Cheryl Howell

School of Government

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Minor Settlements in District Court

I. Court approval is required for settlements involving:

  a. A minor. *Gillikin v. Gillikan*, 252 NC 1 (1960); *Rector v. Laurel River Logging Co*., 179 NC 59 (1919)(settlement of a minor's claim is not binding on the minor unless the settlement is investigated and approved by the court); *Creech v. Melnik,* 147 NC App 471 (2001), *rev. denied*, 355 NC 490 (2002)(covenant not to sue on behalf of a minor is not enforceable unless it was approved by the court); *Ballard v. Hunter,* 12 NC App 613 (1971)(even a confession of judgment must be approved by the court before it is binding on minor).
  b. An incompetent. *Bunch v. Foeman Blades Lumber Co.*, 174 NC 8 (1917)(court must determine settlement is in best interest of incompetent).
  c. Wrongful death action in which one or more of the statutory beneficiaries is a minor or incompetent, or in which one or more of the statutory beneficiaries have not consented to the settlement in writing. G.S. 28A-13-3(23)(where no previous action has been filed, settlement can be approved by judge of district or superior court).

II. Minor Settlements

  a. General Rule
    1. A judgment in favor of a minor plaintiff is a "nullity" if the judgment does not contain a finding or recital that an investigation was undertaken by the court and the court found

the settlement to be just and reasonable. *Ballard v. Hunter*, 12 NC App 613 (1971), *cert. denied*, 280 NC 180.

2. "The 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 and settlements materially affecting the rights of infants." *Sigmund Sternberger Foundation, Inc. v. Tannenbaum,* 273 NC 658 (1968).
3. Consent of a parent or guardian is not sufficient to make a minor settlement binding on the minor. *See In re Reynolds*, 296 NC 276 (1934)("In the case of infant parties, the next friend, guardian ad litem, or guardian cannot consent to a judgment or compromise without the investigation and approval by the court.").
4. Waivers of liability and agreements not to sue made by or on behalf of a minor are not binding on the minor unless the waiver was approved by the court. *Sell v. Hotchkiss,* 264 NC 185 (1965). *See also Creech v. Melnick*, 147 NC App 471 (2001), *disc. rev. denied*, 355 NC 490 (2002)("It is well established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court …" The court also stated that '[t]hose who act in defiance of [this requirement] must take the risk of their action being declared void, or set aside.").

b. Procedure
   1. Some type of action must be commenced before judge can approve a settlement.
      i. A settlement may be presented to a judge for approval in an existing case pending in district court when a settlement is reached after a case was filed; or
      ii. The parties can initiate a 'friendly suit' to obtain judicial approval of a case settled before an action was filed. The complaint is then the same complaint that would have

been filed to initiate the action, for example, negligence and personal injury or breach of contract; or

iii. GS 1-400 and 1-402 allows an expedited special proceeding when all parties are in agreement. Note: GS 7A-246 provides that superior court generally is the proper division for special proceeding without regard to the amount in controversy.

2. Minors must appear in a settlement proceeding by general or testamentary guardian, if they have any within this state, or by a GAL appointed by the court. GS 1A-1, Rule 17.
3. A parent can act as a GAL but there may be a conflict of interest if the parent also has a claim for recovery relating to medical expenses incurred on behalf of the minor. *See* discussion below regarding damages for medical expenses in personal injury cases. *See also* ethics opinions issued by North Carolina State Bar regarding a lawyer's ability to represent the parent as a GAL for a child when the parent also is asserting a claim for recovery of medical expenses arising out of personal injury to the child, RPC 109 (Jan. 17, 1992), and the lawyer's ability to represent a non-parent GAL for a child while also representing the parent with regard to recovery of medical expenses. RPC 123 (April 15, 1994).
4. Case law indicates that a judgment is voidable if entered when a parent GAL had a conflict of interest with the minor child. *See Butler v. Winston*, 223 NC 421 (1943) and *White v. Osborne*, 251 NC 56 (1959).
5. It is not sufficient for the court to merely approve the settlement. Rather, the court must actually investigate the settlement to determine whether it is fair to the minor.
    i. "Where the proceedings are merely formal, and are instituted and carried on only to give an apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or the extent of the recovery is based, a judgment entered in

pursuance of the agreement and by consent merely is only colorable, and will be set aside in a proper proceeding, when its effect, if allowed to stand, would be to bar the infant's substantial rights." *Rector v. Logging Co*., 179 NC 59, 62 (1919).

