

2012

Minor's Personal Injury Actions and Settlements in North Carolina

John M. Kirby

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Judges Commons](#), [Juvenile Law Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Torts Commons](#)

Recommended Citation

John M. Kirby, *Minor's Personal Injury Actions and Settlements in North Carolina*, 34 CAMPBELL L. REV. 293 (2012).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

Minor's Personal Injury Actions and Settlements in North Carolina

JOHN KIRBY*

INTRODUCTION	295
I.SUBSTANCE OF THE CLAIMS ARISING FROM INJURY TO MINOR	296
A. Minor's Claims	296
1. Substantive Claims	296
a. Landowner Liability.....	297
i. Attractive Nuisance Doctrine	301
b. Minor's Claims Against Caregivers and Other Persons	305
2. Defenses to Minor's Claim	308
a. Contributory Negligence	308
b. Statute of Limitations.....	313
c. Parent-Child Immunity	316
d. Supervision by Parents or Other Adults	319
e. Pre-injury Release	321
3. Minor's Damages	323
a. Medical Bills.....	324
i. Necessaries	324
ii. Parent's Waiver of Claim.....	327
b. Lost Earnings	328
c. Liens and Subrogation Claims	329
B. Parents' Claims	332
1. Substantive Claims	333
a. Medical Expenses for Minor's Injury.....	334
b. Loss of Services and Earnings of Minor	336
c. Miscellaneous Claims of Parents	338
2. Whether Claim is Owned by Mother or by Father	340
3. Defenses to Parents' Claims	342
II.PROCEDURES FOR FILING SUIT FOR MINOR	345
A. Guardian <i>ad Litem</i>	345

* John M. Kirby practices litigation and other areas of law in North Carolina. Mr. Kirby graduated from the University of North Carolina School of Law in 1993. Mr. Kirby can be contacted at john@legal-nc.com or through his website at www.legal-nc.com.

1. Procedure for Appointment	350
2. Persons who May Serve as GAL.....	351
3. Conflicts of Interest by GAL	352
4. Duties and Powers of GAL.....	356
5. Liability of GAL.....	361
6. Payment of GAL.....	364
B. Joinder of Claims	365
C. Res Judicata and Collateral Estoppel Effect of Minor's Action.....	365
D. Minor's Attorney	368
1. Conflicts of Interest.....	373
2. Attorney's Fees	375
III.SETTLEMENT OF MINOR'S CLAIM	382
A. Persons Having Authority to Enter Settlement for Minor....	382
B. Need for Court Approval	384
C. Repudiation of Settlement Pending Approval	391
D. Release of Claims	394
E. Procedural Considerations	399
1. Procedural Vehicles.....	399
2. Notice of Proceeding.....	401
3. Presentation of Evidence at Hearing.....	402
4. Rulings on Motion for Approval of Settlement.....	404
5. Order Approving Settlement.....	405
6. Handling of Minor's Proceeds	408
a. Judgments	408
b. Settlements.....	409
i. Payment to Clerk.....	409
ii. Structured Settlements	411
iii. Payment to Guardian or Others	412
c. Implications of Settlement on Minor's Eligibility for Government Programs	413
F. When Order Approving Minor's Settlement May Be Reversed, Overturned or Vacated.....	415
CONCLUSION	421

INTRODUCTION

This Article addresses the issues that are peculiar to claims of minors in North Carolina.¹ Persons who are the age of majority prosecute and settle claims that raise numerous substantive and procedural issues. These issues can be compounded, however, when the claimant is a minor.

The distinct issues that arise with a minor's claim include: that a minor is often held to a different standard of conduct; that other persons are held to a higher or different standard of conduct toward a minor; that other persons may have a duty to protect the minor; that courts generally protect the interests of minors; that minors cannot enter binding contracts; and that injuries to minors typically create claims in other parties, for example, the minor's parents.

This Article addresses the settlement and litigation of these claims. While this Article focuses on claims arising from a personal injury to the minor, many of the same legal issues are also raised in other contexts in which the minor's interests are affected. As shown by many cases cited in this Article, much of the case law in North Carolina addressing the procedures for settling and adjudicating minors' rights has arisen in the context of a minor's interest in an estate or real property.

North Carolina does not have many statutes addressing the substance or procedure for minor's claims; therefore, most of the applicable law is common law developed by the courts. In contrast, many other states have statutes setting forth procedures for these claims.² Most of the law from other jurisdictions is, however, similar to North Carolina law. The common law from those jurisdictions is useful in analyzing and predicting North Carolina law, and this Article therefore references cases from other jurisdictions in areas where North Carolina has no governing authority.

Editorial Note: Campbell Law Review has included parallel citations to the North Carolina reporters per the request of the author.

1. See N.C. GEN. STAT. § 48A-2 (2011) ("A minor is any person who has not reached the age of 18 years."). Note that for purposes of the Uniform Transfers to Minors Act (UTMA), a minor is defined as any person under twenty-one years old. N.C. GEN. STAT. § 33A-1(11). For a brief discussion of emancipated minors, see *infra* notes 614–16 and accompanying text.

2. See, e.g., FLA. STAT. § 744.301(2)(a), (b) (2011); PA. R. CIV. P. 2039 (2011); S.C. CODE ANN. § 62-5-433 (2011).

I. SUBSTANCE OF THE CLAIMS ARISING FROM INJURY TO MINOR

Minors generally have the same claims, and are subject to the same rules and defenses as if they were adults. Thus, a minor can sue for negligence, breach of contract, libel, assault etc.; however, there are some causes of action where the minor's claim is different in some respects from the same claim brought by an adult. Further, an injury to the minor can give rise to claims in her parents. Additionally, some of the defenses to the claims of the minor and her parents merit special attention. Finally, the allocation of the damages arising from an injury to the minor raises complicated issues that are not present when an adult is simply pursuing his own claim. These distinctions in the claims of minors are discussed below.

A. Minor's Claims

1. Substantive Claims

When a minor is injured by the negligence of another person, he may assert a claim for his damages arising from that negligence. For the most part, the elements of these claims—and the doctrines associated with these claims—are the same for a minor as they would be for an adult. Thus, a minor who asserts a claim for medical malpractice must show that the doctor breached the standard of care, in the same manner that an adult would have to establish the negligence of the doctor. Similarly, a motorist has a duty to stop his vehicle at a stop sign regardless of whether a pedestrian in the intersection is an adult or a minor; the failure to stop at the stop sign will be evidence of negligence in a claim asserted by a minor or by an adult who was injured by that motorist.

There are, however, some areas of law where the nature of the defendant's duty or liability is altered by the fact that the claimant is a minor. For example, "the presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse."³ A motorist therefore might have to anticipate that a child will dart in front

3. *Winters v. Burch*, 284 N.C. 205, 209–11, 200 S.E.2d 55, 57–59 (1973) ("Therefore, 'the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.'" (citation omitted)). The court noted that the motorist was not liable to the darting child where the court could only speculate as to "the time when defendant should have first seen Timmy as well as the place and manner of his entrance into the street." *Id.*

of his car,⁴ but would not have to anticipate the same of an adult pedestrian.⁵ Other areas where the plaintiff's status as a minor affects the defendant's duty are premises liability suits and cases against persons having a duty to protect the minor. These are discussed in more detail below.

a. *Landowner Liability*

The duty of owners and operators of businesses, and other persons in control of land, to protect visitors on their land depends, in part, on the age of the visitors to the property. For example, "if . . . an [amusement park] operator invites children who have not reached an age where they are to understand and appreciate and avoid danger incident to a device to which they are thus invited, ordinary care should dictate that he must take such steps as are necessary for their protection."⁶ The landowner's duties toward trespassing children are addressed in the next section. For a child lawfully upon the land, "the possessor of the land is no less obligated to anticipate and take into account his propensities to inquire into or to meddle with conditions which he finds on the land, his inattention, and his inability to understand or appreciate the danger, or to protect himself against it."⁷

A case decided in 2012 addressed whether the jury should be specifically instructed that the landowner's duty to maintain the property depends on the age of persons visiting the land. In *Cobb v. Town of Blowing Rock*, a twelve-year-old girl was injured when she attempted to cross a stream on the defendant's property, which was open to the public, and she was swept over a waterfall.⁸ The jury found that the defendant was not negligent in, *inter alia*, failing to post warning signs and in

4. *Phillips v. Holland*, 107 N.C. App. 688, 693, 421 S.E.2d 608, 611 (1992) (summarizing prior cases addressing "darting children" where evidence was sufficient to show that defendant failed to keep a reasonable lookout, and that defendant could have stopped vehicle).

5. *See, e.g., Blake v. Mallard*, 262 N.C. 62, 66, 136 S.E.2d 214, 217 (1964) (illustrating a claim of an adult motorist who entered the roadway in front of defendant that was properly nonsuited where "[d]efendants, having the right of way, had the right to assume, until put on notice to the contrary, that the pedestrian would obey the law and yield the right of way").

6. *Martin v. Amusements of Am., Inc.*, 38 N.C. App. 130, 136, 247 S.E.2d 639, 644 (1978) (citations omitted).

7. RESTATEMENT (SECOND) OF TORTS § 343B cmt. b (1965).

8. *Cobb v. Town of Blowing Rock*, 713 S.E.2d 732, 734, 2011 N.C. App. LEXIS 1398, at *3 (2011), *rev'd per curiam for reasons stated in the dissent*, No. 479PA10 (Jan. 27, 2012).

failing to maintain barriers to keep the public from the stream.⁹ On appeal, the minor argued that the jury should have been instructed as follows:

The law requires every landowner to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner. *What constitutes a reasonably safe condition of land depends upon the uses to which the owner invites the guests to make of the premises, and the uses which the owner should anticipate its guests will make of the premises. It also depends upon the known or reasonably foreseeable characteristics of the users of the premises. A landowner owes a higher level of care to a child who is unable to appreciate a potential of danger. In this context, ordinary care means that degree of care which a reasonable and prudent person or entity would use under the same or similar circumstances to protect a child of the same or similar attributes as the plaintiff from injury.*¹⁰

The majority of the panel of the Court of Appeals ruled for the minor, and concluded that “the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether the defendant has discharged its duty to exercise reasonable care in maintaining its property for the protection of the plaintiff.”¹¹

On appeal, the Supreme Court reversed *per curiam*, “For the reasons stated in the dissenting opinion.”¹² The dissenting judge at the Court of Appeals opined that there was no error in the jury instructions given.¹³ The thrust of the dissent appears to be that the landowner’s duty is determined by the characteristics of visitors to the property,¹⁴ including the

9. *Id.*

10. *Id.* at 735–36, 2011 N.C. App. LEXIS 1398, at *8–9 (additions to the pattern jury instructions are indicated by italics).

11. *Id.* at 739, 2011 N.C. App. LEXIS 1398, at *22 (ordering a new trial).

12. *Cobb v. Town of Blowing Rock*, No. 479PA10 (Jan. 27, 2012) (*per curiam*).

13. *Cobb*, 713 S.E.2d at 740, 2011 N.C. App. LEXIS 1398, at *25 (Stroud, J., dissenting).

14. *Id.* at 740, 2011 N.C. App. LEXIS 1398, at *26–27 (“[A] jury makes the determination of the standard of care required by a reasonable landowner by considering . . . even the foreseeable characteristics of lawful visitors.”); *id.* at 741, 2011 N.C. App. LEXIS 1398, at *28 (“[T]he ‘reasonably foreseeable characteristics’ of lawful visitors are an important consideration in the jury’s determination of reasonableness of a landowner’s actions in maintaining a property in safe condition.”); *id.* at 742, 2011 N.C. App. LEXIS 1398, at *32 (“[T]he characteristics of persons who might foreseeably be injured by a negligent act are . . . relevant to the jury’s determination of what would constitute ‘reasonable care.’”).

age of the visitors to the property, but that the jury should not be given a specific instruction about this point. The dissenting Judge wrote:

[I]t [the defendant] owed its lawful visitors the duty to exercise reasonable care in the maintenance of the premises and to warn visitors of hidden or concealed dangers of which it was aware or should have been aware. Certainly these visitors might include both adults and children of all ages, but it is the jury's role to determine if the defendant's actions or omissions were consistent with the duty of "reasonable care" owed to all lawful visitors.¹⁵

The case is somewhat puzzling because the majority of the panel of the Court of Appeals simply held that "the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether the defendant has discharged its duty to exercise reasonable care in maintaining its property for the protection of the plaintiff."¹⁶ The majority opinion did not hold that the landowner's duty depends on the particular plaintiff's age. The dissenting judge (whose opinion was adopted by the Supreme Court) does not seem to disagree with this substantive statement of law in the jury instructions set forth by the majority opinion.¹⁷ Instead, the dissent states that the instruction mandated by the majority opinion

would create a "higher standard of care" in any case where a plaintiff has some sort of "characteristic" which may decrease that person's ability to look out for her own safety, be it her youth, physical disability, mental disability, or any other characteristic which might be "reasonably foreseeable."¹⁸

Because the instruction at issue addresses only the characteristics of visitors to the property, and not the characteristics of the particular plaintiff,¹⁹ it is not clear how the proposed instruction would elevate the defendant's duty based on the age of the particular plaintiff. It is also not clear how the proposed instruction would greatly burden landowners,²⁰

15. *Id.* at 747, 2011 N.C. App. LEXIS 1398, at *53.

16. *Id.* 739, 2011 N.C. App. LEXIS 1398, at *22 (majority opinion).

17. *See supra* quotes accompanying note 14.

18. *Id.* at 740, 2011 N.C. App. LEXIS 1398, at *26 (Stroud, J., dissenting).

19. Although the dissent states that "the majority opinion adopts the broad language of the 'reasonably foreseeable characteristics' of the lawful visitor," *id.* at 746, 2011 N.C. App. LEXIS 1398, at *49, the instruction at issue refers to "lawful visitors," and does not refer to "the lawful visitor," nor does it otherwise refer to the characteristics of the particular plaintiff in the lawsuit. *See id.* at 735–36, 2011 N.C. App. LEXIS 1398, at *8–9 (majority opinion).

20. The dissent expressed concern that, "the practical result of a 'characteristic'-based jury instruction on the standard of care would be to require landowners to 'babyproof

as it is a correct statement of the law.²¹ Other portions of the dissent seem to express concern that even if the majority's instruction were given, it would place an "improper emphasis" on the plaintiff's age.²² Thus the opinion could be interpreted to disagree with the majority on the issue of jury instructions, rather than on a substantive point of law.

It bears noting that the Court of Appeals panel unanimously rejected the plaintiff's argument that the defendant owed a "higher level of care" to a minor.²³ Portions of the majority opinion correctly describe North Carolina law in this area, for instance, "'Reasonably safe conditions' in a preschool would be different from those in a factory, bar, or other premises where youthful visitors would not reasonably be foreseeable."²⁴ Further, "to the extent children-licensees were owed the duty of reasonable care before Nelson [v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998)] by virtue of their age, they are now owed that standard by virtue of being a lawful visitor."²⁵

It also bears noting that the plaintiff requested an instruction stating, "A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of

every inch of potentially dangerous natural features of land." *Id.* at 746, 2011 N.C. App. LEXIS 1398, at *48 (Stroud, J., dissenting). The opinions address at length the significance of a natural condition, as opposed to a manmade condition. The ultimate conclusion was that for persons lawfully upon the property, minors and adults alike, the defendant's duty is not limited to manmade conditions. Whether the defective condition is natural, however, may be relevant in determining whether the defendant was negligent. *See id.* at 745, 2011 N.C. App. LEXIS 1398, at *42 (Stroud, J., dissenting) ("Therefore, the cases cited by defendant in support of its argument that it owes no duty to take additional precautions in anticipation of minor lawful visitors as to natural conditions of the land are inapplicable."); *id.* at 739, 2011 N.C. App. LEXIS 1398, at *21–22 (majority opinion) ("Whether a natural condition is involved may inform the jury's determination of what is reasonable under the circumstances, but it provides no basis for forcing the jury to ignore the known or foreseeable characteristics of lawful visitors.").

21. As noted *supra* note 14, the dissenting Judge does not appear to disagree with the substantive statement of law in the majority's proposed jury instruction. The instructions given by the trial judge did not inform the jury that the defendant's duty should be determined, in part, by the characteristics of persons on the land. *See id.* at 735–36, 2011 N.C. App. LEXIS 1398, at *8–9. The drafters of the pattern jury instructions might want to revisit the pattern jury instructions in light of this opinion.

22. *Id.* at 740, 2011 N.C. App. Lexis 1398, at *26 (instruction "would give improper emphasis to the age of the plaintiff"); *id.* at 742, 2011 N.C. App. Lexis 1398, at *32 ("[I]ncluding a specific instruction as to the 'reasonably foreseeable characteristics' of the lawful visitor in this case places double emphasis on plaintiff Chelsea's age.").

23. *Id.* 736, 2011 N.C. App. LEXIS 1398, at *10.

24. *Id.* at 738, 2011 N.C. App. LEXIS 1398, at *17.

25. *Id.* at 737, 2011 N.C. App. LEXIS 1398, at *13.

a reasonably prudent child of the same or similar attributes as the plaintiff.”²⁶ The opinions in the case, however, do not expressly address the issue of instructing the jury on warning signs. In view of the ultimate ruling in the case regarding the defendant’s duty to maintain its property, a fair implication is that the landowner’s duty to place warnings is dependent on the characteristics (e.g., age) of visitors to its property, but is not dependent on the age of the particular plaintiff at issue in the litigation. A prior decision from the North Carolina Supreme Court addressed a similar issue, stating, “A warning sufficient to alert an adult professional dancer to the condition of a dance floor may not be sufficient to absolve the proprietor from liability to a 13 year old pupil for a fall thereon.”²⁷ Whether this issue warrants a specific instruction is unclear.

