**Court Approval Over Cases Involving**
**Injuries to Minors**
**By Adam J. Zayed**

In Illinois, a minor is considered a ward of the court, and the court has a duty and broad discretion to protect the minor's interests.[1] This policy is reflected in the statutory requirement that courts approve or reject any settlement agreement proposed on a minor's behalf. To the trial lawyer this means that in addition to prosecuting the injury claim in trial court, the case will also likely need to be brought in probate court. Obtaining probate court approval requires additional expense, additional legal work, and likely a reduction in contingency fees. It is important to know that after the civil case has been resolved, a significant amount of additional legal work will be required in order to protect the minor's interests.

Personal injury cases can resolve prior to putting the case into suit, during the litigation of the case, during trial, or by judgment. Regardless of when a settlement is reached, all personal injury net proceeds for a minor need court approval. There are several nuances to this approval requirement, partially based on local circuit rules and partially based on the phase of litigation in which the case resolves.

**Net Value of Settlement to Minor Under $10,000**

Where a personal injury case settles for a net amount to a minor of less than $10,000, or in some cases even a larger figure, several Illinois circuits specifically allow the trial court to dispose of the minor's proceeds without probate approval.[2] Similarly some circuits reflect the Small Estate Act by allowing disbursement of a minor's award to a person or parent standing *in loco parentis* to the minor without probate approval in the event that minor's award is less than $10,000.[3] Local court rules and practice vary widely on the issue of when and whether the trial court can dispose of a minor's personal injury award without probate approval.

**Pitfalls of Not Obtaining Probate Approval**

In direct contrast to the local rules of many circuits that permit trial courts to dispose of small net awards to minors without probate approval, the Illinois Appellate Court has specifically held that "any settlement of a minor's claim is unenforceable unless and until there has been approval by the probate court."[4] More specifically, while the trial court, the attorneys, and the insurance carrier might be able to dispose of the case without probate court approval, pursuant to local rule or the Small Estate Act, probate court approval over all settlements involving minors is required for the settlement to be considered final.[5] It follows that where the trial level court disposes of a matter pursuant to local rule concerning awards that are under $10,000 without probate approval, it is conceivable that if the minor later claims that the injury proceeds are inadequate either through a representative or upon reaching majority, the injury award can be challenged and invalidated.[6]

**Cases Settled Prior to Filing**

All personal injury cases involving minors settled prior to filing suit must be approved by probate court and will likely require the appointment of a guardian ad litem. In the many judicial circuits that allow plaintiffs to bypass probate approval in the case of a small award to a minor, it is assumed that the case has obtained trial court approval. In these situations trial judges may approve these smaller awards, bypassing probate approval, presumably for sake of economy.[7] Cases settled prior to being put into suit, even where the net award to the minor is $10,000 or less, must be presented to the probate court for approval or the settlement can be challenged by that minor.[8]

**Obtaining Court Approval Over Settlements Involving Minors**

**I. Approval at the Trial Level**

The Illinois Probate Act provides for the creation of an estate for purposes of compromising injury cases involving minors.[9] The first step towards obtaining probate approval of a settlement or award involving a minor is to present a petition for distribution and a proposed order of distribution to the trial judge presiding over the matter at the time of resolution. After reviewing the petition and the order of distribution the judge must make a finding that the settlement is "fair and reasonable."[10] Factors that will be considered include (1) severity of injury; (2) difficulty in proving liability; (3) whether the case was settled pursuant to arbitration, mediation or pre-trial proceedings; and (4) the alleged level of the defendant's culpability.[11] This approval will be highly instructive to the probate judge in the determination of whether a guardian ad litem is necessary. The trial judge will also rule on the reasonableness of the fees and expenses attributable to the litigation under the attorney's retainer, adjudicate liens where appropriate, and find the degree of dependency in wrongful death cases.[12] In order to ensure that settlement monies owed to the minor are not misappropriated, several circuits require the following language in the order of distribution:

> "The settlement amount approved herein shall be paid only to a guardian appointed by the probate division or Circuit court where the minor or disabled person resided and this order shall be effective after the entry in court of an order approving the bond or other security required to administer the settlement and distribution provided for in this order."[13]

This language complies with the spirit of the Illinois Probate Act by taking approval of the settlement out of the hands of the parents or guardian and requiring the approval of probate court.[14]

## II. Approval in the Probate System

### a. Petition for Guardianship of the Minor's Estate

After the trial court rules on the fairness and reasonableness of the proposed settlement, or after a settlement reached prior to filing suit, with a few exceptions for small net awards, the case must be brought before the probate court. The first step is to file a Petition for Guardianship of the Minor's Estate. The local rules of many circuits provide great insight into the procedure of obtaining approval in probate court.

