August 2014 Vol. 60, No. 2

ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Clear warning for attorneys in wrongful death cases

By Mark Rouleau, Rockford, © all rights reserved

In *Estate Of Powell v. John C. Wunsch, P.C.,* 2014 IL 115997, the Illinois Supreme Court was faced with a case that will be of great interest to all tort practitioners. The Court was asked to decide the nature and extent of a duty that attorney who brings a wrongful death action owes to the decedent's beneficiaries, pronouncing that "that an attorney who brings a wrongful death action owes a legal duty to the decedent's beneficiaries at the distribution of funds phase of the action."

This case stands as a clear lesson for all plaintiffs' counsel that they must seek to probate the portions of settlements that are allocated to minors and incompetents that exceed $5,000. The decision leaves many other issues unanswered and appears to muddy the waters in these actions more than it elucidates.

A disabled adult child brought a legal malpractice claim against the attorneys who prosecuted a wrongful death, survival and family expense action. The defendant attorneys asserted that a lawyer only owes a duty to the named personal representative of the estate and not the beneficiaries of such an action. The claim alleged a breach of duty by the attorneys to the next of kin as third party beneficiaries of the legal representation.

Prior to the wrongful death action, the child next of kin who brought the legal malpractice claim was adjudicated a disabled adult. His parents were appointed to serve as co-guardians of his person *but not as guardians of his estate*. As a result of alleged medical malpractice, his father died leaving two children and his wife as survivors.

The wife of the deceased (and mother of the disabled son) contracted with attorneys to press claims against the doctors and hospital

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Two cases illustrate *res judicata's* broad reach

By Robert T. Park, Califf & Harper, P.C., Moline, and Christopher M. Sorenson, University of Iowa Law Student

The Illinois Appellate Court recently decided two cases illustrating the scope of the doctrine of *res judicata*. While collateral estoppel (issue preclusion) applies only to questions actually litigated, *res judicata* (claim preclusion) includes both actual and potential claims.

In *Semb's, Inc. v. Gaming & Entertainment Management-Illinois, LLC*, 2014 IL App (3d) 130111, the court found the doctrine of *res judicata* barred an action brought by a restaurant, Semb's, Inc., d/b/a Da Lee's Fine Dining (Da Lee's), against a video game terminal (VGT) distributor, Gaming & Entertainment Management-Illinois, LLC (GEM).

Da Lee's entered into a contract with Metro Amusements, Inc. (Metro), a VGT distributor (the Metro Agreement), which gave Metro the exclusive right to place VGT's in plaintiff's restaurant. Another company, Best Gaming, LLC (Best), purchased Metro and then assigned its exclusive placement rights to a licensed VGT operator, GEM. In the meantime, Da Lee's entered into a second exclusive VGT-placement contract with Triple 7 Illinois, LLC (Triple 7), allegedly based

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Clear warning for attorneys in wrongful death cases

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that treated her husband. The disabled son's mother was appointed special administrator of the father's estate to pursue the wrongful death claims.

The father had died intestate leaving the claims as the only assets of his estate. Eventually two settlements were reached; the first was for $15,000, which was distributed equally between the two children and their mother with each receiving $5,000. With respect to the second settlement, the daughter waived her right to recovery and the mother (spouse of the deceased) and the disabled adult son each received about $118,000. A check made payable to both the mother and the disabled adult son was given to mother, who placed both her share of the settlement and her adult son's share into a joint account.

The settlement order did not require that the amount distributable to the disabled adult son would be administered and distributed under the supervision of the probate court, and the disabled adult son did not have a guardian of his estate appointed to receive his share. It was alleged that the attorney who brought the wrongful death, survival and family expense claims advised the wife/mother and daughter that it was "too much trouble" to go through the probate court to distribute the settlement because every time that the mother needed money for her disabled adult son's needs she would have to ask the court to release the funds.

Around three years later the daughter became concerned about the hygiene and well being of her brother and petitioned the probate court to remove her mother as guardian of her brother. The court granted the petition and appointed the sister the plenary guardian of her brother's person and the public guardian the plenary guardian of his estate.

The assets in the joint account were frozen, and it was discovered that the mother had withdrawn all but approximately $26,000 from the account. The wife/mother never provided an accounting of the expenditures.

The public guardian brought the legal malpractice action for the disabled adult. The complaint alleged two causes of action against the attorneys for professional negligence (legal malpractice) regarding each of the settlements and against the disabled adults mother for fraud, breach of fiduciary duty and unjust enrichment.

The trial court granted the defendant attorneys' motions to dismiss under §2-615 of the Code of Civil Procedure, finding that the plaintiff failed to sufficiently allege that defendants owed him (the incompetent adult son) a duty and that the complaint failed to allege proximate cause (most likely due to the intervening acts of the mother).

