Considerations When Settling a Lawsuit for an Individual Lacking Legal Capacity or a Minor

Settling a case for an individual lacking legal capacity or a minor creates several legal issues. This article addresses those issues and provides a roadmap for the efficient resolution of these cases.

A person lacking legal capacity or who has a guardian is a legally incapacitated individual (LII),[1] and a minor is a person under the age of 18 years.[2] LIIs and minors require special handling when resolving a lawsuit filed on their behalf. When a plaintiff is a minor or LII, the probate court has exclusive jurisdiction over the litigation recovery; however, when a lawsuit has been filed and a claim for a minor or LII is subsequently settled, the trial court and probate court have concurrent jurisdiction.[3] In some cases, a personal injury attorney who has settled a case for a minor or LII may choose to file a lawsuit in a trial court simply to obtain the trial court's jurisdiction. Filing a lawsuit in a trial court does not relieve the personal injury attorney of the duty to obtain written verification from the probate court that it has passed on the

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FAST FACTS

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sufficiency of the bond and the bond, if any, has been filed with the probate court;[4] the State Court Administrative Office has approved form MC 95 for this purpose.[5]

As a result, most personal injury attorneys work closely with experienced probate settlement counsel to ensure that the interaction between litigation matters and probate issues is smooth. The intent of the court rules is to provide a bridge between the circuit court and probate court so that settlement funds are protected by (1) providing advance notice to the probate court, (2) allowing the court to order sufficient bond, and (3) reviewing the establishment of a trust so that any settlement plan discourages the distribution of settlement proceeds without proper protective measures.

Minors and legally incapacitated individuals

Michigan court rules require special handling of the resolution of cases for minors or LIIs. MCR 2.420(A) governs settlements in actions brought by a next friend, guardian, or conservator, and it specifically provides that "[b]efore an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is governed by the Estates and Protected Individuals Code."[6]

When a pre-suit settlement is reached on behalf of a minor or LII, the probate court must pass on the fairness of the proposal.[7] If a conservator has been appointed, a petition for approval of the settlement terms is filed in the conservatorship estate. If no probate estate has been opened, a petition for a protective order can be filed by a parent or next friend.[8] A petition for protective order is a one-time request for approval of the settlement terms that often contains a plan for how the minor or LII will receive the settlement proceeds, including any structured settlement annuities to be purchased or establishment of a trust. Protective order proceedings often avoid appointing a conservator and maintaining an estate when the only asset is a cause of action.

Regardless under which estate a petition to settle is filed, a court hearing will be held and proper notice must be provided to the parties. When in probate court, counsel should be aware that the protected person may have to be served. If the protected person is receiving means-tested public benefits, government agencies may also require service. Usually,

the minor or LII must appear in court unless there is good cause for the party not to appear.[9] Good cause typically requires a showing of harm to the plaintiff or some other serious issue excusing appearance. During the hearing, the judge will have the opportunity to observe the nature of the plaintiff's injury. If the judge is not satisfied that the protected person understands the extent of the injury, the judge may require medical testimony by deposition or through court testimony.[10] If the next friend, guardian, or conservator has made a claim in the same action and will share in the settlement, the judge must appoint an independent guardian ad litem.[11] The guardian ad litem issues a report to the judge based on the fairness and reasonableness of the agreement and whether the result is in the best interests of the minor or LII. Depending on jurisdiction, payment for the guardian's services is usually covered by the protected person or the settlement proceeds. However, in automobile injury claims, the probate judge may require that the no-fault automobile insurance carrier pay those fees.

Special provisions for minors

A minor has several additional requirements that must be satisfied when settling a lawsuit. For example, if a minor receives more than $5,000—either immediately or over the course of a calendar year—before turning age 18, protective proceedings must be filed in the probate court. That means the minor or his or her parent or legal guardian cannot legally receive funds in excess of $5,000 in a calendar year without some layer of protection and accountability in the form of a conservatorship, restricted or blocked account, trust, or protective order over which the probate court has exclusive jurisdiction.[12] If a conservator is appointed before the judgment is entered or the action is dismissed, payment must be made to the minor's conservator.[13] If the minor is not receiving more than $5,000 in a calendar year, the settlement planner can instead petition for a protective order.[14]

If a minor requires payment of less than $5,000 in a calendar year before age 18, Michigan law allows assets to be provided directly to parents on behalf of the minor. For example, if the minor has known expenses such as orthodontics, private tuition, or therapy, annual payments of less than $5,000 can be paid directly to a parent or guardian on the minor's behalf in accordance with MCL 700.5102.[15]

