Handling Cases Involving Minors

by Miranda L. Soucie

Introduction

In Illinois, every minor[1] involved in litigation is a ward of the court.[2] As a matter of public policy, the rights of minors are generally guarded carefully, and courts have both a duty to protect the rights of minors, and broad discretion in exercising this role.[3] Accordingly, there are specific rules that apply to the handling of a minor's case.

How Does A Minor Prosecute A Legal Claim?

A minor does not have the legal capacity to pursue litigation in his or her own name.[4] Instead, the claim should be brought on behalf of the minor child by a next friend, guardian, or guardian *ad litem*.[5] Generally, the right to sue on behalf of a minor would fall with a parent (as next friend) or guardian of the minor. The natural mother or father of a minor may appear as next friend without court appointment.[6] Even where sole custody of the minor has been awarded to one parent, both parents retain the right to sue on behalf of the minor.[7] However, the best interests of the minor are paramount, and where one parent has a conflict of interest, a court will not allow that parent to litigate for the minor as "next friend."[8]

Technically, a court may allow any person to litigate on behalf of a minor as next friend.[9] However, if the representation of the parent as next friend is adequate, then there is generally no need for a court to appoint a guardian.[10] For representation to be "adequate," there must be no conflict of interest between either the minor and next friend, or between multiple minors.[11] Furthermore, for representation to be adequate, the next friend must take the necessary steps to prosecute the minor's case.[12] For example, where a minor's parents fail to appear for a motion for summary judgment, a court may find that the representation is not adequate.[13] Outside of a conflict of interest or want of prosecution, it may also not be in the best interests of the minor, for example, for a noncustodial parent to litigate on the minor's behalf when the parent has been delinquent in multiple years for child-support payments.[14] Normally, though, where a parent is the minor's next friend, and there is no conflict of interest, the representation will be considered adequate.[15]

Can a Contingency Agreement be Entered Into on Behalf of a Minor?

In light of a next friend's right to sue on behalf of a minor, a next friend also has the authority to hire legal counsel to prosecute a minor's claim.[16] This inherently vests the next friend with the authority to enter into a contract specifying the attorney's compensation, including contingency fee arrangements.[17] The Illinois Supreme Court recognizes that contingency fee contracts are a longstanding and accepted means by which litigants contract for the purposes of pursuing litigation in tort.[18] Such agreements are the " 'poor man's key to the courthouse door': they enable persons who cannot afford to retain an attorney on an hourly or fixed-fee basis to pursue their claims with competent counsel."[19] There are significant public policy reasons behind contingency fee agreements, including promoting access to the courts, and these reasons do not "evaporate simply because the party in need of legal assistance is a minor."[20] In fact, "the court's duty to protect minors is consistent with the policy of promoting access to the courts," because a court cannot protect a minor who is not before it.[21]

Injured minors, much like adults, require the "key to the courthouse" provided by contingency fee arrangements.[22] A contingency fee arrangement is considered enforceable, unless it is otherwise unreasonable.[23] Because court approval is not needed for a next friend to file a lawsuit on a minor's behalf,[24] prior court approval of the fee arrangement is also unnecessary.[25] In cases involving minors, though, contingency fee arrangements are subject to specific restrictions imposed by local court rules (see below).[26] These local court rules are procedural mechanisms for determining whether a contingency fee is reasonable.[27] Generally, the local court rules set conditional limits on contingency fee arrangements in minor's cases. These rules are upheld as procedural methods for determining when the terms of an agreement are unreasonable.[28] However, a court may not interpret these rules in such a manner so as to limit attorneys to a *quantum meruit* recovery, as this would conflict with the principle that contingency fee arrangements are enforceable.[29] That said, some circuit courts may conduct a quasi *quantum meruit* analysis. A chart outlining the various rules follows.

