# HANDLING LAWSUITS FOR MINORS, DECEDENTS AND THE DISABLED

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## WRONGFUL DEATH CASES

### Appointment of Personal Representative

The single most important probate matter facing the litigator is the appointment of the personal representative. It is the personal representative of the decedent in a wrongful death action who controls every aspect of the case: the selection of the attorney, the settlement and the distribution of the proceeds.

Every litigator's nightmare is illustrated by ***Strickland v. Mobile Towing and Wrecking Co.,*** 293 Ala. 348, 303 So.2d 98 (1974). The plaintiff filed a complaint for the wrongful death of his decedent on the day before the statute of limitations ran. He alleged that he was the administrator of the decedent. The defendant moved to dismiss claiming the plaintiff was not the administrator at the time of the filing of the complaint. In fact, the plaintiff had filed a Petition for Letters of Administration prior to filing the complaint, but the probate court had not issued the letters until two days after the filing of the complaint.

Seeking to cure this technicality, the plaintiff amended his complaint to allege that he was now the duly appointed personal representative of the decedent. The defendant moved for summary judgment based upon the running of the statute of limitations. The court agreed with the defendant ruling that no lawsuit had been filed before the running of the statute of limitations. The amendment was meaningless because there was no lawsuit to amend. 293 Ala. at 353. "If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the probate court, it should be dismissed." 203 Ala. at 353.

Fortunately, **Strickland** was overruled in **Ogle v. Gordon**, 706 So.2d 707 (Ala. 1997). In this case, the husband of a decedent filed his petition for Letters of Administration in a timely manner, but due to a mistake by the probate court, letters were not issued until after the expiration of the two-year statute of limitations on the wrongful death case. The court relied upon Code of Ala. (1975) §43-2-831, which was adopted after the **Strickland** case. This section provides the "powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to the appointment the same effect as those occurring thereafter." The court in the **Ogle** case seemed to rely upon the fact that the personal representative complied with

the law by filing in a timely manner implying that it might not be so helpful to the plaintiff who fails to file properly.

Of course, the first mistake in the **Strickland** case was filing the complaint on the day before the running of the statute of limitation. However, there are any number of dragons in the appointment of a personal representative which might awaken to devour an otherwise good wrongful death action. For example, before a will can be admitted to probate, all heirs-at-law are entitled to notice. Should notice be held to be insufficient, the probate of the will and subsequent appointment of the executor may be revoked. The notice requirement is arguably jurisdictional because without notice, the rights of the heirs were cut off without due process of law. Notice and an opportunity to be heard (including meaningful legal representation) is particularly critical where heirs are minors or incompetents.

Selection of Administrators

The experienced litigator has probably encountered at least one tug-of-war over the appointment of an administrator. If there is a will, the selection is usually made by the decedent. However, when there is no will, the Code determines who has priority to be appointed as Administrator. The person who obtains letters selects the attorney to maintain the wrongful death action.

Code of Alabama (1975) §43-2-42 provides the order of priority for the appointment of administrators:

1. The husband or widow.
2. The next of kin entitled to share in the distribution of the estate.
3. The largest creditor of the estate residing in this state.
4. Such other person as the judge of probate may appoint.

Counties having a population in excess of 400,000, have the following priorities:

1. The husband or widow.
2. The next of kin entitled to share in the distribution of the estate.
3. The largest creditor of the estate residing in this state.
4. The county or general administrator.
5. Such other person as the judge of probate may appoint.

It is important to note that the priority must be claimed within 40 days of the date of the death or it is deemed relinquished. Code of Ala. (1975) §43-2-43.

Considerable difficulty and confusion arises when there is no resident of Alabama who is qualified to serve. For example, when there is no husband or wife, and the next of kin entitled to inherit are all minor children. Can the surviving parent of such children (a former spouse of the decedent) apply for letters of administration as guardian and next friend of the children? If the next of kin are

not qualified, may another relative (who will not inherit) apply for letters? The answer seems to be no in both instances because a fiduciary duty cannot be delegated or held by representation, and that is the rationale followed by most Alabama probate courts. However, some courts might allow a duly appointed conservator or guardian of a minor heir be the personal representative on the theory that he/she will properly administer the estate in order to protect the interests of the ward. It should also be noted after the 40 day period for priorities, the court will generally appoint any family member who first applies.

