

## Court Approval of Minor Settlements in North Carolina

A [minor](#) injured through negligence or other wrongdoing may bring an action [through a representative](#) to recover damages for pain and suffering, permanent injury, and impairment of earning capacity. (A claim for reimbursement of the minor's medical expenses typically belongs to the parents.) Although minors generally are legally incapable of binding themselves to contracts, the law allows a minor's claims to be resolved through a settlement agreement. The settlement, however, is **not enforceable against the minor unless it has first been investigated and approved by the court.** *Sigmund Sternberger Found., Inc. v. Tannenbaum*, 273 N.C. 658, 677 (1968); *Ballard v. Hunter*, 12 N.C. App. 613, 619 (1971). Even if the settlement is arranged by a parent, guardian, guardian ad litem, estate administrator, or attorney, the minor cannot be bound absent prior court approval. *Sell v. Hotchkiss*, 264 N.C. 185, 191 (1965); *In re Reynolds*, 206 N.C. 276 (1934); *Hagins v. Phipps*, 1 N.C. App. 63 (1968). The rule applies not just to claims settled after an action is filed, but also to pre-litigation settlements including waivers of a minor's right to sue. *Creech v. Melnik*, 147 N.C. App. 471, 475 (2001).

The purpose of the court's review is to protect the interests of the minor. The investigation must focus on the minor's welfare and fairness *to the minor* under the circumstances. See *Redwine v. Clodfelter*, 226 N.C. 366, 370 (1946) (minor's welfare is the "guiding star"); *Reynolds v. Reynolds*, 208 N.C. 578, 631?32 (1935) (affirming "fair, just, and equitable" settlement).

### Jurisdiction and Basic Procedure

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." *Creech*, 147 N.C. App. at 477. But before a court may approve a minor's settlement it must have jurisdiction over the underlying action. If the claims being settled are part of an existing action, the parties should file a motion (or "petition") in the action seeking a judgment approving settlement. If there is no underlying action, the parties must invoke superior or district court jurisdiction by filing a "friendly" civil action with a complaint and summons, followed by a petition for approval of settlement. An action seeking approval of a minor settlement may also be initiated by filing a special proceeding pursuant to [G.S. 1-400](#). *Gilliken v. Gilliken*, 252 N.C. 1, 6 (1960). The superior court typically is the proper division for adjudication of special proceedings. [G.S. 7A-246](#).

Court approval also is required for settlement of a wrongful death action in which one or more of the statutory beneficiaries is a minor or incompetent. The court with jurisdiction over the action (or the Industrial Commission, for [Tort Claims Act](#) cases) has jurisdiction over the settlement. [G.S. 28A-13-3\(a\)\(23\)](#).

Before any settlement review can begin, the minor must be represented by a general or testamentary guardian or by a court-appointed guardian ad litem (GAL). See G.S. 1A-1, [Rule 17\(b\), \(c\)](#). Usually, prior to or along with the complaint, counsel will file a petition for appointment of a GAL

and a draft order appointing a GAL for the clerk's or judge's signature. Usually it is not ideal for a parent to act as GAL because the parent could have claims in the action that conflict with the child's interests. See *White v. Osborn*, 251 N.C. 56, 60 (1959) (such conflicts could render the settlement voidable). The State Bar has addressed this potential conflict and related ethical issues. See RPC [109](#), [123](#), and [167](#).

[Also note that, in [estate proceedings](#), the clerk of superior court has authority (pursuant to a relatively new statute) to [approve settlements](#) of certain controversies. Presumably if a minor is a party to one of these controversies the clerk has authority to review the settlement for its fairness to the minor.]

### The Court's Investigation

There is no fixed method for the court's review. Initially the court will notice a hearing at which counsel and the guardian or GAL must be present. In most instances the judge also will want to see and potentially hear from the minor and perhaps the parents. See, e.g., [Rule 12.3 of District 10 Civil District Court](#) (requiring attendance by minor, minor's GAL, and the attorneys for all parties, unless excused by judge in advance.) Although some judges are willing to hear minor settlements in chambers, it seems the better practice to conduct the hearing in open court and on the record. Some local court rules require open court review. See, e.g., [Rule 20.1 of District 15B Civil Superior Court](#). Some also require that the proceeding be recorded. See, e.g., [Rule 20.2 of District 26 Civil Superior Court](#).

