

# Probate Settlements & Judgments

By Hon. Milton L. Mack, Jr.

Amended MCR 2.420 changes the process for minors and legally incapacitated individuals.

For those of you who are still confused about the probate court's role in matters where minors and legally incapacitated individuals (LIIs) are receiving distributions from personal injury or wrongful death claims, help is here. This author has previously written on the hazards associated with this topic.<sup>1</sup> Since that time, significant substantive and procedural modifications regarding settlements and judgments for minors as well as LIIs have occurred as a result of amendments to MCR 2.420, which took effect January 1, 2002.

These changes were designed to protect the estates of minors and LIIs, reduce confusion, and eliminate the duplication of cost in both time and money often caused by attorneys seeking approval of the same settlement in both the probate and circuit courts.

This article will provide an overview of the new procedures to be used when MCR 2.420 is applicable. This court rule is to be used in all matters where an action has been commenced that would benefit a minor or LII. If no action has been commenced on behalf of the minor or LII, then the settlement is governed by the Estates and Protected Individuals Code (EPIC).

Failure to follow the procedures of MCR 2.420 can have severe consequences as was recently illustrated in *Bowden v Harper Hospital*<sup>2</sup> where the court of appeals overturned the approval of a \$1,245,000 settlement involving a minor and his parents and remanded the matter for a hearing in conformity with MCR 2.420(B).<sup>3</sup>

Pursuant to amendments that became effective January 1, 2002, MCR 2.420 now reads as follows:

- (A) *Applicability.* This rule governs the procedure to be followed for the entry of a consent judgment, a settlement, or a dismissal pursuant to settlement in an action brought for a minor or a legally incapacitated individual by a next friend, guardian, or conservator or where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim. Before 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.
- (B) *Procedure.* In actions covered by this rule, a proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the proposal.
- (1) If the claim is for damages because of personal injury to the minor or legally incapacitated individual,
- (a) the minor or legally incapacitated individual shall appear in court personally to allow the judge an opportunity to observe the nature of the injury unless, for good cause, the judge excuses the minor's or legally incapacitated individual's presence, and
- (b) the judge may require medical testimony, by deposition or in court, if not satisfied of the extent of the injury.



- (2) *If the next friend, guardian, or conservator is a person who has made a claim in the same action and will share in the settlement or judgment of the minor or legally incapacitated individual, then a guardian ad litem for the minor or legally incapacitated individual must be appointed by the judge before whom the action is pending to approve the settlement or judgment.*
- (3) *If a next friend, guardian, or conservator for the minor or legally incapacitated individual has been appointed by a probate court, the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.*
- (4) *The following provisions apply to settlements for minors.*
  - (a) *If the settlement or judgment requires payment of more than \$5,000 to the minor either immediately, or if the settlement or judgment is payable in installments in any single year during minority, a conservator must be appointed by the probate court before the entry of the judgment or dismissal.*
  - (b) *If the settlement or judgment does not require payment of more than \$5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102.*
- (5) *If a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the circuit court shall determine the amount to be paid to the trust, but the trust shall not be funded without prior approval of the trust by the probate court pursuant to notice to all interested persons and a hearing.*

The newly modified rule now applies to settlements and judgments involving LIIs, as well as minors. The rule also applies to wrongful death claims where a minor or LII will receive a distribution.<sup>4</sup> It applies to actions brought by next friends in circuit court. In addition, a next friend appointed by the probate court has been added to the list of persons subject to the bond approval process.<sup>5</sup>

One of the most important changes to MCR 2.420 is in the threshold settlement evaluation and bond approval process. The purpose of the modification is to provide protection for the minor or LII. If a next friend, guardian, or conservator for a minor or LII has been appointed, a proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or LII.<sup>6</sup> However, no judgment or dismissal can be entered until the court receives written verification from the probate court that it has passed on the bond's sufficiency, and the bond, if any, has been filed with the probate court.<sup>7</sup> This process assures that the funds

will be protected. It also permits the probate court to assess whether the fiduciary is acting in the best interests of the ward without the necessity of a hearing. In addition, this gives the probate court an opportunity to assess the fairness of the settlement. If the probate court feels the best interests of its ward are not being served by the fiduciary, the probate court can suspend the fiduciary, thereby preventing any defalcation. At that point, the probate and circuit judges can work together to resolve any issues. In most cases this eliminates duplication of the settlement approval process.

