North Dakota Law Review

Volume 44 | Number 1 Article 3

1967

Settlement of Personal Injury Claims of Children

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SETTLEMENT OF PERSONAL INJURY CLAIMS OF CHILDREN

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Most personal injury claims are not tried by a judge or a jury; most are settled. This is true whether the claimant is a child or an adult.

There are many books today which tell how to obtain a more adequate settlement amount—or prevent the amount from becoming excessive. Our decision here assumes that the amount of the settlement has been agreed upon, this discussion starts at the point where the claimant's parents have said, "we'll take what you offer to pay," and defendant's insurer has said, "we'll pay if you give us a binding release that will end the controversy."

If the amount of the settlement is small enough, as a practical matter, there is no problem of how to accomplish the settlement. Lawyers are not usually involved. All insurance companies have some rule of thumb as to an amount they will pay without receiving anything more in return than a parents' indemnifying release. The parents' indemnifying release is simply a release of claims of the parents plus an indemnifying agreement, stating that: if any suit is later brought by the child, the parents will indemnify and hold harmless the defendant. The maximum amount that an insurer will pay with no other protection than the parents' indemnifying release is generally in the neighborhood of $500 to $1000.

When the amount to be paid is "substantial," the defendant's representative will insist on some sort of court approval of the settlement. The purpose of the court approval is to prevent the minor from later disaffirming the contract of settlement and starting his claim over again. It is at this point—the point of court approval—that judges and lawyers have wide differences of opinion as to the proper method of securing the desired judicial sanction of the settlement agreement.

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METHODS OF SECURING COURT APPROVAL

Most minor's claims in North Dakota which are settled with court approval receive that approval by the use of pro forma suits. In this mode, the written court records show a lawsuit with a final judgment. The records do not reflect what has actually occurred. The participating lawyers and judge know that there has not really been a true adversary proceeding. There has been, rather, a proceeding in which the judge has been informed beforehand that this is a "minor settlement," and the participating lawyers have informed the judge as to the amount of the settlement. The judge, in reliance upon the fact that there are two attorneys in the case, summarily approves a settlement. Although the records have the appearance of a lawsuit, the suit is pro forma. In addition to this adversary-appearing form of legal sanction given to settlement of a minor's claim, there are other and better ways, to be mentioned later, of getting a judicial approval which is just as binding on the minor.

Various difficulties arise from the pro forma suit and much of the evil or benefit of the pro forma suit is dependant on the individual judge and attorneys. There is considerable variation throughout the State of North Dakota; each judge and legal community feels that their method is the only proper method in which to give legal sanction to the settlement.

The purpose of having the settlement approved, of course, is to make the settlement binding on the minor. The defendant wants to prevent the minor from over-turning the settlement at a later date. To accomplish this result, some legal communities in this state use the following form of lawsuit.

The attorney who (at least nominally) represents the minor's parents signs his name to a summons and complaint which was probably prepared by the defendant's attorney. The complaint's prayer for relief is no higher than the settlement which has been prearranged. The plaintiff's parent then takes the stand in the short "trial" and gives a brief account of the facts and injuries. No answer or testimony is put in by the defendant. The judge then makes findings of liability against the defendant and damages in the amount demanded.

An attorney participating in this type of proceeding should be aware of the fact that the minor, upon coming of age, could decide that the amount given to him in settlement was inadequate. If a court agrees with him the judgment as to amount, but not as to any finding of liability, may be set aside. The record shows that the defendant voluntarily admitted liability or waived the

opportunity to defend the complaint of liability and acquiesced in a final judgment of liability.[1]

The blunt fact of legal life is that a plaintiff is not bound by any settlement made as a minor if it was not fair to him—even if it was approved by a court. The use of a pro forma suit simply does not protect the parties against the setting aside of the court's judgment if the settlement amount is, in fact, unfair. A judgment is not per se immune to attack.[2]

The possibility of a malpractice suit against the plaintiff's attorney is increased by the fact that, in most settlements, the attorney who appears for the minor or his parents is paid by the defendant or his insurer. This practice is certainly not to be commended. If the practice must be followed, a direct and clear statement should be made which requires the attorney to give advice contrary to the best interests of the person paying for the advice (i.e., contrary to the interests of the defendant and his insurer). The attorney should, at least, be advised that he will be paid regardless of results of advising the minor. Nevertheless, no matter how this situation is handled, the implication is that the attorney cannot expect future referrals of business from the defendant if the minor seeks more than the settlement amount.