The appellate court reversed the trial court finding that the public guardian had sufficiently alleged a duty on the part of the defendant attorneys to the next of kin. The appellate court found that the public guardian failed to allege sufficient proximate cause for the cause of action involving the first settlement because 740 ILCS 180/2.1 only requires the probate court's supervision where the amount distributable to a minor or person under legal disability exceeds $5,000. (Note the apparent conflict with 755 ILCS 5/25-2, which allows for settlement or payment of debts to parents or persons having responsibility for the person under legal disability, where an affidavit is presented showing that the minor or incompetent's personal estate does not exceed $10,000).

After discussing the law regarding §2-615 motions to dismiss and the elements of a legal malpractice claim, the Court expressed the general rule regarding an attorney's duty to his client and potential third party beneficiaries. The court stated that generally "attorney is liable only to his client, not to third persons. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 19 (1982). However, if a nonclient is an intended third-party beneficiary of the relationship between the client and the attorney, the attorney's duty to the client may extend to the nonclient as well. *Id*. at 20-21.

The key consideration is whether the attorney is acting at the direction of or on behalf of the client to benefit or influence a third party. *Id*. at 21. The court in *Pelham* concluded that "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Id*. This is referred to as the "intent to directly benefit" test. *Id*. at 23." (2014 IL 115997 ¶14).

This holding should come as no surprise

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Published at least four times per year.

Annual subscription rate for ISBA members: $25.

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> … an administrator of an estate stands in a fiduciary relationship to the beneficiaries under the Wrongful Death Act and therefore is obligated to act in good faith to protect their interests. (*Johnson v. Village of Libertyville*, 150 Ill.App.3d 971, 974, 104 Ill.Dec. 211, 214, 502 N.E.2d 474, 477 (1986)). Similarly, an attorney who represents an administrator stands in a fiduciary relationship to the beneficiaries. (*In re Estate of Halas*,159 Ill.App.3d 818, 825, 111 Ill.Dec. 639, 643, 512 N.E.2d 1276, 1280 (1987).) If an attorney acts in bad faith and against the interest of the beneficiaries of the estate, attorney fees may be denied. *Halas*, 159 Ill.App.3d 831, 111 Ill.Dec. at 643, 512 N.E.2d 1284.

Szymakowski v. Szymakowski, 185 Ill. App.3d 746, 542 N.E.2d 372 (1st Dist. 1989), *appeal denied,* 127 Ill.2d 642.

Hence if an attorney knows that the unprobated funds may be misapplied the attorney could be found to have acted in bad faith and be denied their attorney fees in the wrongful death action or perhaps have them disgorged at a later time.

In *Sullivan v. OHIC*, 2014 IL App (1st) 111125-U,[1] the appellate court, without expressing any opinion regarding the merits, limited the jurisdiction of the trial court to review the attorneys' fee portion of a minor's settlement (of an assigned bad faith claim against an insurance company regarding its liability for an excess verdict) to the term of court or within 30 days of dismissal, even though the only probate hearing approving the settlement and distribution of funds was in the Ogle County Circuit Court where the underlying judgment was entered. In *Sullivan* the new counsel for the minor and minor's parents filed a filed a motion seeking review of a settlement pursuant to Cook County Circuit Court Rule 6.4.[2] See also *Fleischman v. Law Office of Paul* Stanton (unpublished, Cal. App. 2014), and 93 Ill Atty.Reg. & Disc.Comm. CH 188.

The Supreme Court explained that the Wrongful Death Act creates a cause of action for pecuniary losses suffered by the surviving spouse and next of kin (740 ILCS 180/1 *et seq.*), and that the amount recovered is for the "exclusive benefit of the surviving spouse and next of kin" of the deceased. (740 ILCS 180/2).

The Court expressly noted that section 2 of the act requires the distribution of the proceeds to be dispersed "to each of the surviving spouse and next of kin of such deceased person" based upon their degree of dependency as determined by the court. (740 ILCS 180/2). The Court further noted that Section 2.1 of the Act requires that "if proceeds in excess of $5,000 are distributable to a minor or person under legal disability," the balance of such proceeds after expenses "shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division." (740 ILCS 180/2.1).

Citing to its prior decisions in *DeLuna v. Burciaga*, 223 Ill.2d 49 (2006), and *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, the *Powell* Court said:

> the underlying purpose of a wrongful death action is to compensate those beneficiaries named in the action rather than the decedent's estate. Therefore, the primary purpose and intent of an attorney-client relationship between the personal representative of the deceased and the attorney who brings a wrongful death action is to benefit the decedent's beneficiaries . . . [t]he assertion that an attorney's duty only extends to the personal representative is at odds with the very purpose of the Act.

2014 IL 115997 at ¶20.

The defendants raised the potential for a conflict of interest amongst the beneficiaries at the distribution phase of the case. The Court found that no actual conflict had been asserted and stated "[t]herefore, we make no determination as to the scope of an attorney's duty in a wrongful death action when a conflict among the beneficiaries is specifically alleged."