Jefferson County courts usually observe the priority of the County General Administrator, but there is a well established policy that where a litigator requests the county general administrator to be appointed, he will hire that litigator to handle the wrongful death case. Therefore, litigators should not be reluctant to call upon the county administrator when he holds the priority. In counties without an administrator, or where there is no priority for the administrator, the court can, and usually does, appoint any fit person that applies. Such person might be an attorney who regularly handles probate matters in that county.

Distribution of Wrongful Death Proceeds

Once a settlement or verdict is obtained in a wrongful death case, the personal representative holds the proceeds, not an asset of the estate but as a trustee for the benefit of the heirs-at-law. Even if the decedent had a will leaving everything to someone who is not an heir-at-law and left no assets, the wrongful death proceeds must be distributed to the heirs and none may be used to pay debts; even funeral expenses. The personal representative is "a mere agent of legislative appointment...a conduit" to collect the damages and pay them over to the heirs-at-law. ***Board of Trustees of the Univ. of Ala. v. Harrell,*** 43 Ala. App. 258, 188 So.2d 555 (1965); ***United States Fid. & Guar. Co. v. Birmingham Oxygen Serv., Inc.,*** 290 Ala. 49, 274 So.2d 615 (1973). It is not unusual that a personal representative may have personally guaranteed the payment of funeral expenses and is, therefore, tempted to use wrongful death proceeds for this purpose. However worthy the cause, payment of debts is not permitted.

One small crack in the dam on the issue of use of death proceeds to pay debts may be apparent in ***Louisville & N.R.R. v. Perkins,*** 1 Ala. App. 376, 56 So. 105 (1911). In ***Perkins,*** it was held that the legislature never intended to place a personal financial obligation on the decedent's representative to administer the estate and prosecute a wrongful death action. Therefore, the fees and costs of the administration of the estate (not the decedent's debts) may be paid out of the wrongful death proceeds. Approval of such payment from the death proceeds should be obtained from a court having equity authority since they are part of a "trust corpus" under the theory of the ***Harrell*** case. It is recommended that an action for declaratory judgment be filed separately or as an amendment to the wrongful death case, notify all the heirs-at-law, have a hearing, and obtain an order authorizing the expenditure of funds from the wrongful death proceeds for

the payment of the expenses of administration. Of course, if all of the heirs are adults and of sound mind, this can be done by agreement, but their agreement should be obtained in writing. Where those entitled to receive a share of a wrongful death claim are minors or incompetents, it is prudent to obtain court approval (giving due process) of any settlement, attorney's fees or expenses in order to avoid any allegations of breach of fiduciary duty against the personal representative. For example, if an heir is six years old, he may successfully sue the personal representative for an improper distribution thirteen years later (after attaining majority). While the personal representative has the authority to settle and disburse without court approval, future liability may be avoided by obtaining approval in advance where anything out of the ordinary is requested.

Determination of the identity of the heirs-at-law is often quite complicated. ***Are those entitled to the distribution the next-of-kin as determined at the time of death, or at the time of the distribution?*** The answer seems so obvious. The question sounds ridiculous. The unlikely answer, however, is that those entitled to inherit are those who outlive the lawsuit. The distribution must be made to those who are heirs at the time of the distribution, not at the time of the decedent's death. ***Holt v. Stollenwerck,*** 174 Ala. 213, 56 So. 912 (1911); ***Lowe v. Fulford,*** 442 So.2d 29 (Ala. 1983).

The facts of the ***Holt*** case will illustrate the logic. Wife brings an action for the death of husband number 1. Before the case is settled, wife remarries and thereafter dies. Husband number 2 claims that he should receive the proceeds of the death claim since he is the lawful heir of his wife and her estate had the right to receive the proceeds. The court held that the wife's right to receive the proceeds was inchoate and died with her since she did not take during her life. Since those entitled to a distribution are determined at the time of the settlement, the power of the personal representative becomes greater where there is an imminent birth or death and he or she controls the timing of the settlement.