**i. Description of Estate.**

The petition for guardianship should include a description of the estate, facts of the underlying injury case, name of the defendant, name and address of the liability insurance carrier including policy limits, and information concerning the nature of the medical treatment including treating facilities and expenses.[15]

**ii. Who May Be Guardian**

It is common for a parent or an adoptive parent whose parental rights have not been terminated to serve as guardian or to designate a guardian.[16] If a minor is 14 years of age or older, the minor can nominate the guardian of the estate subject to court approval.[17] Per Illinois code a guardian must have attained the age of 18 years, must be a resident of the U.S., must not be of unsound mind, must not be adjudged a disabled person, and must not be convicted of a felony, unless appointment of the person convicted of a felony is found to be in the minor's best interest.[18] It is also possible to have a financial institution appointed as guardian over the minor's estate which can be helpful if the minor's settlement funds are substantial and will require significant investment direction.

**iii. Notice and Service Requirement for Petition for Guardianship**

The minor must be served with the petition for guardianship and this can be accomplished by bringing the minor to court, to the clerk's office, or via process server or county

sheriff. Additionally, unless excused by court, the petitioner must provide notice of the hearing on appointment of guardian of the minor's estate to the minor's relatives.[19]

### iv. Venue of Probate Action

Probate actions connected with injuries to a minor should be brought in the county in which the minor resides if the minor is a resident of Illinois.[20]

### v. Oath and Bond—Surety or No Surety

The guardian of the minor's estate is required to submit an oath that they will faithfully discharge the duties of guardian and must submit a bond.[21] The bond of a guardian must be double the value of the amount that will come into the possession of the guardian of the minor.[22] If a surety company acts as a surety, the bond must be no less than 1½ times the value of the amount that will come into the possession of the guardian of the minor.[23] The amount designated for attorney's fees does not technically need to be bonded. In order to satisfy the oath and bonding requirements, the guardian must sign an "Oath and Bond of Guardian – Surety" form. Once it is signed it should be taken to a bondsman. The cost of bonding can be considered an expense of the estate. In the event that a bank or corporation qualified to administer trusts is appointed as guardian of the minor estate, a bond is not required, although a corporate representative shall file in the court an acceptance of office.[24]

Because the child is considered a ward of the court, even where a parent or relative of unquestionable repute serves as guardian, the bond requirement stands. Although local rule and local custom may allow for waiver of bond in the event that the attorney for the estate, as an officer of the court, takes responsibility for the distribution and deposit of settlement funds into a protected account in an accredited financial institution, precluding the guardian from ever handling the funds.[25]

#### vi. Guardian ad Litem

Guardians ad litem are routinely appointed pursuant to the Illinois Probate Act and local rules in order to review the adequacy of the proposed settlement.[26] Typically, if the trial judge approved the settlement with the terminology "fair and reasonable," the probate judge will not have reason to appoint a guardian ad litem to review the settlement. It is more likely that a guardian ad litem will be appointed in the event that a trial judge does not have the opportunity to approve a settlement, i.e. when a case is settled prior to being put into suit. In the event that a guardian ad litem is appointed, their fees can be considered an expense of minor's estate. In order to ensure that the guardian ad litem can do their review efficiently, it is prudent to make a complete copy of the case file and to provide the guardian ad litem with a letter providing background information on the case. The more efficiently the guardian ad litem can review the case, the less expense taxed to the minor's award and the easier the guardian ad litem can perform their work.

### b. Petition for Order Approving Settlement of Minor's Claim

#### i. Contents of Petition for Order Approving Settlement

Once the guardian has been appointed and the probate court has jurisdiction, it can hear a petition for an order approving the minor's settlement.[27] Similarly to the petition for appointment of the guardian, the information that must be included in the petition is itemization of all case expenses, a description of the occurrence giving rise to the cause of action, the name and address of the defendants, the name and address of the liability insurance carrier, and a description of the injuries of the minor. Many jurisdictions also require the attorney for the estate to submit an affidavit indicating whether the settlement offer is fair and their recommendations as to whether said offer be approved.[28] Many local rules also require a current

medical certificate or letter from the attending physician stating the nature and extent of the injuries sustained by the minor and the most recent prognosis.[29]

### ii. Contingency Fee Reduction

It is expected that trial attorneys will reduce their contingency fees to 25% of the gross award. Many judicial circuits specifically limit attorney contingency fees in cases concerning injuries to minors.[30] It is very important to check the local rules for a specific limit on attorney fees. Many circuits require a statement justifying attorney fees over 25%.