The Court went on to say "we do not view the beneficiaries in a wrongful death action the same as individual beneficiaries of a decedent's estate, where a potential conflict of interest may arise between the estate's interest and the interest of each of the beneficiaries of the estate." Citing *Szymakowski v. Szymakowski*, 185 Ill.App.3d 746, 542 N.E.2d 372 at 375, (1st Dist. 1989).

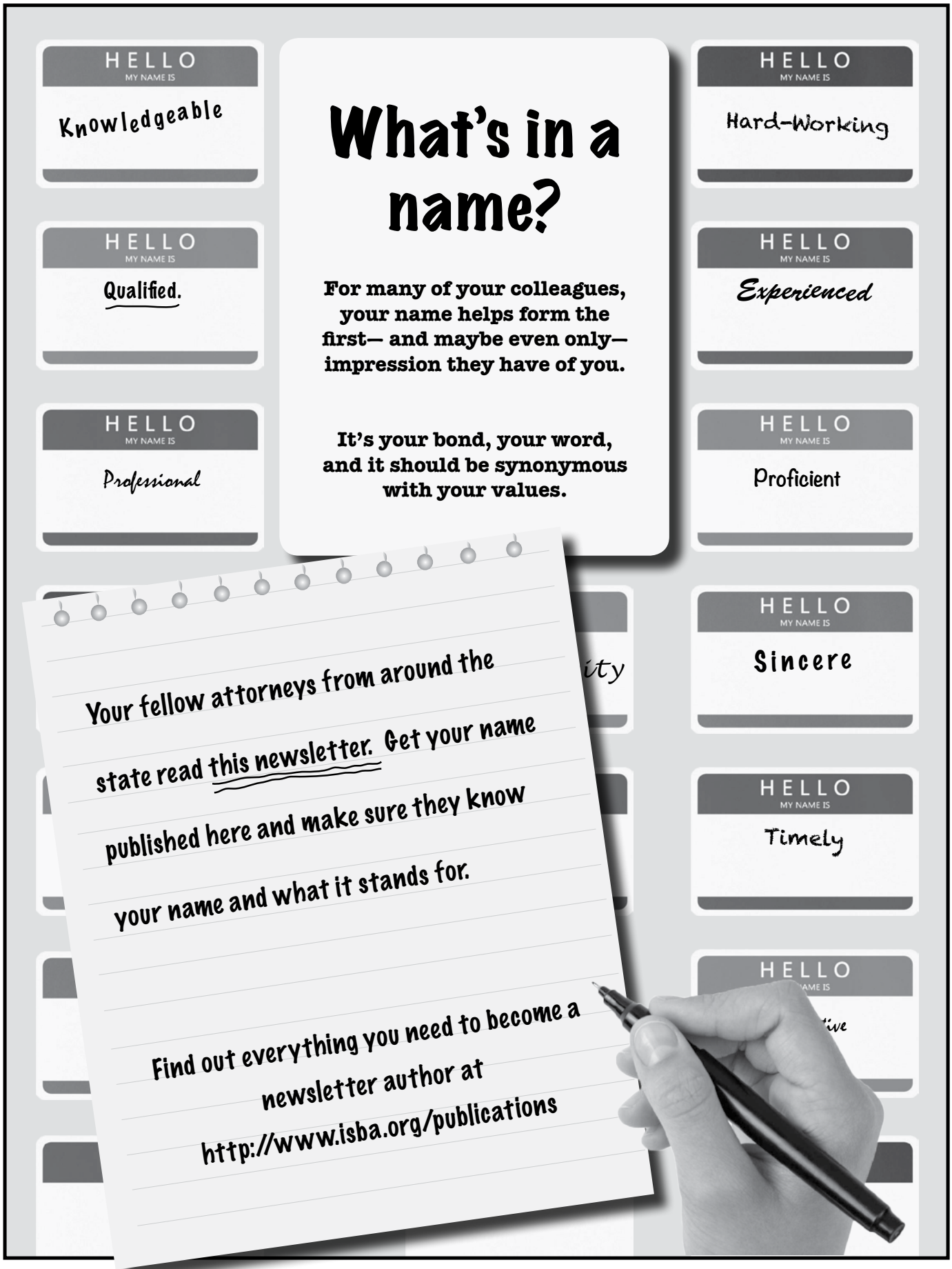
It has long been the law that the mere fact that an administrator may have a personal interest in the outcome of a wrongful death action is not by itself so conflicting or so adverse to the interest of the other beneficiaries that the administrator cannot protect both interests. *Johnson v. Village of Libertyville,* 150 Ill.App.3d 971, 104 Ill.Dec. 211, 502 N.E.2d 474 (1986). It is clear that at an evidentiary hearing to determine percentages of dependence for the purpose of distributing the settlement proceeds conflicts can and do arise. See *Johnson v. Provena St. Therese Medical Center*, 334 Ill. App.3d 581, 268 Ill.Dec. 312, 778 N.E.2d 298 (2002).

