

**FINAL PROCEDURES CONCERNING SETTLEMENT OF  
MINORS' AND DISABLED PERSONS'  
PERSONAL INJURY CASES AND WRONGFUL DEATH CASES  
WITH  
SAMPLE ORDERS**

August 2014

**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 and actions brought under the Wrongful Death Act, 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, in wrongful death cases, 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, and the administration of the estate in cases where the amount involved requires administration.

## II. REQUIREMENTS.

### A. Submission of 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 petition and order of distribution must make a finding that 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 on the part of 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 order of distribution 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 less than \$10,000.00:* If the minor or disabled person is to receive an amount less than \$10,000.00, 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 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 case, 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. 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 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 cause 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 (1<sup>st</sup> 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 (3<sup>rd</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dist. 1996).

*Medical Expenses:* The settlement and distribution order should not allow deductions for medical services where no lien is involved or where the parents have NOT paid for the medical

services with their personal funds. In many of these cases, inquiry will reveal that the medical expenses have in fact been paid by insurance. Similarly, deductions diverting money from the minor or disabled person to the parent or guardian for “reimbursement of the parent’s or guardian’s expenses” or for “the benefit of the minor or disabled person” should not be included in the settlement and distribution order. Whether such deductions are in the best interest of the minor or disabled person can only be determined by the appropriate Probate Division judge.

*Prospective Expenses:* Expenses which 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. 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.**

*Family Expense Act:* The purpose of the Family Expenses Act, 750 ILCS 65/15, is to hold a parent responsible for family expenses. To this end, the Act provides that parents are responsible for the payment of their minor’s medical expenses. In Re Estate of Hammond, 141 Ill. App. 3d 963, 965 (1st Dist. 1986); Beck v. Yatvin, 235 Ill. App. 3d 1085 (1st Dist. 1992). Because of the parents’ primary liability, medical expenses paid on behalf of a minor child are deemed to be for the benefit of the parent, not the child. Id. Further, because the benefits are deemed received by the parent, a minor’s estate has received no benefit, and an insurer who paid the benefits has no subrogation rights against a payment by a tortfeasor in settlement of a claim by the minor’s estate. Id. See also 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); Estate of Aimone, 248 Ill.App.3d 882 (3rd Dist. 1993).

*Exceptions:* There are several exceptions. First, an exception arises under ERISA, that is, if the subrogation lien arises out of a self-funded ERISA-based insurance policy, a subrogation lien may be recovered from a minor's settlement. See Board of Trustees v. Adams, 1998 WL 259543 (N.D. Ill.). Second, an exception is also made where the minor was a direct and intended beneficiary of the insurance contract. See Sosin v. Hayes, 258 Ill App. 3d 949 (1<sup>st</sup> Dist. 1994). Third, an exception is made where the Illinois Department of Public Aid provided medical assistance to the minor recipient. See 305 ILCS 5/11-22 (2001). Lastly, every hospital organized for nonprofit or maintained and operated entirely by a county rendering service in the treatment, care, and maintenance of an injured person shall have a lien upon all such claims and causes of action for the amount of its reasonable charges. See In re Estate of Larry Cooper, a Minor, 125 Ill. 2d 363 (1988).

### **III. CONCLUSION.**

The provisions of this memorandum apply equally to 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 preceding forms would handle the great majority of cases, they do 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.

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Mary Ellen Coghlan  
Presiding Judge  
Probate Division

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James P. Flannery, Jr.  
Presiding Judge  
Law Division

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E. Kenneth Wright  
Presiding Judge  
First Municipal District

**Settlement of minor's personal injury action where proceeds in excess of \$10,000.00 are distributable to minor or disabled person.**

**ORDER**

Upon the motion of the parties hereto through their respective attorneys for the entry of an order approving a settlement in the amount of \$\_\_\_\_\_, the court finds as follows:

1. The settlement amount is fair and reasonable.
2. The attorney for the plaintiff is entitled to fees in the amount of \$\_\_\_\_\_.
3. The attorney for the plaintiff is entitled to reimbursement for expenses attributable to this lawsuit in the amount of \$\_\_\_\_\_ as itemized below:

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
TOTAL:	\$ _____

4. The lien of \_\_\_\_\_ has been adjudicated by the court and allowed in the sum of \$\_\_\_\_\_.
5. The net amount distributable to the minor/plaintiff disabled person is \$(over \$10,000.00).
6. This matter is dismissed with prejudice and without costs.