### iii. Attorney Fees for Probate Work

It is generally assumed that obtaining probate court approval for the minor's award is not compensable beyond the contingency fee for prosecuting the underlying injury claim. In the event that the trial attorney retains a probate specialist to obtain probate approval, it follows that the trial attorney might consider reducing their fee in the amount of the probate attorney fee.[31]

### iv. Vouchers

Probate judges want to see a receipt of deposit "voucher" along with account information from the financial institution where the minor's settlement funds are placed. Judges want to see a restriction on the account that specifically restricts withdrawals, unless authorized by court order, until the minor reaches the age of majority.[32] For example:

> "No withdrawals shall be made from this account, unless authorized by order of court, at any time prior to [date upon which the minor will reach the age of majority]."[33]

Once the court receives vouchers indicating that the minor's funds have been placed in a restricted account, the bond of the guardian can be released, and the case can be closed in the probate division, with the court to retain jurisdiction until the minor reaches the age of majority.[34]

**A Brief Note on Liens**

Insurance subrogation liens cannot attach to the personal injury recovery of a minor.[35] Medical expenses paid for the treatment of a minor are considered for the benefit of the parents.[36] It follows that the minor's parents may very well be responsible for the minor's medical expenses in the event that no effort is made to reimburse the insurance carrier from a settlement. There are exceptions to the rule that liens do not attach to a minor's settlement and/or estate including ERISA liens, situations where the minor is a direct and intended beneficiary of the insurance contract, Illinois Public Aid liens, and liens generated by nonprofit hospitals.[37]

**Conclusion**

Trial lawyers are accustomed to advancing their client's interests via the trial court system. Injury cases involving minors require representation in an additional forum. Obtaining probate approval can be unwieldy for the uninitiated, requiring reduction of fees, additional work, and additional scrutiny. As officers of the court, these additional efforts are justified by the assurance that the minor's funds are protected by court order and will be available when they reach college age.

**Endnotes**

[1] *Wreglesworth v. Arctco, Inc.*, 316 Ill.App.3d 1023, 1026, 250 Ill.Dec.495,738 N.E.2d 964 (2000).
[2] *See*, *e.g.*, Cook County Cir. Ct. R. 6.4; 15th Cir. Ct. R. 10.1(k); 16th Cir. Ct. R. 10.01(m) (provides for the trial court to distribute net awards to minors that are less than $15,000.00); 18th Cir. Ct. R. 10.01(k)-(m). Judicial economy and avoidance of probate costs are good reasons for permitting trial courts to approve and dispose of small net awards to minors.
[3] 755 ILCS 5/25-2; *see*, e.g., 9th Cir. Ct. R. 9.65(H)
[4] *Villalobos v. Cicero School District 99*, 362 Ill.App.3d 704, 298 Ill.Dec. 944, 841 N.E.2d 87 (1st Dist. 2005); *Smith v. Smith*, 358 Ill.App.3d 790, 793, 295 Ill.Dec. 510, 832 N.E.2d 960 (4th Dist. 2005); *Wreglesworth v. Arctco*, *supra* note 1.
[5] *Smith*, *supra*, note 4.
[6] *See,* e.g., *Villalobos*, *supra,* note 4 (father brought a personal injury claim on his daughter's behalf, without an attorney, and settled the matter prior to suit. The child later invalidated the settlement because it was not approved by a probate court). The *Villalobos* case is easily distinguishable from a case that is brought by an attorney, settled while at the trial level, with the approval of the trial judge, for a net amount to the minor of under $10,000. There is