The judge may begin assessing the claims and defenses by reading the pleadings and reviewing relevant excerpts from discovery responses, deposition transcripts, and affidavits. To assess the severity of the minor's injuries, the judge may review relevant parts of the medical evidence and may find it helpful to explore the medical bills. Some judges prefer also to see statements by treating physicians (and experts, where relevant) regarding the degree of permanent injury. The judge may also ask to hear from the minor and the defendant(s) either informally or, if the judge chooses, through sworn testimony. If the insurance coverage is inadequate, the judge will want financial information about the settling defendant(s). Although not the norm, the judge may also subpoena other witnesses and records as he or she sees fit. Naturally, the scope of review will vary with the complexity of the case.

Some of the key issues for the court to examine are:

- **The merits.**
  - Strength of plaintiff's case. How compelling is the evidence? How might a jury react to these particular parties?
  - Strength of defenses, if any.
  - Extent of damages exposure. If medical malpractice, will statutory [liability limits](#) apply? Are [punitive damages](#) at issue?

- Burden and expense to the minor (and family) of ongoing litigation.
- **Nature and extent of the minor's injuries or harm.**
  - Extent of pain and suffering. Do some or all of the injuries persist?
  - Are there permanent injuries? To what degree? Will ongoing care be required? Will it impair future earning potential?
- **Available funds.**
  - Defendant's insurance coverage available to compensate the minor.
  - Ability of defendant(s) to pay a likely judgment.
- **Specific terms of the settlement**
  - *What is the actual net amount the minor will receive?*
    - Will any payments be made out of the settlement amount? Unless the minor is emancipated or the parents have waived their claims for reimbursement, medical bills usually are not paid out of the minor's settlement. If the settlement does specify such payments, the court should determine whether adequate funds remain to fairly compensate the minor for her injuries.
    - Are there any potential liens or claims, such as [hospital and physician liens](#), potential [Medicaid claims](#), or claims arising under ERISA?
    - What amount will go to pay attorney fees? Is it fair and reasonable? The minor is not bound to a prior attorney fee agreement, and such agreement does not determine the amount the attorney will receive. *Matter of Estate of Sturman*, 93 N.C. App. 473 (1989) (an "infant has no power to contract as to fees"). Instead, the court must review the fee for reasonableness. As in other contexts, the court must consider time and labor expended, skill required, customary fee for like work, and experience and ability of the attorney. *Parker v. Hensley*, 175 N.C. App. 740, 742 (2006). Counsel should be prepared to address these factors with time records and affidavits.
  - *How will the minor be paid? Will the funds be protected until the minor reaches majority?*
    - Are the funds paid in cash? If so, have the parties arranged for the funds to be held either [by the clerk of court](#) or [by a guardian of the minor's estate](#)?
    - Are the funds to be paid in a structured settlement (purchase of annuity for periodic future payments to the minor)? If so:
      - Has the defendant certified to the court the present value of the annuity?
      - Does it satisfy requirements for tax-free treatment? The court may require an opinion of a tax expert, tax attorney, or CPA that the settlement creates no tax liability for the minor.
      - Is the company from which the annuity will be purchased a highly-

rated institution (by S&P, A.M. Best, Fitch, Moody's)?

- At what age will the minor begin to receive payments? What is the payment interval? In the court's view, is it appropriate for the minor to have the funds at that age and in that amount?
- *Could the payments affect the minor's eligibility for government benefits? If so, have counsel arranged for a special needs trust (under [42 U.S.C. 1396p\(d\)\(4\)](#)) to preserve the minor's eligibility?*
- *Does the agreement contain a broader release than the action fairly contemplates?*

Not every case will require review of all these points, and some cases will raise additional issues. Whatever the facts, it is the court's task to examine whether the settlement is reasonable from the minor's perspective. The court's order need not recite every inquiry made, *Oates v. Tex. Co.*, 203 N.C. 474, 474 (1932), but it should reflect that the court has thoughtfully investigated the settlement and deemed it either reasonable (thus approving it) or unreasonable under the circumstances (thus denying approval).