After determining that plaintiff's counsel owed the incompetent adult next of kin a duty, the Court considered the issue of proximate cause, finding that, where the amount to be distributed to the minor or incompetent does not exceed $5,000, the plaintiff guardian could not establish proximate cause between the loss of funds and the attorney's negligence.

The Supreme Court upheld the decision of the Appellate Court allowing the public guardian to proceed against the attorneys who brought the wrongful death action for the settlement in excess of $5,000, which was not subjected to the probate court's supervision on behalf of the incompetent adult. (Note Cook County Circuit Court Rule 6.4 Disposition of Pending Cases of Minors or Disabled Persons allows for distribution of funds not exceeding $10,000 to a parent or person standing *in loco parentis* to the minor or to the spouse or relative having the responsibility of the support of the disabled person in accordance with the provisions of 755 ILCS 5/25-2.)

Many skilled practitioners may see the Supreme Court's approach as unusual where in these types of cases settlements frequently seek not only to allocate damages between the various next of kin claimants but between the competing types of claims and non-family claimants.

Conflicts of interest arise frequently enough where there is a dispute regarding the distribution of the settlement funds and the potential varying degrees of dependency. (See, for example, *Cushing v. Greyhound Lines, Inc.*, 2013 IL App (1st) 103197, 371 Ill. Dec. 941, 991 N.E.2d 28, husband and minor daughter of deceased, where a guardian ad litem was appointed for the daughter who was a step-child of the husband; *In re Estate of Finley*, 151 Ill.2d 95, 176 Ill.Dec. 1, 601 N.E.2d 699 (1992), parents and children over death of their brother); *Knobloch v. Peoria & Pekin Ry. Co.*, 118 Ill.App.3d 205, 207, 73 Ill.Dec. 834, 454 N.E.2d 1083 (1983), FELA action where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the decedent was survived by a sister and a child born out of wedlock post mortem; *Johnson v. Village of Libertyville*, 150 Ill.App.3d 971, 502 N.E.2d 474 (2nd Dist. 1986), conflict between decedent's surviving spouse and the next of kin; *Estate of Lande,* 209 Ill.App.3d 55, 567 N.E.2d 668 (4th Dist. 1991), parent estranged from minor child not entitled to distribution; *Frederick v. Zeigler Coal Co.*, 56 Ill. App.3d 888, 372 N.E.2d 730 (4th Dist. 1978), conflict between widow and minor children).

In those types of situations, there is a very real possibility of a conflict of interest amongst the next of kin. Additionally, where cases are settled, the parties seek to allocate as much as is reasonably possible to the wrongful death claims as opposed to the "family expense" or "survival claims," in order to maximize the recovery to the family members rather than to "health care services liens" which only attach to claims "secured by or on behalf of the injured person." See 770 ILCS 23/20, Items to which lien attaches.

See also *Caterpillar, Inc. v. Wilhelm*, 824 F.Supp.2d 828 (C.D. Ill. 2009), finding that ERISA plan had no right to recover under Illinois wrongful death statute and insurance subrogation which is a contractual claim with the deceased (see, *Matter of Schmidt's Estate*, 79 Ill.App.3d 456, 34 Ill.Dec. 766, 398 N.E.2d 589 (2nd Dist. 1979), clause allowing subrogation of wrongful death claim held to be a violation of public policy; and *National Bank of Bloomington v. Podgorski*, 57 Ill.App.3d 265, 14 Ill.Dec. 951, 373 N.E.2d 82 (4th Dist. 1978), payment of survivor's benefits under policy.

But see *Thatcher v. Eichelberger*, 102 Ill. App.3d 231, 57 Ill.Dec. 816, 429 N.E.2d 1090 (4th Dist. 1981), and *Glidden v. Farmers Automobile Insurance Association*, 57 Ill.2d 330, 312 N.E.2d 247 (1974), allowing subrogation in wrongful death actions of uninsured motorist payments.

If the allocation of the settlement goes entirely to the wrongful death claim, it passes outside of the estate, and thus is not subject to the claims of creditors of the estate. Furthermore, the claim for wrongful death does not involve any medical expenses.

Note, however, that allocating the entire recovery to the wrongful death claim does not negate a workers' compensation lien on those funds where there were survival or family expense claims. See *Borden v. Servicemaster Management Services*, 278 Ill.App.3d 924, 215 Ill.Dec. 403, 663 N.E.2d 15 (1st Dist. 1996).

Furthermore, note that in this specific case the settlement was allocated not only between competing types of claims but also between defendants, as one of the defendants settled early on, resulting in the initial $5,000 distribution to the incompetent adult. Why the total settlement was not viewed as a single entity is very strange in light of the many decisions holding that a wrongful death claim is a single cause of action for which a single recovery may be had. See, *Pasquale v. Speed Products Engineering*, 166 Ill.2d 337, 654 N.E.2d 1365 (1995) ("the single-action requirement meant that the beneficiaries possessed but a single, indivisible right to recover.")