This should not have to be said, but unfortunately it must: once an estate is opened, even if the primary motive was only to file a wrongful death case, it must be fully administered as to all assets and a final settlement must be filed in order to conclude the estate. In the case of intestate estates, this should be done sooner rather than later because bond premiums must be paid annually and continue as long as the estate remains open. The Alabama Rules of Professional Conduct, Rule 1.1 and 1.2 requires a lawyer to provide competent representation to a client and may limit the scope of the representation only by written agreement with the client. Therefore, if the litigator undertakes to handle the decedent's estate, he/she must be prepared to handle all matters necessary to bring the estate to a proper conclusion.

It is strongly recommended that the intestate statute be consulted each time a distribution is about to be calculated. No matter how many times the statute has been read, something new seems to appear when read in light of existing facts. For example, a man is wrongfully killed and at the time of the recovery, he is

survived by a wife, but no children. Is there enough information to determine a proper distribution? No. We need to know if he had a parent or parents living at the time of recovery because the intestacy statute gives only the first $100,000 to the surviving spouse. The balance is divided between the spouse and the surviving parents. Code of Alabama (1975) §43-8-41 (2).

Mixed cases of personal injury and wrongful death

Formerly, when a plaintiff died of his injuries after filing a personal injury action, it was necessary to dismiss the action and refile an action for wrongful death under the homicide statute. ***King v. National Spa and Pool Institute, Inc.,*** 607 So.2d 1241 (Ala. 1992). The ***King*** case changed our procedure and created a new world of traps for the litigator. In what appeared to be a help to the litigator, the ***King*** case held that the pending personal injury action could be amended to include a claim for wrongful death where the plaintiff died of the injuries complained of after the commencement of the action. The good news is a plaintiff can present evidence of **and** recover for the personal injuries and recover punitive damages for wrongful death in the same action. The bad news is, the recipients of these two types of damages may well be different creating a potential conflict for the litigator. The actual plaintiff will be the personal representative for both claims, but that client may have adverse groups of "takers" after the case is concluded.

For example, plaintiff is a 60 year old man with two grown children and a wife (not their mother) to whom he was married for 15 years and to whom he left his entire estate by will. Following his injury, he files suit and while the case is pending, he dies of his injuries. Just after the father/plaintiff dies, one of his two sons dies leaving a wife and three children. The plaintiff's wife (stepmother) probates the will, obtains Letters Testamentary, is substituted as plaintiff and the complaint is amended to include wrongful death. Pursuant to a successful mediation, the case is settled for $500,000. Who gets the money and how much? The answer is: we need more facts.

Any part of the recovery which was for personal injuries (not for wrongful death) will go into his probate estate. After payment of all debts, including hospital and/or Medicaid subrogation, the balance, if any, will be distributed to the widow under the terms of the will. Any portion of the settlement which is for the wrongful death claim will be subject to neither Medicaid subrogation nor any hospital lien or any other expense of the estate, but will be distributed one half to the widow and one fourth to the son who was alive at the time of the recovery. The wife of the deceased son gets nothing because, under ***Holt v. Stollenwerck,*** her husband had no interest in the claim until the case was settled at which time he had died. The three children of the deceased son share equally their deceased father's one fourth.

Without knowing what part of the settlement is attributed to which claim, the proceeds cannot be properly distributed. Therefore, settlement agreements

should set out specific amounts for each claim. This can be quite difficult when the widow is the personal representative and the heirs-at-law are minors who cannot give their consent to the apportionment. These minors have until two years after their 19th birthday to sue the personal representative (the litigator's client) for breach of fiduciary duty and self dealing in making the apportionment. Even though the personal representative has the statutory authority to settle the claim as she sees fit, she would be well advised to seek court approval of the settlement with a hearing and a guardian ad litem for the minors. This can be in the form of a proceeding in the nature of a pro ami hearing or a declaratory judgement action in the nature of an interpleader.

Apportionment of damages between the personal injury case and the wrongful death case is more difficult when the case is tried to a jury. Few litigators really want to ask the jurors to specify amounts for each claim for fear that they may make a reversible mistake. However, the plaintiff may request the court to make the determination at the conclusion of the trial, or propound interrogatories to the jury ***after*** the verdict is reached. Additionally, the litigator may simply file the declaratory judgement action after recovery of a lump sum. The delay and expense is well spent to avoid trouble among the heirs later. Where the heirs are all competent adults, a written agreement with them should be reached as a condition of disbursing the funds. Usually, they will be most willing to agree if it will speed the receipt of the funds. However, if no agreement is obtained, they may well decide to complain after their money has been spent.