These principles apply to minors who are lawfully on the defendant’s property, and who thus are not trespassers. “[W]ith respect to trespassers, a landowner need only refrain from the willful or wanton infliction of injury.”²⁸ A minor who is a trespasser can still recover, however, in the absence of willful or wanton conduct by the defendant, if she can satisfy the attractive nuisance doctrine, discussed below.

i. Attractive Nuisance Doctrine

In a premises liability case, a minor who is a trespasser can receive the benefit of the attractive nuisance doctrine. The “attractive nuisance” doctrine allows a minor to recover for negligence even if the minor is a trespasser, without proof of willful and wanton conduct. For actions arising on or after October 1, 2011, this issue is now governed by statute.²⁹ The statute, however, largely codifies the existing common law; therefore, the older common law cases should still be persuasive. One court explained the doctrine as follows:

At the heart of land owner liability under the doctrine of attractive nuisance is the duty to protect children of tender years who ‘because of their youth do not discover the condition or realize the risk.’ ‘The attrac-

26. *Id.* at 736, 2011 N.C. App. LEXIS 1398, at *10.

27. *Hedrick v. Tigniere*, 267 N.C. 62, 66, 147 S.E.2d 550, 553 (1966) (“The sufficiency of a warning to the invitee of the existence of a condition upon the premises will depend, in part, upon whether the proprietor should know that the invitee, by reason of youth, old age or disability, is incapable of understanding the danger and of taking precautions for his or her own safety under such conditions.”).

28. *Nelson v. Freeland*, 349 N.C. 615, 618, 507 S.E.2d 882, 884 (1998) (citing *Bell v. Page*, 271 N.C. 396, 400, 156 S.E.2d 711, 714–15 (1967)).

29. 2011 N.C. Sess. Laws 283 § 3.2 (applying “to causes of actions arising on or after” October 1, 2011).

tive nuisance doctrine is designed to protect ‘small children’ or ‘children of tender age.’³⁰

The effect of this doctrine is to render the minor an invitee (or lawful occupant) on the property, such that the landowner owes a duty of reasonable care toward the minor.³¹ The statute enacted in 2011 that codifies the attractive nuisance doctrine states:

A possessor may be subject to liability for bodily injury or death to a child trespasser resulting from an artificial condition on the land if all of the following apply:

- a. The possessor knew or had reason to know that children were likely to trespass at the location of the condition.
- b. The condition is one the possessor knew or reasonably should have known involved an unreasonable risk of serious bodily injury or death to such children.
- c. The injured child did not discover the condition or realize the risk involved in the condition or in coming within the area made dangerous by it.
- d. The utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child involved.
- e. The possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.³²

This statute is substantially similar to the case law applicable prior to this enactment. These criteria were enunciated in *Broadway v. Blythe Industries, Inc.*³³ The only appreciable difference is that the third element

30. *Coleman v. Rudisill*, 131 N.C. App. 530, 533, 508 S.E.2d 297, 300 (1998) (citations omitted).

31. *Cobb*, 713 S.E.2d at 737, 2011 N.C. App. LEXIS 1398, at *13. The court explained:

After *Nelson*, all lawful visitors are entitled to the higher of the two previous standards [i.e., that of an invitee]. In other words, to the extent children-licensees were owed the duty of reasonable care before *Nelson* by virtue of their age, they are now owed that standard by virtue of being a lawful visitor.

Id. (emphasis in original).

32. N.C. GEN. STAT. § 38B-3 (2011).

33. *Broadway v. Blythe Indus., Inc.*, 313 N.C. 150, 154, 326 S.E.2d 266, 269 (1985) (quoting RESTATEMENT (SECOND) OF TORTS § 339 (1965)); accord *Leonard v. Lowe's Home Ctrs., Inc.*, 131 N.C. App. 304, 308–09, 506 S.E.2d 291, 294 (1998) (stating that where child used a steep path to ride bikes and collided with a car, defendant's actions in mowing and bush-hogging the property were reasonable steps in maintaining the land rather than the negligent maintenance of an artificial condition).

as stated in *Broadway* was that “the children *because of their youth* do not discover the condition or realize the risk”³⁴

This doctrine applies to a “child trespasser,” which is defined as “[a] trespasser who is less than 14 years of age or who has the level of mental development found in a person less than 14 years of age.”³⁵ This predominantly codifies the common law doctrine, which held that the doctrine ordinarily does not apply to minors fourteen and older.³⁶ A few cases address whether a minor fourteen or older has a “level of mental development” diminished sufficiently to invoke the doctrine. In one case, a fourteen-year-old boy failed the first grade and had grades in the C range, and a psychiatrist testified that the minor’s mental development was that of a thirteen-year-old.³⁷ On the other hand, his math and science grades were a B, and the expert testimony was shaky.³⁸ The court held that the attractive nuisance doctrine did not apply due to the minor’s age, and that the minor did not establish that he lacked sufficient mental development.³⁹ In another case, a doctor testified that a fifteen-year-old boy “hasn’t the mind of a boy over 8 or 10 years old.”⁴⁰ The court held that this was sufficient to invoke the doctrine.⁴¹

The doctrine also does not apply to “common dangers.” “In the context of attractive nuisance cases, it is incumbent upon parents to warn and guard their children against ‘common dangers, existing in the order of nature’ and where they fail to do so, ‘they should not expect to hold others responsible for their own want of care.’”⁴²

34. *Broadway*, 313 N.C. at 154, 326 S.E.2d at 269 (emphasis added).

35. N.C. GEN. STAT. § 38B-4(1).

36. *Dean v. Wilson Constr. Co.*, 251 N.C. 581, 588, 111 S.E.2d 827, 832–33 (1960) (stating attractive nuisance doctrine “cannot be applied to a child of the age of fourteen or over, at least in the absence of some showing of a lack of the mental development which is ordinarily found in children of that age or of a very exceptional state of facts” (citations omitted)).

37. *Hashtani v. Duke Power Co.*, 578 F.2d 542, 545 (4th Cir. 1978).

38. *Id.* (noting that the expert met with the minor for only twenty minutes approximately eight years after the incident).

39. *Id.* at 545–46 (determining that a boy who was fourteen years and two months old who climbed an electrical tower and sustained an injury was a trespasser).

40. *Graham v. Sandhill Power Co.*, 189 N.C. 381, 385, 127 S.E. 429, 431 (1925).

41. *Id.* (noting that a minor playing on a sawdust pile contacted live wire, and that the doctor testified that the minor “inherited insanity”); *see also Soledad v. Lara*, 762 S.W.2d 212, 214 (Tex. Ct. App. 1988) (stating that where a minor was fourteen to sixteen, was in special education class, was lacking in mental development, was a slow learner, and saw a psychologist regularly, the doctrine could apply to him).

42. *Vares v. Vares*, 154 N.C. App. 83, 89, 571 S.E.2d 612, 616 (2002) (citations omitted).

Many cases have rejected application of the attractive nuisance doctrine as a matter of law. For example, where an eleven-year-old boy pulled bricks from the bottom of a chimney at a burned farmhouse, and the chimney collapsed upon him, he was deemed “capable of appreciating the danger” and his claim failed.⁴³ Where a child played on a dumpster which fell on her, her claim was rejected because the dumpster did not pose an unreasonable risk.⁴⁴ In one case, a seven-year-old boy climbed into the rafters of an abandoned house and was injured, and the North Carolina Supreme Court held that the attractive nuisance doctrine did not apply because the child’s action was too remote to be foreseen.⁴⁵ Numerous other cases reject the doctrine where the children could foresee the risk, the object was not dangerous, or the injury was not foreseeable.⁴⁶

43. Griffin v. Woodard, 126 N.C. App. 649, 654, 486 S.E.2d 240, 243 (1997).

44. Feagin v. Staton, 72 N.C. App. 678, 680–81, 325 S.E.2d 316, 318 (1985) (emphasizing that evidence did not show that dumpster was a dangerous instrumentality or created an unreasonable risk, and that evidence did not show that a person of ordinary prudence would have foreseen that injury was likely to result). The court also noted that it was not customary to secure a dumpster to ground. *Id.* at 681, 325 S.E.2d at 318.

45. Prather v. Union Nat’l Bank, 211 N.C. 98, 98, 189 S.E.2d 182, 183 (1937).

46. See Walker v. Sprinkle, 267 N.C. 626, 629, 148 S.E.2d 631, 633 (1966) (stating where three-year-old fell into a pit under an outhouse, “We cannot hold that the ordinary outhouse or privy is an attractive nuisance or an inherently dangerous instrumentality”); Roberson v. Kinston, 261 N.C. 135, 138, 134 S.E.2d 193, 195–96 (1964). In *Roberson*, the court explained:

The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location. . . . If it should be conceded that a branch or creek is inherently dangerous to children of tender years, it must be conceded that such streams cannot be easily guarded and rendered safe.

Id. (citations omitted)); see also *Herring v. Humphrey*, 254 N.C. 741, 746, 119 S.E.2d 913, 917 (1961). The *Herring* court concluded:

[T]he evidence was insufficient to support a finding that defendant’s bulldozer was parked at such place and in such manner that defendant in the exercise of due care should have foreseen that a trespassing child would likely get on the bulldozer and set it in motion. . . . such an occurrence would seem unlikely, improbable and remote.

Id. (emphasis added)); see also *Dean v. Wilson Constr. Co.*, 251 N.C. 581, 586–87, 111 S.E.2d 827, 831 (1960) (holding where fourteen-year-old boy operated a crane and struck high-tension transmission and was electrocuted, he was conscious of the danger, and deliberately risked the consequences of his wrongful conduct).

An example of an attractive nuisance was presented in *Broadway*.⁴⁷ In this case, a common carrier (Lisk) delivered a large concrete storm drainage pipe to a construction site across the street from the public housing project.⁴⁸ A woman who lived across the street from the construction site asked Lisk's employees to secure the pipes for the safety of children who played in that area.⁴⁹ A five-year-old boy was playing around the pipes and was crushed when the pipe rolled on him.⁵⁰ The Court held that the defendant was not entitled to summary judgment, stating:

[The] evidence tends to show, inter alia, that Lisk placed the pipes on an incline within the construction site some five to fifteen feet from the edge of a street on which, on the other side, stands a housing project; that Lisk was warned that there were children nearby and that they would likely play on the pipes; that unsecured pipes of the size and weight left at the site by Lisk involved an unreasonable risk of death or serious bodily harm to children who might play on them; that children would not realize the risk of becoming hurt by playing on the pipes; that the pipes could easily have been secured from playing children; and that Lisk failed to exercise reasonable care to eliminate the danger or otherwise to protect the children. We hold that this forecast of the evidence discloses genuine issues of material facts which require resolution by a jury.⁵¹

In another case, a four-year-old child fell into a well on the defendant's property.⁵² The court held that the child's estate could recover because the landowner knew that children played around the well.⁵³

b. Minor's Claims Against Caregivers and Other Persons

Those persons entrusted with the care of minors have a duty to protect the minor, and can be held liable for a breach of that duty.⁵⁴ Thus,

47. *Broadway v. Blythe Indus., Inc.*, 313 N.C. 150, 155–56, 326 S.E.2d 266, 270 (1985).

48. *Id.* at 151, 326 S.E.2d at 268.

49. *Id.*

50. *Id.*

51. *Id.* at 156, 326 S.E.2d at 271–72 (applying attractive nuisance doctrine to non-possessors of land if they create the dangerous condition on behalf of the possessor).

52. *Brannon v. Sprinkle*, 207 N.C. 398, 400, 177 S.E.2d 114, 115 (1934) (noting that the presence of a well was actionable where a four-year-old child drowned and the owner knew that children played around the well).

53. *Id.* at 406, 177 S.E. at 119.

54. *See, e.g., Wallace v. Der-Ohanian*, 18 Cal. Rptr. 892, 894 (Cal. Ct. App. 1962) (“The measure of precaution which must be taken by one having a child in his care, who

teachers and day care workers can be held liable for injuries to the minor. As the Court of Appeals of North Carolina explained,

While North Carolina case law does not specifically address the duty owed by day care providers to the children under their supervision, our courts have held that the appropriate standard of care for a school teacher is that of a person of ordinary prudence under like circumstances. By analogy, we believe that day care providers have a duty to abide by that standard of care which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances. The amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations. Day care providers, however, cannot be expected to "anticipate the myriad of unexpected acts which occur daily in and about schools, and are not insurers of the safety of the children in their care. The foreseeability of harm to pupils in the class or at the school is the test of the extent of the day care provider's duty to safeguard her pupils from dangerous acts of fellow pupils."⁵⁵

In this case, the owners of the daycare were aware that several three-year-old boys had a history of pushing each other, knew of the danger created by this, and did not contact the parents of the boys or take any actions other than reprimanding the boys.⁵⁶ The boys eventually pushed another three-year-old boy and fractured his leg.⁵⁷ The court held that whether the owners of the facility violated their standard of care created an issue of fact for the jury.⁵⁸ On the other hand, a teacher was not liable for failing to safeguard a student inadvertently injured where students had thrown an eraser and oranges, and would "sword fight" with their pencils.⁵⁹ Persons holding a pool party have a duty to

stands in no relation to the child except that he has undertaken to care for it, is that care which a prudent person would exercise under like circumstances." (citation omitted) (internal quotation marks omitted)). For a discussion of parental immunity and the doctrine of *in loco parentis*, see *infra* Part I.A.2.c.

55. *Pruitt v. Powers*, 128 N.C. App. 585, 590–91, 495 S.E.2d 743, 747 (1998) (citations omitted) (internal quotation marks omitted).

56. *Id.* at 591, 495 S.E.2d at 747.

57. *Id.* at 587, 495 S.E.2d at 745.

58. *Id.* at 591, 495 S.E.2d at 748. The court noted that the finding of negligence was only against the owners of the facility, and that the teacher in the classroom was not negligent. *Id.* at 588, 495 S.E.2d at 746.

59. *James v. Charlotte-Mecklenburg Bd. of Educ.*, 60 N.C. App. 642, 648–49, 300 S.E.2d 21, 25 (1983) ("Elementary school children, while certainly capable of harming one another, cannot be expected to be model citizens at all times, and the mild exuberance demonstrated by throwing oranges or portions of oranges at one another is not an example of assaultive or dangerous conduct.").

exercise "reasonable care supervising children lawfully using the pool at their invitation."⁶⁰

The duty toward younger children is generally greater than it is for older children.⁶¹ Cases generally recognize that children react to situations differently, and the law must accommodate a child's perspective.⁶²

The Department of Social Services (DSS) can also be liable for failing to follow statutes which impose duties on the DSS to protect children. In *Coleman v. Cooper*,⁶³ two children were murdered by their father, and their estates brought wrongful death actions against an employee of the DSS, alleging that she failed to adequately protect the minors.⁶⁴ The court noted that section 7A-544 of the North Carolina General Statutes requires the DSS to investigate a report of abuse and to decide whether the child should be removed, and authorizes the DSS to file a complaint and to take temporary custody of the child.⁶⁵ The court stated:

[I]t appears that one of its specific purposes is the protection of minors from harm. Plaintiff's intestates are within the class intended to be protected by N.C. Gen. Stat. 7A-544 and the harm resulting from Mr. Cole-

60. *Royal v. Armstrong*, 136 N.C. App. 465, 470, 524 S.E.2d 600, 603 (2000) (noting that, in an action for the drowning of an eight-year-old boy at a pool party, the facts showed that the hosts exercised reasonable care in supervising the children, and were not negligent in delegating supervision to other adults). The court explained that "such adult hosts or supervisors have a duty to the children to exercise a standard of care that a person of ordinary prudence, charged with similar duties, would exercise under similar circumstances." *Id.* 471, 524 S.E.2d at 604.

61. *Pruitt*, 128 N.C. App. at 591, 495 S.E.2d at 746 (citing *Fowler v. Seaton*, 394 P.2d 697 (Cal. 1964) (noting that preschool nurseries are primarily intended to provide supervision of very young children, and should therefore provide a higher degree of care than schools); see also *Payne v. N.C. Dep't of Human Res.*, 95 N.C. App. 309, 314, 382 S.E.2d 449, 452 (1989) ("[T]he amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations").

62. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011). The Court stated:

It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the Miranda custody analysis.

Id. at 2398–99.

63. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2 (1988). *Coleman* was later overturned on procedural, and not substantive, grounds. *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 886 (1997) (showing that prior cases—including *Coleman*—indicated that claims against a county are to be filed with the Industrial Commission under Tort Claims Act are overruled).

64. *Coleman*, 89 N.C. App. at 189–90, 366 S.E.2d at 4.

65. *Id.* at 196–97, 366 S.E.2d at 7–8 (interpreting N.C. GEN. STAT. § 7A-544 (1985)).

man's actions is the specific type of harm which the statute was intended to prevent. We hold that a violation of this statute can give rise to an action for negligence.⁶⁶

The court noted that the DSS employee was aware that the father had physically and sexually abused the minors, and had abused the mother.⁶⁷ The mother told the DSS employee that she was concerned about the reaction of the father when he learned about the investigation into allegations of his abuse of the children.⁶⁸ Other than the act of the DSS employee in instructing the school that the father was not to be allowed access to the children, "the record is silent with regard to what determination, if any, was made concerning the risk of harm to plaintiff's intestates or whether they should have been provided any type of protective services."⁶⁹ The court thus held that the minors' claims should have survived a motion for summary judgment.⁷⁰

2. *Defenses to Minor's Claim*

There are a few defenses that operate differently when the claimant is a minor.

a. *Contributory Negligence*

Minors are held to a different standard than adults when determining whether they are contributorily negligent. The principle has been stated as follows:

66. *Id.* at 197, 366 S.E.2d at 8.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* A suit against the DSS and its employee raises issues of governmental and perhaps public official immunity, as well as the "public duty doctrine." In *Coleman*, the defendants raised governmental immunity, which the court rejected on the basis that the county purchased insurance and thereby waived its immunity. *Id.* at 192, 366 S.E.2d at 6. The immunity doctrines involved in these claims are beyond the scope of this Article. See also *Smith v. Jackson Cnty. Bd. of Educ.*, 168 N.C. App. 452, 465, 608 S.E.2d 399, 409 (2005) (indicating that where a minor sued a school based on harm inflicted by a teacher, the school's cross-claim against a resource officer for contribution and indemnification survives a motion to dismiss based on the public duty doctrine, where the cross-claim alleged that the officer had a "special duty to protect [the minor] from criminal acts . . . [t]hese allegations allege a special duty to the school and principal apart from a general law enforcement obligation"); *Mullis v. Sechrest*, 347 N.C. 548, 555, 495 S.E.2d 721, 725 (1998) (holding that when a minor sustaining injury in shop class sued the teacher in his official capacity the teacher shared the school board's immunity).

