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Compromise of Claims Based Upon Personal Injuries to Minors

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COMPROMISE OF CLAIMS BASED UPON PERSONAL INJURIES TO MINORS.—A, aged twelve years, the son of B and C, is struck by an automobile driven by D, sustaining personal injuries which result in the amputation of one of his legs. B, the father, necessarily incurs expenses amounting to $500.00 in having A's injuries properly treated. The accident is alleged to have been caused by D's negligent driving. D is willing to pay a substantial sum in settlement of the claims growing out of the accident in order to avoid litigation, and desires the preparation and execution of proper releases so that he may be fully protected from the prosecution of any claims thereafter. In what way can a valid and binding settlement of the claims be effected, so as to afford complete protection to D? Situations and questions of this character are confronting prac-

ticing lawyers everywhere with increasing frequency, especially since the advent of the automobile. The propositions of law raised are of considerable practical importance, irrespective of what may be said as to their theoretical interest.

The first step, of course, is to ascertain precisely what legal claims against D may have grown out of the accident. Upon analysis, it will be found that, in the case supposed, the injury to A created two separate causes of action against D, namely:—

(1) The right of B, the father, to recover the amount of the expenses incurred by him, and also for the loss of A's services during minority. At common law, of course, the father alone was entitled to his child's services and earnings. In some states, however, of which West Virginia is one[1] statutes have been enacted providing that the mother shall have an equal right with the father to the services and earnings of their children. In such jurisdiction, therefore, there would be two separate causes of action for loss of services in the supposed case—one being vested in B and the other in C.

(2) The right of A to be compensated for his pain and suffering, and his permanent disability.

The settlement and release of the claims of the two parents is, of course, without theoretical difficulty. B and C are both *sui juris*, and therefore capable of entering into binding contracts and releases. It is to be observed, however, that in jurisdictions like West Virginia where the mother is entitled to a portion of her child's services and earnings, both parents must join in the settlement and execute proper releases; if settlement should be made with the father alone, the mother's cause of action would still be alive.

The second cause of action mentioned above—that of A, the minor—is not so easily disposed of. How can D with safety secure a settlement and release of A's claim? It is clear that a release signed by A himself would afford no protection, as A could disaffirm the release when he became of age and could then institute a suit against D notwithstanding his signature to the instrument. Further-

[1] See WEST VIRGINIA CODE, Ch. 82, §7.

more, A would be under no obligation whatsoever to return to D the money which A had been paid for signing the release, unless it should happen that this money was still intact in A's hands. Such was the doctrine pronounced by our own Supreme Court of Appeals[2] following the general rule established in other jurisdictions.

It is equally apparent that B and C, merely in their capacity as parents, have no power or authority to execute a release discharging A's cause of action. A release from the parents would be effective only so far as it discharged their own claims for expenses and loss of services, referred to above. An interesting case upon this question was one where a child was bitten by a dog.[3] The owner of the dog endeavored to effect a settlement for the unfortunate accident by procuring a release signed by the parents only. Later, the child died as a result of its injuries and its administrator instituted suit under a Kentucky statute for the purpose of recovering damages for the child's pain and suffering from the time it received the injury until its death. The Court of Appeals of Kentucky permitted a recovery, holding that the release of the parents could not affect the child's cause of action.

Two further methods of effecting a valid settlement of A's claims may be suggested: (1) A settlement through the form of court procedure generally known as a "friendly suit", and (2) taking a release from the fiduciary in charge of A's estate, commonly known as "legal guardian". These two methods will, for the sake of clearness, be discussed separately below.

The fundamental idea behind the "friendly suit" as a means of perfecting a settlement for personal injuries to minors is that in this way the transaction receives the stamp of the court's approval. In the case supposed, the procedure would probably be substantially as follows: After the amount to be paid by D had been agreed upon, D's counsel would engage some friendly attorney to institute a suit on behalf of A against D. The usual declaration and pleas in personal injury cases would be filed and the action regularly matured and placed on the trial docket. Instead of having a jury trial, however, judgment would be entered

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[2] Britton *v.* South Penn. Oil Co., 78 W. Va. 792, 81 S. E. 525 (1914).
[3] Meyer's Administrator *v.* Zall, 119 Ky. 480, 84 S. W. 543 (1905).