Likewise, if the duty of the attorney arose simply fact that the attorney owes a duty to each and every next of kin (other than to maximize the recovery which is a general obligation to all next of kin and not a personal obligation to any specific individual), the court's decision finding that the settlement amount distributed for $5,000 or less need not be probated seems in conflict with the general proposition of a duty to the minor or incompetent next of kin.

The Court found that the duty existed, electing to create a proximate cause escape to that duty based upon the mandatory statutory obligation to probate funds in excess of $5,000. 740 ILCS 180/2.1. The logic of having a lower limit on the requirement to probate settlement or judgment awards is compelling given the administrative nightmare that would exist if all amounts no matter how small were required to be probated. However, the statute does not say that smaller amounts cannot be subject to probate, only that amounts in excess of $5,000 must be probated. In reality the adult incompetent in this case suffered the loss of the funds for less than $5,000 as a result of the failure to probate that settlement.

Furthermore, if a court finds that there is a conflict of interest there becomes a very real issue as to whether the attorney who brought the wrongful death claim is entitled to attorney fees under the doctrine established in *King v. King*, 52 Ill.App.3d 749, 753, 10 Ill.Dec. 592, 594, 367 N.E.2d 1358, 1360 (1977), where it was noted:

> An attorney cannot recover from the party that he has wronged for legal services where he has represented adverse, conflicting, and antagonistic interests in the same litigation. *Strong v. International Investment Union* (1899), 183 Ill. 97, 55 N.E. 675; *Gary v. Beadles* (1916), 202 Ill.App. 58; *Beerly v. William Meyer Co.* (1947), 332 Ill.App. 653, 75 N.E.2d 783 (Abst.).

To make sense of the case, it seems that the duty that is actually imposed by the court upon the attorney retained by the personal representative is the duty created by 740 ILCS 180/2.1. However, that duty seems to extend not only to the plaintiff's attorney but also to the special administrator, the court and potentially any other attorneys involved in the proceedings (guardians ad litem and defense counsel).

This case stands as a clear lesson for all plaintiffs' counsel. However, it should cause consternation for many others involved in the litigation of these claims as well. The case seems to create more unanswered issues than it resolved. If there is a hearing to determine "degrees of dependency" where there is a dispute amongst the next of kin, must the attorney who obtained the settlement withdraw from the proceeding because they had a duty to each of the potential claimants or may they continue to represent the personal representative?

Collateral Attack of Settlements for Minors & Incompetents

There are several lingering and unanswered questions as a result of this decision and the general subject that need to be addressed.

If a Guardian Ad Litem is appointed to represent the minor or incompetent to review the settlement do they have a duty to make sure the funds are probated?

Does the attorney for the defendant (or the defendant) owe a duty to the minor or incompetent not to distribute the minor or incompetent's funds directly to the minor's parent or parent's counsel?

Is the defendant discharged from the claim of the minor or incompetent where the funds going to the minor or incompetent are not probated or can the minor or incompetent bring a successive action for those funds?

It is unlikely that defense counsel or the defendant owe a duty to the minor or incompetent regarding the handling of the settlement funds. However, if they fail to obtain the order of a probate court approving the settlement, they are still responsible to the minor or incompetent for the liability on the

initial tort claim as the release or settlement are ineffective. See, *Pruitt v. Jockisch*, 169 Ill. Dec. 438, 228 Ill.App.3d 295, 591 N.E.2d 942 (4th Dist. 1992), *appeal denied* 146 Ill.2d 651, where mother of deceased who was appointed special administrator without notice to other potential claimants executed settlement which was held to be void as against father who did not receive notice; *Villalobos v. Cicero School District 99*, 362 Ill.App.3d 704, 711, 298 Ill.Dec. 944, 841 N.E.2d 87 (2005), failure to comply with court's local rules regarding settlements of minors and disabled persons; *Glavinskas v. Dawson Nursing Center,* 392 Ill. App.3d 347, 332 Ill.Dec. 188, 912 N.E.2d 675, (2008).

See also Wreglesworth v. Arctco, Inc., 316 Ill. App.3d 1023, 1026-27 (1st Dist. 2000), "any settlement of a minor's claim is unenforceable unless and until there has been approval by the probate court;" *Villalobos v. Cicero School District 99*, 362 Ill.App.3d 704, 712 (1st Dist. 2005), and *Smith v. Smith*, 358 Ill.App.3d 790, 793 (4th Dist. 2005), mother's settlement with her own automobile liability insurer on behalf of her minor daughter did not bar daughter's personal injury claim against mother where there was no record that a trial court approved terms of settlement.

Glavinskas, supra, also made it clear that the Probate Court does not have to rubber stamp another court's approval. It would seem that where there is an incompetent or a minor, the defendant must insist on obtaining approval of the court (acting in its probate capacity or by the probate division) to ensure that any settlement with stand collateral attack.