[C]ontributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. . . . [T]he standard of care thus varies with the age, capacity and experience of the child.⁷¹

“The courts recognize that the love of play is instinctive in childhood, and that children may be expected to act as children and upon childish impulses.”⁷² In addressing the contributory negligence of a minor, the cases recognize three categories of minors, depending on their age.

The first category is for minors under seven-years-old (i.e., six-years-old and younger). “As a matter of law, a child under seven years of age is incapable of negligence.”⁷³ The second category begins at age seven and ends when the minor becomes fourteen. The rule for minors from seven until fourteen has been stated as follows:

Between the ages of 7 and 14, a minor is presumed to be incapable of contributory negligence. This presumption, however, may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances. A child must exercise care and prudence equal to his capacity. If it fails to exercise such care and the failure is one of the proximate causes of the injuries in suit, the child cannot recover.⁷⁴

Some cases seem to set forth an objective standard—i.e., the minor in this age category is required to exercise that degree of care that other minors of a similar age and experience would exercise.⁷⁵ Other cases,

71. *Fry v. S. Pub. Util. Co.*, 183 N.C. 281, 291, 111 S.E. 354, 360 (1922) (citation omitted) (internal quotation marks omitted).

72. *Hollingsworth v. Burns*, 210 N.C. 40, 43, 185 S.E. 476, 478 (1936) (holding that when a twelve-year-old boy was skating in the street and was struck by a car, “[t]he law wisely takes into consideration the fact that a small boy will have only the understanding and the thought of a child, not that of a man”).

73. *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963); *accord* *Allen v. Equity & Investors Mgmt. Corp.*, 56 N.C. App. 706, 709, 289 S.E.2d 623, 625 (1982) (“An infant under 7 years of age is conclusively presumed to be incapable of contributory negligence.” (citation omitted)).

74. *Wooten v. Cagle*, 268 N.C. 366, 371–72, 150 S.E.2d 738, 742 (1966) (citation omitted) (internal quotation marks omitted).

75. *Watson v. Stallings*, 270 N.C. 187, 154 S.E.2d 308 (1967) (holding that contributory negligence of eleven-year-old minor “was to be determined on the basis of whether on this occasion he exercised the degree of care a reasonably prudent boy of his age,

however, seem to apply a subjective standard, and hold that whether the child is negligent depends on the minor-plaintiff's capacity.⁷⁶ Except as noted in the next paragraph, the practical effect of this "presumption" is not clear, as the ultimate rule seems to be that such a minor is held to a standard commensurate with his age and experience.

A minor in this age category cannot be held contributorily negligent as a matter of law; thus this issue (when supported by the facts) must be decided by the jury. "Under our decisions, a person between the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law. 'Whether he (is) capable of contributory negligence presents an issue for a jury, because there is a rebuttable presumption that he (is) incapable.'⁷⁷

The third category starts at fourteen and ends when the minor reaches eighteen (i.e., while the minor is age fourteen, fifteen, sixteen, or seventeen). The rule here is that the minor is again held to a standard of care commensurate with her age. "An infant of the age of 14 years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age."⁷⁸ Again, the practical effect of this presumption is not clear, as the net effect of the rule is to simply hold the minor to a standard of care commensurate with her capacity to appreciate danger.

A minor of fourteen years or older can be contributorily negligent as a matter of law. Thus, where a fourteen-year-old girl who did not know the depth of the water, and who had been told not to dive into water when she did not know its depth, dove into shallow water and broke her neck, she was negligent as a matter of law.⁷⁹ A fourteen-year-old boy who jumped off a train moving at thirty miles per hour was similarly negligent as a matter of law.⁸⁰ Other cases find that the issue creates a question of fact for the jury. Thus, whether a fourteen-year-old boy was

experience, capacity and knowledge should and would have exercised under the same or similar circumstances").

76. *Allen*, 56 N.C. App. at 709, 289 S.E.2d at 625 ("Defendants may offer evidence at trial to . . . show Tara's capacity to exercise care for her own safety.").

77. *Wooten*, 268 N.C. at 372, 150 S.E.2d at 742 (citation omitted); *accord Allen*, 56 N.C. App. at 709, 289 S.E.2d at 625.

78. *Welch v. Jenkins*, 271 N.C. 138, 144, 155 S.E.2d 763, 768 (1967) (holding that a fourteen-year-old is "presumptively chargeable with the same standard of care for his own safety as if he were an adult").

79. *Davies ex rel. Hardy v. Lewis*, 133 N.C. App. 167, 170-71, 514 S.E.2d 742, 744 (1999).

80. *Baker v. Seaboard Air Line Ry.*, 150 N.C. 562, 568, 64 S.E. 506, 509 (1909).

negligent in dismounting from a trampoline was held to create a jury issue.⁸¹ And where a seventeen-year-old operated a crane so as to contact a power line, his contributory negligence also created a jury issue.⁸²

The origin of these rules is somewhat murky, but appears to be grounded in common law, criminal law, and marital laws:

The responsibilities of infants are clearly defined by text-writers and courts. At common law, fourteen was the age of discretion in males and twelve in females. At fourteen an infant could choose a guardian and contract a valid marriage. After seven, an infant may commit a felony, although there is a presumption in his favor which may, however, be rebutted. But after fourteen an infant is held to the same responsibility for crime as an adult.⁸³

The jury should be instructed on the applicable rule for the minor's contributory negligence.⁸⁴ Minor passengers in a motor vehicle generally are not negligent as they do not control the operation of the vehicle.⁸⁵

81. *Bryant v. Adams*, 116 N.C. App. 448, 472, 448 S.E.2d 832, 845 (1994) (holding that whether a fourteen year old was contributorily negligent for jumping off a trampoline creates jury issue; “[h]owever, if the instructions themselves were not adequate or if the plaintiff did not read the instructions but the jury determined that the plaintiff still exercised reasonable care, a plaintiff should not be found contributorily negligent.”); see *Ford v. Nairn*, 717 N.E.2d 525, 530 (Ill. App. 1999) (rejecting *Bryant* and other cases, on the basis that they applied a subjective standard and noting that “a reasonable 14 year old would appreciate the open and obvious danger of jumping on a trampoline, and we find no duty to warn on the part of either the Nairns or Jumpking”).

82. *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 411, 196 S.E.2d 789, 800 (1973) (noting that a minor had been given only general warnings of danger of working near power lines and that he was directly under lines).

83. *Brown v. S. Ry. Co.*, 195 N.C. 699, 702, 143 S.E. 536, 537 (1928) (“We find in the books many cases where children of various ages, from seven years upward, have been denied a recovery because of their own negligence.”); accord *Baker*, 150 N.C. at 565, 64 S.E. at 508 (“Inasmuch as an infant, after 14, may select a guardian, contract marriage, is capable of harboring malice and of committing murder, it is no great imposition on him to hold him responsible for his own negligence.”); see also *Walston v. Greene*, 247 N.C. 693, 697, 102 S.E.2d 124, 127 (1958) (Rodman, J., dissenting) (“I dissent because I am unable to agree with the conclusion reached by the majority that a child who has passed his sixth but has not reached his seventh birthday is so lacking in mental capacity and judgment that under no circumstances can he be held responsible for his conduct.”).

84. *Hoots v. Beeson*, 272 N.C. 644, 650, 159 S.E.2d 16, 21 (1968) (“We are of opinion, and so decide, that, upon the trial of an issue relating to the alleged contributory negligence of a child between the ages of seven and fourteen, the rebuttable presumption that such child is incapable of contributory negligence is a substantial feature of the case, and that it is incumbent upon the trial judge to instruct the jury as to its significance.”).

One Court of Appeals case—that is currently being reviewed by the North Carolina Supreme Court—holds that the manufacturer of an allegedly defective product cannot raise as a defense that a minor under the age of seven misused the product.⁸⁶ While the manufacturer in a product liability suit can raise as a defense the plaintiff's misuse of the product,⁸⁷ the North Carolina Court of Appeals held that this defense does not apply where the plaintiff is less than seven years old.⁸⁸ In this case, the court ruled that, as a matter of law, a five year-old child's claim against a car manufacturer was not barred by her misuse of the seatbelt.⁸⁹ The court wrote, "because Cheyenne was a child under seven years of age at the time of the alleged alteration or modification, Defendant is unable, as a matter of law, to prove the requisite element of foreseeability inherent in the proximate cause portion of its N.C.G.S. § 99B-3 defense."⁹⁰

There is no authority in North Carolina as to whether a minor's claim can be barred by the doctrine of "assumption of the risk."⁹¹ It should be noted that in North Carolina, this doctrine applies only where the parties have a contractual relationship.⁹²

85. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 43, 161 S.E.2d 590, 598 (1968) (noting that minor plaintiffs, age fifteen and twelve, "were passengers in the automobile driven by their mother, and had no control over the driving of the automobile").

86. *Stark v. Ford Motor Co.*, 204 N.C. App. 1, 13, 693 S.E.2d 253, 260 (2010), *disc. review allowed*, 365 N.C. 74, 705 S.E.2d 741 (2011) (holding that the father's misuse of a seatbelt was not a valid defense in a suit against an automobile manufacturer for the injuries of a minor under the age of seven because the father was not a "party" as required by statute).

87. N.C. GEN. STAT. § 99B-3 (2011).

88. *Stark*, 204 N.C. App. at 8, 693 S.E.2d at 258.

89. *Id.*

90. *Id.*

91. In *Howard v. Jackson*, 120 N.C. App. 243, 461 S.E.2d 793 (1995), an eleven-year-old minor entered a pool and drowned. Her estate sued the homeowner and an adult who was at the pool. *Id.* at 244, 461 S.E.2d at 795. The court held that the homeowner would be liable only if he was willful or wanton. *Id.* at 247, 461 S.E.2d at 796. In its discussion, the court held that the defendant's conduct was not willful or wanton, and also stated, "[t]he girl entered the swimming pool at her own risk and assumed the dangers of a pool with no ladder at the deep end, no underwater lighting, and no trained lifeguard," and "[a]s a licensee who was old enough to know she was a poor swimmer, the decedent assumed the risk of jumping into a pool not equipped with certain safety devices." *Id.* at 248, 461 S.E.2d at 797. This case could be viewed as authority that a minor can assume the risk of injury, but that issue was not directly before the court.

92. *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 290, 669 S.E.2d 777, 783 (2008) ("In North Carolina, the doctrine of assumption of risk has been generally limited to cases where there was a contractual relationship between the parties.").

The parent's negligence does not bar the child's claim against a third person. "[T]he negligence of a parent, guardian, or other custodian of a child non sui juris in permitting the child to be exposed to danger cannot be imputed to the child . . ."⁹³ Similarly, a parent's assumption of a risk does not bar the minor's claim.⁹⁴

b. Statute of Limitations

The statute of limitations and statute of repose for a minor's claim are tolled until the minor reaches the age of majority, at which time his statute of limitations begins to run.⁹⁵

If the guardian *ad litem* (GAL)⁹⁶ has been appointed, the statute begins to run.⁹⁷ Where the minor does not have a general guardian or a GAL, however, the statute of limitations does not begin to run; his parent's assertion of a claim, without proper appointment as a GAL, will not commence the statute of limitations.⁹⁸

93. *Martin v. Amusements of Am., Inc.*, 38 N.C. App. 130, 137, 247 S.E.2d 639, 644 (1978) (citing *Davis v. R.R. Co.*, 136 N.C. 115, 48 S.E. 591 (1904)); *accord Bottoms v. Seaboard & R.R.*, 114 N.C. 699, 708, 19 S.E. 730, 731 (1894) (stating that negligence of a parent is not "imputed to the child as to defeat an action, when brought in its own behalf").

94. *Coole v. Haskins*, 135 P.2d 176, 178–79 (Cal. Ct. App. 1943) ("[A]ssumption of risk by parents should not be held to preclude a recovery by a minor child on his own behalf.").

95. N.C. GEN. STAT. § 1-17(a)(2009) ("A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed . . .").

96. As noted *infra* notes 278–86 and accompanying text, the cases decided prior to the current Rules of Civil Procedure typically referred to the plaintiff's representative in a court proceeding as the "next friend," which is roughly the equivalent of a GAL. For simplicity, this Article often refers to a next friend as a GAL.

97. *Jefferys v. Tolin*, 90 N.C. App. 233, 235, 368 S.E.2d 201, 202 (1988) (noting that if a GAL is appointed for a minor, the limitation period runs from the time of appointment). The court also noted that the time for notifying an Estate of a claim under North Carolina's intestacy statute is tolled by section 1-17 of North Carolina's General Statutes. *Id.*

98. *Simmons v. Justice*, 87 F. Supp. 2d 524, 529 (W.D.N.C. 2000) (noting that even though the caption was "Thomas Simmons, guardian for Omar Rhasheen Simmons," and even though the complaint alleged that the father was the minor's "biological father, legal custodian and guardian," the father was not the general guardian and was not the GAL, and hence the statute of limitations did not expire); *see also Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979) (stating that where a minor's mother represented the child as next friend in an action filed in West Virginia, pursuant to local procedures, which did not entail appointment by court, said action was not sufficient to

It should be noted, however, that the parent's claim for medical expenses is not tolled during the minority of the child.⁹⁹ Further, even if the parent assigns his claim to the minor, the statute of limitations on the claim for medical expenses continues to run (and is not tolled simply because the claim is transferred to the minor).¹⁰⁰

Where a GAL has been appointed, the statute of limitations runs only as to those claims that the GAL has been appointed to pursue.¹⁰¹ Thus, if the complaint clearly shows an intent to sue only one party, the appointment of a GAL will not commence the statute of limitations against other parties.¹⁰² Further, the GAL generally does not have a duty to pursue execution of the judgment, and thus the minor's statute of limitations for collecting the judgment does not run by the mere appointment of a GAL.¹⁰³

Once a GAL is appointed to prosecute the minor's claim, the statute of limitations begins to run as to that claim, and it is not stopped even if the case is dismissed.¹⁰⁴ Where the minor has a general guardian (and not merely a GAL), the minor's claims are not tolled.¹⁰⁵

Even though the statute of limitations does not begin to run against the minor's claims during his minority, the minor can nevertheless lose his rights where they are contingent on the claim of another person, whose statute of limitations is not tolled. Thus, where a minor is a bene-

cause the statute of limitations to run on a claim against other persons under North Carolina law).

99. *Vaughan v. Moore*, 89 N.C. App. 566, 568, 366 S.E.2d 518, 520 (1988).

100. *Id.*; see also *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955) ("Conceivably, the defendant might have a defense in an action brought by the parent which would not be available if the action is brought by the infant.").

101. See *Genesco*, 604 F.2d at 286-87.

102. See *id.* ("Therefore, the filing of the complaint did not impose upon [the minor] a duty, sufficient to invoke the doctrine, to seek relief from all persons who might be liable to [the GAL] for the injuries sustained from the burning of her nightgown.").

103. *Teel v. Kerr*, 261 N.C. 148, 152, 134 S.E.2d 126, 129 (1964) ("We hold that the authority of plaintiff's next friend in the personal injury case ended on April 19, 1948 [the date on which the minor obtained a judgment] . . .").

104. *Rowland v. Beauchamp*, 253 N.C. 231, 235, 116 S.E.2d 720, 723 ("The present action was instituted after plaintiff's first action was nonsuited and more than three years after the appointment of plaintiff's mother as his next friend [in the first action], and is barred by the three-year statute of limitations, unless it is saved by [the rule allowing for the re-filing of a suit within one year]."); accord *Frederick v. Williams*, 103 N.C. 189, 9 S.E. 298 (1889) ("It is well settled that, when the statute of limitations begins to run nothing stops it.").

105. *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 144, 7 S.E.2d 475, 477 (1940) ("[I]t is the duty of the guardian to bring suit, when necessary, upon the choses in action belonging to the ward's estate.").

ficiary of a wrongful death claim, the statute of limitations for the wrongful death claim runs against the administrator of the estate even though a beneficiary of the claim is a minor.¹⁰⁶

Malpractice actions have a different tolling rule. Subject to the caveat noted at the end of this subsection, a claim arising from “professional services” (other than medical malpractice) can always be brought until the minor is nineteen years old.¹⁰⁷ The claim can be brought after this time only if the claim complies with the general statute of limitations for such actions.¹⁰⁸ Under a newly enacted statute for medical malpractice,¹⁰⁹ if the minor’s claim is otherwise barred by the statute of limitations, it survives only if the minor is less than ten years old.¹¹⁰ Thus, after a minor attains ten years of age, he is subject to the same statute of limitations against a health care provider as an adult.¹¹¹

In a product liability case, there is a statute of repose that precludes an action from being filed more than twelve years after the “initial purchase for use or consumption.”¹¹² In a case addressing the prior statute of repose, which was six years, the Court of Appeals addressed the interplay between the statute of repose (now at section 1-46.1, formerly at section 1-50(6)) and the tolling provision of section 1-17 of the North Carolina General Statutes, stating:

106. *Boomer v. Caraway*, 116 N.C. App. 723, 726, 449 S.E.2d 215, 217–18 (1994) (“[I]f the statute of limitation has run against the administratrix, it has also run against the minor beneficiaries of a wrongful death settlement or recovery.”).

107. N.C. GEN. STAT. § 1-17(b)(2009) (“[A]n action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in [section] 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.”).

108. *Id.*

109. 2011 N.C. Sess. Laws 400 § 9 (applying to actions arising on and after October 1, 2011). The statute also contains provisions providing more time for abused and neglected children, and children in the custody of the State. *See id.*

110. N.C. GEN. STAT. § 1-17(c) (“[A]n action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider’s performance of or failure to perform professional services shall be commenced within the limitations of time specified in [section] 1-15(c), except as follows: (1) If the time limitations specified in [section] 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.”).

