

**FINAL PROCEDURES CONCERNING DISPOSITION OF
MINORS' AND DISABLED PERSONS'
PERSONAL INJURY CASES, SURVIVAL ACTIONS, AND WRONGFUL
DEATH CASES
WITH
SAMPLE ORDERS**

May 2019

**TO: ALL JUDGES OF THE LAW AND PROBATE DIVISIONS,
AND MUNICIPAL DEPARTMENT**

FROM: MARY ELLEN COGHLAN, PRESIDING JUDGE, PROBATE DIVISION

JAMES P. FLANNERY, JR., PRESIDING JUDGE, LAW DIVISION

E. KENNETH WRIGHT, PRESIDING JUDGE, FIRST MUNICIPAL DISTRICT

This memorandum, outlining procedures to be followed in handling minors' and disabled persons' personal injury cases, actions which survive a plaintiff's death, and actions brought under the Wrongful Death Act 740 ILCS 180/0.01 et seq., supersedes all prior memoranda relating to these procedures.

I. INTRODUCTION.

Pursuant to Cook County Circuit Court Rules 6.4 and 6.5, the judges of the Law Division and Municipal Department hearing a minor's or disabled person's personal injury action, an action brought under the Wrongful Death Act, or an action which survives a plaintiff's death, shall rule on the fairness and reasonableness of a proposed settlement, fix the attorneys' fees and expenses attributable to the litigation, adjudicate liens, and find the degree of dependency where appropriate. Additionally, where there is recovery for wrongful death, the court shall determine the net amount distributable to those persons entitled. Such matters shall not be referred to the Probate Division.

Once the Law or Municipal judge makes these determinations, pursuant to Cook County Circuit Court Rule 12.15, the judges of the Probate Division are responsible for the appointment of guardians or other representatives, setting and approval of bonds, authorizing the settlement distribution of proceeds and approval of vouchers, and the administration of the estate in cases where the amount involved requires administration.

II. REQUIREMENTS.

A. Submission of Verdict or Settlement Petition and Proposed Order of Distribution.

Any attorney seeking approval of a settlement in an action involving: (1) a minor's or disabled person's personal injury case; (2) an action brought under the Wrongful Death Act; or (3) an action which survives a plaintiff's death shall, in a written form, submit a petition and proposed order of distribution to the judge presiding over the matter at the time of settlement.

B. Fair and Reasonable.

The judge reviewing the aforementioned settlement petition shall decide whether the settlement is "fair and reasonable." Such a determination shall be based upon the totality of the known facts. Factors that are considered include, but are not limited to: (1) the severity of the injury; (2) the difficulty in proving liability against the defendant(s); (3) whether the case was settled pursuant to arbitration, mediation or pre-trial proceedings; and (4) in wrongful death cases, the alleged level of the defendant's culpability may also be considered.

Recitation of Known Facts in Petition: In order to make a finding that the settlement is "fair and reasonable," the Petition must include a brief recitation of the case's known facts.

Fair and Reasonable Language in Order: The settlement order must contain the following language: "***The settlement amount is fair and reasonable.***"

C. Proceedings Transferred to Probate for Estate Administration.

Amount distributable \$10,000.00 or more: In any action in which the net amount distributable after deducting fees, expenses, and liens from the total settlement amount to a minor or disabled person is \$10,000.00 or more, a proceeding must be instituted in the Probate Division in the county where the minor or disabled person resides. In such instances, the order of distribution **must** contain the following language:

"The settlement amount approved herein shall be paid only to a guardian appointed by the probate division where the minor or disabled person resides and this order shall be effective only after the entry in the probate division or circuit court of an order approving the bond or other security required to administer the settlement and distribution provided for in this order."

The order **shall not** contain language which appoints a guardian, designates a depository or purports to waive a bond. Further, the order **shall not** direct the execution of releases by the

parent, next friend or guardian. Said language would allow settlement without bond and without reference to the Probate Division.