Local Rules On Attorney's Fees In Minors' Cases

Circuit	Local Rule Number	Local Rule Description
1st	5.1	A sworn petition must be furnished to the court, setting forth the terms of employment, the services rendered, the customary and usual charges for such services, and any special circumstances that might bear on the question of fees.
2nd	Does not address attorney's fees in local rules.	
3rd	Does not address attorney's fees in local rules.	
4th	Does not address attorney's fees in local rules.	
5th	X(C)	Fees cannot exceed one-third (⅓) of the recovery if the case is disposed of in the trial court by settlement or trial, and cannot in any event exceed one-half (½) if the case is disposed of on appeal.
6th	8.9(e)–(f)	Fees are subject to the approval of the court. For reimbursement of expenses, an affidavit must be furnished to the court certifying to the reasonableness, necessity, and propriety of the expense.
7th	Does not address attorney's fees in local rules.	
8th	Does not address attorney's fees in local rules.	
9th	9.65-E	Fees are subject to the approval of the court. For reimbursement of expenses, an affidavit must be furnished to the court certifying to the reasonableness, necessity, and propriety of the expense.
10th	Does not address attorney's fees in local rules.	
11th	Does not address attorney's fees in local rules.	
12th	5.01 5.03(D)	The court will adjudicate the reasonableness of the fees and expenses attributable to the litigation under the attorney's retainer agreement and pursuant to Article VIII of the Illinois Rules of Professional Conduct Rule 1.5 (fees). When structured payments are part of a settlement, if the attorney's fees are not similarly structured, then they will be based on a percentage of the present cash value of the total settlement. A sworn petition must be furnished that includes the terms of employment, with a copy of all contracts or correspondence verifying those terms, a statement that the fees sought comply with Article VIII of the Illinois Code of Professional Responsibility Rule 1.5 and the basis for that compliance, and any special circumstances that might bear on the question of fees.
13th	11.14(e)–(f)	Fees are subject to the approval of the court. For reimbursement of expenses, an affidavit must be furnished to the court certifying to the reasonableness, necessity, and propriety of the expense.
14th	Does not address attorney's fees in local rules.	

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15th	10.1(e) 12.14(e)–(f)	Attorney's fees cannot exceed one-third (⅓) of the gross settlement amount unless a sworn petition is furnished reciting the work and hours involved or other special circumstances that would justify a higher fee to compensate the attorney fairly for the work performed. For reimbursement of expenses, an affidavit must be furnished to the court certifying to the reasonableness, necessity, and propriety of the expense.
16th	10.01(j)	A sworn statement must be furnished that includes either: (1) an itemization of the hours expended, the work performed and the hourly rates charged; or (2) if the fees sought are based upon a contingent fee agreement, an account of the work performed, the result realized (together with a copy of the fee agreement) and a statement justifying any amount in excess of 25% of the gross settlement amount.
17th	15.03(c)	A sworn petition must be furnished that includes: (1) the terms of employment, with a copy of all contracts or correspondence verifying those terms; and (2) an itemized statement of services rendered.
18th	10.01(e)	Fees cannot exceed 25% of the gross settlement amount unless a sworn petition is furnished reciting the work and hours involved or other special circumstances that would justify a higher fee to compensate the attorney fairly for the work performed.
19th	14.23(I) 14.24(A)–(B)	For a settlement where no lawsuit is pending, fees cannot exceed twenty-five (25) percent of the settlement, unless a verified petition is furnished stating that the fee would not fairly compensate the attorney for the work performed, in which case the court will fix the fee at whatever amount it determines to be fair and reasonable. For settlement of a pending lawsuit without trial or for a judgment entered after trial, the judge hearing the case may waive the filing of a written petition under Rule 14.23 for the approval of attorney's fees in excess of twenty-five (25) percent of the settlement or award.
20th	Does not address attorney's fees in local rules.	
21st	10.7(e)–(f)	Fees are subject to the approval of the court. For reimbursement of expenses, an affidavit must be furnished to the court certifying to the reasonableness, necessity, and propriety of the expense.

22nd	14.23(i) 14.24(a)–(b)	For a settlement where no lawsuit is pending, attorney's fees cannot exceed twenty-five (25) percent of the settlement, unless a verified petition is furnished stating that the twenty-five (25) percent fee would not fairly compensate the attorney for the work performed, in which case the court will fix the fee at whatever amount it determines to be fair and reasonable. For settlement of a pending lawsuit without trial or for a judgment entered after trial, the judge hearing the case may waive the filing of a written petition under Rule 14.23 for the approval of attorney's fees in excess of twenty-five (25) percent of the settlement or award.
23rd	5.65(a)	A sworn statement must be furnished that includes either: (1) an itemization of the hours expended, the work performed and the hourly rates charged; or (2) if the fees sought are based upon a contingent fee agreement, an account of the work performed, the result realized (together with a copy of the fee agreement) and a statement justifying any amount in excess of 25% of the gross settlement amount.
Cook	6.4(b)	Attorney's compensation cannot 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, attorney's compensation cannot in any event exceed one half of the recovery.