111. *Id.*

112. N.C. GEN. STAT. § 1-46.1(1) (“No action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than 12 years after the date of initial purchase for use or consumption.”); 2009 N.C. Sess. Laws 420 § 2 (affecting causes arising on or after October 1, 2009).

If a product is over six years old at the time of injury, which would be the time that the claim accrues, then the statute of repose operates as a total bar on that claim. However, if a claim accrues before the six year statute of repose has expired, [North Carolina General Statutes section] 1-17 simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B [for a product liability action]. Therefore, claims accruing after six years will still be barred.¹¹³

It is not clear if the rationale of this case, which holds that a minor's claim for product liability is barred where the claim did not arise (or accrue) within the statute of repose period, applies to the statute of repose for other claims, such as the statute of repose for improvements to real property.¹¹⁴

c. Parent-Child Immunity

As shown throughout this Article, as a general matter, the defendant's duties and potential liability are greater where the claimant is a minor. For example, a motorist must sometimes anticipate that children will dart into his path; the manufacturer of a product might not be allowed to assert a child's misuse of the product; and a landowner might have to anticipate that children will trespass on his property. In one area of tort law, however, our courts have determined that public policy concerns should actually limit, rather than expand, the child's claim and the tortfeasor's liability. A minor's claim against his parents for negligence is generally barred by the parent-child immunity.

The general rule in North Carolina is that an unemancipated minor child cannot maintain a tort action against his parent for personal injuries. As the child's immunity is considered the reciprocal of the parents' immunity, a parent likewise cannot sue an unemancipated minor child for a personal tort. The parent-child immunity doctrine does not apply to actions by an unemancipated minor with respect to contract and property rights, actions by an unemancipated minor involving willful and mali-

113. *Bryant v. Adams*, 116 N.C. App. 448, 458, 448 S.E.2d 832, 837 (1994) (indicating that a minor's claim is not time-barred, while a parent's claim is time-barred unless the defendant is estopped from raising the defense); *accord* *Robinson v. Bridgestone/Firestone N. Am. Tire, LLC*, 703 S.E.2d 883, 887-88, 2011 N.C. App. LEXIS 86, at *12-13 (2011) (affirming dismissal of claim because "[u]nder [section] 1-17, the minor plaintiffs had to show that the accident occurred less than six years after the tire was initially sold").

114. N.C. GEN. STAT. § 1-50(a)(5) (creating a six year statute of repose for actions arising from an unsafe or defective improvement to real property).

cious acts, or actions by an emancipated child for torts committed after emancipation.¹¹⁵

This rule is designed to maintain family harmony.¹¹⁶ Even if the parent has liability insurance, the parent still retains immunity.¹¹⁷ By statute, however, a minor child can sue a parent for injuries arising from a motor vehicle accident.¹¹⁸

The parent is not immune for his willful and malicious acts.¹¹⁹ The minor can also sue the parent for mishandling the minor's property.¹²⁰ The parent has authority to control the child's property for the purposes of supervising or disciplining the child.¹²¹

Where the minor is injured by his parent, who is acting in the course and scope of his employment, the minor may sue the employer notwithstanding that the minor cannot sue his parent, who is the active tortfeasor.¹²²

115. Coffey v. Coffey, 94 N.C. App. 717, 719, 381 S.E.2d 467, 469 (1989) (citations omitted) (internal quotation marks omitted).

116. Small v. Morrison, 185 N.C. 577, 579, 118 S.E. 12, 13 (1923) ("The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.").

117. Skinner v. Whitley, 281 N.C. 476, 483–84, 189 S.E.2d 230, 234–35 (1972) ("[T]he existence of liability insurance is not a valid reason to abolish the immunity doctrine.").

118. N.C. GEN. STAT. § 1-539.21 ("The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child.").

119. Doe v. Holt, 332 N.C. 90, 96, 418 S.E.2d 511, 514 (1992) (holding parent-child immunity does not apply to "injuries resulting from their parent's willful and malicious acts").

120. Small, 185 N.C. at 586, 118 S.E. at 16 ("The law will not permit a parent, or other, to take the property of a minor child, or any one else, hold it unlawfully, and thus profit by his own wrong. This would be an unjust enrichment which the law cannot condone." (citing Walker v. Crowder, 37 N.C. 478 (1843))).

121. See, e.g., Smith v. Simpson, 260 N.C. 601, 615, 133 S.E.2d 474, 485 (1963) (Sharp, J., dissenting) ("Because a father could forbid his son to drive the son's car on a Saturday night, it does not follow that he could legally require the son to turn the car over to another member of the family for the evening.").

122. Wright v. Wright, 229 N.C. 503, 507–08, 50 S.E.2d 540, 544 (1948) ("The personal immunity from suit because of the domestic relation does not extend to the employer so as to cancel his liability or defeat recovery on the principle *respondet superior* when the injury was inflicted by the servant acting as such.").

The parent-child immunity doctrine extends to stepparents, under the doctrine of *in loco parentis*.¹²³ The doctrine of *in loco parentis* is used in various contexts, and generally means that a person other than the true parent acquires the rights or obligations of a parent.¹²⁴ Thus, “if a stepfather voluntarily takes the child into his home or under his care in such a manner that he places himself *in loco parentis* to the child, he assumes a parental obligation to support the child which continues as long as the relationship lasts.”¹²⁵ A person acquires this status if he “has assumed the status and obligations of a parent without formal adoption.”¹²⁶

Where, however, persons who are not parents have custody over the minor, which is less permanent than that of a parent or stepparent, they do not have immunity. Where the DSS had legal and physical custody of a child, and placed the child with his aunt for two months, during which time the long-term placement plan was to reunite the child with his parents, the aunt did not stand *in loco parentis* with the child and was not entitled to immunity from suit from the minor.¹²⁷ The court wrote:

A person does not stand *in loco parentis* “from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. This relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance.”¹²⁸

The court wrote that “defendants did not intend to assume the status of Ambra’s parents and did not stand *in loco parentis* to Ambra,” and concluded that the aunt did not have immunity.¹²⁹ Similarly, a day care worker does not stand *in loco parentis* with a child.¹³⁰

123. *Morgan v. Johnson*, 24 N.C. App. 307, 309, 210 S.E.2d 503, 504–05 (1974); *Mabry v. Bowen*, 14 N.C. App. 646, 647, 188 S.E.2d 651, 651–52 (1972).

124. See generally 59 AM. JUR. 2D *Parent and Child* § 9 (“Where one stands *in loco parentis* to another, the rights and liabilities arising out of that relation are, as the words imply, substantially the same as between parent and child . . .”).

125. *Moyer v. Moyer*, 122 N.C. App. 723, 724, 471 S.E.2d 676, 678 (1996) (citing *In re Dunston*, 18 N.C. App. 647, 649, 197 S.E.2d 560, 562 (1973)).

126. *Id.* at 724, 471 S.E.2d at 676 (citation omitted).

127. *Liner v. Brown*, 117 N.C. App. 44, 50, 449 S.E.2d 905, 908 (1994).

128. *Id.* at 49, 449 S.E.2d at 907 (quoting *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811 (1980)).

129. *Id.* at 50, 449 S.E.2d at 908.

130. *Pittard*, 45 N.C. App. at 703, 263 S.E.2d at 811 (holding day care worker who struck two-year-old child did not stand *in loco parentis* with child because the worker did not assume duty of “support and maintenance,” and rejecting potential defense arising from teacher-student relationship because defendant was not a teacher); see also *Gasper-*

The child's parents are not immune to suit from each other. Thus, even though the child cannot sue his mother for injuries negligently inflicted, the father can sue the mother to recover for the medical expenses incurred for treatment of such injuries.¹³¹ The parent's immunity to a suit by his child also bars a tortfeasor who injures the child from asserting a claim against a negligent parent for contribution where the parent would be immune from a direct suit by his child.¹³²

d. Supervision by Parents or Other Adults

In some contexts, the minor's claim against the landowner or against another tortfeasor is barred where the minor is supervised by his parents, or another adult, at the time of the injury. Thus, a landowner's duty toward children "does not apply . . . where the minor child is being actively supervised by a parent who has full knowledge of the condition of the premises and appreciation of the danger thereby presented."¹³³ In this case, the father cut down a tree on the defendant's property, and the tree fell on his six-year-old son's head, causing serious injuries.¹³⁴ The son sued the owner of the property where the incident occurred, alleging that he had a duty to protect him from inherently dangerous activity.¹³⁵ The court ruled that the property owner was entitled to summary judgment: "Because the evidence establishes that Justice was injured while being actively supervised by his father, who was actually performing the activity that plaintiff asserts was inherently dangerous, the duty of care

sohn v. Harnett Cnty. Bd. of Educ., 75 N.C. App. 23, 27, 330 S.E.2d 489, 493 (1985) ("[A] teacher has the right to administer corporal punishment to students so long as it is done without malice and to further an educational goal."); N.C. GEN. STAT. § 115C-390 ("Except as restricted or prohibited by rules adopted by the local boards of education, principals, teachers, substitute teachers, voluntary teachers, and teacher assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order.").

131. Foster v. Foster, 264 N.C. 694, 698, 142 S.E.2d 838, 841 (1965).

132. Lee v. Mowett Sales Co., Inc., 316 N.C. 489, 489-90, 342 S.E.2d 882, 883 (1986) (holding that where a minor's father operated a lawnmower and accidentally injured the minor, and the minor sued the manufacturer of the lawnmower, the manufacturer's suit against the minor's father for contribution was barred by parent-child immunity). The court in *Lee* reasoned that "since a parent is not liable in a direct action for the plaintiff child's injury, the parent cannot be held liable for any contribution for damages awarded against another as a result of such injury." *Id.* at 492, 342 S.E.2d at 884 (citing *Watson v. Nichols*, 270 N.C. 733, 735, 155 S.E.2d 154, 156 (1967)).

133. Vares v. Vares, 154 N.C. App. 83, 88, 571 S.E.2d 612, 616 (2002).

134. *Id.* at 85, 571 S.E.2d at 614.

135. *Id.* at 86, 571 S.E.2d at 614.

to protect Justice belonged to [the parent] and not to [the landowner].¹³⁶

Where the children are being supervised by an adult who fails to exercise ordinary care for the safety of the children, the chain of causation is broken and the landowner is not liable. Thus, where five children were accompanied by a forty-two-year-old man and they entered the defendant's land and boarded a four-person boat without life preservers, and the boat was defective and capsized, the minors did not have a claim against the defendant.¹³⁷

A variation of this principle was presented in *Watson v. Nichols*.¹³⁸ In this case, the defendant was mowing a lawn, and the minor plaintiff approached the lawn mower and was injured.¹³⁹ The minor sued the operator of the lawn mower, who in turn sued the minor's parents and the minor's ten-year-old brother, alleging that they were negligent in allowing the minor (who was four years old) to approach the lawn mower.¹⁴⁰ The North Carolina Supreme Court held that the claims against the ten-year old brother were properly dismissed, stating:

Ordinarily when parents are present, in charge of their children of tender years, responsibility for their care and safety falls on the parents. In this case the [minor plaintiff's] parents were at home. Both the plaintiff and [his ten year old brother] were under their control. Any promise made by [the ten-year-old] to take care of [plaintiff] would not relieve the parents of that responsibility. The allegations of the cross action are insufficient to state a cause of action against [the ten-year-old].¹⁴¹

136. *Id.* at 89–90, 571 S.E.2d at 616. Compare *Freeze v. Congleton*, 276 N.C. 178, 171 S.E.2d 424 (1970) (holding claim barred where child collided with sliding glass door placed by defendant because child's mother was present in the room with full knowledge of the danger), with *Mitchell v. K.W.D.S., Inc.*, 26 N.C. App. 409, 216 S.E.2d 408 (1975) (holding claim not barred by minor's grandmother's presence on premises where six-year-old plaintiff collided with a glass panel on defendant's premises, but the record did not show that she was present in the portion of the building where the child was injured).

137. The North Carolina Court of Appeals has held:

When children are harmed by the intervening negligent acts of an adult, the harm is not proximately caused by the existence of risks not apparent to them due to their tender years, rather, the children are harmed by the negligent acts of the adult. The intervening adult negligence is not a consequence of the negligent maintenance of a nuisance attractive to children.

Coleman v. Rudisill, 131 N.C. App. 530, 533, 508 S.E.2d 297, 300 (1998).

138. *Watson v. Nichols*, 270 N.C. 733, 155 S.E.2d 154 (1967).

139. *Id.* at 734, 155 S.E.2d at 156.

140. *Id.*

141. *Id.* at 736, 155 S.E.2d at 157.

e. Pre-injury Release

North Carolina does not have any law addressing whether the child or his parents can release persons for injury to the minor which has not yet occurred (i.e., the “pre-injury release”). Adults can generally waive their potential future claims against others.¹⁴² There are, however, instances where these provisions are deemed invalid.¹⁴³

Cases from other jurisdictions are split on the issue of whether the parents can waive their child's prospective claims. Most jurisdictions hold that such an agreement is not binding because the parent lacks the capacity to release the minor's claims.¹⁴⁴ Some of these decisions note the need to discourage negligence and to protect minors.¹⁴⁵ Other cases

142. See, e.g., *Young v. Prancing Horse, Inc.*, 170 N.C. App. 699, 614 S.E.2d 607 (2005) (deeming pre-injury release valid); *Bertotti v. Charlotte Motor Speedway, Inc.*, 893 F. Supp. 565, 568 (W.D.N.C. 1995) (“By signing the Release Agreements, plaintiffs expressly assumed the risk for injuries that occurred during the kart race even if those risks arose due to negligence on the part of the defendants.”).

143. See, e.g., *Strawbridge v. Sugar Mountain Resort, Inc.*, 320 F. Supp. 2d 425, 433 (W.D.N.C. 2004) (“[A] party cannot protect himself by contracting against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty.” (citation omitted)).

144. *J.T. ex rel. Thode v. Monster Mountain, LLC*, 754 F. Supp. 2d 1323, 1327–28 (M.D. Ala. 2010) (holding that contracts with minors are voidable) (“[T]he court concludes that, under Alabama law, a parent may not bind a child to a pre-injury liability waiver in favor of a for-profit activity sponsor by signing the liability waiver on the child's behalf.”); *id.* at 1327 (“[T]he only published decisions from other jurisdictions that have bound children to pre-injury releases executed by a parent or guardian *ad litem* on the child's behalf have done so in the context of a ‘minor's participation in school-run or community-sponsored activities.’” (quoting *Kirton v. Fields*, 997 So. 2d 349, 356 (Fla. 2008))); *Simmons by Grenell v. Parkette Nat. Gymnastic Training Ctr.*, 670 F. Supp. 140, 144 (E.D. Pa. 1987) (holding pre-injury release signed by minor gymnast did not bar her claims but mother's claims were barred by her signature on release); *Woodman v. Kera, LLC*, 760 N.W.2d 641, 655–56 (Mich. App. 2008) (stating “preinjury waivers effectuated by parents on behalf of their minor children are not presumptively enforceable”); *id.* (“Specifically, within the context of our state's overriding policy, and in the absence of any specific legislative exceptions permitting the waiver of liability by parents in these situations, the release signed on behalf of plaintiff's son cannot be construed as valid.”).

145. *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 387 (N.J. 2006) (invalidating pre-injury release because “[a]lthough the Rule governing post-injury settlements is not dispositive of our treatment of pre-injury releases, we find that the purposes underlying the post-injury settlement rule also apply in the present context.”). The *Hojnowski* court stated that:

[I]n view of the protections that our State historically has afforded to a minor's claims and the need to discourage negligent activity on the part of commercial

note that a pre-injury release should be treated with more suspicion than a post-injury release, which requires court approval.¹⁴⁶ However, some states hold that the parents can enter a binding pre-injury release. These cases often note the “importance of parental authority,” and the benefits to children of activities such as sports.¹⁴⁷

In view of the strong doctrine in North Carolina that protects the rights of minors, our courts are more likely to hold that such a pre-injury release is not valid. This issue is, however, an open question in North Carolina. To the extent that public policy favors a pre-injury release in certain contexts (e.g., volunteer work or school activities), this is

enterprises attracting children, we hold that a parent’s execution of a pre-injury release of a minor’s future tort claims arising out of the use of a commercial recreational facility is unenforceable.

Id. at 390. However, the dissent believed that:

[F]reedom of contract principles lead me to the conclusion that a pre-tort waiver entered into by a minor, or ratified by a parent on behalf of a minor, should be enforceable when a reviewing court or arbitrator determines that the waiver was reasonable and not based on unequal bargaining positions.

Id. at 397 (LaVecchia, J., dissenting).

146. *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001). On pre-injury release the Supreme Court of Utah held that:

[A] parent does not have the authority to release a child’s claims before an injury. . . . [W]e see little reason to base the validity of a parent’s contractual release of a minor’s claim on the timing of an injury. . . . [T]he law generally treats preinjury releases or indemnity provisions with greater suspicion than postinjury releases.

Id. Some cases might negate the pre-injury release only for a commercial activity (as opposed to, for example, a volunteer activity or a school trip). See *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008) (holding a pre-injury release is invalid as to tort action arising from participation in a commercial activity).

147. See, e.g., *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998). In *Zivich*, the Supreme Court of Ohio stated:

[W]e believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children. We also believe that the enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities.

Id. at 205. The court further distinguished a post-injury release because “[a] parent who contemplates signing a release as a prerequisite to her child’s participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim.” *Id.* at 206 (citation omitted) (internal quotation marks omitted). See also Jordan A. Dresnick, *The Minefield of Liability for Minors: Running Afoul of Corporate Risk Management in Florida*, 64 U. MIAMI L. REV. 1031 (2010) (analyzing *Kirton*, 997 So. 2d 349, which rejected a pre-injury release, and addressing cases nationwide).

probably better addressed by legislation, which has occurred elsewhere.¹⁴⁸

3. *Minor's Damages*

When an adult is injured, he may assert a claim for all losses incurred by him arising from the tortfeasor's negligence, which typically consists of past and future medical expenses, past and future lost earnings (or lost earning capacity), scarring, disability, and pain and suffering. The injured person's spouse might also have a derivative claim for loss of consortium.¹⁴⁹

When a child is injured, however, some elements of damage are held by the parents, and other elements of damage are held by the child. The minor can recover "damages for pain and suffering, for permanent injury, and for impairment of earning capacity after attaining majority."¹⁵⁰ The minor can also recover for future medical expenses to be incurred after the age of majority.¹⁵¹ The allocation of these damages can have a significant impact on the parents' and minor's claims. An error in the jury instructions on this allocation of damages between the parent and child warrants a new trial.¹⁵² The minor's recovery of medical bills incurred during minority is complicated, and requires further analysis. The minor's claim for future earnings likewise requires some discussion, as do the potential liens against the minor's recovery.