by the court in favor of A for the amount agreed upon, either upon a verdict directed by the court or in the form of a consent judgment, without any verdict at all. It will thus be observed that, in actual practice, the friendly suit usually fails of its fundamental purpose. The hearing of the evidence and the court's approval of the amount of settlement are perfunctory in most cases. It would seem that the employment of a friendly suit in the supposed case would be unsatisfactory to D for several reasons: It involves considerable expense; it requires several months for completion; it subjects D to the danger of having a much larger verdict and judgment entered against him than he had agreed to pay, in the event the evidence should actually be heard at length and the court and jury should refuse to adhere to the agreed settlement; and on the other hand, if the hearing of the evidence and entry of judgment are merely perfunctory, as is usually the case, A will not be bound thereby after he becomes of age. The cases generally show how lightly the courts look upon a judgment rendered in a friendly suit, when there is any showing either that fraud was used in obtaining the judgment, or that the amount of the agreed judgment was so small as to be grossly unfair to the child.[4] The force which it would give to a judgment of this character has apparently never been squarely decided by the Supreme Court of Appeals of West Virginia, but in a somewhat analogous situation,[5] our Appellate Court indicated that it would not give much force to a consent judgment or decree affecting the rights of an infant, when the merits of the case had not been fully considered by the trial court.

The writer conceives that the method of perfecting a settlement through the agency of a friendly suit may be unsatisfactory, not only to the interested parties, but to the court and the public as well. The time and energy of the court and jury should be directed toward the determination of issues upon which parties cannot agree between themselves. The procedure in a common law court is not

[4] Leslie *v.* Proctor & Gamble Co., 102 Kan. 159, 169 Pac. 193, L. R. A. 1918C, 55 (1917); Missouri Pacific Railroad Co. *v.* Lasca, 79 Kan. 318, 99 Pac. 616, 21 L. R. A. (N. S.) 338 (1909); Carroll *v.* Atlantic Steel Co., 151 Ga. 378, 106 S. E. 908, 15 A. L. R. 660 (1921); Tennessee Coal Co. *v.* Hayes, 97 Ala. 201, 12 S. E. 98 (1890); Pittsburgh, etc., Railroad Co. *v.* Haley, 170 Ill. 610, 48 N. E. 920 (1897); Rector v. Laurel River Logging Co., 179 N. C. 59, 101 S. E. 502 (1919); Robinson *v.* Floeach Construction Co., 291 Mo. 34, 236 S. W. 332, 20 A. L. R. 1239 (1921).

[5] Simmons *v.* Simmons, 85 W. Va. 25, 100 S. E. 743 (1919).

designed for the protection of the welfare of infants. If an attempt should be made at the present time to settle all personal injury claims of infants in this way, our courts would soon have more cases of this character on their dockets than they could conveniently take care of. That this method of effecting a settlement is cumbersome and unsatisfactory seems to be generally recognized by the legal profession in West Virginia, as the friendly suit is apparently seldom, if ever, invoked in our courts.

There remains for consideration the second suggested method of compromising A's claim against D—that of entering into a settlement with A's legal guardian. In all states, statutes will be found providing for the appointment of legal guardians and defining their powers. It is generally held by the courts that, in the absence of statutory restrictions, a legal guardian who has been duly appointed and qualified has the power to compromise his ward's claims for personal injuries, provided such settlement is made in good faith and is not grossly unfair.[6]

The West Virginia statutes on the subject of the relations between guardian and ward appear in Chapter 82 of the Code. Section 7 of this chapter defines the powers and authority of a legal guardian in this state as follows:—

> "Every guardian who shall be appointed as aforesaid, and give bond when required, shall have the custody of his ward, and the possession, care and management of his estate, real and personal * * * ."

No decision of our Appellate Court has been found which expressly passes upon the right of a legal guardian in West Virginia to compromise and release his ward's cause of action for personal injuries. However, it is believed that the language of the statute quoted above is sufficiently broad to give the guardian such power. There can be no doubt, and our Supreme Court of Appeals has held,[7] that any money paid in compromise of an infant's claim should be paid to its legal guardian; and it would seem to follow that if the guardian receives the money, he is the natural person to release the claim in settlement for which the money is paid.