far more judicial oversight in the latter example. However, it is still conceivable that a child could later challenge an award only approved by the trial judge because of the lack of probate approval.
[7] *Villalobos*, *supra,* note 4.
[8] *Id*.
[9] 755 ILCS 5/19-8*; Burton by Burton v. Estrada*, 149 Ill.App3d 965, 103 Ill.Dec. 233, 501 N.E.2d 254, 262 (1st Dist 1986).
[10] Henry A. Budzinski, William D. Maddux, E. Kenneth Wright, *Final Procedures Concerning Settlement of Minors' and Disabled Persons' Personal Injury and Wrongful Death Cases & Sample Orders* (2007), available at http://www.cookcountycourt.org/Portals/0/Law%20Divison/Forms/Final%20Procedures%20Concerning%20Sttlement%20of%20Minors%20and%20Disabled%20Persons'%20PI%20and%20WDC.PDF.
[11] *Id*.
[12] *See, e.g.*, 12th Cir. Ct. R. 5.01.
[13] *Id*.; *Budzinski*, *supra,* note 8.
[14] 755 ILCS 5/19-8. *Mastrioanni v. Curtis*, 78 Ill App.3d 97, 397 N.E.2d 56, 33 Ill.Dec.723 (1st Dist. 1979)
[15] 755 ILCS 5/11-8; s*ee,e.g.*,12th Cir. Ct. R. 5.03A
[16] 755 ILCS 5/11-5
[17] 755 ILCS 5/11-5(c)
[18] 755 ILCS 5/11-3
[19] 755 ILCS 5/11-10.1; 755 ILCS 5/11-8. Only certain relatives need to be notified of the petition: "(i) the spouse, if any; if none, (ii) the parents and adult brothers and sisters, if any; if none, (iii) the nearest adult kindred."
[20] 755 ILCS 5/11-6
[21] 755 ILCS 5/12-2
[22] 755 ILCS 5/12-5(a)
[23] *Id*.
[24] 755 ILCS 5/12-1
[25] *See*, *e.g.*, 16th Cir. Ct. R. 10.01(n)
[26] *See*, *e.g.*, 12th Cir. Ct. R. 5.03B
[27] *Hayes v. Massachusetts Mutual Life Ins. Co.*, 125 Ill. 626, 18 N.E. 322 (1888).
[28] *See*, *e.g.*, 18th Cir. Ct. R. 10.01(a)
[29] *Id*.
[30] *See*, *e.g.*, 5th Cir. Ct. R. X(C) ("Attorneys' compensation shall not be more than one-third (1/3) of the recovery if the case is disposed of in the trial court by settlement or trial. If an appeal is perfected and the case disposed of by the reviewing court, the compensation to be paid to the attorney shall not in any event exceed one-half (1/2) of the recovery"); Cook County Cir. Ct. R. 6.4(b) ("Except as otherwise limited by rule or statute, attorneys' compensation shall not exceed one-third of the recovery if the case is disposed of in the trial court by settlement or trail. If an appeal is perfected, the compensation to be paid to the attorney shall not in any event exceed one half of the recovery"); 18th Cir. Ct. R. 10.01(e) ("In minor's personal injury cases, an allowance for attorneys' fees shall not exceed 25% of the gross settlement amount unless the attorney representing the minor in a sworn petition recites the work and hours involved or other special circumstances which would justify a higher attorney's fee to compensate the attorney fairly for the work performed, in which case the Court may fix the fee in excess of the 25% limitation").
[31] Presumably a probate judge will consider a petition for probate attorney fees even beyond the contingency fee.
[32] *See*, *e.g.*, 19th Cir. Ct. R. 14.24(E).
[33] *Id.*
[34] Structured settlements require court approval, and payments must be payable to the estate of the minor, and the guardian of the minor will be required to file proof of payment or vouchers. The financial institution managing the structured settlement should hold a rating of "A" or better by Best's Insurance Guide or a similar publication.
[35] *Kelleher v. Hood*, 238 Ill.App.3d 842, 605 N.E.2d 1018, 179 Ill.Dec. 4 (2nd Dist. 1992).
[36] 750 ILCS 65/15(a)(1); *In Re Estate of Hammond*, 141 Ill. App. 3d 963, 491 N.E.2d 84, 96 Ill.Dec. 270 (1st Dist. 1986); *Beck v. Yatvin*, 235 Ill. App. 3d 1085, 603 N.E.2d 558, 177 Ill.Dec. 488 (1st Dist. 1992).
[37] *Budzinski*, *supra,* note 8, *citing*, Board of Trustees v. Adams, 1998 WL 259543 (N.D. Ill.); Sosin v. Hayes, 258 Ill. App.3d 949, 630 N.E.2d 969, 196 Ill.Dec. 804 (1st Dist. 1994); 305 ILCS 5/11-22; *In re Estate of Cooper*, 125 Ill. 2d 363, 532 N.E.2d 236, 126 Ill.Dec. 551 (1988).