Amount distributable \$10,000.00 or less: If the minor or disabled person is to receive an amount \$10,000.00 or less, the settling judge has the discretion to order that all or part of the funds be: 1) distributed to and controlled by the parent, next friend, or guardian for **the sole benefit** of the minor or disabled person until the minor reaches the age of majority and/or disability is removed, and/or 2) distributed to the parent, next friend, or guardian to be placed in an interest-bearing bank account and held therein until the minor reaches the age of majority and/or the disability is removed. In any case, the order of distribution must indicate to whom the funds will be distributed, how they will be used and protected (bank account, money market account, etc), whether said account will be taxed, and who will be administering the account.

1. Actions brought by a Personal Representative.

In wrongful death/survival actions brought by a personal representative appointed by the Probate Division, the distributable amount is administered in the Probate Division.

Upon the settlement or disposition of a wrongful death cause of action, the law division or other judge shall determine the allocation of the wrongful death proceeds based upon the degrees of dependency of the next of kin. Further, prior to distribution of the proceeds, the Law Division or other judge disposing of the wrongful death case shall consider appointing a guardian ad litem to represent the interests of any minor or disabled person solely for the purpose of distribution. The necessity for appointment of a guardian ad litem usually arises in circumstances in which the proposed distribution allocates a **disproportionately low amount to the minor or disabled person**. The fees of the guardian ad litem shall be paid out of the gross estate rather than the distributive share of the minor.

The order approving the settlement or entering the judgment in such actions shall provide that the amount distributable, based on dependency, shall be accounted for and administered in the Probate Division. Upon the entry of the order, the representative shall file a petition in the Probate Division requesting the entry of an order authorizing the representative to accept the distributable amount and fixing and approving the bond, unless waived by the Probate Division, or other security required pursuant to the settlement or judgment. A copy of the order entered in Law Division must be attached to the petition.

2. Actions brought by a Special Administrator.

In wrongful death actions brought by a special administrator appointed pursuant to 740 ILCS 180/2, the order entering judgment or approving the settlement shall provide that the court in which the action is heard shall distribute the amount recovered in any such action. However, if proceeds in excess of \$10,000.00 are distributable to a minor or disabled person, the order of distribution shall be administered and distributed under the supervision of the Probate Division.

3. Structured Settlements.

Structured settlements require formulating procedures and/or payment schedules to safeguard settling minors and disabled persons in personal injury cases. Any structured settlement proposal is subject to the approval of the court in accordance with the guidelines set forth in this memorandum.

D. Attorney's Fees For Settlement of Minors' and Disabled Persons' Personal Injury and Wrongful Death cases.

Pursuant to Cook County Circuit Court Rule 6.4(b):

Except as otherwise limited by rule or statute, attorneys' compensation shall not exceed one-third of the recovery if the case is disposed of in the trial court by settlement or trial. If an appeal is perfected, the compensation to be paid to the attorney shall not in any event exceed one half of the recovery.

Contingent Fees for Attorneys in Medical Malpractice Actions Filed before January 18, 2013:

Under the former provisions of 735 ILCS 5/2-1114, "In all medical malpractice actions the total contingent fee for plaintiff's attorney or attorneys shall not exceed the following amounts:

- 33 1/3 of the first \$150,000.00 recovered;
- 25% of the next \$850,000.00 recovered, and
- 20% of any amount recovered over \$1,000,000.00 of the sum recovered."

According to the former provisions of 735 ILCS 5/2-1114(c): "In special circumstances, where an attorney performs extraordinary services involving more than usual participation in time and effort the attorney may apply to the court for approval of additional compensation." Thus, the court has the discretion to consider an "enhanced

fee” in medical malpractice actions filed before January 18, 2013. (See also Clay v. County of Cook, 325 Ill. App. 3d 893, 902 (1st Dist. 2001).)

Contingent Fees for Attorneys in Medical Malpractice Actions Filed on or after January 18, 2013:

Under the provisions of 735 ILCS 5/2-1114, effective January 18, 2013, “In all medical malpractice actions the total contingent fee for plaintiff’s attorney or attorneys shall not exceed 33 1/3% of all sums recovered.”

Structured Settlements: When structured payment settlements are utilized, the attorney’s compensation shall not exceed 33 1/3% (or that allowable by statute) of the “Present Cash Value” of the total settlement.