ii. *See also Marsh v. Dellinger*, 127 NC 360, 363(1900)(court should take evidence, by affidavit, of reliable, disinterested persons to "inform itself in order that infants will be protected.").

iii. *Cf. Oates v. Texas Co.*, 203 NC 474 (1932)(where judgment recites an investigation by the court and includes a finding that the settlement is just and reasonable, such finding is conclusive in the absence of fraud).

6. While the court clearly needs to consider evidence in determining whether to accept the settlement, there is no law specifying that these proceedings must be held in open court and on the record. While GS 1- 1A, Rule 43 and GS 7A-191 provide that unless another statute specifies otherwise, testimony of all witnesses in a *trial* shall be in open court in a "regular courtroom", GS 7A-191 provides that "all other proceedings, hearings and acts may be done or conducted by a judge in chambers…" Note: Judges must be specifically authorized to hear matters in chambers by the chief district court judges before they can do so. *See* GS 7A- 192.

c. Considerations for Court

1. There is no statute or case law specifying the details of the court's inquiry. The ultimate question is whether the settlement is fair to the minor under the particular circumstances of the case. See *Redwine v. Clodfelter,* 226 NC 366 (1946)("[infant's] welfare is the guiding star in determining the reasonableness and validity [of a settlement]").
2. Appropriate areas of consideration include:

i. The strength of plaintiff's case and the existence of any viable defense.
ii. The nature and extent of the minor's physical injuries, if any.
iii. The amount of insurance coverage available.
iv. The ability of defendant to pay compensation to the minor.
v. The exact amount the minor will receive under the terms of the settlement.
vi. The propriety of any proposed payments from the minor's settlement fund. For example, see discussion below regarding when it is and is not appropriate for medical expenses to be paid out of the minor's settlement.
vii. The details of the proposed release of the minor's claim against the defendant(s).
viii. Reasonableness of the attorney fees. See discussion below.
ix. Whether the GAL and the parents of the minor think the settlement is fair and reasonable under the circumstances.
x. In cases of a structured settlement, all elements necessary for settlement to be tax free pursuant to IRS regulations. See discussion below under Disbursement of Settlement Proceeds.

d. Medical Expenses

1. Generally, a parent is liable for medical expenses incurred on behalf of an unemancipated minor. *Ellington v. Bradford,* 242 NC 159 (1955); *North Carolina Baptist Hospital v. Franklin*, 103 NC App 446 (1991).
2. Therefore, two causes of action arise when an unemancipated minor is injured through negligence, one on behalf of the parent for earnings of the child during her minority and expenses incurred for necessary medical treatment, and the other on

behalf of the minor child to recover damages for pain and suffering, for permanent injury, and for impairment of earning capacity after attaining majority. *Ellington v. Bradford*, 242 NC 159 (1955).

3. Because the parent and not the minor is liable for the medical treatment of the child, the minor's settlement generally will not include compensation for medical expenses. Except for the rights to reimbursement discussed in section 4 below, the proceeds of the minor settlement should not be used to pay medical expenses when the child's claim did not include a claim for medical expenses. However, there are circumstances when a minor's claim can include recovery of medical expenses.
    i. For example, "an emancipated minor, or one without a parent, or one whose parent is financially unable to pay for the treatment, may be liable as for other necessities." *Id. See also North Carolina Baptist Hospital v. Franklin*, 103 NC App 446 (1991).
    ii. Also, if a defendant does not object, a parent may waive his right to recover damages for the loss of the child's earnings and services, as well as for medical expenses during minority and instead allow the child to recover all of the damages that arise out of the injury. Suzanne Reynolds, <u>Lee's Family Law</u>, p. 15-61, citing *Bolkhir v. N.C. State University,* 321 NC 706 (1988) and *Kleibor v. Rogers,* 265 NC 304 (1965)(both holding that court will imply a waiver when parent brings a claim on child's behalf as a GAL and seeks to recover for lost earning capacity and medical expenses as damages for the minor).
4. Specific Claims for Medical Expenses against the Settlement.
    i. **Hospital and Physician Liens.** GS 44-49 creates a lien upon any sum recovered as reimbursement of medical expenses arising out of a personal injury claim in favor of