Contractual Third Party Beneficiary – Next of Kin

Although the case was not decided upon a contract theory involving the third party beneficiary doctrine, the court held that the plaintiff's attorney in a wrongful death action owes a fiduciary duty to the next of kin as an intended beneficiaries.

The third party beneficiary doctrine arises most frequently in cases against attorneys in the estate-planning context. See *Pelham v. Griesheimer*, 92 Ill.2d 13, 22, 64 Ill.Dec. 544, 440 N.E.2d 96 (1982); *Ogle v. Fuiten*, 102 Ill.2d 356, 466 N.E.2d 224 (1984).

The exposure of an attorney drafting of wills or other estate planning documents must be distinguished from the role of an attorney hired by the executor of an estate, where the attorney's primary duty "is not to benefit the beneficiaries; rather, his duty is to the executor so that the executor can fulfill his duties as required by law. *Rutkoski v. Hollis* (1992), 235 Ill.App.3d 744, 175 Ill.Dec. 826, 600 N.E.2d 1284." *Jewish Hospital of St. Louis, Missouri v. Boatmen's Nat. Bank of Belleville*, 261 Ill.App.3d 750, 633 N.E.2d 1267 (5th Dist. 1994).

"Our supreme court has strongly embraced the concept that third-party-beneficiary status should be easier to establish when the scope of the attorney's representation involves matters that are non-adversarial, such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial". *Id.*, 261 Ill.App.3d at 761.

In the case of whether to probate the wrongful death beneficiary's funds or to allow a parent or guardian of the person only to administer those funds for the benefit of the minor or incompetent, there is no conflict as the purpose of either is to make sure that the funds are used for the benefit of the minor or incompetent.

Additional Uncompensated Labor – Probating Estates for Free

Contingent fee contracts provide for a fee based upon the recovery from a tortfeasor who caused damages to the attorney's client. The courts and the legislature have placed many uncompensated mandates upon plaintiff's counsel who work on a contingent basis, including resolution of third party statutory or contractual claims against the victim of the tort. These claims include statutory liens (*i.e.,* medical provider liens) and third party subrogation claims usually based in contract with insurers and health plans.

The attorney is both representing the client in a tort cause of action against the person who injured the client and in separate causes of action arising in contract for debts that the client owes to third parties. Other than the value of potential attorney's time in dealing with these third party claims, the only additional expenses are related to the probate proceeding are filing fees and guardian ad litem fees, which would generally be paid out of the estate for the minor or incompetent.

Frequently lawyers are called upon to dispose of third party claims that relate to settlement or judgment funds as part of the complete and total resolution of the underlying tort claim, such as liens and subrogation interests. This process has become far more complicated over time and often consumes as much time as resolving smaller underlying claims.

Similarly hearings to determine degrees of dependency to apportion wrongful death settlements and probating funds of minors and incompetents consumes more attorney time over and above the representation against the tortfeasor.

Another reason that some one might seek to avoid probating a settlement of a minor or incompetent's claim is to avoid the scrutiny or limitations that some courts impose on attorney fees. (See, for example, Cook Circuit Court Rule 6.4; 19th Judicial Circuit Rule 14.23; and 18th Judicial Circuit Clerk Rule 10.01(e). See also *Leonard C. Arnold, Ltd. v. Northern Trust Co. of Chicago*, 93 Ill.Dec. 843, 139 Ill.App.3d 683, 487 N.E.2d 668 (2nd Dist. 1985), *aff'd in part, rev'd in part*, 116 Ill.2d 157, 107 Ill.Dec. 224, 506 N.E.2d 1279, holding valid a local court rule limiting attorney fees incurred in settlement of actions for injuries of a minor to 25%, unless the court finds that to be inadequate compensation.

However, the decision in *Sullivan v. OHIC*, 2014 IL App (1st) 111125-U, may offer a choice of forum shopping regarding local rules where plaintiff's counsel properly opens the probate proceeding in the county where the minor resides (755 ILCS 5/11-6) and that county does not have such rules limiting fees while litigating the action in another county.[3]

Arguably where an attorney is required to probate a wrongful death settlement, an attorney could petition the court for the fees and costs associated with the separate probate action. See *Estate of Byrd*, 227 Ill.App.3d 632, 169 Ill.Dec. 772, 592 N.E.2d 259 (1st Dist. 1992), where the attorneys hired by the daughter of an incompetent were entitled to attorney fees as representatives of the estate; and *Sherwood's Estate*, 56 Ill.App.2d 334, 206 N.E.2d 304 (1965), where both the attorney's fees, incurred in prosecution and defense of incompetency proceedings, where the petition is brought in good faith constituted "necessaries" of the incompetent, which the court may assess to be paid from the incompetent's estate.