## CASES INVOLVING MINORS OR PROTECTED PERSONS

Guardians, Conservators and Next Friends

Actions for personal injury to a minor or a protected person may be brought by that person's guardian, conservator or next friend. ARCP, Rule 17(c). Common practice is to obtain Letters of Conservatorship and/or Guardianship prior to the filing of a lawsuit. Often the purpose for this is to acquire the authority to obtain medical records of the protected person. A common problem arising from this practice, however, is that upon opening a conservatorship, a bond must be filed and the time starts to run in which a partial settlement must be filed (not less than every three years). If the records reveal that no suit is warranted, it becomes necessary to deal with closing a conservatorship which will include a settlement (even though there are no funds), a hearing and a guardian *ad litem*.

One solution to this problem is to obtain Letters of Guardianship which involves no money, but gives the authority to obtain medical records. Code of Alabama §§ 26-2A-107 and 26-2A-137 provide for the issuance of Temporary Letters for a single or special purpose. These letters expire on their own terms and require no further court action after they are granted. They can be used to obtain medical records while a suit is being evaluated.

It is good practice to obtain Letters of Conservatorship of a minor and both Letters of Conservatorship and Guardianship of a protected person prior to the

filing of a lawsuit instead of relying upon "next friend" status. There are many reasons for this including the pre-approval of the litigator's contingent fee contract which will be discussed below.

When a conservatorship is opened at the beginning of the litigation, caution should be exercised to keep the probate matter updated as the personal injury matter progresses. Alabama law now requires conservators to file a sworn inventory within sixty days of receiving Letters of Conservatorship. The main purpose of this requirement is to permit the court to determine the proper amount of bond to be posted by the conservator. Unlike decedent's estates, the bond amount may change as the conservator receives additional funds belonging to the protected person. The initial Letters of Conservatorship are usually issued based upon a minimal bond (now $10,000.00 in Jefferson County, $2,000 in others) where there is little or nothing in the estate when opened. Once the case is settled or resolved, the conservator often receives a sum greatly in excess of the $10,000.00 or $2,000.00 bond. **Prior to releasing any money to the conservator, the litigator should see to it that the bond amount is increased.** Failure to do so could constitute malpractice or complicity in the mishandling of funds. More than once, an unwary litigator has been sued as the "deep pocket" after disbursing a large sum to an inadequately bonded conservator who later squanders the money.

Generally, when the bond is increased, the surety company on the bond will require that the attorney for the conservator or some representative of the surety company maintain joint control over the funds. Joint control arrangements place additional responsibility on the attorney to insure that any distribution of conservatorship funds be made properly for the duration of the conservatorship (which might be the lifetime of an incompetent). The conservator should be advised that no funds may be spent, with few exceptions, without prior court approval. The conservator should immediately file a Petition for an Allowance to obtain advanced court approval for items needed. Generally, the Court will not allow minor's funds to be used to replace the parent's child support obligation or to support the other members of the minor's family. The court will generally approve the use of funds to accommodate or improve the disability of a protected person or improve the education of a minor. These limitations should be explained to a parent or family member well in advance of settlement. There are often many misconceptions about what the proceeds of a personal injury action might be used for when recovered on behalf of a minor or incompetent plaintiff.

Conservatorships involving large sums (several hundred thousand dollars) present special difficulties with investments. All funds must be held in so called "legal investments." In fact, by Amendment to the Constitution of Alabama (Amend. 40), no funds held in a fiduciary capacity may be invested in a private stock company. Generally, "legals" are defined as investments backed by the federal government or one of its agencies. Since FDIC insurance is limited to $100,000.00 per bank, investment solely in bank products is unwieldy. Treasury

bills and government bonds are a better alternative for the investments of large conservatorship estates.

In addition to being confined to "legal investments," a conservator is also held to the "prudent investor" rule. An investment might be "legal," but not prudent. For example, most Alabama municipal or industrial development bonds are considered "legal" because they are public and not private obligations, and they are often specifically authorized as "legal" investments for trust funds. However, an unrated municipal bond of a city with a bad credit rating may not meet the "prudent investor" rule, even though "legal."