any physician, dentist, trained nurse, or hospital for medical services rendered and for drugs and medical supplies furnished in the treatment of the injury for which said damages have been recovered. However, this statute does not change the common law rule that a child's personal injury settlement generally does not include compensation for medical expenses. *Ellington v. Bradford*, 242 NC 159 (1955). If the settlement does not include compensation for medical expenses because the child could not or did not assert a claim for recovery of medical expenses, no lien attaches to the minor settlement pursuant to GS 44-49, *id.*, and the proceeds of the minor's settlement should not be used to pay these providers.

ii. Medicaid. The North Carolina Supreme Court has held that GS 108A-57(a) does give Medicaid a claim against a minor settlement for reimbursement of medical expenses incurred on behalf of a minor child, even if the child's claim did not include reimbursement for medical expenses. *Andrews v. Haygood,* 362 NC 599 (2008). The amount Medicaid is entitled to recover is the total Medicaid expenditures for past medical expenses relating to the child or one-third of the total recovery, whichever is less. The total recovery amount is determined without regard to attorney fees and costs. G.S. 108A-57(a).

iii. **Employer Health Insurance Plans.** While North Carolina law generally prohibits subrogation of rights arising out of personal injury settlements, *see Harris-Teeter Super Markets, Inc v. Watts*, 98 NC App 684 (1990)(common law prohibition) and N.C. Admin. Code tit. 11, r. 12.0319 (Sept. 1978)(insurance companies prohibited from including provisions in policies allowing subrogation of claims for recovery against third parties for personal injury), provisions in the Employee

Retirement Income Security Act of 1974 (ERISA), 29 USC sec. 100*1, et. seq*., allow self-funded employment benefit plans [meaning those plans not insured by an insurance company] to seek reimbursement of medical payments made on behalf of an injured plan member out of funds recovered from a tortfeasor. *Hampton Indus. Inc., v. Sparrow,* 981 F.2d 726 (4th Cir. 1992). *See also FMC Corp. v. Holliday,* 498 US 52 (1990)(court explains relationship between ERISA and state laws, particularly state laws prohibiting subrogation of rights arising out of a cause of action for personal injury). Therefore, when the self-funded plan includes provisions in the insurance policy providing for subrogation rights to any recovery obtained by any person covered by the plan, the plan is entitled to reimbursement from a minor settlement for amounts paid by the plan as a result of the injury to the minor. *Rhodes Inc. v. Morrow,* 937 F. Supp. 1202 (M.D.N.C. 1996). While there was a specific clause in the policy at issue in *Rhodes* allowing this recovery, the court noted that "the Fourth Circuit has affirmed the right for a plan to recover even in the absence of a signed reimbursement agreement". 937 F. Supp. at 1212. However, the Fourth Circuit case referenced in *Rhodes* did not deal specifically with a minor settlement*, see Hampton Indus. Inc., v. Sparrow,* 981 F.2d 726 (4th Cir. 1992), so it is not clear whether medical expenses can be recovered from a minor settlement when there is no specific language in the insurance policy allowing such recovery. ERISA does not limit the recovery of the plan in relation to the amount of the settlement nor does ERISA address the issue of attorney fees. *See id.,* (North Carolina statute limiting reimbursement of medical expenses to 50% of total recovery did not apply to ERISA plan).

e. Attorney Fees
    1. As the minor child cannot enter into an enforceable fee agreement with an attorney, *see Matter of Estate of Sturman*, 93 NC App 473 (1989)("the infant has no power to contract as to fees, and in most cases is too young to understand such matters"), any fee contract with the attorney is not controlling as to the amount the attorney is entitled to receive out of the settlement.
    2. Therefore, the court is required to consider the reasonableness of the amount to be paid to the attorney, considering all circumstances including for example, the difficulty of the work actually performed by the attorney, the time spent by the attorney on the case, the results obtained, and the usual and customary fees in the area for similar services rendered.