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

\_\_\_\_\_  
JUDGE



**Settlement of minor's or disabled person's personal injury action where the proceeds under \$10,000.00 are distributed to parent/guardian/next of friend.**

**ORDER**

Upon the motion of the parties hereto through their respective attorneys for the entry of an order approving a settlement in the amount of \$\_\_\_\_\_, the court finds as follows:

1. The settlement amount is fair and reasonable.
2. The attorney for the plaintiff is entitled to fees in the amount of \$\_\_\_\_\_.
3. The attorney for the plaintiff is entitled to reimbursement for expenses attributable to this lawsuit in the amount of \$\_\_\_\_\_ as itemized below:

	\$ _____
	\$ _____
	\$ _____
	\$ _____
TOTAL:	\$ _____

4. The lien of \_\_\_\_\_ has been adjudicated by the court and allowed in the sum of \$\_\_\_\_\_.
5. The net amount distributable to *name of minor or disabled plaintiff*, minor/disabled plaintiff, is \$\_\_\_\_\_ and *name of parent /guardian/ next of kin*, parent/guardian/next of kin of the minor/disabled person plaintiff, is qualified to receive said sum on the behalf of the minor.
  - a. \$\_\_\_\_\_ of these funds shall be distributed to *name of parent /guardian/next of kin* on *date* for the sole benefit of *name of minor/disabled person* and used to \_\_\_\_\_; and/or
  - b. \$\_\_\_\_\_ of these funds shall be placed in an interest bearing bank account at *Name of Bank*, Account #\_\_\_\_\_, and held therein until the minor reaches majority/the disability is removed.
6. Vouchers evidencing attorney's expenses and disbursement of funds shall be filed with this court within 60 (sixty) days.
7. This matter is dismissed with prejudice and without costs.

IT IS THEREFORE ORDERED that this Court shall retain jurisdiction to enforce the terms of the settlement and to adjudicate liens.

\_\_\_\_\_  
JUDGE

**Settlement of a Wrongful Death action in which the proceeds distributable to a minor or disabled person are less than \$10,000.00.**

**ORDER**

Upon the motion of the parties hereto through their respective attorneys and pursuant to the Illinois Wrongful Death Act, for the entry of an order approving the settlement in the amount of \$ \_\_\_\_\_, the court finds as follows:

1. The settlement amount is fair and reasonable.
2. The attorney for the plaintiff is entitled to fees in the amount of \$\_\_\_\_\_.
3. The attorney for the plaintiff is entitled to reimbursement for expenses attributable to this lawsuit in the amount of \$\_\_\_\_\_ as itemized below:

	\$ _____
	\$ _____
	\$ _____
	\$ _____
TOTAL:	\$ _____

4. The lien of \_\_\_\_\_ has been adjudicated by the court and allowed in the sum of \$\_\_\_\_\_.
5. The next of kin (heirship as set forth in 755 5/2-1 et seq.) of the decedent is as follows: **(all next of kin/heirs must be identified)**

Name	Relation	Adult, Disabled Adult, Minor
Name	Relation	Adult, Disabled Adult, Minor
Name	Relation	Adult, Disabled Adult, Minor
Name	Relation	Adult, Disabled Adult, Minor

6. The percentages of dependency for the next of kin identified in paragraph 5 are as follows:

Name	Percentage of Dependency	%	Amount
Name	Percentage of Dependency	%	Amount
Name	Percentage of Dependency	%	Amount
		%	

- | Name | Percentage of Dependency | Amount |
|------|--------------------------|--------|
|------|--------------------------|--------|
7. The net amount distributable to the adult next of kin is \$\_\_\_\_\_ and should be distributed in accordance with the above percentages of dependency.
  8. The net amount distributable to the minor/disabled next of kin is \$\_\_\_\_\_ and name of parent/guardian/next of kin, parent/guardian/next of kin of the minor/disabled person plaintiff, is qualified to receive said sum on the behalf of the minor.
    - a. \$\_\_\_\_\_ of these funds shall be distributed to name of parent/guardian/next of kin on date for the sole benefit of name of minor/disabled person and used to \_\_\_\_\_; and/or
    - b. \$\_\_\_\_\_ of these funds shall be placed in an interest bearing bank account at Name of Bank, Account No: ##### \_\_\_\_ \_\_\_\_, and held therein until the minor reaches majority/the disability is removed.
  9. Vouchers evidencing attorney's expenses and disbursement of funds shall be filed with this court within 60 (sixty) days.
  10. This matter is dismissed with prejudice and without costs.

IT IS THEREFORE ORDERED that the settlement is approved and the [special] administrator/executor is authorized and directed to execute releases upon receipt of the sum offered and to distribute the proceeds in accordance with the provisions of this order. The Court shall retain jurisdiction to enforce the terms of the settlement and to adjudicate liens.

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JUDGE