Other legal communities in this state have not utilized findings of fact by the judge in the pro forma suit. Instead, the attorneys involved have simply presented to the judge a stipulation of facts, or even worse, a stipulation without any facts but an agreement to a particular judgment. The court makes the judgment based on the stipulation, without further hearing. The North Dakota Court held that in such instances, the trial court made no findings of fact on the issues of liability or damages, and therefore, there is no adjudication on which the defense of res judicata could be based.[3] If the defense of res judicata is not available, it is difficult to see how the minor is in any way bound by what purports to be a decision binding him. There is a judgment, but there is no hearing to determine the question on which

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1. Missouri-Kansas-Texas Ry. v. Pluto, 138 Tex. 1, 156 S.W.2d 265 (1941) (portion of *pro forma* judgment in favor of minor may stand, while remainder vacated as unfair to him.)

2. Union Saw Mill Co. v. Langley, 188 Ark. 316, 66 S.W.2d 300 (1933) (guardian's motion to vacate settlement and judgment granted on ground that minor's case had been improvidently handled.); Missouri Pac. Ry. Co. v. Lasca, 79 Kan. 311, 99 P. 616 (1909) (judgment in a *pro forma* suit with complaint asking for judgment in the same amount as the settlement held properly vacated to prevent bar of minor's rights); Missouri-Kansas-Texas Ry. v. Pluto, 138 Tex. 1, 156 S.W.2d 265 (1941) (evidence admissible to show the real settlement agreement and that attorney had not properly presented plaintiff's case to the court when presented for approval of settlement through *pro forma* suit.); Kates v. Anderson, Dulin, Varnel Co., 9 Tenn. App. 396 (1929).

3. Feather v. Krause, 91 N.W.2d 1 (N.D. 1958).

the court must make an independent judgment on the question of fairness and adequacy.

There must be a judicial investigation as to the merits of the claim and of the settlement. A compromise stipulation, without actual consideration of the facts by the court, is not binding and relief may be had against such a judgment.[4]

Generally, there are two theories that can be applied to the court's judgment in approving the settlement. The judgment or order may be regarded as having the same effect as any other judgment and the rule giving finality to judgments applied. On the other hand, the order or judgment may be functionally regarded as a release of a claim through agreement which may not be rescinded on the ground of infancy, but only for fraud, mistake or non-disclosure. The latter theory is the one adhered to most often by the courts.[5] For example, by the use of this theory it has been held that a court may vacate its approval of a compromise settlement, covering unknown as well as known damages, executed without fraud or overreaching of any kind, if it appears that separate and distinct injuries were sustained by the minor, which, as a matter of mutual mistake, were not contemplated or considered in the settlement.[6]

Instead of the pro forma suit, which by its very name indicates that it is form for the sake of form only, would it not be simpler to have the court records show what has actually been done?[7]

The manner in which most North Dakota minor's settlements are accomplished appears to be caused by inertia or some such principle. Other states use different methods, such as the procedure in Minnesota trial courts involving only a simple application to the court.[8] Under the Minnesota procedure, the minor appears in court with his guardian ad litem, states the situation, and asks for approval of a settlement. This method also has been used in North Dakota by some judges and lawyers; it certainly has the advantage of honesty in the record.

The only essential element required in getting court approval is to establish the court's jurisdiction over the minor. This is

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4. Missouri Pac. Ry. v. Lasca, *supra* note 2. See 27 AMER. JUR. *Infants* § 132 (1940) for supplementary citations.