E. Attorney’s Expenses.

Every petition and order of distribution must include a **detailed itemization of all expenses claimed** and the party seeking to recover attorney’s fees bears the burden of presenting sufficient evidence to support the claim. GMAC Mortgage Corp. v. Larson, 232 Ill. App. 3d 697, 703 (3rd Dist. 1992). Strict judicial scrutiny of these items is to be expected pursuant to the applicable case law. It is within the discretion of the reviewing court to determine whether said expenses are recoverable. In any case where more than one petition is submitted (i.e., where parties settle at different times during the litigation), only those expenses attributable to the parties involved in the particular settlement shall be included in each respective petition.

Overhead Expenses: An attorney cannot separately itemize and charge to the client expenses properly designated as overhead. Overhead expenses include general office expenses, such as photocopying, legal newspaper subscriptions, telephone and delivery services, telecopier and computer research (i.e. Westlaw), and other similar expenses. Harris Trust and Sav. Bank v. Am. Nat’l Bank and Trust Co. of Chicago, 230 Ill. App. 3d 591, 599-600 (1st Dist. 1992).

Ambiguous Charges: Expenses that that are indistinct in terms of the task performed, its purposes, or the time spent on the task are considered “ambiguous” and unrecoverable. Mercado v. Calumet Fed. Sav. & Loan Ass’n, 196 Ill. App. 3d 483, 494 (1st Dist. 1990).

Excessive or Duplicative Billing: The court shall exclude from any distribution order deductions for expenses that are “excessive, redundant, duplicative, or otherwise unnecessary.” Berlak v. Villa Scalabrini Home for the Aged, 284 Ill. App. 3d 231, 244 (1st Dist. 1996).

Medical Expenses: See Section G below for guidance regarding when deductions for medical expenses are and are not permitted.

Prospective Expenses: Expenses that are prospective, such as expenses to be paid by the attorney subsequent to the entry of the settlement and distribution order, Probate filing fees, bond fees, etc., are **not recoverable** in the Law Division or the 1st Municipal Division. However, to ensure recovery of said expenses the attorney may include the following language in the order:

“The Probate expense(s) claimed herein appear reasonable, however, reimbursement of the same must be obtained from the Probate estate.”

F. Vouchers

In all settlements where the distribution of the proceeds is not supervised by the Probate Division, the plaintiff's attorney must, within 60 days of entry, file and submit to the settling judge vouchers evidencing that: 1) the funds have been distributed and received in accordance with the settlement order and 2) the attorney expenses claimed in the settlement order are consistent with costs actually paid. Failure to file vouchers within this designated period could result in the issuance of a rule to show cause.

G. Liens and Reimbursements for Medical Expenses

Health Care Services Lien Act. A valid primary lien under the Health Care Services Lien Act, 770 ILCS 23/1 *et seq.*, shall be satisfied from any award, even if the award is in favor of a minor or disabled person, and even if the award does not specifically incorporate recovery for medical expenses incurred or paid, Manago v. County of Cook, 2017 IL 121078 ¶23. There is no inherent conflict between the application of the Family Expense Act and the Lien Act. *Id.* at ¶ 33.

Insurance subrogation claims. Inasmuch as it is the parents of the minor who receive a benefit from the payment of medical expenses by an insurer, the insurer may not recover those expense from the minor's estate. Estate of Aimone v. State Health Benefit Plan/ Equicor, 248 Ill. App. 3d 882, 884 (3d Dist. 1993). See also, In Re Estate of Hammond, 141 Ill. App. 3d 963, 965 (1st Dist. 1986); Klem v. Mann, 279 Ill. App. 3d 735, 738-739 (1st Dist. 1996); Estate of Woodring v. Liberty Mutual Fire Ins. Co., 71 Ill. App. 3d 158 (2nd Dist. 1979). However, where the trial court explicitly finds that the dependent of an insured was a third-party beneficiary of the insurance contract, an insurer's subrogation claim against the minor's recovery may be allowed. See, e.g., Sosin v. Hayes, 258 Ill. App. 3d 949, 952 (1st Dist. 1994) (The injured minor was named as a covered dependent under his father's health plan and would continue to receive

benefits arising out of the accident after reaching the age of majority; the minor's mother assigned her rights to reimbursement for medical expenses to him; and the minor's father executed the unambiguous reimbursement agreement for medical expenses with insurer on behalf of himself and on behalf of his minor son, so minor was deemed a direct contract beneficiary and subrogation was allowed from minor's settlement.)