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Family Medical Expense Act

Under the "Family Medical Expense Act," parents are liable for the medical expenses of their minor children.[30] Therefore, any cause of action to recover for the medical expenses incurred by the minor is held by the parents, not the child.[31] This has certain implications in various contexts: for example, a settlement entered into without being approved by the court would be unenforceable as to the minor, and the minor could later bring suit for his or her injuries; however, the minor would be unable to recover for medical expenses as that part of the settlement would be enforceable against the parents, assuming they signed the agreement.[32]

Alternatively, parents may assign their cause of action to their minor child.[33] The minor would then need to prove the parents had a cause of action, and the minor child cannot recover if the parents could not.[34] The minor is also subject to any defense that could have been raised against the parents, for example, failing to plead and prove the parents were free from contributory negligence.[35]

Statute of Limitations For Minor's Claims

For personal injury cases involving minors and certain other causes of action, a minor is not subject to the typical two-year statute of limitations.[36] Instead, a minor may still bring his or her action within two years after reaching the age of eighteen, as long as the cause of action accrued while he or she was a minor.[37] However, for an "action for damages for injury or death against any physician, dentist, registered nurse or hospital," if the cause of action accrued while the client was a minor, the statute of limitations is eight years after the cause of action accrued.[38] In no event, though, may this type of action be brought past the client's 22nd birthday.[39]

The limitations period for a claim arising out of the Family Medical Expense Act is derivative of the underlying cause of action.[40] Thus, where the limitations period for the original injury is tolled or extended, as mentioned above, so too is the limitations period under the Act tolled or extended to coincide with that of the original injury.[41]

When to get a Guardian *Ad Litem* Involved

The most common situation when a guardian *ad litem* (or "GAL") is required in order to represent the interests of a minor is when no guardian or next friend appears on behalf of the minor. In this situation, it is the duty of the court to appoint a GAL and the failure to do so is considered reversible error.[42] However, where a next friend or guardian appears on behalf of a minor, and the court determines that the minor's interests are adequately represented, it is not necessary for the court to appoint a GAL.[43]

A party may petition the court to have a GAL appointed to represent the minor's interests during the pendency of the case.[44] The court may also appoint a GAL on its own motion, and it has broad discretion to do so when it finds it to be in the best interests of the minor,[45] or whenever the court is concerned that the minor's interests are not adequately represented.[46] Thus, a court will appoint a GAL when the interests of the minor and next friend are different,[47] adverse,[48] or conflicting.[49] Additionally, a court will appoint a GAL to review and complete a settlement offer that is in the best interests of the minor, if the next friend rejects such an offer or refuses to follow through on it.[50] In practice, many circuit courts will appoint a GAL to review a petition to settle a minor's cause of action, although the decision to do so is discretionary.

Is Filing a Probate Action Required?

While a next friend can hire an attorney and file suit on behalf of a minor, they have no legal right to settle a minor's cause of action without court approval.[51] Any proposed settlement agreement must be reviewed and approved by the court.[52] Therefore, if a settlement is reached before a case is filed, a probate case generally needs to be opened so the court can review and approve the settlement.[53] Local court rules will outline the procedure for obtaining court approval. These procedures may include filing an affidavit stating the settlement is reasonable, and a statement of the attending physician describing the nature and extent of the minor's injury and current medical condition.[54] As with all other determinations affecting a minor, the court will only approve a settlement that is in the best interests of the minor.[55] The consequence of failing to seek or obtain court approval is that the settlement may be deemed unenforceable.[56]

It is important to know the local court rules where an action is filed to determine the proper procedures for filing, settling, and collecting proceeds in minors' cases. Depending on the local court rules, if a minor is entitled to proceeds, either as a result of a judgment or settlement, it may be necessary to initiate probate proceedings and have a personal representative appointed to administer the minor's estate. While these rules vary from circuit to circuit, the degree of the court's involvement typically is less if the minor's estate does not exceed $10,000. This amount indicates the cutoff for a small estate under the Probate Act of 1975 ("Probate Act") where the appointment of a representative is unnecessary for the disposition of property.[57] For any settlement, though, regardless of whether it is necessary to file a probate case, the minor's representative must obtain leave of court, approving the settlement, for the settlement to be enforceable.[58] Also, for a settlement to be enforceable, settlement approval must comply with the procedures

outlined in the local court rules.[59] Further, if the value of the minor's estate is or becomes less than the small estate amount specified in Section 25-2 of the Probate Act ($10,000 currently), then some local rules allow the court to be petitioned to request that the estate be distributed without further administration.[60]

Conclusion

Cases involving minors can involve complexities unlike those of adults. Understanding the various local rules, probate laws, and cases providing guidance about attorney's fees, statutes of limitations and settlements can help to avoid pitfalls, and prevent prolonging results for clients. Having a bench memo handy on these topics can often assist judges, other lawyers, and insurance adjusters who may not be aware of the rules governing minor's cases.

Endnotes

1 "A minor is a person who has not attained the age of 18 years." 755 ILCS 5/11-1.

2 *Ott by Ott v. Little Co. of Mary Hosp.*, 273 Ill.App.3d 563, 570–71 (1st Dist. 1995).