5. See *e.g.*, Larson v. Stowe, 228 Minn. 216, 36 N.W.2d 601 (1949).

6. *Id.*

7. As to the various forms of settlement that a minor's action may take and ways in which these settlements can be overturned, *see generally* 27 AMER. JUR. *Infants* § 130 (1940) and the following sections. *See also* 8 A.L.R.2d 460 (1949). A short reading of the legal literature will convince most people that the *pro forma* lawsuit is certainly no better than the other forms of court approval in the settlement of minors.

8. MINN. DIST. CT. CODE R.3. Non-Minnesota lawyers will find this rule contained in Saylor v. Sass, 258 Minn. 300, 104 N.W.2d 36 (1960).

established when the minor appears before the court. At early common law, infants who came before the court were subject to its jurisdiction. This common law doctrine has been recognized in North Dakota.[9]

Of course, it goes without saying that the action involved must be one subject to the court's jurisdiction. Also, in order to make the court's approval binding, the facts must be fairly presented to the court so that its decision can be based on a fair evaluation of the facts rather than on a misleading record which has been "staged" by the parties in order to obtain a settlement.

The final order entered by the court is simply to judge the settlement as one which is fair and in the minor's best interest. Nothing more is required; and indeed, this is exactly what is needed. The pro forma lawsuit, with its finding of liability but lack of finding that the settlement is fair, is an example of what is not needed. There is no reason for not utilizing the simple method of a petition to the court of general trial jurisdiction.

TO WHOM PAYMENT IS MADE

Our statutes provide that a guardian ad litem cannot receive money on any settlement without filing a bond.[10] This provision is quite frequently circumvented by a court order specifying that the money pass directly through the guardian ad litem's hands to a depository who is to hold the money, or to a person who is to receive reimbursement out of the settlement amount. The theory is that the guardian ad litem is not receiving money but is merely acting as a conduit for a fleeting moment. This appears to be a practical substitute for what otherwise would require the burdensome expense of a guardianship.

Skillful counsel may, however, later utilize this fact, that a payment went through the guardian ad litem, in arguing that the settlement is invalid, thus allowing the minor to disaffirm it. North Dakota has a statute which absolutely prohibits the guardian ad litem from receiving any money or property of the ward unless a bond has been filed.[11] In at least one case, it was successfully argued: (1) that the court had no authority to allow payment to a guardian ad litem who had no bond, and (2) therefore, the satisfaction filed by the guardian ad litem had no validity, (3) consequently, the settlement had not yet been completed and was open to attack as an "unexecuted" compromise and accord, and (4)

9. Shuck v. Shuck, 77 N.D. 628, 44 N.W.2d 767 (1950). When an infant appears as a party to an action pending before the court, the infant becomes a ward of the court. It is the duty of the court to see that the infant's interest is protected.

10. N.D. CENT. CODE § 28-03-05 (1960).

11. *Id.*

hence, suit could be on the original cause of action for which judgment had been entered.[12] For an example of how the problem of possible wrongful payment to the next of friend has been avoided see *Galveston City Ry. Co. v. Hewitt*[13] wherein the court ordered the money to be paid to the clerk of court. This appears to be a sensible solution. It might be noted that though the guardian ad litem could not receive money and enter a satisfaction, the attorney might be able to do so.[14]

COURTS OF LIMITED JURISDICTION

The district courts of this State are generally used for approval of minor's settlements. However, county courts of increased jurisdiction have jurisdiction of civil matters in amounts up to $1,000.00.[15] Thus the question may arise whether such court could approve a settlement for $1,000.00 or less if the matter is one in which the potential lawsuit could be for amounts greater than the court's jurisdiction. The Minnesota court, in the case of *Saylor v. Sass*,[16] held in the affirmative by stating that the municipal court, with limited jurisdiction, had authority to give valid approval to a settlement as long as the settlement amount was within the court's jurisdiction.

SETTLEMENT THROUGH A GENERAL GUARDIANSHIP

A general guardian occasionally applies to the probate court for approval of the proposed minor's settlement. Seeking approval in the court which appoints a general guardian for a child is based on the well-established idea that a general guardian has power to manage the property of the ward.

