

When to Seek Approval - A Discussion on Infant Settlements.

There is a car accident. The insured has rear-ended Marie and her ten-year old son, James. After much investigation, it is determined that the insured is at fault, and Marie and James' claims are settled. Marie and James did not file lawsuits. Marie's claim is settled outside of court, with the exchange of the executed release and settlement draft. However, settling James' claim may not be as simple. In Virginia, in order for any settlement with a minor to be binding, the court must approve the settlement. Therefore, in order to finalize a binding settlement with James, there must be a court action.

By Definition. A settlement with a minor, legally referred to as an infant settlement, is governed by Virginia Code Section 8.01-424. A minor is considered to be one under a disability, and not able to enter into a legally binding contract. Therefore, the law requires the court to review the settlement "contract" and determine if it is fair and suitable. Section 8.01-424 sets the framework for when an infant settlement is required and the manner in which the settlement funds are to be paid. As provided by the statute, in any case where there is damage to the person or property of a minor, which is caused by the wrongful act, ne-

glect, or default of another person, any person or insurer interested in compromising any claim may move the court to approve the settlement. By the time the court is involved, the settlement is already reached. The court is not available to cause settlement. The court is there to simply approve the settlement.

Binding or Not Binding- That is the Question. James' claim may be settled without court action, but it will not be binding. The effect of a nonbinding settlement is not realized until the settlement is challenged. For example, the settlement would be challenged should James reach the age of majority and file a lawsuit to recover further damages for his claim. An accord and satisfaction defense would not protect the insured and the insurance carrier from James' attempts at additional recovery. On the other hand, had the settlement been approved by the court, then the settlement would be binding, and absent fraud, the court approved settlement would not be set aside and no further recovery based on the same claim would be permitted. The key for each infant settlement is to determine whether it is important that the settlement is binding.

Not Worth the Risk. In deciding whether to petition for court approval of the infant settlement, consider three questions. First, is this a large infant settlement? The settlement overall may be large, but the portion of the settlement funds tendered to the minor may be relatively small. For example, is a \$2,000 settle-

ment worth the court's approval? Probably not. However, is a \$10,000 settlement worth the court's approval? Probably so. Second, consider what is the likelihood that this settlement may be challenged in the future? Are there facts to support that the parents compromising the settlement may be wavering on settlement? If it appears that the settlement may be challenged in the future by the parents or the minor initiating a lawsuit, then obtain court approval of the settlement. Third, what is the likely potential of the minor's claim? If the minor later filed a lawsuit, and the nonbinding settlement was disregarded, what is the potential outcome? This question is answered by placing a value on the claim. If the medical specials, future medicals, and pain suffering would support a large award, then have the infant settlement approved by the court. By approving the infant settlement, it will remove the possibility of a future lawsuit that returns a significant award.

Remember the Parents! The parents' claim for medical expenses is a wholly separate cause of action than the infant's claim for pain, suffering, etc. Section 8.01-36 of the Code of Virginia allows a parent to recover from the tort-feasor "the expenses of curing or attempting to cure such infant from the result of personal injury." Therefore, when settling an infant's claim remember to ensure that the parents' derivative claim for medical expenses is included in the settle-



ment and that the parents sign separate releases for their own individual claims as well as a release for the infant's claim. Note that a parent's claim for medical expenses is considered a property damage claim and therefore, the five-year statute of limitations for property damage applies to a parent's claim under §8.01-36.

Infant Settlement Roadmap. If it is determined that it is best for the court to approve the infant settlement, the following is an outline of the approval process:

- **Reviewing the Settlement.** Once defense counsel receives the claim, counsel's first step will be to review the settlement and discuss the settlement with the insurance adjuster. The settlement must be

likely to pass the court's scrutiny.

- **The Petition.** If there is already a case pending and settlement is reached during litigation, then approval for the compromise settlement may be made by filing a motion before that court. Although the circuit court usually hears infant settlements, if the case is pending in the general district court, then the general district court may approve the settlement. If there is not already a case pending, then the court's approval must be sought by filing a petition in the circuit court. The filing and any service of process fees are usually taxed to the insurance carrier.

- **GAL Appointment.** In most cases, the settlement will not be approved by the court without the appointed guardian ad litem's (GAL) recommendation.

The legal fee for the GAL is usually paid by the insurance carrier.

- **Release.** While awaiting the final hearing, it is still good measure to have the parent(s) execute a release of all claims on behalf of the minor.

- **The Final Order.** Once the settlement is approved by a final order of the court, the settlement drafts may be exchanged, and the case may be closed.



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