148. See COLO. REV. STAT. § 13-22-107(3) (2011) ("A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.").

149. See, e.g., *Johnson v. Johnson*, 317 N.C. 437, 447, 346 S.E.2d 430, 436 (1986) (listing damages for injury to married adult as "(1) those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating the non-injured spouse for loss of services or loss of consortium").

150. *Ellington v. Bradford*, 242 N.C. 159, 160–61, 86 S.E.2d 925, 926 (1955).

151. No North Carolina case expressly supports this proposition. Because the parent's claim is dependent on his duty to support the child, as discussed *supra* Part I.D.1.a., the parent's claim should not include losses incurred after the minor attains eighteen years, and the child should have that claim. See also *Vaughan v. Moore*, 89 N.C. App. 566, 568, 366 S.E.2d 518, 520 (1988) ("[T]he parents may recover for the child's lost earnings and medical expenses during minority . . .").

152. *Johnson v. Lewis*, 251 N.C. 797, 804, 112 S.E.2d 512, 517 (1960) (holding that a jury instruction which does not "limit the infant's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering, and for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money after reaching his majority" is error that requires a new trial).

a. *Medical Bills*

The general rule is that a minor is not liable for his medical expenses.¹⁵³ Thus, the child normally cannot recover those damages in her claim against the tortfeasor. The child also cannot recover for these expenses (incurred during minority) after the child attains the age of majority.¹⁵⁴

Notwithstanding the general rule that only the parent is liable for the minor's medical expenses,¹⁵⁵ there are several situations where the minor is liable for those expenses, and thus he can assert a claim for them; these situations are addressed below. It should be noted that some jurisdictions have rejected the common law rule and have simply held that both the minor and his parents have a right to claim damages for the minor's pre-majority medical expenses.¹⁵⁶ These courts reach this result in part because, as shown below, the minor is sometimes liable for his medical expenses. The reasoning of these cases is fairly persuasive, and the North Carolina Supreme Court could adopt this view as well.

i. *Necessaries*

Under the doctrine of "necessaries," the minor can be liable for his medical expenses. The doctrine of necessaries renders an express contract by a minor enforceable against the minor.¹⁵⁷ Further, the doctrine

153. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 42, 161 S.E.2d 590, 598 (1968) (ruling that "medical expenses incurred by [father] in the necessary treatment of his two minor, unemancipated children injured in the collision . . . [results in] the liability of the father, and not of his two minor children.").

154. See generally *Vaughan*, 89 N.C. App. 566, 366 S.E.2d 518.

155. See *infra* Part I.B.1.a. for a discussion of the parents' claim for these expenses.

156. *St. Packard v. Perry*, 655 S.E.2d 548, 560–61 (W. Va. 2007) ("[I]t is difficult for us to fathom a legal system in which a child could be responsible for his or her pre-majority medical expenses, but that he or she, simply by reason of infancy, is unable to pursue such damages in his or her lawsuit . . . under no circumstances will double recovery be allowed."); see also Stephen J. Cosentino, Note, *Boley v. Knowles: Child's Pay—Child May Recover Medical Expenses Independently of the Parent*, 64 UMKC L. REV. 431 (1995) (discussing child's right to assert claim for medical expenses).

157. See *N.C. Baptist Hosps. v. Franklin*, 103 N.C. App. 446, 405 S.E.2d 814 (1991) ("Under the doctrine an infant who contracts for or obtains necessaries that are not being supplied by his parents or guardian may not disavow the agreement and can be held liable for their fair value."). For a discussion of the minor's lack of capacity to enter a contract, see *infra* text accompanying notes 607–12.

can be used to support a claim against the minor for services based on an implied contract.¹⁵⁸

The necessities doctrine applies only to a good or service that is a "necessary."¹⁵⁹ Necessaries include medical services "reasonably required by the infant."¹⁶⁰ Thus, the minor is liable for emergency service to save his life.¹⁶¹ A minor "without parent, or one whose parent is financially unable to pay for the [medical] treatment, may be liable as for other necessities."¹⁶²

The doctrine applies where the parent is unable or unwilling to pay for the expenses. "[A] child living with its parents cannot be held liable even for necessities 'unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, [etc.], as the parent considers necessary.'"¹⁶³

No North Carolina case holds that a minor who is liable for his medical expenses can recover them from the tortfeasor,¹⁶⁴ but he should be able to do so, as the fundamental purpose of damages is to make the plaintiff whole.¹⁶⁵ There is authority from other jurisdictions that the minor may sue the tortfeasor to recover these expenses under these circumstances.¹⁶⁶ If the minor is liable to the health care provider for the

158. *Hyman v. Cain*, 48 N.C. 111 (1855) (holding that "the law will imply a promise on the part of an infant to pay a reasonable price for necessities furnished to him").

159. Necessaries include necessary "meat, drink, apparel, boarding, schooling, and nursing." *Freeman v. Bridger*, 49 N.C. 1, 2 (1856).

160. *Cole v. Wagner*, 197 N.C. 692, 695, 150 S.E. 339, 340 (1929) (citation omitted).

161. *In re Peacock*, 261 N.C. 749, 753, 136 S.E.2d 91, 94-95 (1964) (noting that his father can also be liable for these expenses).

162. *Ellington v. Bradford*, 242 N.C. 159, 161, 86 S.E.2d 925, 927 (1955); *accord Peacock*, 261 N.C. at 753, 136 S.E.2d at 94-95 ("Certainly, when a minor has no parent, as in the instant case, who is able to provide medical services necessary to be rendered in an effort to save his life, such services will be classed as necessities.").

163. *N.C. Baptist Hosps., Inc. v. Franklin*, 103 N.C. App. 446, 449, 405 S.E.2d 814, 816 (1991) (quoting *Freeman v. Bridger*, 49 N.C. 1, 4 (1856)).

164. One case held that the converse is true; i.e., where the minor recovers medical bills for necessary treatment in the tort action, the health care provider can sue the minor for these expenses. *Cole*, 197 N.C. at 699, 150 S.E. at 341 (deciding that where minor obtained judgment, which included hospital bills, hospital can sue minor to recover bills because "[t]o allow the defendant infant to recover upon this theory and then deny the plaintiff in the present action the right to recover on the same theory of necessary expenses, would be blowing hot and cold in the same breath").

165. *Cavin's, Inc. v. Atl. Mut. Ins. Co.*, 27 N.C. App. 698, 702, 220 S.E.2d 403, 406 (1975) ("Compensatory damages, which are awarded to compensate and make whole the injured party . . .").

166. *Johns Hopkins Hosp. v. Pepper*, 697 A.2d 1358, 1368 (Md. 1997) (holding that minor made sufficient showing to have pre-majority medical expenses and deciding that

medical bills, then logically he should be able to recover them from the tortfeasor.¹⁶⁷ In some jurisdictions the minor may sue to recover these expenses, even where the claim of his parents has expired.¹⁶⁸

One case in North Carolina holds that the necessities doctrine does not apply where the hospital, in providing services to the minor, relies on the parents', and not the minor's, credit, and obtained a judgment against the parents.¹⁶⁹ This case also indicates that an express contract between the parents and the provider will preclude recovery by the hospital against the minor, because an express contract generally negates an implied contract.¹⁷⁰

a minor is required to show that parents "are financially incapable of providing medical necessities"); *Garay v. Overholtzer*, 631 A.2d 429 (Md. 1993) (a negligently-injured minor child may make a claim for medical expenses in his or her own name if, *inter alia*, the parents of the child are unable to meet those expenses).

167. *See Betz v. Farm Bureau Mut. Ins. Agency of Kansas, Inc.*, 8 P.3d 756 (Kan. 2000) ("The parents' cause of action for medical expenses can be shifted to the minor if: (1) the minor child has paid or agreed to pay the expenses; (2) the minor child is legally responsible for payment (emancipation, death or incompetency of the parents); (3) if the parents waive or assign their right to recovery in favor of the minor; or (4) when recovery of expenses is permitted by statute.").

168. *See, e.g., Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 249 P.3d 767 (Ariz. 2011) (deciding that both minor and mother can recover pre-majority medical expenses as long as there is no double recovery and the minor's statute of limitation was tolled during minority); *Garay*, 631 A.2d at 445–46 (Md. 1993) (holding that minor was entitled to claim medical expenses, limitations period on minor's claim was tolled during his minority, and that minor's liability for medical expenses pursuant to necessities doctrine "will, in turn, give a minor the right to claim medical expenses on his or her own behalf"); *Pepper v. Johns Hopkins Hosp.*, 680 A.2d 532, 539 (Md. Ct. Spec. App. 1996), *aff'd*, 697 A.2d 1358 (Md. 1997) ("[I]f the minor child meets his burden of showing that his parents are unable or unwilling to pay his medical expenses, and that he has paid or will be responsible for paying such expenses, he may make a claim for them," even if parent's claim is time-barred). The *Pepper* court decided that the lower court erred in excluding from trial evidence of pre-majority medical expenses, where plaintiff produced evidence supporting necessities doctrine. *See id.*

169. *See generally N.C. Baptist Hosps., Inc. v. Franklin*, 103 N.C. App. 446, 405 S.E.2d 814, (1991) (overturning a ruling that awarded \$5,000 of minor's \$25,000 settlement to be distributed pro rata to the health care providers through a judgment obtained against a minor's parents when the health care providers sued the minor for the parents' debt). The court ultimately decided that an express contract with parents for payment of bills precludes the necessities doctrine "[s]ince the charges were incurred upon the parents' credit, the child was not liable for the debt under the necessities doctrine." *Id.* at 451, 405 S.E.2d at 818.

170. *Id.* at 449–50, 405 S.E.2d at 816–17.

ii. Parent's Waiver of Claim

Where the parent who is liable for the child's medical expenses serves as the GAL in the minor's lawsuit, and asserts a claim for the minor to recover medical expenses, the child can recover these damages.¹⁷¹ These cases implicitly hold that the claim is assigned or transferred to the minor. In such a case, the parent loses his claim to recover payment for the medical bills,¹⁷² and thus there is no possibility of a double recovery.

Where the minor is represented by a GAL who is not liable for payment of the minor's medical bills (i.e., typically a GAL other than a parent), the minor cannot recover the medical expenses pursuant to this doctrine.¹⁷³ Even if the parent expressly waives his claim for medical expenses, the child cannot assert this claim where the parent does not serve as the GAL.¹⁷⁴

It should be noted, however, that under older procedural rules, if the defendant objected to the minor's assertion of the claim for medical bills, the child could not assert that claim.¹⁷⁵ This result was based on the principle that the parent has the claim for medical expenses, and the parent cannot join his claim with that of his child because there would be a misjoinder.¹⁷⁶ Under modern procedural rules, which are more liberal regarding joinder, the parents and the child can jointly file suit

171. *Shields v. McKay*, 241 N.C. 37, 40, 84 S.E.2d 286, 288 (1954). The court explained that by filing suit in this manner, "[t]he father treats the child as emancipated in so far as recovery for such elements of damage are concerned, and cannot claim that he, and not the child, is entitled to recover therefor; and, hence, she [the minor] may recover the full amount to which both she and her father would have been entitled if separate suits had been brought." *Id.* at 41, 84 S.E.2d at 289. The father would therefore be estopped from making a separate claim for such loss. *Id.* at 40, 84 S.E.2d at 288; see also *Ellington v. Bradford*, 242 N.C. 159, 161, 86 S.E.2d 925, 926 (1955).

172. *Bolkhir v. N.C. St. Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902-03 (1988) ("[T]he parents have waived their claim for medical expenses in favor of their son. . . . [T]he Commission erred by awarding the medical expenses to the parents.").

173. *Brown v. Lyons*, 93 N.C. App. 453, 378 S.E.2d 243 (1989).

174. *Id.* at 459, 378 S.E.2d at 247 (holding that neither a grandmother nor a minor can recover medical expenses even though the minor's father waived his claim, where the father has custody of minor and there is no evidence that grandmother provides support for grandchild). The lower court did not err in refusing to continue the hearing to allow more time to obtain waiver of claim from father because said waiver would not avail plaintiffs. *Id.* The result in this case would have been different if the father had not merely waived his claim, but had also expressly assigned those claims to the minor.

175. *Ellington*, 242 N.C. at 162, 86 S.E.2d at 927.

176. *Id.*

against the tortfeasor.¹⁷⁷ Further, as noted below, the parent should be able to assign his claims to the minor. Therefore, the doctrine (that the defendant can insist that the minor not assert a claim for medical expenses, and that such allegations should be stricken on the defendant's motion) is not likely to have a practical effect under current procedural rules, and would not apply where the parties are consenting to a settlement.

The parent's waiver of the claim for medical expenses, effectuated by serving as the GAL and allowing the minor to recover these expenses, has the effect of transferring, or assigning, this claim to the minor. North Carolina does not have a case expressly holding that a parent can transfer or assign the claim for medical expenses to the child other than by serving as the GAL, but the parent should be able to formally assign the claim to the minor without serving as the GAL.¹⁷⁸ The statute of limitations for the assigned claim, however, continues to run (and is not tolled by the minor's incapacity).¹⁷⁹

b. Lost Earnings

The child can assert a claim for lost earnings that she will incur after she attains the age of majority.¹⁸⁰ Projecting future lost earnings for a minor can be very difficult because minors typically do not have a work history, often have not decided upon a career, and sometimes do not have a significant academic record. Other jurisdictions have adopted a lower standard for minors to prove future lost earnings. "In cases involving injured infants, in which there is always going to be limited evidence, if any at all, permitting a concrete calculation of future earnings, our courts have allowed juries to determine the loss without requiring evidence that would permit its specific quantification."¹⁸¹

177. See discussion *infra* Part II.B.

178. See, e.g., *Bauer v. Mem'l Hosp.*, 879 N.E.2d 478, 502 (Ill. App. Ct. 2007) ("[T]he parents may assign their cause of action for medical expenses to their child . . .").

179. *Vaughan v. Moore*, 89 N.C. App. 566, 568, 366 S.E.2d 518, 520 (1988) (noting that the claim is not saved by assignment of claim to minor, where suit is not instituted within three years).

180. *Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965) (noting that a minor can bring a cause of action to recover "impairment of earning capacity after attaining majority").

181. *Lesniak v. Cnty. of Bergen*, 563 A.2d 795, 802–03 (N.J. 1989). The court further explained "[w]hen it can be inferred that a child's ability to be of service to a parent is diminished, a court will submit the damage question to the jury." *Id.* at 803. The court explained that it "will not require expert testimony, as a general rule, to establish the quantum of earning-capacity loss for a minor." *Id.* at 806.

In one case, a child sustained a brain injury when she was almost three years old, and claimed a loss of earnings.¹⁸² The jury awarded the minor \$1,675,000, which included a claim for lost earnings.¹⁸³ The child's economist projected more than \$800,000 in lost earnings.¹⁸⁴ This was based on testimony that she would not be able to complete college and that her scars would affect her employability.¹⁸⁵ On appeal, the defense argued that the child "was too young for the testimony [about her lost earnings] to be anything but speculative."¹⁸⁶ The court rejected this argument, stating:

While we acknowledge that with young children proof of future damages involves a significant degree of speculation, we decline to hold that young children can not recover for loss of earning capacity because they are injured so early in life, where there is sufficient evidence offered so that such damages are not unreasonably speculative. [The child] was two years and eleven months old when the accident occurred. Plaintiffs presented sufficient evidence, including testimony and medical records pertaining to [the child's] mental and physical condition prior to her injury, to provide the jury with a reasonable basis upon which to estimate damages of [the child's] lost earnings.¹⁸⁷

The child can also assert his claim for lost earnings which have been or will be incurred prior to majority where his father serves as the GAL and seeks recovery of these losses for the minor.¹⁸⁸

c. Liens and Subrogation Claims

Liens arising from the provision of medical services to the minor may attach to the minor's monetary recovery. The net effect of such a lien that attaches to the minor's recovery (by settlement or judgment) is that the minor will pay for his medical expenses, either to the health care provider directly, or to a third-party payor (e.g., Medicaid, or private health insurance).

182. *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346 (2001).

183. *Id.* at 271–72, 542 S.E.2d at 350–51.

184. Brief of Defendant-Appellant at 14, *Fox-Kirk*, 142 N.C. App. 267, 542 S.E.2d 346 (No. 99-1168), available at http://www.ncappellatecourts.org/nc_main_1.nsf.

185. *Fox-Kirk*, 142 N.C. App. at 273, 542 S.E.2d at 351.

186. *Id.* at 272, 542 S.E.2d at 351.

187. *Id.* at 272–73, 542 S.E.2d at 351 (holding also that expert testimony was properly allowed as to whether minor "would attend college and the effect of scarring on her future employability.").

188. See generally *Pascal v. Burke Transit Co.*, 229 N.C. 435, 50 S.E.2d 534 (1948) (noting that father, who served as next friend and prosecuted child's claim for lost earnings, would be estopped from asserting this claim in a subsequent suit).