At common law it was generally held that, in the absence of a specific statutory prohibition, even without court approval of any sort, a guardian could compromise, settle and release personal injury claims of the ward. If the guardian has such powers, the ward is bound unless the settlement is entered into in bad faith or defrauds the minor. Moreover, the minor cannot urge his minority as a defense to the settlement made by the general guardian.[17] The guardian generally has authority to compromise a claim existing in favor of the ward.[18]

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12. Pacheco v. Delgardo, 46 Ariz. 401, 52 P.2d 479 (1935). 111 A.L.R. 689-90 (1937) is also helpful.
13. 67 Tex. 473, 3 S.W. 705 (1887).
14. See Garner v. Schilling Co., 234 Ala. 192, 174 So. 834 (1937); *Contra,* Southern Ry. Co. v. McKinney, 276 F. 772 (5th Cir. 1921).
15. N.D. CENT. CODE § 27-08-20 (1960).
16. *Supra* note 8.
17. Manion v. Ohio Valley Ry. Co., 99 Ky. 505, 36 S.W. 580 (1896).
18. For additional discussion see 39 C.J.S. *Guardian and Ward* § 70 (1944) and 25 AM. JUR. *Guardian and Ward* § 106 (1940).

It is argued that if the guardian has such powers, and if the probate court is the court supervising the general guardian, the probate court should be, or could be, the court granting the necessary approval of the settlement. There can be little doubt that approval is granted in the probate court in many cases. There seems a vague uneasiness of the trial and appellate courts, however, in recognizing such a power. Generally, the problem seems to arise from the fact that probate courts traditionally have not been staffed with lawyers or judges well qualified in tort law or in evaluating the possible range of jury verdicts for a particular injury.

The general superiority of trial courts in evaluating the minor's claim is commented upon in *Duddex v. Sterling Brick Co.*[19] It was held that where the father of an injured infant was appointed guardian by the probate court but had an action pending in a general trial court for the injuries, a settlement by the father, as guardian, with approval of the probate court was void. The court decided the better rule to be:

> Had a compromise been proposed before action was commenced in the Circuit Court, it would have been proper to invoke the aid of the probate court, but, after such a case is commenced in the Circuit Court, it is the duty of that court to conclude it, and see that the best interests of the infant are conserved if a compromise is adjusted.[20]

A more serious objection in seeking judicial approval in the probate court is the objection that the general guardian is without authority to make a compromise; hence, the supervising court is without power to sanction the general guardian's actions performed beyond his authority. This argument arises from the fact that the statutes now set out the powers of a general guardian; and the statutory omission of a power, arguably, means that the guardian is without power.

In many states the probate statutes clearly specify the authority of the general guardian to make compromises. Thus, for example, Minnesota provides that the general guardian may "collect all debts and claims" of the ward or "compromise the same . . . with the approval of the court."[21] Other states, such as North Dakota, do not provide for such a power by statute.

The NORTH DAKOTA CENTURY CODE provides that the general guardian may compromise "debts."[22] Unfortunately, there is a

19. 237 Mich. 470, 212 N.W. 92 (1927).
20. *Id.*, 212 N.W. at 93.
21. MINN. STAT. ANN. § 525.56 (1947).
22. N.D. CENT. CODE § 30-14-06 (1960).

rather strong line of cases distinguishing between "debts" and personal injury "claims." A debt is usually spoken of by the courts as a liquidated amount that is due. For example, in *Manion v. Ohio Valley Ry. Co.*,[23] it was held that settlement of a minor's personal injury "claim" did not fall within the probate code's section providing for the compromise by the general guardian of "debts."[24]

Eastern North Dakota lawyers frequently use the method by which a general guardianship is set up and then obtain the probate court's approval of the settlement. Nevertheless, there appears to be no North Dakota case relating to the authority of the general guardian or the probate court to bind the minor in a settlement of a tort claim.

Perhaps the most vehemently voiced objection to the use of a general guardian and the probate court, in place of the guardian ad litem and the trial courts, is that the general guardianship is more expensive in many cases. If five thousand dollars is to be paid as a settlement, the parents do not want to bear the disproportionate expense of opening the guardianship, making annual accounts, or even closing the guardianship. Isn't it simpler, they say, to ask the district court if the settlement is fair? Indeed, it is simpler. It is also the best safeguard the child has to assure a true judicial—and competent—evaluation of the compromise.