Small settlements

Because of the cumbersome requirements of a conservatorship and the expenses required to maintain it, small settlements or verdicts for minors often present great difficulty and conservatorships should be avoided for economic considerations. For example, if a conservatorship had to be established for a 16 year old who will be legally competent upon attaining the age of 19 years, a recovery of $9,000 (net to the minor after deducting attorney's fees, expenses and subrogation) might require a bond premium of $200, court costs and guardian ad litem's fees of $500, attorney's fees of $500 and conservator's commissions of $450 for a total of $1650, just to maintain the conservatorship for three years. At "legal investment" rates, one might expect to earn no more than $1500 over the three year period. Therefore, the poor child receives less than he started with in the name of "protecting" his money. There are several ways this result might have been avoided.

The Alabama "Facility of Payment" act can be found at Code of Alabama §26-2A-6. It permits the payment of certain small sums due to a minor to the custodial parent, any person having legal custody, a guardian or the probate judge in the minor's county of residence. If a lump sum, the amount must not be greater than $5,000. If a series of payments are made, they may not exceed $3,000 in any one year and must not exceed $25,000 in the aggregate during the minority of the child. The act may not be used if there is a known conservator appointed, and it does not authorize the parent (or other person) to settle or liquidate the debt due to the minor. The parent or other person is merely authorized to receive a sum which has been determined to be due. Thus, a proper *pro ami* order should be obtained, but a conservatorship might be avoided. The act also restricts use of the funds for the health, support, education or maintenance of the minor requires the **payor** of the funds to file a report of such payment with the probate court in the child's county of residence.

The "series of payments" provision of the Facility of Payment act might be coupled with a structured settlement to avoid a conservatorship of a minor in a larger case. For example, a $100,000 settlement for a 15 year old might include terms that call for monthly payments of $150 to the custodial parent during the minority of the child ($1800 per year and not exceeding $25,000 during the

child's minority), with the balance paid in a lump sum or several lump sums or in increased monthly payments after the child attains majority.

Even without the use of the Facility of Payment act, a structure may be used to avoid a conservatorship. A structure can provide for no payments during the child's minority with lump sum payments or monthly income after majority. Approval of the structure should be made by court order pursuant to a proper pro ami settlement, but once approved the conservatorship can be avoided because there are no funds due during the child's minority to be administered. In some cases, defense counsel, annuity companies or judges might require the appointment of some personal representative for the minor to sign the acceptance of the annuity assignment. If so, this might be accomplished by the appointment of a temporary guardian or through the authorization of a single transaction under Code of Alabama §§ 26-2A-107 and 26-2A-137.

A single payment for the use and benefit of a minor can made to a parent or other custodian in excess of the $5,000 authorized by the Facility of Payment act through the use of the Uniform Transfers to Minors Act (UTMA) codified at Code of Alabama § 35- 5A-1 et seq. UTMA is usually thought of as an estate planning device, but contains provisions which clearly indicate that it was intended to facilitate the settlement of lawsuits for minors. While sections 5, 6 and 7 of the act refer to estate planning types of transfers, section 8 (§ 35-5A-8) specifically allows any obligor owing a liquidated debt to a minor not having a conservator to discharge the obligation by paying the debt to a custodian as long as the debt does not exceed $10,000. The comments to this section actually use a tort judgment debtor as an example of one who may discharge the debt by payment to a custodian. The comment points out that the section is permissive and may be used instead of a conservator, or a conservator may be appointed.

While UTMA does not have the "series of payments" exception contained in the Facility of Payment act, it does increase the lump sum settlement option to $10,000. If no more than $10,000 is distributed as a lump sum, UTMA could be used to settle a larger case when combined with a structure to defer future payments beyond the age of majority in the same manner as the Facility of Payment act.

Most transfers under UTMA remain with the custodian until the minor attains the age of 21 years instead of 19. However, the act specifically provides for UTMA transfers from debtors such as a tortfeasor to be distributed to the minor at age 19. Presumably, this requirement is included to meet constitutional standards. When using UTMA to avoid a conservatorship in settling a case for a minor, care should be taken to observe the entire act. It should also be noted that UTMA, like the Facility of Payment act, does not grant authority to settle or to liquidate the amount due. In other words, a custodian is not empowered to determine that any offer is fair, reasonable or in the best interest of the minor, but may receive any money due the minor after the settlement has been deemed to be fair after a proper *pro ami* hearing.