Trust considerations

Often, a settlement planner will use a trust—either a minor's settlement trust or a special-needs trust—to assist the protected person in managing and protecting the assets. If a civil suit has been filed, the trial court has authority to approve settlement terms, including attorney fees and costs, liens, and any structured settlement annuities. The trial court can also order that a trust be created to ultimately receive and manage the minor's or LII's funds, but the probate court has exclusive jurisdiction over the trust terms and its administration, including ongoing supervision of the trust.[16]

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Depending on jurisdiction, a minor settlement trust can be used when a minor is receiving a large settlement, as it provides additional protection beyond age 18 to allow time for the minor to mature and prevent waste of assets. This is a separate proceeding filed in the probate court. The trial court has jurisdiction over the suit and allocation of the proceeds, and can order that a trust be created for a minor or person with disabilities. However, the probate court has exclusive jurisdiction over the trust terms and administration, and as a result, a separate action is filed in the probate court after the settlement has been approved or otherwise resolved in alternative dispute resolution. Keep in mind that if no suit has been filed, the probate court has jurisdiction to approve a settlement for a minor or LII in addition to approving how the proceeds are paid. For a claimant with disabilities who is receiving means-tested government benefits such as Supplemental Security Income, Medicaid, or both, a special-needs trust is generally recommended. Because special-needs trusts involve both trust law and knowledge of public benefits, an attorney experienced in the establishment and administration of these trusts should be retained early in the litigation process.[17]

What if an adult has not been determined "legally incapacitated" but objectively appears to lack capacity?

Some plaintiffs may lack capacity due to mental illness or deficiency, physical illness or disability, prolonged use of drugs

or chronic intoxication, or other cause,[18] but are not considered an LII as previously defined in this article because the person does not have a guardian or has not been adjudged by a court to lack capacity. If the plaintiff has a revocable trust agreement or a durable power of attorney, these documents may provide the trustee or attorney-in-fact with authority to file, settle, and receive proceeds from a cause of action without any probate involvement. Under a durable power of attorney, individuals may give their agent authority to do anything the individual could do. It remains in effect even when the individual no longer has capacity.[19] If the authority granted is broad and permits a durable power of attorney to make legal claims and conduct litigation, appointment of a guardian or conservator may be unnecessary. More importantly, approval of a settlement would not be required because MCR 2.420 only pertains to settlements in action brought for a minor or an LII by a next friend, guardian, or conservator; there is no statutory provision or court rule which governs settlements in action brought by a durable power of attorney. Documents must be reviewed carefully to make sure they include specific authority to settle lawsuits.

If there is no revocable living trust or power of attorney, the settlement planner has the option to seek court appointment of a next friend,[20] guardian,[21] or conservator[22] and pursue probate court approval of the settlement as previously described. ■

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ENDNOTES

1. MCL 700.1105(i), which defines an LII as "an individual, other than a minor, for whom a guardian is appointed under this act or an individual, other than a minor, who has been adjudged by a court to be an incapacitated individual."
2. MCL 722.1(a).
3. MCR 2.420.
4. MCR 2.420(B)(3).
5. SCAO, *Numerical Index of Approved Michigan Court Forms* <http://courts.mi.gov/Administration/SCAO/Forms/Pages/Michigan-Court-Index.aspx>. All websites cited in this article were accessed November 29, 2017.
6. MCR 2.420(A).
7. MCR 2.420(B).
8. MCR 2.201(E)(1).
9. MCR 2.420(B)(1)(a).
10. MCR 2.420(B)(1)(b).
11. MCR 2.420(B)(2) and MCR 5.407.
12. MCR 2.420(B)(4)(a).
13. *Id.*
14. MCL 700.5401 to MCL 700.5408.
15. MCR 2.420(B)(4)(b).
16. MCL 700.7201.
17. For a more thorough discussion of planning for persons with disabilities, see Fuller, *Planning for a Person with Disabilities: Traditional and Emerging Planning Considerations*, 93 Mich B J 38 (November 2014) <https://www.michbar.org/file/barjournal/article/documents/pdf4article2492.pdf>.
18. MCL 700.1105(a).
19. MCL 700.5501.
20. The Estate and Protected Individuals Code does not have any provisions relating to the appointment of a next friend. Although MCR 2.201(E) does not apply to actions in the probate court, it mandates that all actions on behalf of a minor or incompetent person be brought through a court-appointed conservator or next friend. A next friend can be appointed by the trial court, whereas a conservator or guardian must be appointed by the probate court and may require a hearing. Notably, although a guardian is an appropriate fiduciary for pre-suit settlements, a guardian is not appropriate for the filing of claims on behalf of a minor or incompetent person. However, the next friend is responsible for the costs of the action under MCR 2.201(E)(1)(b). Therefore, many personal injury attorneys prefer to appoint a next friend at the onset of litigation and wait to appoint a conservator until it becomes clear that a settlement will occur.
21. MCL 700.1104(n).
22. MCL 700.1103(h).