See Following Appendix for Forms

23. *Supra* note 16.
24. See also the frequently cited case of Cambough v. Atl. Coach Co., 58 Ga. App. 197, 200 S.E. 203(1938) for a discussion of the distinction between "debts" as liquidated amounts owed, and "claims" as unliquidated amounts.

APPENDIX

The following forms illustrate the method of a petition to a court of trial jurisdiction. The usual court heading has been omitted from the forms. The forms of petition, order, oath, etc., to get a guardian ad litem appointed have also been omitted.

PETITION FOR MINOR SETTLEMENT

TO: A JUDGE OF THE ABOVE NAMED COURT:

....., as Guardian ad litem of ....., a minor, states:

1

..... is a minor who presently is ..... years old and was born on .....

2 (Facts of the Accident)

On ....., 19....., the minor was a passenger in a vehicle driven by the Defendant. An automobile accident occurred at a point near ..... A vehicle driven by ..... collided with the vehicle which the Plaintiff was riding in. The two vehicles were headed in opposite directions and met at the crest of a hill. The vehicle in which the Plaintiff was riding was on its proper side of the road and the other vehicle came onto the Plaintiff's side of the road because of slippery and icy conditions on the roadway.

3

As a consequence of the accident, the minor Plaintiff received injury. The minor Plaintiff was under the care of Dr. ..... of ..... A report of the said doctor is attached to this petition as Exhibit C. Exhibit C shows and describes the injuries of the minor Plaintiff.

4

As a result of the accident, the Guardian ad litem and her husband incurred expenses on behalf of the minor as shown on the attached Exhibit D in the total amount of $.....

5

Negotiations have been undertaken by Petitioner on behalf of the minor Plaintiff with the adverse parties or their representatives. Considering the facts of the case, the Petitioner believes that a total of $..... to be paid in settlement of personal injury liability claims of the minor Plaintiff is a proper settlement amount. ..... (hereinafter called Defendant) has offered to pay the sum of $..... in exchange for properly executed releases in the forms attached and marked Exhibits A and B.

6

Petitioner believes that the proposed settlement is fair and adequate under all circumstances and is for the interest of the minor. The Defendant has conditioned his offer to pay the said sum in exchange for the said releases upon the approval of this settlement by the Court and the specific authorization of this Court to the Guardian ad litem to make the settlement so that the settlement will be complete and binding.

WHEREFORE, Petitioner prays for an order of this Court adjudging the proposed settlement to be fair and to the infant's interest, approving the

compromise settlement, and authorizing your Petitioner to execute a release in the form attached and marked Exhibit A.

Petitioner further prays for the order of this Court authorizing the said $..... to be the consideration for the settlement and release as specified in the form attached and marked Exhibit A.

Petitioner further prays that the order of this Court authorize payment out of the settlement proceeds and over to ..... the sum of $..... as reimbursement for ..... expenses as set forth in this Petition, and

Petitioner further prays that the order of this Court authorize the deposit of the balance of the settlement in the ..... bank to the credit of the minor, said deposit to be subject to the order of this Court and to be released to the minor upon the minor becoming of age.
Dated:

.....
GUARDIAN AD LITEM and PETITIONER

EXHIBIT A—MINOR'S RELEASE

For a consideration of $....., ... does hereby release and discharge ....., from all claims of every kind and character which ..... has against ....., because of injuries to person or property resulting or to result from an accident on or about ....., 19....., whether developed or undeveloped, patent or latent, and hereby acknowledges full settlement and satisfaction of all claims of whatever kind and character which ..... has against ....., by reason of the above mentioned accident or any injuries arising therefrom.

This is a compromise of a disputed matter and takes into account possibilities of the future the chances of litigation being successful, and the financial responsibilities of possible defendants.

It is further understood that payment of said sum is not to be construed as an admission on the part of the payor or those with whom the payor has contractual relations of any liability.