Subrogation and attorneys' fees

If any subrogation is due (or any payment has been guaranteed by the litigator), either the Circuit Court in the pro ami order, or the probate court in the conservatorship should be asked to approve this disbursement. Probate court approval, generally, would not be required where the Circuit Court has approved it in a pro ami order prior to determining the net proceeds of a settlement. If, however, a verdict is recovered or the settlement order does not approve subrogation, the probate court should authorize any expenditure. Care should be taken to notify any party which may claim subrogation before a probate or pro ami hearing where the subject may be ruled upon. It is not uncommon for a probate or circuit court to find that no subrogation is due because the recovery was insufficient to fully compensate the minor or incompetent. However, without notice and opportunity to be heard (due process), such a finding may well be collaterally attackable by the claimant. The better practice is to give notice to all potentially affected parties.

Attorneys' fees must be approved before they are paid by a minor or incompetent also. The parent or next friend of an injured child or incompetent may enter into a contingent fee contract with the litigator, but this does not necessarily bind the child or incompetent or authorize the payment of any such fees from the recovery.

If a conservator or guardian is appointed before entering into a fee agreement with an attorney, the contract may be binding on the ward under Code of Alabama (1975) § 26-2A-152(19) and (24). However, upon a settlement, the conservator may be made to pay back to the estate of the ward any attorney's fees determined to be unreasonable. The better practice is to open the conservatorship or guardianship early in large cases and obtain approval of the fee contract at that time. It is much easier to obtain permission than forgiveness. A fifty percent contingent fee does not look as unreasonable at the beginning when recovery is uncertain and thousands of dollars must be risked by the litigator in order to prosecute the case as it might look after a couple of million are "on the table."

*Pro ami* settlements

If a suit involving a minor or incompetent is settled prior to litigation, during litigation or on appeal, the minor or incompetent will not be bound to the settlement unless it is found to be fair and reasonable and is approved by the Court. ***Abernathy v. Colbert County Hospital Board,*** 388 So.2d 1207 (Ala. 1980). When small suits are settled with parents on behalf of a minor without benefit of court approval, defendants often require the parent to sign an "indemnity and (or indemnifying) release." The purpose of the document is to require the parent who makes the settlement to agree to pay the settlement proceeds back to the defendant should the minor challenge the fairness of the settlement after attaining majority. The indemnity usually requires the parent to

reimburse the defendant for any attorney's fees spent in the challenge as well. For this reason, court approval of ALL settlements is a good idea. Upon refusing to settle a small case without a complete pro ami hearing, expect the defendant to suggest the indemnifying release as an alternative. When the indemnifying release is rejected by the plaintiff, expect the defendant to refuse to pay the costs of a pro ami (which would include a guardian ad litem fee). Insistence upon a proper pro ami is still recommended to effectively represent the interests of the parent or next friend who is, perhaps, the real client. At least, a parent or next friend should be fully informed and consent in writing before accepting the potential liability associated with an indemnifying release to save costs.

The filing of a suit for the express purpose of obtaining a *pro ami* order could be avoided, however, by having Letters of Conservatorship issued, then obtaining probate court approval of the settlement. Since the conservatorship is probably necessary anyway, it can be used to make the settlement binding, approve attorney's fees and subrogation, authorize the conservator to sign a release on behalf of the minor or incompetent and avoid the additional expense of filing a circuit court suit and holding a *pro ami* hearing.

If not authorized by the probate court, a **proper** *pro ami* hearing and order is necessary to protect all parties. The case of ***Large v. Hayes by and through Nesbitt,*** 534 So.2d 1101 (Ala. 1988) supplies a frightening illustration: a pro ami hearing was held in 1982 approving a settlement in a medical malpractice case. The trial court heard testimony ore tenus and approved the settlement and attorney's fees as fair, reasonable and in the best interest of the child. In 1988, a guardian ad litem for the child filed an action on behalf of the child claiming that the attorney's fee was unreasonable and should be repaid by the trial attorney. The complaint alleged that the parents had breached their duty of care to the child by entering into an unfair contract with the trial attorney which was never approved by any court. A jury agreed and a verdict for over $59,000 was entered against the attorney. The verdict was overturned on appeal, but the case should never have survived a motion for summary judgment. "If there had been no hearing preceding the pro ami settlement as required by **Abernathy**, then clearly an independent action attacking the judgement would have been appropriate." 534 So.2d at 1106.