f. Disbursement of Settlement
    1. Paid to Clerk of Superior Court
        i. GS 7A-111 authorizes the clerk of court to accept and hold settlement funds for a minor up to $25,000.
        ii. The clerk will hold the funds until the minor reaches the age of 18.
        iii. "The clerk is authorized … to disburse the monies … at such time … as in his judgment is in the best interest of the child, except the clerk must first determine that the parents … are financially unable to provide for the necessities of such child…" GS 7A-111.
    2. Paid to Guardian of Child's Estate
        i. Clerk of court may appoint a guardian of the estate for the minor pursuant to GS 35A-1220, *et seq*.
        ii. Once appointed by the clerk, the guardian can accept the settlement funds on behalf of the minor, subject to GS 35A-1252 (powers of the guardian of the estate) and 35A-1253(duties of the guardian of the estate).

3. Structured Settlement
    i. Settlement proceeds are used to purchase an annuity or other form of future periodic payments.
    ii. Annuity contract generally will provide that the minor will receive settlement proceeds in periodic payments for a set period of time, beginning when the minor turns 18 years of age.
    iii. If the settlement is structured pursuant to the provisions of sec. 104(a)(2) of the Internal Revenue Code, it will be tax free to the recipient. IRS regulations provide that:
        1. Payments must be fixed and determinable as to amount and time of payment;
        2. Plaintiff can have no ownership rights of any type in the annuity or other funds relied upon to make the future payments, including no right to change beneficiary, right to control investment of fund, or right to take early withdrawal of funds;
        3. Payments may not be subject to acceleration, deferral, increase or decrease by the recipient of the payments;
        4. Agreement must specify that payments are not compensation for lost income;
        5. Defendant or insurer cannot be required to set aside payments to guarantee the future payments; and
        6. The liability of the insurance company may be no greater than the liability of the defendant or the defendant's liability carrier.
    iv. For a comprehensive list of matters to consider during the approval hearing for a structured settlement, *see* "Structured Settlements", North Carolina Trial Judges' Bench Book, Superior Court, Vol. 2 (Civil), Chapter 13 (Institute of Government 1999).
4. Special Needs Trust

i. A trust created pursuant to 42 USC sec. 1396p(d)(4) to preserve minor child's eligibility for governmental assistance through SSI and Medicaid despite child's receipt of assets that are placed in trust.
ii. Trust must be created by a parent, grandparent, guardian or by the court on behalf of the minor. 42 USC sec. 1396(d)(4).
iii. Trust can allow distributions to meet reasonable needs of the minor as those needs are determined by the trustee.
iv. Trust created pursuant to 42 USC sec. 1396p(d)(4) must provide that all assets in the trust remaining at the death of the beneficiary will be paid to Medicaid or other governmental program to the extent those programs paid for services rendered to the beneficiary.
v. Creation of the special needs trust does not bar Medicaid recovery directly from the settlement proceeds for medical expenses paid as a result of the injury to the minor. *Payne by Rabilus v. State, Department of Health and Human Resources, Division of Medical Assistance,* 126 NC App 672 (1997).

g. Sealing the Record
1. Subject to specific statutory exceptions not applicable to minor settlements, court records are public records. GS 7A-109(a) provides that "except as prohibited by law, records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained."
2. GS 132-1.3 provides that settlement documents in lawsuits against governmental agencies, except malpractice actions against hospitals, may not be sealed unless the court determines that the presumption of openness is overcome by an overriding

interest in maintaining the confidentiality of the proceeding and that the interest cannot be served by any measure other than sealing the documents.

3. The North Carolina Supreme Court has recognized that trial judges have the inherent authority to order that court records be sealed but also specified that such authority is to be used sparingly and only when necessary for the fair administration of justice, or "where for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial." *Virmani v. Presbyterian Health Services Corporation,* 350 NC 449 (1999).
4. Before exercising this inherent authority, a court must consider all alternatives to closure and then specify in writing the facts that support the decision to seal. *Id.*
5. For more thorough discussion of this topic, see Drennan, *Privacy and the Courts*, Popular Government, Spring 2002. http://www.sog.unc.edu/pubs/electronicversions/pg/pgspr02/article4.pdf.