.....
.....
Minor's guardian ad litem for and on behalf of said minor child

EXHIBIT B—RELEASE OF ANY PARENTS' CLAIMS AND INDEMNITY AGREEMENT OF PARENTS

This is to certify that we ..... and ....., parents of ....., a minor, in consideration of a settlement made with ....., (the minor child) which settlement is made with said minor at our request, do hereby acknowledge satisfaction in full of all claims of each of us and both of us arising out of injuries to said minor child on ....., 19....., out of an accident described as follows:

We do hereby release and forever discharge ..... from any liability for tort causing such injuries.

As a further consideration for the settlement in payment of the monies provided for therein, we each do hereby agree to protect .....,

and any insurer of his, against any claim for damages, compensation or otherwise on the part of each of us and both of us, or on the part of the minor child of ourselves, growing out of or resulting from injuries to ..... in connection with the accident of ....., 19....., and to reimburse or make good to ..... or any insurer of his, any loss or damage or cost the said ..... or his insurer may have to pay because of any claims for damages, compensation or otherwise on the part of each of us and both of us or on the part of ....., our minor child, growing out of or resulting from injuries to ....., our minor child, in connection with the accident of ....., 19.....

.....
Parent

.....
Parent

ORDER APPROVING SETTLEMENT

The Petition for Minor's Settlement in this case, came on before the undersigned Judge of the District Court on ....., 19....., at the Courthouse of ..... County in ....., North Dakota the Plaintiff appeared personally and with his Guardian ad litem. ..... appeared as attorney for the Defendant and not as attorney in any way for the Plaintiff or his Guardian ad litem. The Petition for Minor Settlement is for the approval of a proposed compromise settlement of the claim of the Plaintiff as set forth in said Petition and for an Order disposing of the funds received through such a settlement.

The Court heard the evidence of the Petitioner and questioned the Plaintiff and his Guardian ad litem. The Court being fully advised in the premises:

IT IS ORDERED that the Guardian ad litem be and hereby is authorized to settle, discharge and release the claims of the minor Plaintiff, for the injuries arising out of an accident which occurred on ....., 19....., at a point near ....., for a consideration of the sum of $....., and by giving releases in the form set out as Exhibits A and B in the Petition for Minor's Settlement.

IT IS ADJUDGED by this court that the proposed settlement set out in the Petition for Minor Settlement is fair and for the interest of the infant under all of the circumstances of the case. The Court approves the proposed compromise settlement.

IT IS FURTHER ORDERED that the Guardian ad litem is authorized to execute releases in the form attached as Exhibits A on the Petition for Minor Settlement.

The releases in the form attached as Exhibits A and B on the Petition for Minor Settlement shall be executed and shall be delivered. Execution and delivery shall be effective when there is deposited by the Defendant with the Clerk of this Court a check made payable to the Guardian ad litem.

IT IS FURTHER ORDERED that the Guardian ad litem shall endorse the check over to the Clerk of this Court who shall then receive the settlement monies.

IT IS FURTHER ORDERED that the Clerk of this Court shall disburse $ ..... to ..... as reimbursement for the expenses set forth on Exhibit D attached to the Petition for Minor Settlement.

IT IS FURTHER ORDERED that the Clerk of this Court shall disburse the balance of the settlement monies as follows:

$..... by draft payable to the ..... bank to be deposited as a savings account to the credit of the minor Plaintiff.

IT IS FURTHER ORDERED that deposit is to be in a separate savings account of the said minor and the deposit book for the savings account shall be filed by the Guardian ad litem with the Clerk of this Court, subject to the further order of this Court. It is ordered that the Clerk of this Court shall be authorized and directed to turn said passbook over to said Minor upon proper identification on or after the ..... day of ....., which is the date upon which said minor will reach his majority.

The said bank is authorized on or after said date to turn over to said minor any accrued interest and the principal after the request of said minor, upon proper identification and upon proper presentation of said passbook.

IT IS FURTHER ORDERED that if any of the sum so deposited for the benefits of the minor is needed by him for his proper expenses before he reaches his majority, then in that event, he shall make application to this Court for withdrawal of the funds for his benefit and shall await the order of this Court.

Dated:

BY THE COURT:

.....

Judge