The new rule requires the probate court to pass on the sufficiency of the bond, regardless of the amount to be paid or when it will be paid, provided that the probate court has appointed a next friend, guardian, or conservator for the minor or LII. However, as under the prior version of MCR 2.420, once a settlement or judgment has been approved, if the settlement or judgment does not give over \$5,000 to a minor in any year during minority, the money can be distributed pursuant to EPIC's "\$5,000 direct payment provision."<sup>8</sup>

In Wayne County, the probate and circuit courts worked together to develop a similar process that has now been in place for several years. One form is used in cases where minors or LIIs are to receive distributions from a wrongful death claim while another is used where a minor or LII is to receive payment in an action commenced by the minor or LII. It is hoped that a form or forms will be approved by the State Court Administrative Office to standardize practice throughout the state.

For a structured settlement, the comment to MCR 2.420 provides the bench and bar with guidance for determining whether a proposed payment schedule is in the minor or LII's best interests. The following factors are listed for consideration: age and life expectancy and current and anticipated financial needs of the minor or individual, any income and estate tax implications, any impact on eligibility for government benefits, and the proposed payment arrangement's present value.<sup>9</sup>

A new procedure has also been established for settlements or judgments that provide for the creation of a trust for a minor or LII.<sup>10</sup> Only the probate court can establish a trust for a minor or LII. The new procedure permits the circuit court to authorize the amount to be paid to the proposed trust but does not permit funding of the trust until the probate court approves the terms of the trust at a hearing with notice to all interested persons. The intent of this provision is to rely on the extensive experience of the probate courts in supervising trusts to protect the minor or LII.

Effective January 1, 2002, a new subrule has been adopted that lists the interested persons in a petition for the approval of a trust under MCR 2.420. They are: the protected individual (if at least 14

### Fast Facts:

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*The rule applies to wrongful death claims where a minor or LII will receive a distribution.*

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*The purposes behind the modifications to MCR 2.420 are to provide protection to the assets of minors and LIIs and to clarify the responsibilities of the probate and circuit courts. A careful reading of the new rule will protect your clients and provide you with peace of mind.*

years old); the protected individual's presumptive heirs; if there is no conservator, the attorney in fact under a durable power of attorney; the nominated trustee; and a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending.<sup>11</sup>

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*A member of the Wayne County Probate Court since 1990, Judge Milton L. Mack, Jr. has served as the court's chief judge since January 1, 1998. He is past-president of the Michigan Probate Judges Association. He previously served as a Wayne County commissioner, a special assistant attorney general, and was in private practice for 15 years. Judge Mack has given numerous presentations on probate law for the Institute of Continuing Legal Education (ICLE) and has authored a chapter on conservatorship and protective proceedings for ICLE's Guardianship and Conservatorship Handbook. He is a graduate of Wayne State University Law School, Eastern Michigan University and the Harvard University Program for Senior Executives in State and Local Government.*

**Footnotes**

1. Mack, *Settlements for Minors and Legally Incapacitated Persons: Protect Your Client; Protect Yourself*, 77 Mich Bar J 1288 (1998).
2. 252 Mich App 566; 652 NW2d 592 (2002).
3. *Id.*, slip op at 4, 5.
4. MCR 2.420(A).
5. MCR 2.420(B)(3).
6. *Id.*
7. *Id.*
8. MCR 2.420(B)(4)(b); MCL 700.5102.
9. Staff comment to MCR 2.420.
10. MCR 2.420(B)(5).
11. MCR 5.125(C)(28).