3 *Id.*

4 *Stevenson v. Hawthorne Elementary School, East St. Louis School Dist. No. 189*, 144 Ill.2d.294, 300 (1991); *Skaggs v. Industrial Com.*, 371 Ill. 535, 542 (1939).

5 *Skaggs*, 371 Ill. at 542.

6 *Stevenson*, 144 Ill.2d.at 300.

7 *Id.*, at 301.

8 *Id.*, at 301-302.

9 755 ILCS 5/11a-18(c).

10 *Stevenson*, 144 Ill.2d.at 304.

11 *Sunderland v. Portes*, 324 Ill.App.3d 105, 112 (2d Dist. 2001).

12 *Sunderland*, 324 Ill.App.3d at 112.

13 *Id.*, at 108, 111–12.

14 *Id.*, at 301.

15 *In re Chicago, Rock Island & Pac. Ry.*, 788 F.2d 1280, 1282 (7th Cir. Ill. 1986).

16 *Leonard C. Arnold, Ltd. v. Northern Trust Co.*, 116 Ill.2d.157, 163 (1987).

17 *Id.*, at 163–64.

18 *Id.*, at 164.

19 *Id.*

20 *Id.*

21 *Id.*, at 165.

22 *Id.*

23 *Id.*, at 164, 166.

24 755 ILCS 5/11-13(d).

25 *Leonard*, 116 Ill.2d.at 165–66.

26 *Id.*, at 164.

27 *Id.*, at 167.

28 *Id.*, at 168–69.

29 *Id.*, at 169–70.

30 750 ILCS 65/15; *Estate of Hammond v. Aetna Casualty*, 141 Ill.App.3d 963, 965 (1st Dist. 1986) (citing *Graul v. Adrian*, 32 Ill.2d.345, 347 (1965)).

31 *Id.* (citing *Bibby v. Meyer*, 60 Ill. App.2d 156, 163 (1965)).

32 *Bibby*, 60 Ill.App.2d at 162–63.

33 *Kennedy v. Kiss*, 89 Ill.App.3d 890, 895 (1st Dist. 1980).

34 *Id.*

35 *Id.*

36 735 ILCS 5/13-211.

37 *Id.*

38 735 ILCS 5/13-212(b).

39 *Id.*

40 735 ILCS 5/13-203; *Pirrello v. Maryville Acad., Inc.*, 2014 IL App (1st) 133964, ¶ 13 (1st Dist. 2014).

41 735 ILCS 5/13-203; *Pirrello*, 2014 IL App (1st) 133964, ¶ 13.

42 *Skaggs v. Industrial Com.*, 371 Ill. 535, 542 (1939).

43 *Stevenson v. Hawthorne Elementary School, East St. Louis School Dist. No. 189*, 144 Ill.2d.294, 304 (1991).

44 755 ILCS 5/11-5(a).

45 *Id.*

46 *Id.*; *Stevenson*, 144 Ill. 2d at 302.

47 *Skaggs*, 371 Ill. at 541–42.

48 *Kroot v. Liberty Bank of Chicago*, 307 Ill.App.209, 214 (1st Dist. 1940).

49 *Aetna Life Ins. Co. v. Strickland*, 33 Ill.App.3d 52, 58 (1st Dist. 1975); *In re Estate of Viehman*, 47 Ill.App.2d 138, 149 (5th Dist. 1964).

50 *Will v. Northwestern Univ.*, 378 Ill. App.3d 280, 294 (1st Dist. 2007); *Ott by Ott v. Little Co. of Mary Hosp.*, 273 Ill. App.3d 563, 571 (1st Dist. 1995).

51 *Mastroianni v. Curtis*, 78 Ill.App.3d 97, 100 (1st Dist. 1979).

52 755 ILCS 5/19-8; *Ott by Ott v. Little Co. of Mary Hosp.*, 273 Ill.App.3d 563, 571 (1st Dist. 1995).

53 *Mastroianni*, 78 Ill.App.3d at 101.

54 *See, e.g.*, 6th J. Cir. Ct. R. 8.9.

55 *Ott*, 273 Ill.App.3d at 573.

56 *Wreglesworth v. Arctco, Inc.*, 316 Ill. App.3d 1023, 1028 (1st Dist. 2000).

57 755 ILCS 5/25-2.

58 755 ILCS 5/19-8; *Ott*, 273 Ill. App.3d at 571.

59 *Glavinskas v. William L. Dawson Nursing Ctr., Inc.*, 392 Ill.App.3d 347, 353 (1st Dist. 2008).

60 6th J. Cir. Ct. R. 8.3(c).

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