The question of appropriate amount fees allowed from the estate of an incompetent is properly one for the court. *In re Brandt's Estate*, 109 Ill.App.2d 172, 249 N.E.2d 876 (1969). However, it unlikely that although

there is additional work involved in probating claims where distributions are going to minors or incompetents most courts will simply take the position that such work is part and parcel of handling wrongful death or tort claims of such persons, perhaps this may be a justification not to reduce the negotiated fee to a lesser amount.

Duty to Seek Appointment of GAL

Although it is likely in the best interest of both the defendants and all the plaintiffs that any minor or incompetent have a guardian ad litem appointed for them it seems that only the court has a duty to protect the interests of a minor or incompetent. See *Gage v. Schroder*, 73 Ill. 44 (1874); *Campbell v. Campbell*, 63 Ill. 462 (1872); *Kessler v. Penninger*, 59 Ill. 134 (1871); *Quigley v. Roberts*, 44 Ill. 503 (1867); *Peak v. Shasted*, 21 Ill. 137 (1859); and *Roth v. Roth,* 52 Ill.App.3d 220, 10 Ill.Dec. 54, 367 N.E.2d 442 (1st Dist. 1977).

> While it is generally true that the failure to appoint a guardian ad litem is not reversible error when a minor is represented by a next friend (*Morgan v. Hamlet*, 345 Ill.App. 107, 109, 102 N.E.2d 365 (1951)), we hold that such is not the case when, as here, the next friends abandoned their obligation to protect the minors' interests. . . . Thus, when a court has notice that a minor is present without proper representation, the court has a duty to appoint a guardian ad litem to protect the minor's interests. *McDonald v. McGowan*, 163 Ill.App.3d 697, 699, 114 Ill.Dec. 779, 516 N.E.2d 934 (1987). Once the court has done so, the court must monitor the guardian ad litem to make sure that he or she is properly protecting the minor's interests. *Skaggs v. Industrial Comm'n*, 371 Ill. 535, 542, 21 N.E.2d 731 (1939)."

Sunderland ex rel. Poell v. Portes, 324 Ill. App.3d 105, 753 N.E.2d 1251 (2nd Dist. 2001).

However a guardian ad litem is not mandatory to appoint one in every case. *In re Marriage of Koenig*, 211 Ill.App.3d 1045, 156 Ill.Dec. 385, 570 N.E.2d 861 (1st Dist. 1991).

In the case of an adult whose competency has not been adjudicated, a trial court has no obligation to appoint guardian ad litem or conduct competency hearing unless there is an allegation of insanity or legal incompetence. *Curry v. Curry*, 31 Ill.App.3d 972, 334 N.E.2d 742 (4th Dist. 1975).

When it has been brought to the attention of court that an insane person is present without representation, the court has duty to appoint representative, however such appointment does not relieve court of its obligation to ensure that rights of such person are protected. *Kirkland v. Kirkland*, 38 Ill. App.2d 280, 186 N.E.2d 794 (1962).

Conclusion & Lessons Learned

It seems that the public guardian may have simply selected the target of opportunity where he chose not to seek to assert a new wrongful death claim on behalf of the incompetent adult where there was no guardian of his estate appointed to receive notice on his behalf regarding the appointment of the special administrator, or in seeking approval in the probate division of the settlement terms and distribution where it is likely that the payment by the defendant to the plaintiff's counsel and special administrator was void, as against an adjudicated disabled adult. (See *Meyer v. First American Title Ins. Agency of Mohave, Inc.*, 285 Ill.App.3d 330, 674 N.E.2d 496 (2nd Dist. 1996), stating that payment to a third party not in privity with the original judgment holder does not protect the judgment creditor from paying the judgment to a proper successor in interest. Citing to 49 C.J.S. Judgments § 523, at 975 (1947)).

Given this decision, everyone involved in a wrongful death case involving minors or mentally disabled adults must seek to probate settlements or judgments where a distribution to the minor or incompetent exceeds $5,000. ■

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1. Two notable differences exist between the decision in *Estate of Powell* and *Sullivan v. OHIC*: (1) in *Powell* no probate was ever opened to approve the settlement and distribution, whereas in *Sullivan* the settlement was approved by a probate court in a different circuit court in Illinois; and (2) *Powell* was brought as a malpractice action for failing to seek probate approval and disbursement of funds, whereas in *Sullivan* the minor sought to reopen a closed case in order to have it reviewed under Cook County Local Rules.

2. It is unknown to the author whether a petition for leave to appeal has been granted on this case. Given that this decision only eight days after the Supreme Court decision in *Estate of Powell,* the concept is likely to enjoy new life, perhaps under the §2-1401 petition in that case; however, it will face the *res judicata,* collateral estoppel and comity effects of the Ogle County Probate Court approval of the case.

3. There is a clear conflict between local circuit rules requiring probating of minors estates in the county where the action is venued when the minor resides in another county. 755 ILCS 5/11-6.