A proper *pro ami* hearing should include the appointment of guardian ad litem to represent the interest of the child, testimony from which the court can infer that liability was disputed, testimony concerning the nature and extent of injury to the ward, and a written order in which the court finds that the settlement is fair, reasonable and in the best interest of the child. It should be noted that, where appropriate, the court may include a statement to the effect that the settlement, while fair and reasonable, is not adequate to fully compensate the child for his or her injuries. The effect of this statement is to negate claims of subrogation, but care should be taken to afford subrogation claimants due process as discussed above.

Recitations of findings of fact are a good idea in a pro ami order, while it might be argued that an official record of the hearing might not be a good idea. Since the trial court is afforded a presumption of correctness in its findings of fact, a record might only serve to prove that there was some lack of evidence to support a necessary finding made in the order.

**SETTLEMENT OF CASES INVOLVING PERSONS WITH SPECIAL NEEDS OR ON PUBLIC BENEFITS**

Nothing in the law is as simple as it once was, and settlements are no exception. To the person who is totally reliant upon public assistance for his continuing medical care, a small settlement can be a curse instead of a blessing. Just in case ALL settlements are not "the big one," the following discussion should be considered.

Income and resource sensitive benefits

There are many types of social security and other government benefits. Some of them are income or resource sensitive and some are not. The most common types of Social Security benefits include regular retirement income (the kind we all hope to, but really don't expect to receive at age 62 or 65), Social Security Disability Income (SSDI) and Supplemental Security Income (SSI). Of these types, only SSI is income and resource sensitive. That is, one has to be poor to receive it.

Eligibility for SSI is the sole determinant for Medi**caid** eligibility in Alabama and many other states. For this reason, the litigator must consider the impact upon the client of receiving any amount where the client is dependant upon SSI and/or Medicaid. Medi**care** is health care coverage primarily for the elderly and is not income or resource sensitive. Medicare is also available to those who are not elderly but have been on SSDI for two years.

If a plaintiff relies upon Medi**caid** as his sole health care insurance and has continuing hospitalizations, institutionalizations or expensive medications or treatments, the recovery of a net amount over $2000 can render the client temporarily ineligible for Medicaid requiring the client to pay out more than the recovery. For example, a plaintiff has dialysis and takes $1000 worth of medicine each month, all paid for by Medicaid. The client recovers a net $10,000 from an automobile accident and is paid the money on June 29th. The client spends all but $3000 of the money by July 18th when she goes into the hospital for an infection. On August 15th, she receives a bill for medicine for June through August in the amount of $3000 because her Medicaid was terminated for the entire month of June upon receipt of the settlement money. Because she still had more than $2000 on the first day of August, she was still disqualified for coverage. None of the hospital expenses will be covered by Medicaid. She might ask the litigator if his fee was the only benefit derived from the settlement.

Many older citizens are now beginning to receive payments from asbestos and breast implant class actions. Those who are reliant upon Medicaid and SSI will have great difficulty unless properly advised. There are different rules for Medicaid used to pay for nursing home care. Any gifts made within 36 months of filing an application for nursing home Medicaid can cause a delay in coverage. Careful planning by a specialist in public benefits or elder law should be made by anyone before agreeing to receive a lump sum of money or periodic payments, especially where confinement in a nursing home might be imminent.

Structuring a Settlement with a Special Needs Trust

Funds held in a fiduciary capacity in Alabama may not be invested in any private stock company. Const. of Ala. § 40. For this reason, conservatorship funds may not be invested in common stock or annuity contracts sold by an insurance company, for example. This rule is circumvented in a structured settlement because the *pro ami* order directs that the defendant shall pay to the plaintiff a specified sum of money per month. The court then permits the defendant to fund those future payments by purchasing an annuity. The funds of the protected person are not received for investment in an annuity, thus there is no investment in a private stock company. The annuity is owned by the defendant for use to fund the future payments. It is the approval of monthly payments as a condition of the settlement that makes a structure work.

