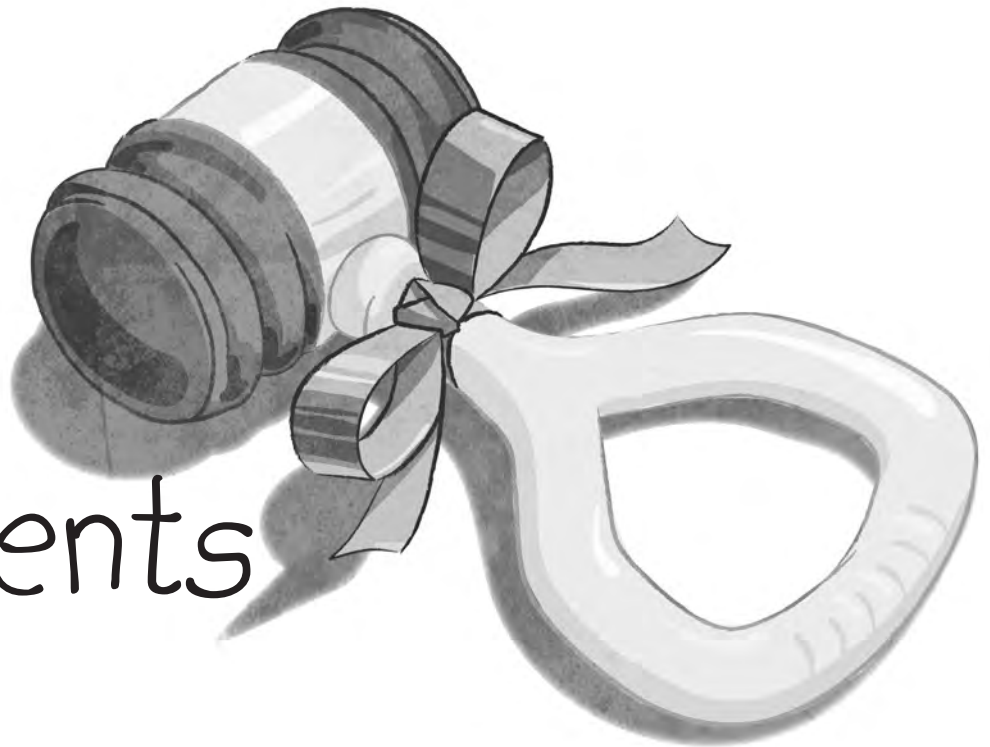

Children and the Law

How to handle infant settlements



by Joanna L. Suyes

Facing court approval for settlement of a case involving a minor may seem to be nothing but a routine inconvenience. As with many other aspects of trial practice, however, procedures vary from court to court and judge to judge. The following is meant to provide information that will suffice in most any court, though practitioners should avail themselves of any special requirements their local courts may have.

Without an agreement to compromise the claim of an infant, court approval cannot be sought. In other words, one party cannot force settlement on another party by petitioning the court for approval.¹ Virginia Code §8.01-424 contemplates that an agreement has already been reached and allows any party with an interest in a settlement involving a “person under a disability” to petition the court for approval of the compromise.² Among other things, “person under a disability” is defined as an infant.³ A prudent attorney who represents a minor will have discussed this possible outcome with the parents/guardians early in the attorney-client relationship so the decision to seek a court’s approval will not come as a surprise.

While the law does not require the parties to seek approval of the compromise of a case involving a minor, the practitioner would be wise to consider the implications of failing to seek the court’s approval, including that a non-court-approved compromise may not be binding on the infant as well as the possibility that turning the proceeds over to the parents or guardians may expose the lawyer to a malpractice claim for failure to protect the child’s interests.

When court approval is sought, the Code allows the parties to schedule a hearing in any circuit court in the Commonwealth or in the court where the action is already pending.⁴ A Petition is filed followed by an Answer, and a hearing date is scheduled; however what may seem to be a simple matter can become complex quickly. As the Supreme Court of Virginia pointed out in *Gunn v. Richmond Community Hospital, Inc.*, the statute authorizing courts to approve infant settlement claims gives a court explicit authority to approve a settlement; therefore, “[i]mplicitly, the court has the power under the statute to *disapprove* a compromise.”⁵ Preparation for the judge’s review of the case becomes important.

Regardless of whether the infant is represented by an attorney, many courts now require appointment of a guardian *ad litem* to represent the interests of the infant and to assist in determining whether the settlement is in the best interest of the child. The party seeking approval often pays the fee of the guardian *ad litem*,⁶ who will review the child’s medical records and liability information and will meet with the child prior to the hearing. The guardian *ad litem* may file an Answer to the Petition separate from that filed by the respondent.