When the child's treatment is paid by the Medicaid program, the North Carolina Division of Medical Assistance (DMA) has a lien against the child's recovery.¹⁸⁹ The DMA has such a lien even if the minor's recovery is clearly allocated for the child's claims, and where the minor's recovery excludes the claim for medical expenses.¹⁹⁰ The Medicaid lien upon the minor's recovery has been held to be constitutional.¹⁹¹

Health care providers can acquire a lien against a patient's settlement or judgment pursuant to sections 44-49 and 44-50 of North Carolina's General Statutes. The extent to which a health care provider has a lien against the minor's recovery is not clear. The statute creating the lien states, "[w]here damages are recovered for and in behalf of minors or persons non compos mentis, the liens shall attach to the sum recovered as fully as if the person were sui juris."¹⁹² The only case addressing this provision asserted, "The lien is created only in cases where the beneficiary may be indebted for the expenses incurred."¹⁹³ This apparently means that the lien is created against the minor's recovery only if the minor is indebted for the medical expense.

Whether the provider has a lien against the minor's recovery therefore depends on whether the minor is indebted for those expenses. The aforementioned case addressed that issue and stated, "In cases (1) where the parent waives his right, or (2) the child has no parent, or (3) the child is permitted to recover all elements of damage, the lien likewise at-

189. N.C. GEN. STAT. § 108A-59(a) (2011) ("Notwithstanding any other provisions of the law, by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled.").

190. *Payne v. N.C. Dept. of Human Res.*, 126 N.C. App. 672, 677, 486 S.E.2d 469, 471 (1997). The court stated that "by accepting Medicaid benefits, [the minor plaintiff] assigned his right to third-party benefits to DMA, and . . . DMA's lien vested at that time." *Id.* at 677, 486 S.E.2d at 471. In *Campbell v. North Carolina Department of Human Resources*, the court held that Medicaid payments had to be repaid from a minor's settlement, even though the minor did not receive payment for bills and the minor had no standing to sue for bills. *Campbell v. N.C. Dept. of Human Res.*, 153 N.C. App. 305, 307, 569 S.E.2d 670, 672 (2002) (deciding that a minor is obligated to repay the Medicaid payments pursuant to section 108A-57(a) of the North Carolina General Statutes because the statute "does not restrict defendant's right of subrogation to a beneficiary's right of recovery only for medical expenses").

191. *Armstrong v. Cansler*, 722 F. Supp. 2d 653 (W.D.N.C. 2010) (holding that the State's subrogation right to Medicaid reimbursement from a settlement with a third-party was consistent with federal Medicaid anti-lien provisions and rejecting the argument that the law is unconstitutional on the ground that the statute allows the State to assert a lien on compensation for damages other than medical expenses).

192. N.C. GEN. STAT. § 44-49(a).

193. *Ellington v. Bradford*, 242 N.C. 159, 161, 86 S.E.2d 925, 926-27 (1955).

taches.”¹⁹⁴ Where the parent has failed to pay the medical bill, the minor is probably liable for the medical expenses under the doctrine of necessities,¹⁹⁵ and the minor should be able to recover them from the tortfeasor.¹⁹⁶ Hence, where the parents fail to pay the medical bill, the lien likely attaches to the minor’s recovery. Where, however, the doctrine of necessities does not apply, and the child has a parent who does not waive his right to recover the medical bills, the provider apparently does not have a lien against the minor’s recovery.

Another potential claim against the minor’s proceeds is a lien asserted by a health care plan provided by the parents’ employer and subject to ERISA. Such a plan typically provides for a right of subrogation.¹⁹⁷ Two federal¹⁹⁸ cases in North Carolina have held that such plans, which have paid for the minor’s medical treatment, can recoup their payments from the minor’s settlement. These courts have rejected arguments that the minor’s recovery does not include medical bills, and that the minor did not enter a subrogation agreement with the employer. One court wrote, “[b]y accepting benefits paid by the Plan on the minors’ behalf, the [minor and parents] obligated themselves to reimburse the Plan from any third party recovery.”¹⁹⁹ Another case reasoned that to

194. *Id.* at 162, 86 S.E.2d at 927.

195. *See In re Peacock*, 261 N.C. 749, 753, 136 S.E.2d 91, 94–95 (1964); *Ellington v. Bradford*, 242 N.C. 159, 161, 86 S.E.2d 925, 927 (1955).

196. *See* discussion *supra* Part I.A.3.a.i.

197. *See generally* John R. Cella, Jr., *The Pursuit of Proceeds by Plans, Participants and Plaintiffs’ Lawyers: Dissonant Solutions to an Alliterative Problem*, 22 CAMPBELL L. REV. 317 (2000).

198. There is authority that the existence of a subrogation right pursuant to ERISA law must be decided in a federal action. *See Turner v. Turner*, 672 S.E.2d 242, 244–52 (W. Va. 2008) (discussing employer’s intervention in action to approve settlement and holding that employer’s request to enforce subrogation rights—pursuant to ERISA plan—against minor’s settlement proceeds must be decided in federal action); *see also Fravel v. Stankus*, 936 F. Supp. 474 (N.D. Ill. 1996) (noting that federal court retained the ERISA issue where a minor was sued in state court and an ERISA lienholder removed the case to federal court to adjudicate lien, but remanding the underlying personal injury action to state court).

199. *Blue Cross & Blue Shield v. Cooke*, 3 F. Supp. 2d 668, 672 (E.D.N.C. 1997). The court held that the defendant’s state court judgment were also subject to ERISA, “[o]therwise, defendants would be rewarded for breaching their contractual duty to notify BCBSA of the suit and to afford BCBSA an opportunity to participate” *Id.* The court noted that employer’s plan specifically applied to “all family members including minors,” and rejected the argument that a minor cannot enter into a contract because “courts may determine that ERISA preempts state laws relating to ERISA benefit plans that have the potential of subjecting plan administrators to conflicting state regulations.” *Id.*

regard the claim for medical expenses as that of the parents only would, under North Carolina law, “prevent seamless administration of nationwide or multi-state plans.”²⁰⁰ The safest course is therefore for the minor’s attorney to address the employer’s subrogation claim at (or prior to) the time of the settlement.

In one case in North Carolina, the father’s employer paid for the minor’s medical treatment and the father agreed to reimburse the employer from a settlement with the tortfeasor.²⁰¹ The minor later made a claim against the tortfeasor, but he did not assert a claim for the medical expenses.²⁰² The employer was not allowed to intervene in the tort action.²⁰³ The employer then sued the parents alleging that they retained the benefits of employer’s payments “without asserting, assisting, or cooperating in a claim against [tortfeasor] for medical expenses,” that they “are primarily liable for these medical expenses because of their obligation to provide for the support of their minor child.”²⁰⁴ The court held that the parents could be liable to the employer under a theory of unjust enrichment.²⁰⁵

B. Parents’ Claims

An analysis of the parents’ claims requires a discussion of substance of the parents’ claims, whether those claims can be asserted by the mother or by the father, and the defenses to those claims.

200. *Rhodes, Inc. v. Morrow*, 937 F. Supp. 1202, 1211–12 (M.D.N.C. 1996) (stating that pursuant to the terms of the plan, an employer is entitled to funds “in the event of a recovery from such third person on account of such injury or illness”). The court also stated that “[t]o accept Defendant’s argument that the children are not directly obligated to reimburse the Plan because they were not the true beneficiaries of the Plan would not only circumvent the purposes of the Plan and ERISA, but would also require the Court to ignore the first sentence of the [terms of] the Master Plan document.” *Id.* But see *Kelleher v. Hood*, 605 N.E.2d 1018, 1024–26 (Ill. App. Ct. 1992) (noting that where Illinois prohibited health insurers from subrogating against minor’s estate for medical expenses, any connection between these laws and an ERISA plan was too tenuous and remote for federal law to preempt Illinois law, and holding that the group health plan did not have a lien against the minor’s settlement).

201. *Harris-Teeter Super Mkts., Inc. v. Watts*, 98 N.C. App. 684, 685, 392 S.E.2d 123, 123 (1990).

202. *Id.* at 685, 392 S.E.2d at 124.

203. *Id.*

204. *Id.* at 687, 392 S.E.2d at 125.

205. *Id.* at 687–88, 392 S.E.2d at 125.

1. *Substantive Claims*

The parents have several potential claims arising from the injury to their child. The primary claim the parents have is for the child's medical expenses up to the age of majority, as well as a claim for the loss of the child's earnings up to the age of majority. The general rule for these damages has been stated as follows:

In case of injury to an infant by wrongful act, a cause of action in behalf of the parent (the mother if the father is dead) arises, permitting recovery for (1) the loss of earnings of the child during its minority if unemancipated, and (2) expenses incurred for necessary medical treatment.²⁰⁶

In settlement discussions, it is important for both sides to understand clearly whether they are settling the entire claim or only the minor's claim. In a case from another jurisdiction, the insurance adjuster thought that she was settling the entire claim, but the court ruled that she settled only the minor's claim and that the parents could still maintain their claim for medical expenses.²⁰⁷ The writings between the adjuster and the lawyer tended to indicate that only the minor's claim was settled.²⁰⁸ In most instances, however, absent an indication to the contrary, the settlement of a minor's claim probably includes the parents' claims for medical expenses.²⁰⁹

206. *Ellington v. Bradford*, 242 N.C. 159, 160, 86 S.E.2d 925, 927 (1955).

207. *Grange Mut. Cas. Co. v. Kay*, 589 S.E.2d 711, 715–16 (Ga. Ct. App. 2003).

208. *Id.* at 713–15 (noting that where a lawyer for a minor and the minor's parents made separate demands for the parents and for the minor, and stated that parents had a claim for medical expenses, and the adjuster thereafter wrote to the lawyer confirming settlement of "the Bodily Injury claim on your client, Laura Beth Kay [minor,]" the settlement was binding and was only for the minor's claim, and the parents could still pursue their claim, and that any mistake by adjuster was unilateral).

209. *See Crane v. Jordan*, 475 So. 2d 542, 543–45 (Ala. 1985) (holding that where the court dismissed the mother's claim, the parties then settled and obtained approval for the minor's claim, and the mother then attempted an appeal from dismissal of her claims but defendants moved for and had the order set aside, the parties clearly intended the settlement to encompass the mother's claim). "The appropriate remedy to rectify the situation is not to set aside the properly entered order approving the settlement for the minor, but to enforce the agreement on behalf of the Plaintiffs' counsel not to proceed with the mother's case." *Id.* at 545. Note also that in a jurisdiction where the parent's claim is derivative, such that the loss of the minor's claim extinguishes the other claim, the settlement of the minor's claim will necessarily bar the parent's claim. *See infra* notes 266–68 and accompanying text for a discussion of whether the parent's claim is derivative in North Carolina.

a. *Medical Expenses for Minor's Injury*

The parents have a claim for the child's medical expenses incurred through the age of majority. "The parental right to recover for both loss of services and medical expenses is . . . tied to the support obligation."²¹⁰ The parents have an obligation to support their children, which they cannot contract away, and which adheres even if the parent does not have custodial rights.²¹¹

The parent's obligation to support the child generally ends at the age of majority.²¹² The parent's duty to support his child can, however, continue after the age of majority, where the child is incapable of maintaining himself.²¹³ Therefore presumably the parent can pursue a claim for medical expenses for a child over eighteen where the child cannot maintain himself.

This rule permitting the parent to recover medical expenses has broad implications. For example, in one case, the jury awarded \$6,700 to the minor for her injuries and \$4,500 to the parents for medical expenses.²¹⁴ The minor's attorney then sought attorneys fees under section 6-21.1 of North Carolina's General Statutes, which allowed for the recovery of fees in a case where the judgment is less than \$10,000.²¹⁵ The defendant opposed the request for attorneys fees on the basis that

210. *Flippin v. Jarrell*, 301 N.C. 108, 121, 270 S.E.2d 482, 490 (1980).

211. *Alamance Cnty. Hosp., Inc. v. Neighbors*, 315 N.C. 362, 365–66, 338 S.E.2d 87, 89–90 (1986) ("A father cannot contract away or transfer to another his responsibility to support his children. The obligation survives divorce and continues even though custody of the children is awarded to the mother."). Where parental rights are terminated, the parent's duty to support the child terminates. N.C. GEN. STAT. § 7B-1112 (2010) ("An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile . . .").

212. See *Shoaf v. Shoaf*, 282 N.C. 287, 291, 192 S.E.2d 299, 303 (1972) (holding that parents' "duty to support [child] ceased at the time he became of age. . . . Thereafter, he was under no obligation to conform his life to the wishes of either parent. They were freed of any legal obligation to support him").

213. *Wells v. Wells*, 227 N.C. 614, 619–20, 44 S.E.2d 31, 35 (1947) (holding a mother can sue a father to recover necessary expenses for a child after the child's twenty-first birthday, where their son was mentally and physically incapable of earning a livelihood). The court described how the mother sued to recover for food, clothing, heat, medical attention, nursing and necessary personal attendance, and also apparently for the value of her services in tending to the child: "where this presumption [that an adult is capable of maintaining himself] is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues." *Id.* at 620, 44 S.E.2d at 35.

214. *Moquin v. Hedrick*, 163 N.C. App. 345, 345, 593 S.E.2d 435, 436 (2004).

215. *Id.* at 345–46, 593 S.E.2d at 436–37. The statute was amended in 2011, and now includes cases where damages are under \$20,000. 2011 N.C. Sess. Laws 283 § 3.1.

the total judgment for the minor and her parents was in excess of \$10,000. The Court of Appeals held that the two awards should be viewed separately, stating, “plaintiffs’ causes of actions, one for personal injuries to the daughter and one for medical expenses incurred by the parents, must be categorized as several [i.e., separate].”²¹⁶ “Because plaintiffs’ separate damage awards were less than \$10,000.00, application of section 6-21.1 was triggered, and the trial court had the discretion to award attorney’s fees thereunder.”²¹⁷

Several cases have addressed whether the parents’ and the minor’s claims are one claim or multiple claims for purposes of insurance coverage. Where a policy of insurance limits recovery to \$100,000 “per person,” and a child is injured giving rise to claims by the child and his parents, the insurer is obligated to pay only \$100,000, and the two claims are not regarded as separate so as to allow for a total recovery of \$200,000.²¹⁸ On the other hand, where the insurer issued one policy providing \$50,000 in uninsured motorist coverage to the minor, and issued another policy for \$50,000 to his parents which also provided uninsured motorist coverage, the insurer was obligated to the parents for the medical expenses up to the policy limits, even though it had paid the policy limits on the minor’s policy, thus resulting in a total exposure of \$100,000.²¹⁹

Family members of the minor, other than the parents, generally cannot sue to recover the medical expenses; thus, a grandmother who

216. *Id.* at 349, 593 S.E.2d at 438.

217. *Id.* at 349, 593 S.E.2d at 439; *accord* *West ex rel Farris v. Tilley*, 120 N.C. App. 145, 147–51, 461 S.E.2d 1, 2–4 (1995) (reaching same result where claim was filed by minor only, and parties had stipulated that verdict would include medical expenses because the mother was not a party to the action).

218. *Holt ex rel Holt v. Atl. Cas. Ins. Co.*, 141 N.C. App. 139, 142–43, 539 S.E.2d 345, 347–48 (2000) (noting that parent’s claim for child’s medical expenses is limited to “per person” limits of liability, and not the separate limits for property damage coverage); *Howard ex rel Sigmon v. Travelers Ins. Cos.*, 115 N.C. App. 458, 458–63, 445 S.E.2d 66–69 (1994) (holding that parents’ claim for minor’s medical expenses was derivative in nature, and they had suffered no “bodily injury” in accident such as would entitle them to separate \$100,000 awards).

219. *Nationwide Mut. Ins. Co. v. Lankford*, 118 N.C. App. 368, 374–77, 455 S.E.2d 484, 487–89 (1995). The court noted that language in the minor’s policy stating that \$50,000 was Nationwide’s “maximum limit of liability for all damages for bodily injury, including damages for care, loss of services or death, sustained by any one person in any one auto accident,” did not affect coverage under parents’ policy. *Id.* at 377, 455 S.E.2d at 489. “However, we do not perceive the parents’ claim as being ‘derivative’ with respect to the provisions and terms of their individual policy,” and the court did not address minor’s argument that he was also entitled to coverage under his parents’ policy, as this argument was inconsistent with his other arguments. *Id.* 371, 374, 455 S.E.2d at 486, 487.

did not have legal custody of her grandchild and was not responsible for the medical expenses could not recover those expenses.²²⁰ Therefore, if a family member other than the parents has legal custody or is responsible for the minor's bills, she might be allowed to recover those damages.

Pursuant to statute, the minor's grandparents are liable for his support where the minor's parents are also minors.²²¹ Because the grandparents in this situation are liable for the grandchild's medical expenses, they should be able to sue for the medical expenses.

b. Loss of Services and Earnings of Minor

The father can also recover for the loss of services of the minor and the minor's lost earnings through the age of majority.²²² Although some cases regard the child as the "property" of the father,²²³ this doctrine is not used much in modern times. Absent a waiver by the parent, which occurs when the parent serves as the GAL and allows the minor to pursue this claim, it is error to allow the minor to recover these losses.²²⁴

220. *Brown v. Lyons*, 93 N.C. App. 453, 458–60, 378 S.E.2d 243, 246–47 (1989).

221. *Whitman v. Kiger*, 139 N.C. App. 44, 48, 533 S.E.2d 807, 809 (2000) ("The plain meaning of the above statutory language, coupled with the legislative intent, imposes primary responsibility for an infant born to unemancipated minors on the minors' parents (the infant's grandparents)." (relying on N.C. GEN. STAT. § 50-13.4)).

222. *Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965) (stating that a parent can recover for "loss of the services and earnings of the child during minority"); *Smith v. Hewett*, 235 N.C. 615, 617, 70 S.E.2d 825, 827 (1952) ("[T]he father is primarily entitled to [the minor's] services and earnings as long as the minor is legally in his custody or under his control.").

