney for the settling party. Generally, the court will consider the severity of the injury, potential problems in establishing liability on the part of the defendant, and the need for additional benefits or medical treatment in the future. After the judge has heard all the details of the claim and the proposed settlement, he or she will make a ruling either approving or rejecting the proposed settlement.

Assuming the settlement is approved, additional steps must be taken to establish that the settlement funds have been properly deposited and protected. The Order approving the minor's settlement will generally require that settlement funds be deposited in an interest-bearing account, with specific restrictions on withdrawals. Most often, any withdrawals from this account

before the minor reaches age 18 must be approved by the court. After the minor reaches age 18, there are no further restrictions on the use of those funds. A traditional savings account is usually the destination for the settlement funds, but other types of accounts are allowable if they are specified in the court's Order. Generally, courts will approve the purchase of certificates of deposit or treasury bonds. In some instances, mutual funds can be purchased. Generally, courts will not allow for the purchase of individual stocks. Structured settlements or annuities can also be purchased with settlement funds, but the court will want to have all of the details, including purchase price and payment schedules at the time of the hearing.

After the settlement funds have been deposited, a final report needs to be filed with the court. The final report will show that the funds have been properly deposited pursuant to the Order and will confirm that any outstanding medical bills have been paid. Upon receipt of that report, the court will discharge both the guardian and the guardian *ad litem*. The court will also require confirmation that the guardian *ad litem's* fees have been paid. The guardian *ad litem* will generally present the court with an accounting of his or her charges. These charges are generally paid by the settling party, but they can also be deducted from the amount of the settlement.

The court will consider a request from the minor's parents to withdraw settlement funds before the minor's 18th birthday, but these requests are closely scrutinized. Things like medical bills and tuition may be paid out of settlement funds if the court agrees they are necessary and it is established that the parents are unable to otherwise afford those charges. The court is unlikely to authorize a withdrawal for a new car or a vacation.

VIII. COMMON DIFFICULTIES

A minor's settlement can be tripped up for any number of reasons, but there are a handful of problems that are a common cause of delay. Depending on which judge is assigned to review the proposed settlement, it can be difficult to gather all of the information necessary to secure approval of the settlement. Some judges will require extensive testimony from both parents regarding their thoughts on whether the proposed settlement is fair or not. Where the minor's parents are not on good terms, it can be difficult to bring them together for a hearing on the settlement. In some instances, one parent may not even know where the other parent resides, and they may not have spoken for an extended period of time. If there is a past history of domestic abuse, one parent may not even be comfortable being in the same room as the other parent.

In other instances, it can be difficult to work with the guardian *ad litem* to secure approval of a proposed settlement. The appointed guardian *ad litem* may not be familiar with the litigation process, and may not have a full understanding of potential defenses to a minor's claim. The court will usually account for liability problems in evaluating a settlement, but the guardian *ad litem* might not see these same problems. If the guardian *ad litem* suggests that a proposed settlement is inadequate, the court may not approve the settlement based on that

recommendation. A guardian *ad litem* who spends most of his or her time working in family law or business transactions can make it difficult to efficiently approve a settlement.

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Joe concentrates his practice in the areas of workers' compensation defense, professional liability and employment matters. Joe has taken several bench and jury trials to verdict, and has drafted and argued numerous dispositive motions. Joe has handled workers' compensation arbitration hearings at venues throughout the state, and has argued multiple cases before the Workers' Compensation Commission. Joe regularly handles depositions of expert witnesses and treating physicians in both civil and workers' compensation matters. Joe also devotes a portion of his practice to representing the firm's clients at depositions of plaintiffs and fact witnesses in asbestos personal injury matters.

Joe began his career with Heyl Royster, clerking in the Urbana office. Following graduation from law school, he joined the firm's Urbana office as an associate in August of 2004 and became a partner in 2015. During law school, he served as Articles Editor for the University of Illinois Journal of Law, Technology & Policy.

Publications

- "A Primer on Recent Cases Impacting Workers' Compensation Defense," *Illinois Defense Counsel Quarterly Monograph* (2016)
- "A Disturbing Trend In Recent WC Appellate Decisions," *Below the Red Line - Heyl Royster Workers' Compensation Newsletter* (2013)
- "Amputations," *Below the Red Line - Heyl Royster Workers' Compensation Newsletter* (2012)
- "Review of a Workers' Compensation Claim," *Below the Red Line - Heyl Royster Workers' Compensation Newsletter* (2011)
- "Settlement Contracts – New Law and What You Need to Know," *Below the Red Line - Heyl Royster Workers' Compensation Newsletter* (2009)

Public Speaking

- *"High Impact Defense of Low Impact Accidents"* Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- *"Compensability of Psychological Injuries"* ISBA Advanced Workers' Compensation Seminar (2015)
- *"Taking Depositions of AMA Doctors"* ISBA Advanced Workers' Compensation Seminar (2014)
- *"News from the Commission"* Heyl Royster 29th Annual Claims Handling Seminar (2014)

Professional Recognition

- Named to Law Bulletin Publishing Company's 2015 and 2016 list of Illinois *Emerging Lawyers*. Only two percent of Illinois lawyers under the age of 40 or who have been licensed to practice for 10 years or less earn this distinction.
- Named to the Illinois *Super Lawyers Rising Stars* list (2012-2017). The *Super Lawyers Rising Stars* selection process is based on peer recognition and professional achievement. Only 2.5 percent of Illinois lawyers under the age of 40 or who have been practicing 10 years or less earn this designation.
- Named a 2015 "Forty Under 40" attorney by *Central Illinois Business Magazine*. Winners are chosen based on achievement, experience, innovation, leadership, and community involvement.

Professional Associations

- Illinois State Bar Association (Workers' Compensation Section Council)
- Champaign County Bar Association

Court Admissions

- State Courts of Illinois
- State Courts of Indiana
- United States District Court, Central District of Illinois

Education

- Juris Doctor, University of Illinois College of Law, 2004
- Bachelor of Science-Environmental Science, Bowling Green State University, 2001