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[6] 28 C. J. 1124; 12 R. C. L. 1130; Grievance Committee *v.* Ennis, 84 Conn. 594, 80 Atl. 767 (1911); Manion *v.* Ohio Valley Railroad Co., 99 Ky. 504, 36 S. W. 530 (1896); Bishop *v.* Big Sandy Lumber Co., 119 Ala. 463, 74 So. 931 (1917).

[7] Fletcher *v.* Parker, 53 W. Va. 422, 44 S. E. 422 (1903).

If for no other reason, it would seem that the legal guardian of a minor should have such power because it is not vested elsewhere. The parents of the child cannot release its claim; the child itself is incapable of executing a valid release; the child's next friend, in whose name its action at law upon the claim must be brought, has no such authority;[8] and as has been pointed out, a friendly suit is both cumbersome and uncertain. There is no injustice to the child in vesting such power in its guardian, for, if the settlement is fraudulent or grossly unfair, the release signed by the guardian will not support a plea of accord and satisfaction in a suit instituted by the child upon its claim after becoming of age.[9] Under most statutes, including those in effect in West Virginia, the father of the child is usually entitled to be appointed its legal guardian. The query may be made, therefore, why the father's release after such appointment has any more validity as to the child's cause of action than before. The answer is obvious. Upon being appointed guardian, the father takes a solemn oath to perform his duties properly as such, and furnishes bond conditioned upon the proper handling of his ward's property. The transition from parent to legal guardian may seem unimportant to the lay-mind, but it has a fundamental legal significance.

It is submitted, therefore, that in the case supposed, D should effect his settlement with A's legal guardian. If no guardian has been appointed, D can arrange, with little trouble and expense, to have B appointed as A's guardian by the proper county court, and can then secure from B as guardian a release which will give him the protection he desires.

In conclusion, one other interesting feature might be added to the supposed case discussed herein. If A dies as a result of his injuries after D has made settlement with his legal guardian, can D be sued by A's administrator under Lord Campbell's Act, giving the personal representative a right to sue on account of his decedent's death by wrongful act? The difficulty in answering this question lies in the fact that our state statutes following the English "Lord Campbell's Act" are usually regarded as creating entirely

[8] *Supra*, n. 6.
[9] Norvell *v.* Kanawha & Michigan Railroad Co., 67 W. Va. 467, 68 S. E. 288 (1910).

new and independent causes of action, and do not merely permit a survival of the right of action which the deceased person had. Such is the construction placed upon the statutes in force in the Virginias.[10] In view of the nature of the cause of action vested in the administrator of the decedent under these statutes, some courts have reached the conclusion that the administrator's right to sue is not barred by a release signed by the decedent before his death. This doctrine is well illustrated by a decision of the Supreme Court of South Dakota.[11] However, the weight of authority, both in America and in England, seems to be that a release of the injured party's claim during his lifetime will prevent a suit being instituted by his personal representative after death.[12] This rule seems to be the preferable one from the standpoint of fairness and justice, although it is not free from theoretical difficulties.

In Virginia, the question has been solved by a statute[13] which provides that where the injured party has executed a proper release during his lifetime, no suit can be maintained thereafter by his personal representative, even though the injury results in death.

It would seem to be to the interest of society that full effect should be given to the release executed by or on behalf of the decedent prior to his death. Otherwise, the party accused of liability for the accident would never dare to enter into a settlement or compromise unless and until he was certain that the injured party would not die from the effects of his injuries.

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[10] Lambert *v.* Ensign Co., 42 W. Va. 813, 26 S. E. 431 (1896); Beaver *v.* Putnam, 110 Va. 713, 67 S. E. 353 (1910).

[11] Rowe *v.* Richards, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E, 1075 (1915).

[12] 17 C. J. 1246; 27 L. R. A. (N. S.) 176, note; L. R. A. 1915E, 1163, note; Read *v.* Great Eastern Railway Co., L. R. 3 Q. B. 555, 9 Best. & S. 714 (1868); Hecht *v.* Ohio Railway Co., 132 Ind. 507, 32 N. E. 302 (1892); State *v.* United Railways Co., 121 Md. 457, 88 Atl. 229 (1913).

[13] Virginia Code of 1924, §5787.