223. *Foster v. Foster*, 264 N.C. 694, 699–701, 142 S.E.2d 638, 642–43 (1965) (noting that a father who incurs medical expense can recover from the mother who negligently injured the child). *Foster* held that "plaintiff's action to recover necessary medical expenses expended by him for his infant daughter in the instant case in within the fair intent and meaning of section 52-10.1 of North Carolina's General Statutes, [which abolished inter-spousal tort immunity] imposing liability for damages sustained to property." *Id.* at 699, 142 S.E.2d at 642. *Foster* also cites numerous authority from other jurisdictions for the proposition that a father's claim for medical expenses and loss of services of child are elements of damage to property. *Id.*

224. *Shipp v. United Stage Lines*, 192 N.C. 475, 479, 135 S.E. 339, 341 (1926) (noting that charging the jury to allow a minor to recover for loss of earning capacity during minority is error). "The father is entitled to the services and earnings of his minor child so long as the latter is legally in his custody or under his control and not emancipated." *Id.*

The claim for lost earnings appears to consist of the loss of income to the minor from employment outside the home.²²⁵ In modern times, a parent's claim for the minor's lost earnings is rarely seen. This is probably due in part to the age of majority being lowered from twenty-one to eighteen in 1971,²²⁶ as well as child labor laws.²²⁷ A parent cannot recover these losses if the minor is not in the parent's custody or if the minor is emancipated.²²⁸

With regard to the claim for loss of services, the cases do not elaborate on the computation of this claim. Most cases merely describe this as a claim for "loss of services" without further elaboration.²²⁹ The father must show an actual loss of services of the minor.²³⁰ "The father's right of action [for loss of services and other losses] . . . is based not only upon the right to services of the child but also upon his duty to care for and maintain the child."²³¹ This claim does not exist if the minor dies immediately in the accident, because the claim for loss of services will be included in a wrongful death claim.²³²

225. See, e.g., *Pascal v. Burke Transit Co.*, 229 N.C. 435, 440–41, 50 S.E.2d 534, 538 (1948) (affirming award to minor for his lost wages of \$25 per week where his father waived the claim).

226. N.C. GEN. STAT. § 48A-1 ("The common-law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated."); N.C. GEN. STAT. § 48A-2 (establishing age of majority as 18). Prior to this statute, the age of majority was determined by common law. E.g., *Shoaf v. Shoaf*, 282 N.C. 287, 288, 192 S.E.2d 299, 301 (1972) ("At the time the foregoing judgment was entered, according to the common law rule, an infant became emancipated at twenty-one years.").

227. Child labor laws are beyond the scope of this Article. Prior to reaching age eighteen, there are restrictions on the employment of a person in North Carolina. N.C. GEN. STAT. § 95-25.5(a) ("No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted."). Further, the federal Fair Labor Standards Act sets forth rules regarding the employment of minors. See 29 U.S.C. § 212 (2006). Whether the minor can be employed depends, *inter alia*, on his age, whether he works for his parents, and whether the work is dangerous.

228. *Shipp*, 192 N.C. at 479, 135 S.E. at 341.

229. *Foster v. Foster*, 264 N.C. 694, 697, 142 S.E.2d 638, 641 (1965) (recognizing "the right of the father to recover for loss of services of the infant during minority"); *Musgrove v. Kornegay*, 52 N.C. 71, 74 (1859) ("A father is entitled to the services of his child until he arrive at the age of twenty-one.").

230. *Floyd v. Atl. Coast Line Ry. Co.*, 167 N.C. 55, 60, 83 S.E. 12, 14 (1914) (adopting the view that "if there be no actual loss of services, there can be no recovery by the parent," and rejecting the view that "the right of action [is based] upon the right to services rather than the actual rendition of services").

231. *White v. Holding*, 217 N.C. 329, 333, 7 S.E.2d 825, 827 (1940).

232. *Gibson v. Campbell*, 28 N.C. App. 653, 654, 222 S.E.2d 449, 450 (1976) ("However, if the child dies as a result of such tortious conduct, there can be no recovery for

In one case, the court held that the mother did not provide sufficient proof of a claim for loss of services.²³³ The court did not, however, elaborate on the evidence presented a trial, nor the evidence required to support this claim.

c. Miscellaneous Claims of Parents

In addition to claims for medical expenses and lost services and earnings, the parents may have claims for miscellaneous losses, and for emotional damage. There is not much authority in North Carolina addressing those losses, other than medical bills and lost earnings, that the parents can recover arising from injury to their minor child. Where the parent incurs an extra expense in caring for the minor due to the minor's injuries, such as a wheelchair ramp, that should be recoverable.²³⁴ There is authority from other jurisdictions that a parent can be reimbursed for his or her time spent in caring for the child,²³⁵ however, the parent cannot recover for care that he or she otherwise would have provided for the child.²³⁶ One case from North Carolina suggests that the parent can recover the value of services in caring for a child.²³⁷

In some instances, the parent may also have an independent claim for negligent infliction of emotional distress (NIED) arising from the in-

loss of services for the period following the death, though the parent may still recover damages for loss of services of the child for the period intermediate its injury and death.”).

233. *Cates v. Wilson*, 83 N.C. App. 448, 458, 350 S.E.2d 898, 904 (1986) (describing how a mother sued health care providers for “lost services and earnings” of the minor, alleging that doctors failed to diagnose pregnancy and delayed in referring her to an obstetrician, resulting in cerebral palsy and mental retardation in minor; “however . . . despite plaintiff-mother’s contention to the contrary, it appears that plaintiffs did not present sufficient evidence of the value of the child’s services during minority to justify a verdict for these damages”).

234. *Floyd*, 167 N.C. at 60, 83 S.E. at 14 (1914) (“[I]f the parent is, by the wrong of another in injuring the child, put to extra expense in fulfilling his duty, he is entitled to recover indemnity from the wrongdoer, without reference to any loss of services resulting from the injury.”).

235. *Worley v. Barger*, 807 N.E.2d 1222, 1227 (Ill. App. Ct. 2004) (“The consequence of placing the burden on the defendant to pay the reasonable value of the services rendered to the minor child by the parent is no greater than if the expense had been incurred in employing a third person to deliver the service.”).

236. *Bradford v. Edmands*, 30 Cal. Rptr. 185, 191 (Cal. Ct. App. 1963) (“Care and attendance of a son is a maternal duty and only the special care necessitated by the accident should be the subject of compensation.”).

237. *See Wells v. Wells*, 227 N.C. 614, 620, 44 S.E.2d 31, 35 (1947) (noting that mother can sue father to recover for the value of her services in tending to a child who could not maintain himself, as father has primary obligation to support child).

juries to the child. The seminal case in North Carolina, *Johnson v. Ruark Obstetrics & Gynecology Associates*,²³⁸ held that a plaintiff may recover for his severe emotional distress arising from injury to another person, if the plaintiff can prove that he has sustained severe emotional distress as a proximate and foreseeable result of defendant's negligence.²³⁹ Most of the cases following *Ruark*, however, have rejected claims by parents who did not witness the incident causing the injury to the child.²⁴⁰ Along these lines, where the child's mother was in the car with the minor at the time of the accident, she had a claim for NIED.²⁴¹

Some authority holds that a parent can sue for the loss of companionship of a child who is abducted.²⁴² This doctrine is, however, limited to situations where the defendant abducts the child; where the defendant merely encourages the child to leave the parent, there is no action.²⁴³

238. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 304–05, 395 S.E.2d 85, 97–98 (1990).

239. *Id.* at 305, 395 S.E.2d at 98 (“Factors to be considered on the question of foreseeability in cases such as this include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act.”).

240. *Hickman ex rel Womble v. McKoin*, 337 N.C. 460, 461, 446 S.E.2d 80, 81 (1994) (rejecting claim when twelve- and fifteen-year-old children learned of automobile accident and were told their mother was not likely to survive her injuries, and they saw her briefly in the ICU, and witnessed her in constant pain and observed her undergo life-threatening operations); *Sorrels v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (deciding that the possibility that defendant's negligence in serving alcohol to son would combine with his driving while intoxicated, which would cause parents to suffer severe emotional distress was too remote to be reasonably foreseeable when considering “(1) ‘the plaintiff's proximity to the negligent act’ causing injury to the other person, (2) ‘the relationship between the plaintiff and the other person,’ and (3) ‘whether the plaintiff personally observed the negligent act’”); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993) (holding that parent-child relationship was not sufficient to compensate for plaintiff's lack of close proximity to the negligent act and lack of observance of defendant's negligent act when mother saw son in ER undergoing resuscitative efforts after automobile accident but was miles away when she learned of his death).

241. *Fox-Kirk v. Hannon*, 42 N.C. App. 267, 275, 542 S.E.2d 346, 352 (1979).

242. *Little v. Holmes*, 181 N.C. 413, 416, 107 S.E. 577, 578 (1921) (“That the parent is entitled to such services on the part of the child is sufficient to give him a right of action, and having such right on which to base the action, he may recover damages for the injury to his feelings, and the loss of the companionship of his child, as well as for the loss of the child's services.”).

243. *Morris v. Bruney*, 78 N.C. App. 668, 672, 338 S.E.2d 561, 564 (1986) (distinguishing *Little*: “In the case at bar, plaintiff Morris alleges only that her son left home, with the aid of defendant, after defendant Bruney cast aspersions on plaintiff's character

A parent cannot sue another person, including the other parent, for alienating the affections of the child.²⁴⁴ The law does not allow a child to recover for loss of consortium of the parent,²⁴⁵ and thus it appears that the parent likewise does not have a claim for loss of the injured child's companionship.²⁴⁶

2. *Whether Claim is Owned by Mother or by Father*

It is not always clear whether the claim for medical expenses, lost earnings, and loss of services is held by both parents, or by the father or mother separately. In many cases, of course, this will have no practical impact. There are, however, instances in which this can be significant. Under the traditional doctrine, the claim belongs predominately to the father.²⁴⁷ Thus, where the father has paid a medical expense for injuries to the minor, caused by the mother's negligence, he may sue the mother to recover those losses.²⁴⁸ Further, although the father can transfer the

and fitness as a mother. This is insufficient to support an action for abduction in this State.”).

244. *Edwards v. Edwards*, 43 N.C. App. 296, 300, 259 S.E.2d 11, 14–15 (1979). In affirming the dismissal of a counterclaim based on plaintiff's alienation of the affections of their son, the court held that “[a]lthough a cause of action exists for one spouse to recover for the alienation of the affections of the other spouse it does not necessarily follow that a parent may recover for the lost companionship of a child.” *Id.* at 302, 259 S.E.2d at 15.

245. *Vaughn v. Clarkson*, 324 N.C. 108, 109, 376 S.E.2d 236, 236 (1989) (“The common law of this jurisdiction has refused to recognize a child's claim for loss of parental consortium when the parent was negligently injured by another.”); *Hill v. Gilmore*, 85 N.C. App. 70, 74, 354 S.E.2d 315, 317 (1987) (“The spousal relationship and the relationship between parent and child are not the same. Companionship, service, responsibility, love and affection between spouses differ in both degree and kind from those of a parent-child relationship. The law is not constitutionally required to treat these relationships as identical.”); *see also Greer v. Parsons*, 103 N.C. App. 463, 468, 405 S.E.2d 921, 924 (1991) (“Damages for loss of a stillborn child's companionship, services, society and the like are too speculative to be recoverable under the Wrongful Death Act.”).

246. In a claim for the child's wrongful death, the estate could of course recover the parent's loss of the child's companionship, and this would typically inure to the benefit of the parents. N.C. GEN. STAT. § 28A-18-2(b)(4)b (2011) (establishing that an estate can recover for loss of “[s]ervices, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered”).

247. *See Flippin v. Jarrell*, 301 N.C. 108, 119, 270 S.E.2d 482, 489 (1980) (“In turn, the father ordinarily has been entitled to services of his child during the child's minority and, as between the parents, has alone been afforded the right to bring suit for parental losses due to injuries to the child.”).

248. *Foster v. Foster*, 264 N.C. 694, 697, 142 S.E.2d 638, 640 (1965).

claim for medical bills to the child by serving as GAL and allowing the child to recover them, the mother cannot do so.²⁴⁹

In *Flippin v. Jarrell*,²⁵⁰ the mother paid at least one-half of the child's support and paid medical expenses not covered by insurance (which was provided by the father). The Court held that she could sue the tortfeasor for medical expenses and loss of services arising from injuries to the child.²⁵¹ The Court noted, "The mother does, however, have an obligation to support her child when the father fails in whole or in part to do so."²⁵²

Most of the cases also state that the father has the claim for the loss of services of the child.²⁵³ The mother may, however, acquire this claim, as follows: "As between the parents, this right [for services rendered by child] belongs, primarily, to the father; but, as a general rule, is given to the mother where, by reason of the father's death or otherwise, the right to the custody and services of the child has devolved upon her."²⁵⁴

The notion that the father, and not the mother, is primarily responsible for the child's support is arguably not consistent with the modern trend in the law, which is to deem both parents equally responsible for the child's support. By statute, the parents are both "primarily liable" for the support of their child.²⁵⁵ Many of the cases holding that the father is primarily liable for the child's support, or that only the father has the claim for medical expenses, were decided prior to the enactment of this statute, and our courts could therefore discount or altogether distinguish these cases.

249. See generally *Smith v. Hewett*, 235 N.C. 615, 70 S.E.2d 825 (1952).

250. *Flippin*, 301 N.C. 108, 270 S.E.2d 482 (1980).

251. *Id.* at 121, 270 S.E.2d at 490.

252. *Id.*

253. *Id.* at 120, 270 S.E.2d at 490 (recognizing that injury to child results in "a claim by the parent, ordinarily the father, for parental losses caused by . . . loss of services during the child's minority"); *Foster*, 264 N.C. at 697, 142 S.E.2d at 640 (recognizing "the right of the father to recover for loss of services of the infant during minority").

254. *Floyd v. Atl. Coast Line Ry. Co.*, 167 N.C. 55, 59, 83 S.E. 12, 14 (1914) (citations omitted) (internal quotations omitted) (deciding that only father, and not mother, may sue for mental anguish arising from mutilation of son's body because son's body belonged primarily to father as next of kin).

255. N.C. GEN. STAT. § 50-13.4(b) (2011) ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child."); *Alamance Cnty. Hosp., Inc. v. Neighbors*, 315 N.C. 362, 366, 338 S.E.2d 87, 90 (1986) (discussing how statute "enlarges a mother's responsibilities by making both parents primarily liable for the support of their children").

3. *Defenses to Parents' Claims*

The parent's claim is generally subject to the same defenses that would apply if the parent were prosecuting an action for the parent's bodily injury or property damage. Thus, in an action based on the defendant's negligence, the parent's contributory negligence will bar the parent's claim.²⁵⁶

The defendant can assert that the minor's parents were negligent in failing to protect their child. Parents have a duty to protect their child, which has been described as follows:

At common law, a parent has the duty to protect his child. In the performance of this duty, parents . . . are bound to provide such reasonable care and protection as an ordinarily prudent person, solicitous for the welfare of a child, would deem necessary. This duty was recognized by our Supreme Court in [a case] establishing criminal liability of a parent as an aider and abettor to child abuse. The General Assembly has also recognized this duty by enacting a criminal statute prohibiting a parent from creating or allowing to be created a substantial risk of physical injury to any child under sixteen years of age. A similar standard is used to define an abused juvenile.

We can discern no justifiable reason for failing to apply the same duty in civil cases.

This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances . . . to prevent harm to their children.

We hold that failure to perform this duty is negligence.²⁵⁷

256. *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 43, 161 S.E.2d 590, 593 (1968) (describing how father's claim for medical expenses is barred where the father sued to recover medical expenses incurred by him for the treatment of two children, and wife's negligence in operating vehicle is imputed to father).

257. *Coleman v. Cooper*, 89 N.C. App. 188, 198–99, 366 S.E.2d 2, 8–9 (1988) (citations omitted) (internal quotation marks omitted) (deciding that where mother knew that her former husband posed a risk to her children, but she only asked a neighbor to watch for the father's car when the children were alone, whether the mother was contributorily negligent created a jury issue in a claim for wrongful death in which the defense asserted mother's contributory negligence to bar her recovery, despite the fact that the defendant DSS worker had informed the mother that adequate police protection would be provided if needed), *overruled on other grounds by* 347 N.C. 97 (1997).

In one case, the parents allowed their four-and-one-half-year-old child to walk two blocks from her home, under the care of the child's ten-year-old sister.²⁵⁸ The child was struck by a bus while crossing a street, and the defendant argued that the parents were contributorily negligent in allowing the child to walk from her home.²⁵⁹ The court rejected this argument as a matter of law.²⁶⁰

The father's claim can be barred by the negligence of the mother, where the mother's negligence is imputed to the father. This can occur when, for example, the children are injured in automobile accident that is caused, in part, by the mother's negligence, where the family purpose doctrine operates to impute her negligence to the child's father.²⁶¹ The ironic result of this is that the father can sue the mother, based on her negligence, to recover the child's medical bills,²⁶² but he cannot sue another negligent motorist for this loss.

The father can lose his claim through waiver, as addressed in Part I.A.3.a.ii. of this Article. The parent can also lose his claim by assigning it to his child.²⁶³ The parent's claim is typically also barred by any doc-

258. Reid v. City Coach Co., 215 N.C. 469, 474, 2 S.E.2d 578, 581 (1939).

259. *Id.*

260. *Id.* ("We cannot see how the parents were negligent and contributed to the injury of Dorothy Virginia Reid, who was killed by the defendant. Her sister, Helen, who had her in charge, was ten years old.").

261. *Price*, 274 N.C. at 42-43, 161 S.E.2d at 597-98. In *Price*, the father's claim for property damage against third person was barred by his wife's negligence, which was imputed to him. *Id.* The court wrote:

In principle we can see no difference in Brooks M. Price's action to recover damages for the demolition of his automobile and his action to recover medical expenses incurred in the necessary treatment of his two minor, unemancipated children injured in the collision, and we hold that his action to recover such medical expenses incurred in the treatment of the injuries of his two minor, unemancipated daughters is barred.

Id. at 43, 161 S.E.2d at 598. The parties stipulated that the mother, who was negligent in the operation of the vehicle, was the father's "agent and servant and that on the occasion complained of her operation of the automobile was within the scope of such agency as this was a family automobile." *Id.* at 36-37, 161 S.E.2d at 593.