Two cases illustrate *res judicata's* broad reach

Continued from page 1

on its understanding that the Metro Agreement was invalid because the Illinois Gaming Board (IGB) had denied Best's application for a license to place VGTs.

Triple 7 filed a complaint against GEM, the assignee of the Metro Agreement, requesting the court declare the Metro Agreement invalid. Granting GEM's motion to dismiss, the court ruled that the Metro Agreement was not a "use agreement" under the Video Game Act and therefore did not require either Best or GEM to hold a valid license from the IGB. The appellate court affirmed that dismissal.

While the Triple 7 case was still pending on appeal, Da Lee's filed its own complaint against GEM, Best and Metro, alleging that the Metro Agreement was invalid. Having lost in the trial court, Da Lee's appealed, contending the Metro Agreement was invalid because, *inter alia*, it did not meet the requirements of "use agreement" regulations.

The appellate court rejected Da Lee's argument, holding the Triple 7 case had already found the Metro Agreement was not a "use agreement." The court further held that *res judicata* barred Da Lee's complaint against GEM, Best and Metro that sought to relitigate the validity of the Metro Agreement.

The court found the case met all three requirements for applying *res judicata*. First, a court of competent jurisdiction had rendered a judgment on the merits. When affirmed on appeal, the Triple 7 decision upholding the Metro Agreement was final and binding. Second, because both Triple 7 and Da Lee's complaints sought to invalidate the Metro Agreement, the causes of action were essentially identical. Third, since the Triple 7 decision affected Da Lee's interests, Triple 7 and Da Lee's were in privity as to the two actions.

Applying the waiver rule, the court refused to address Da Lee's argument that the Metro agreement was void because it was an illegal contract for gaming, since Da Lee's first raised that issue on appeal.

The *Semb's* court emphasized that *res judicata* bars not only what the court in the Triple 7 action actually decided but also any issue that could have been decided in that earlier case.

In the second decision, *Wanandi v. Black*, 2014 IL App (2d) 130948, the court found that a previous Kentucky judgment barred an employer's action against a former employee because the subject claim had been a compulsory counterclaim in the Kentucky litigation.

The former employee, Bruce Black, sued Trailmobile Parts and Services Corporation (TPS), of which Edward Wanandi was the sole shareholder, in Kentucky, seeking compensation TPS had promised him in a written contract (the 2006 Agreement). Under the 2006 Agreement, Black had the right to receive $1.6 million upon either the sale of the TPS parent or termination of Black's employment for reasons other than gross negligence or a felony conviction.

By its terms, the signed 2006 Agreement was to remain in effect through 2010. In October 2008, Wanandi terminated Black's employment with the TPS parent. Black then brought the Kentucky suit alleging his firing triggered his contractual right to compensation. A jury found that the employer had breached the 2006 Agreement, awarding Black $1.6 million plus punitive damages.

Thereafter, in 2012, Wanandi filed his Illinois complaint against Black, alleging that Black had promised to remain employed by TPS after Wanandi sold TPS's parent company. Wanandi alleged Black had repudiated the promise, demanding a $1.6 million bonus to stay on. Because Black would not stay on without the bonus, a potential sale fell through, resulting in a major loss to Wanandi.

Black moved to dismiss Wanandi's complaint, asserting that the prior Kentucky judgment barred Wanandi's Illinois claim because it was a mandatory counterclaim that had to be brought in the Kentucky case.

Wanandi responded by asserting that the Kentucky judgment was not yet final and did not arise from the same core of facts. Instead, Wanandi asserted that the Kentucky litigation revolved around existence of the 2006 Agreement, while the issue in the Illinois case was whether Black had promised to stay on after a sale.

The court rejected Wanandi's argument, holding that the existence of Black's right to $1.6 million was the heart of both cases. Likewise, because the two cases came from the same nucleus of facts, the doctrine of *res judicata* applied to bar Wanandi's Illinois action. The court reasoned that a judgment on a claim, under Kentucky law, was *res judicata* not only as to the claim itself but also as to all compulsory counterclaims, *i.e.,* all counterclaims arising out of the same transaction or occurrence as the complaint. Ky. R. Civ. P. 13.01.

In both *Semb's* and *Wanandi*, the Illinois Appellate Court found *res judicata* barred both what had been decided in the previous case, as well as what could have been decided. In *Wanandi*, the court further held that what could have been decided encompassed compulsory counterclaims.

The doctrine of *res judicata* is a powerful tool, and a litigator needs to fully examine its implications on a case-by-case basis.[1] ■

1. Shortly before this article went to press, the Third District of the Illinois Appellate Court decided *Harrison v. Deere and Co.*, 2014 IL App (3d) 130497, also demonstrating that res judicata applies not only to issues that were previously litigated but also those that could have been litigated but were not, so long as they arise from the same operative facts as the earlier litigation. Id., ¶ 46.

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Trial Briefs
Illinois Bar Center
Springfield, Illinois 62701-1779
August 2014
Vol. 60 No. 2

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