The same concept may be applied to settle the claim of a minor or incompetent in exchange for the minor being named as beneficiary of a Special Needs Trust. A Special Needs Trust, sometimes called a Supplemental Needs Trust or a Discretionary Trust, is a trust holding funds for the benefit of a named beneficiary. The trustee may distribute any part of the income, all of the income, or none of the income, (in the trustee's sole discretion) for the benefit of the named beneficiary. If the trustee chooses to distribute a very small amount of income to the beneficiary, the beneficiary may remain eligible for Medicaid benefits or other public assistance.

These trusts were widely used in past years where a parent or grandparents wished to make a testamentary disposition of property for the benefit of a health impaired child without disturbing the child's eligibility to have Medicaid pay for institutional care.

These trusts have become trendy after the passage of 42 U.S.C. §1396, commonly referred to as OBRA 93. OBRA created a "safe harbor" requiring Medicaid agencies in all states to recognize the Special Needs Trust as a proper means of excluding funds placed therein from consideration as an available resource. The act permits the establishment of a Special Needs Trust by a court, a parent, a grandparent or a guardian. Under such an arrangement, a pro ami order would be entered authorizing settlement of the incompetent's or child's case in exchange for the defendant establishing and funding a Special Needs Trust naming the child or incompetent as beneficiary. Even though a conservator might not be

permitted to donate the child's funds to such a trust (just as he could not invest the child's funds in an annuity), a court could authorize the establishment of such a trust in settlement of the case in the same manner as it might authorize the funding of monthly payments by an annuity.

The terms and conditions of a Special Needs Trust should be drafted, employed and administered with great care. In most cases, an OBRA complying Special Needs Trust must contain a "pay back" provision making the Medicaid agency the primary beneficiary after the death of the beneficiary up to the amount it has expended on the beneficiary during his lifetime. The trust must not be used as a support trust. It is for ***supplemental*** needs only. Therefore, use of the SNT is not always as beneficial as anticipated. It must be irrevocable, cannot be established by anyone over the age of 65 years and can only be established for a disabled person. These requirements are often overlooked in the rush to establish an SNT for every plaintiff on public benefits. Sometimes, the client is better served by a carefully planned spend down or gift program with the proceeds, instead of needlessly encumbering all of the funds for a lifetime. Often, the SNT is not a good fit because most of the recovery was for the purpose of supplementing future income needs instead of future medical needs, and an SNT is prohibited from supplementing income.

Additionally, the widespread use of Special Needs Trusts to make assets available for the benefit of recipients of government benefits may not be tolerated by government agencies in the future. However, where a plaintiff is likely to need lifetime institutional care and the case will not likely produce enough funds to provide that institutional care, a Special Needs Trust may be employed as a meaningful alternative settlement.

A final mention should be made of a developing fourth alternative for settlements. Under the same legal rationale that would permit a court, after a pro ami hearing, to permit a structure or the establishment of a Special Needs Trust, a court might (some have) authorize the establishment of a settlement trust. A settlement trust would be established in the same manner as an SNT, but would not have the restrictions of irrevocability or distributions for special needs only. Such a trust would have a trustee which is granted authority by the court approved trust instrument and which may be granted the authority to invest in "non-legals," be exempted from bond, and may be given broad discretion in making unsupervised distributions. Such an innovation effectively makes an "end run" around the conservatorship laws and is truly progressive. Still, there are situations which fit a settlement trust. Alabama's version of the Uniform Guardianship and Protective Proceedings Act contained in Chapter 2A of Title 26, even permits the probate court to authorize a conservator to establish a trust for the benefit of a minor or incompetent person. Code of Alabama (1975) §26-2A-136(b). Many probate judges are justifiably skeptical of granting such bold authority, but when coupled with sufficient safeguards, a settlement trust might be justified.

In summary, settlements for minors and incompetents generally must follow one of three (or possibly four) paths or a combination of them: 1) a lump sum paid to a conservator, 2) a series of payments under a structured settlement which usually must be paid to a conservator, 3) a highly restrictive Special Needs Trust established irrevocably at the time of settlement, or 4) possibly, a settlement trust. Great care should be made in selecting the method or combination to be used. A proper selection requires some prediction of future needs.