Both parents should attend the hearing with the infant; however, should one custodial parent not be able to attend the hearing, the absent parent should sign the Final Order in advance of the hearing. With proper notice,⁷ the failure of one parent to attend the hearing should not prevent its occurrence. The child’s attorney should be prepared to present any valid custody agreements that may bear on the outcome.⁸

Prior to the hearing, the attorney should:

- prepare the parents for the possibility that the judge may question them (and the child depending on his/her age) regarding the injuries suffered, how well the child has recovered, any residual effects the child may have and whether the parents agree to the compromise and the proposed distribution of its proceeds.
- be prepared to introduce the family to the court and give a brief overview of the liability situation, insurance coverage, the child’s injuries, the medical treatment received, the prognosis, and the amounts of any medical bills, liens or other claims for reimbursement which must be paid out of the settlement funds.
- be able to confirm whether any medical expense coverage was collected and, if so, to whom the proceeds were paid.
- be prepared to present copies of the child’s medical records and medical bills to the judge for review, particularly if a guardian *ad litem* is not required. Other documents the judge may wish to examine are: a certified copy of the infant’s birth certificate, pictures of the child’s injuries, copies of any custody agree-

ments that may impact the parent’s ability to authorize the settlement or sign the Order, and copies of letters from Medicare or Medicaid confirming the amounts of any claims for reimbursement. The well-prepared attorney appearing at a court approval in an unfamiliar venue will seek counsel from the court’s clerk or from others who have appeared previously in that court for advice on any special requirements.

The court will require payment of the settlement proceeds into the court or the court’s general receiver, or to a fiduciary of the minor.⁹ If the amount paid is less than \$15,000, the court, following Code §8.01-606(A), may turn the funds over “to the person to whom it is due” or “to some other person who is considered competent to administer it, for the benefit of the person entitled to the fund....”¹⁰ In the case of a structured settlement, a fourth option allows the court to order funds secured by a bond or guaranteed by an A-plus rated insurance company be paid to a fiduciary.¹¹ An infant entitled to funds being held by a court may petition the court to pay the funds over to a person “capable of properly handling it, to be used solely for the education, maintenance and support” of the infant.¹² To allow for proper administration of the funds, many courts require submission of an Affidavit detailing the infant’s name, address, date of birth and social security number.¹³

With the hearing complete, the appropriate documents signed – don’t forget the check – and the funds distributed, the attorney’s obligations do not end. While most law firms have instituted procedures for the storage and destruction of files after a short time, generally five to seven years, fifteen years or more may pass before a minor whose settlement has been court-approved reaches the age of maturity. While, in order to disburse the funds held for an infant, courts generally require only presentation of a driver’s license, a birth certificate or some other acceptable form of identification and not a copy of the Order entered years before, it is not uncommon after the passage of time for the person entitled to the funds to have forgotten in which court the funds are being held. A procedure should be instituted for indexing Orders for clients whose funds have been court approved so that the information is readily available to anyone in need of it.

Settlement of a case involving a minor may seem to be routine, but preparation is the key to bringing the matter to a smooth and successful end.

Endnotes

1. *Gunn v. Richmond Community Hospital, Inc.*, 235 Va. 282 (1988) (holding that since there was no compromise to approve, the trial court erred in forcing acceptance of the settlement offer on appellant’s guardian).

2. "In case of damage to the person or property of a person under a disability, caused by the wrongful act, neglect or default of any person, when death did not ensue therefrom, any person or insurer interested in compromise of any claim for such damages, including any claim under the provisions of any liability insurance policy, may . . . move the court to approve the compromise." Code of Virginia § 8.01-424(B).
3. §8.01-2; *See also* §1-204.
4. §8.01-424(B) (emphasis added). *See also* §8.01-606(A) ("Whenever there is due to any person, any sum of money from any source, not exceeding \$ 15,000, the fund may be paid into the circuit court of the county or city in which the fund became due or such person resides.")
5. *Gunn*, 235 Va. at 286.
6. Rule 1.8(f) of the Rules of Professional Conduct and Virginia State Bar's Legal Ethics Opinion 1831 discusses the conflict that may exist when a third-party pays the fee of an attorney/GAL.
7. *See* §8.01-296.
8. *See, e.g., Sims v. Va. Electric and Power Co.*, 550 F.2d 929 (4th Cir. 1977). Presenting a valid custody agreement assists to prove a guardian's relationship to the minor as well as to demonstrate why a parent's participation in the hearing is no longer necessary.
9. §8.01-424(D).
10. §8.01-606(A)(i) and (ii).
11. §8.01-424(D).
12. §8.01-606(B).
13. §8.01-600.



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