ERISA Plan's reimbursement rights. If a self-funded ERISA plan requires reimbursement by all plan beneficiaries who receive benefits thereunder, such contractual terms can be enforced to require reimbursement from a minor's settlement and state anti-subrogation statutes are preempted. FMC Corp. V. Holiday, 498 U.S. 52 (1990); *See also Board of Trustees v. Adams*, 1998 WL 259543 (N.D. Ill).

Illinois Department of Healthcare and Family Services liens. The Illinois Public Aid Code provides that the Illinois Department of Healthcare and Family Services has a charge upon all claims, demands, and causes of action for injuries to someone who received or has applied for financial aid, including health care benefits. 305 ILCS 5/11-22. Additionally, this right of reimbursement "take[s] priority over all other liens and charges existing under the laws of the State of Illinois with the exception of the attorney's lien." *Id.* Distribution of settlement proceeds is within the trial court's powers. McKim v. S. Ill. Hosp. Servs., 2016 IL App (5th) 140405, ¶ 17.

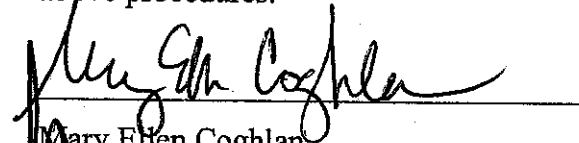
Medicare liens. Under the Medicare Secondary Payer Act, Medicare does not pay for medical services in cases where an injury or illness was caused by another party or in situations where payment can be made by liability insurance. 42 U.S.C. § 1395y(b)(2)(A)(ii) (2012). If Medicare pays for medical care under such circumstances, the payment is construed as a "conditional payment." 42 U.S.C. § 1395y(b)(2)(B)(i) (2012); C.F.R. § 411.52 (2012). Medicare has a direct right to recover the entire amount of the bills paid from the entity responsible to make the primary payment, or alternatively from the individual or entity that received payment from the responsibly party. 42 U.S.C. § 1395y(b)(2)(B)(iii) (2012). McKim v. S. Ill. Hospital. Servs., 2016 Il App (5th) 140405, ¶ 22.

III. CONCLUSION.

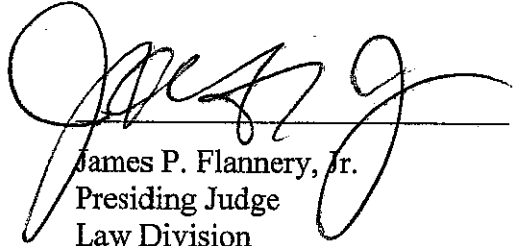
The provisions of this memorandum apply equally to minors' and disabled persons' personal injury cases, wrongful death and survival actions. The objective of the procedures described above is to permit the total disposition by the Law Division or Municipal Department of any case in which appropriate Probate Division action is not necessary while, at the same

time, ensuring that appropriate Probate Division involvement is not eliminated by reason of an overly broad Law Division or Municipal Department order.

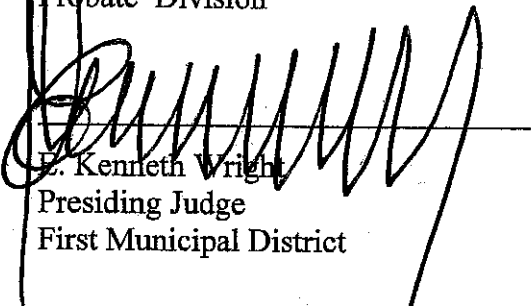
It is to be noted that while the following forms would handle the great majority of cases, they may not deal with those which go to verdict and judgment as opposed to settlement. In those cases, orders must be tailored to suit the particular circumstances bearing in mind the above procedures.



Mary Ellen Coghlan
Presiding Judge
Probate Division



James P. Flannery, Jr.
Presiding Judge
Law Division



E. Kenneth Wright
Presiding Judge
First Municipal District