262. Foster v. Foster, 264 N.C. 694, 697, 142 S.E.2d 638, 640 (1965).

263. N.C. Baptist Hosps., Inc. v. Mitchell, 323 N.C. 528, 534, 374 S.E.2d 844, 847 (1988) ("In an assignment of a raw claim or cause of action for personal injuries, the claimant loses all control of the conduct of settlement negotiations, the right to bring an action against the tort-feasor in his own name, the right to control the litigation, and the right to control the settlement of the lawsuit.").

trine that bars the minor's claim.²⁶⁴ Thus, the parent's claim is barred by the negligence of the minor.²⁶⁵

Some cases state that the parent's claim is "derivative" of the child's claim.²⁶⁶ In some contexts, however, the parents' claim will be deemed a separate claim, and not a derivative claim.²⁶⁷ For a true derivative claim, the general rule is that the derivative claim must be litigated with the main claim, and the loss of the main claim results in the loss of the derivative claim.²⁶⁸ In North Carolina, the parent's claim does not have to be filed with the minor's claim.²⁶⁹ Further, a prior suit by the minor will not impair the parent's right to bring suit to recover medical expenses.²⁷⁰

264. W. PAGE KEETON, *THE LAW OF TORTS* § 125, at 937 (W. Page Keeton et al. eds. 5th ed. 1984) ("[I]f the injured spouse or child is barred by a statute of limitations, or because workers' compensation represents his exclusive remedy, the derived spouse or parent claim will be barred.").

265. *Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965) ("Unquestionably, the contributory negligence of his minor son, if established in this action, would constitute a bar to plaintiff's recovery herein."); see also *Townsend v. Frye*, 30 N.C. App. 634, 640, 228 S.E.2d 56, 60 (1976). The court noted that *Kleibor* was brought into question by subsequent cases, but nevertheless concluded:

[I]f, at the new trial, the child is found to have been contributorily negligent, the child's contributory negligence will bar the mother's right to recover for loss of the child's services and medical expenses for the child. It appears that our holding is consistent with that of most of the courts in other jurisdictions that have decided the question.

Id.

266. *Howard ex rel Sigmon v. Travelers Ins. Cos.*, 115 N.C. App. 458, 463, 445 S.E.2d 66, 69 (1994) ("The parents' claim for the child's medical expenses is derivative in nature.").

267. *Nationwide Mut. Ins. Co. v. Lankford*, 118 N.C. App. 368, 374, 455 S.E.2d 484, 487 (1995) (noting that issuing two policies of insurance does not allow the insurer to avoid paying benefits under both policies on argument that parent's claim is derivative).

268. See *Desjarlais v. USAA Ins. Co.*, 824 A.2d 1272 (R.I. 2003). In *Desjarlais*, the minor's claim for loss of consortium of parent, and the wife's claim for loss of consortium of husband were barred because the husband settled with the tortfeasor and husband failed in arbitration of the underinsured motorist claim. *Id.* at 1281. Because these claims were derivative, the court noted that "these claims are not independent of their father's personal-injury claim, but 'stand[] or fall[]' with it." *Id.* at 1282 (quoting KEETON, *supra* note 264, § 125, at 938). Derivative claims must be brought with the principal action unless it is not feasible to do so. *Id.* at 1280–82.

269. *West ex rel Farris v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995) ("[T]he interests of plaintiff and her mother were not so united as to require joinder of [the mother] under Rule 19(a).").

270. *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955) (holding that in an action by a minor, allegations pertaining to medical expenses should be stricken upon timely motion by the defendant, seen when the court states that "[t]he decisions of this Court recognize the right of the defendant to require that the parent's cause of

The parent can lose some claims if he fails to support the child. "The parental right to the child's services, being contingent on parental fulfillment of support obligations, may be lost when the parent neglects or refuses to furnish support."²⁷¹ Where a parent abandons his child, it is possible that the parent may lose his claim arising from his parental relationship.²⁷²

II. PROCEDURES FOR FILING SUIT FOR MINOR

There are several procedural issues raised when a minor files suit that are not present when the plaintiff is an adult.

A. *Guardian ad Litem*

Where there is a civil action or special proceeding, in which the minor is the plaintiff, Rule 17(b)(1) of the North Carolina Rules of Civil Procedure requires that the minor appear by a GAL, stating, "In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian *ad litem* appointed as hereinafter provided"²⁷³

Thus, a minor who is a party to an action or proceeding generally must have a GAL.²⁷⁴ A GAL should also be appointed for a minor party in proceedings that are not subject to the rules of civil procedure, such as a workers compensation proceeding in the Industrial Commission.²⁷⁵

action and the infant's cause of action be separately brought, provided he makes objection to the joinder in apt time . . ." and the court implicitly recognizes that the father can bring a subsequent action for medical expenses); *see also* discussion *infra* Parts II.B. and II.C., regarding issues pertaining to joinder of the parent's and minor's claim, and pertaining to the *res judicata* effect of one case on the other case.

271. *Flippin v. Jarrell*, 301 N.C. 108, 120, 270 S.E.2d 482, 490 (1980).

272. *Williford v. Williford*, 288 N.C. 506, 510, 219 S.E.2d 220, 223 (1975) ("It follows that the plaintiff father, having abandoned the deceased when the latter was a minor child, may not now share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix.").

273. N.C. GEN. STAT. § 1A-1, Rule 17(b)(1) (2011).

274. *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981) (recognizing that minors are required to have GAL pursuant to Rule 17, regardless of whether the Termination of Parental Rights Act requires a GAL).

275. *See, e.g., Cobb v. E. Clearing & Grading, Inc.*, 1 N.C. App. 327, 332, 161 S.E.2d 612, 616 (1968) (deciding that in an industrial commission action, the hearing commissioner properly appointed a next friend for minors asserting a claim for death benefits).

Under the federal rule, the appointment of a GAL is optional.²⁷⁶ In one case, the federal court noted that the minors could be well served by having their parents represent them, as that would avoid using settlement funds for the GAL fees.²⁷⁷

Prior to Rule 17, the action in state court would have been prosecuted by the “next friend.”²⁷⁸ Under the older procedure and terminology, a minor plaintiff was represented by the “next friend,” and the minor defendant was represented by a “guardian *ad litem*.”²⁷⁹ The use of the “next friend” was mandated by statute and rule.²⁸⁰ Even without a codified rule authorizing the appointment of a GAL, the courts generally have the power to appoint a GAL to represent a minor who is a party to a proceeding.²⁸¹ These older cases involving next friends and GALs should be highly instructive in modern cases involving GALs under Rule

276. FED. R. CIV. P. 17(c)(2). Rule 17(c)(2) provides:

A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*. The court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

Id.

277. Seibels, Bruce & Co. v. Nicke, 168 F.R.D. 542, 544 (M.D.N.C. 1996). The court explained,

[I]t may be presumed that a parent acts in the best interest of the child. Permitting the parent to act as a guardian saves the expense of appointing a guardian which is also an important policy consideration. . . . Furthermore, a federal court should, as a matter of sound policy, be cautious in attempting to step between the parent and his or her child.

Id. (citations omitted). See also *id.* at 546 (deciding, when plaintiff filed an interpleader action against minors and moved for appointment of guardians, “that [mother] shall show cause within twenty days of the entry of this Order why she should not represent the interests of [her children] or should not procure someone to represent those interests”).

278. Sadler v. Purser, 12 N.C. App. 206, 209, 182 S.E.2d 850, 852 (1971) (holding that, even though minor appeared by “next friend” and not GAL as required by new Rules of Civil Procedure, any error was corrected by stipulation that next friend was properly qualified as GAL for said minor).

279. Johnston Cnty. v. Ellis, 226 N.C. 268, 278, 38 S.E.2d 31, 38 (1946) (“[A] next friend is appointed to bring or prosecute some proceeding in which the infant suitor is plaintiff, or at least where some right is positively asserted . . . while a guardian *ad litem* is appointed to defend.”).

280. Houser v. W.R. Bonsal & Co., 149 N.C. 51, 54, 62 S.E. 776, 777 (1908) (citing statute requiring next friend for minor plaintiff). The next friend was also appointed by the court. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

281. Carraway v. Lassiter, 139 N.C. 145, 152, 51 S.E. 968, 971 (1905) (“Certainly the superior court has, independently of the Code, the power to appoint a guardian *ad litem* for an infant defendant.”).

17. There is also an important distinction between a “guardian *ad litem*,” and a “general guardian.”²⁸²

A general guardian is responsible for the entirety of one's person and/or estate and maintains such responsibility beyond the context of the courtroom. . . . In contrast, a guardian *ad litem* is appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party. ‘*Ad litem*’ is a Latin phrase that means [f]or the purposes of the suit[.]²⁸³

If the minor has a general guardian, he can appear for the minor in the proceeding; the court may also appoint a GAL.²⁸⁴

The effect of the failure to appoint a GAL for the minor is not clear. In one case, where the father served the functions of a next friend and the court regarded the father as the next friend, the Supreme Court held that the proceeding was valid.²⁸⁵ Where the minor is not represented by a GAL, or its equivalent, there is some authority that the failure to appoint a next friend does not render the judgment void.²⁸⁶ Under this authority, such a judgment or settlement is merely voidable. For a discus-

282. *Teele*, 261 N.C. at 150, 134 S.E.2d at 128. The court in *Teele* explained:

A guardian is authorized . . . to take possession of all his estate for the use of his ward and to bring all necessary actions therefor. [Section] 1-64 [of the North Carolina General Statutes] merely authorizes infant plaintiffs without a general guardian to appear by their next friend when it is necessary for them to prosecute an action. The power of a next friend is strictly limited to the performance of the precise duty imposed upon him by the order appointing him, that is, the prosecution of the particular action in which he was appointed.

Id.

283. *Roberts v. Adventure Holdings, LLC*, 703 S.E.2d 784, 787, 2010 N.C. App. LEXIS 2417, at *6–7 (2010) (citations omitted) (internal quotation marks omitted) (establishing venue through GAL's county of residence is insufficient standing alone).

284. N.C. GEN. STAT. § 1A-1, Rule 17(b)(3) (2011).

285. *Oates v. Texas Co.*, 203 N.C. 474, 478, 166 S.E. 317, 319 (1932) (deciding that even if father was not properly appointed as next friend, “as one appeared in fact, and the court so treated him, that was sufficient for the purpose of acquiring complete jurisdiction”).

286. *Tate v. Mott*, 96 N.C. 27, 28, 2 S.E. 176, 180 (1887) (holding that where minors filed petition to sell land, court should have appointed next friends for them, but court's ruling requiring sale of property was not void); *McRorie v. Shinn*, 11 N.C. App. 475, 481, 181 S.E.2d 773, 777 (1971) (ruling that where minor's interest in land was lost through proceeding decades earlier to pay debts of estate, and minors were not represented by GALs in said hearing, “we do not think the failure to provide the [minor] *Femme* plaintiffs with [a GAL] rendered the proceedings fatally defective”); see also *Maager v. Hoyer*, 122 F.Supp. 932 (E.D.N.C. 1954) (relying on national treatise although controlled by Virginia law, and deciding that prior consent judgment barred instant action). The *Maager* court noted, “Generally, in absence of fraud or collusion, neither failure of infant to sue by next friend nor fact that next friend has an adverse interest will render judgment void.” *Id.*

sion of the distinction between a void judgment and a voidable judgment, see Part III.F. of this Article.

Other cases, however, indicate that the absence of a GAL deprives the court of jurisdiction and renders the judgment affecting the minor's rights void.²⁸⁷ Some cases hold that a minor is not bound by a judgment entered without a GAL, but do not clearly articulate if the judgment is void or voidable.²⁸⁸

The GAL should be appointed prior to or at the time the lawsuit is filed.²⁸⁹ The courts tend to adopt a functional approach in determining the effect of a delay in the appointment of a GAL. Where the court acts promptly in appointing a GAL upon realizing that the party is a minor, and there is no prejudice resulting from the delay, there is no error.²⁹⁰ Where a case goes to trial, and the GAL is not appointed until the day of

287. See, e.g., *Johnston Cnty. v. Ellis*, 226 N.C. 268, 279, 38 S.E.2d 31, 38 (1946) (noting that lower court lacked jurisdiction over foreclosure proceeding, which affected minors' interest in property, where minors did not have a GAL and rejecting the argument that minor's challenge to prior order was barred by laches, because the order was void); *Butler v. Winston*, 223 N.C. 421, 425, 27 S.E.2d 124, 126–27 (1943) (noting that where a clerk enters judgment for a sale of real property, and the minor with interest in the property was not appointed a guardian until the next day, the judgment is void, and does not operate as an estoppel to deny the minor the ability to claim title to property); see also *White v. Osborne*, 251 N.C. 56, 59, 110 S.E.2d 449, 452 (1959) (deciding whether GAL had conflict of interest at minor's trial, "question arises as to whether [the presiding judge] lacked jurisdiction in respect of such conflict on the ground that the infant plaintiff was not then represented with reference thereto").

288. See, e.g., *Cranford v. Steed*, 268 N.C. 595, 597–98, 151 S.E.2d 206, 208 (1966) (noting that where plaintiff sued minor defendant, and obtained consent judgment, and minor was thereafter appointed a guardian and asserted a counter-claim, and plaintiff asserted that consent judgment precluded minor's counter-claim, the fact that minor did not have guardian on date of consent judgment "alone would seem sufficient to require that the purported consent judgment . . . be vacated as to him"); *McIver Park, Inc. v. Brinn*, 223 N.C. 502, 27 S.E.2d 548 (1943) (holding that service by publication as to minors was valid, but absence of GAL rendered the judgment not binding against minors; also holding that a deed issued pursuant to tax foreclosure proceeding in which minors did not have guardian does not terminate minor's rights to land).

289. N.C. GEN. STAT. § 1A-1, Rule 17(c)(1).

290. *Franklin Cnty. v. Jones*, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957). The court held that "[w]hen the disability was called to the attention of the court, it acted promptly and appointed a guardian *ad litem*." *Id.* The court further seemed to hold that the lower court did not err where plaintiff sued minors, the clerk entered ruling for plaintiff for sale of land, the clerk then learned that some defendants were minors and appointed a GAL, the GAL did not deny allegations of complaint and consented to judgment, and the land was thereafter sold. See generally *id.*

trial, the judgment can be set aside.²⁹¹ On the other hand, it has been held that a GAL could be appointed after the jury verdict where the minor's interests were adequately protected at the trial by the minor's attorney.²⁹² The court cannot appoint a GAL *nunc pro tunc* where the minor's interests were not adequately protected in the proceeding.²⁹³ An error in the appointment of a GAL can be ratified by the minor, if he attains the age of majority and continues prosecuting his case.²⁹⁴

Pursuant to Rule 17(b)(4) of the North Carolina Rules of Civil Procedure, a GAL may represent an unborn person in an action involving, *inter alia*, wills, trusts and the distribution of property.²⁹⁵ In the absence of such a statute, however, an unborn child cannot have a GAL.²⁹⁶ Rule

291. *In re R.A.H.*, 171 N.C. App. 427, 431–32, 614 S.E.2d 382, 385 (2005) (reversing order based on termination of parental rights (“TPR”) hearing where the court did not appoint a GAL until three-and-a-half days into the TPR hearing, even though judge offered GAL the option of recalling witnesses and postponing further hearings); *Simms v. Sampson*, 221 N.C. 379, 389, 20 S.E.2d 554, 560 (1942) (denying that a motion to set aside the judgment was an error by lower court because “[t]he GAL was appointed the day the case was tried. He accepted service of summons, copies of the pleadings, and filed his answer the same day. No such haste is contemplated under the provisions of Consolidated Statutes of North Carolina, Section 451”).

292. *Tart v. Register*, 257 N.C. 161, 171, 125 S.E.2d 754, 761 (1962) (holding that in an action against a minor defendant where a GAL was not appointed until after the jury rendered the verdict, this irregularity did not render the judgment void, and, further, the attorney adequately represented the minor).

293. *Butler v. Winston*, 223 N.C. 421, 425–26, 27 S.E.2d 124, 127. The court held that judgment for sale of property, made when a minor did not have a GAL, is void: “It nowhere appears that the appointment was made or attempted to be made *nunc pro tunc*, and even if such an appointment had been so made it could not have availed the defendants.” *Id.*

294. *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954) (describing minor that ratified earlier proceedings in which he arguably did not have a properly appointed GAL by “continuing the prosecution of the cause in his own right”).

295. N.C. GEN. STAT. § 1A-1, Rule 17(b)(4) (2011) (“In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person GAL to defend on behalf of such unborn person.”). This language is almost a verbatim recitation of section 1-65.2 of the North Carolina General Statutes, which was repealed in 1967. N.C. GEN. STAT. § 1-65.2 (repealed 1967). This statute was enacted in 1955, presumably to address the problem created by the *McPherson* case, discussed *infra* note 296.

296. *McPherson v. First & Citizens Nat. Bank of Elizabeth City*, 240 N.C. 1, 18, 81 S.E.2d 386, 397 (1954) (holding that the representation of minor defendants by a GAL is

17 does not provide for the appointment of a GAL for an unborn person in a personal injury suit, and therefore presumably an unborn person cannot pursue such a suit.

The next subsections address several issues that arise with GALs.

1. Procedure for Appointment

The Clerk is authorized to appoint a GAL;²⁹⁷ the court can also appoint a GAL.²⁹⁸ Where a GAL has not been appointed and the court becomes aware of this fact, the court should appoint a GAL.²⁹⁹ The GAL is “subject to judicial supervision.”³⁰⁰ “The next friend is an officer of the court, and subject to removal by its order at any time.”³⁰¹ When the minor is represented by a GAL with an interest in the proceeding, the court should not rule on the merits of the case, but should instead require another GAL to be appointed.³⁰²

not “sanctioned by law” but instead “[t]he rule is that, in the absence of statute, the capacity to be sued exists only in persons in being. With us, in the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem*.” (citation omitted)).

297. N.C. GEN. STAT. § 7A-103 (1979) (“The clerk of superior court is authorized to . . . [a]ppoint and remove guardians and trustees, as provided by law.”); *In re Estate of Sturman*, 93 N.C. App. 473, 475, 378 S.E.2d 204, 205 (1989) (“If the revocation matter is an ‘action’ or ‘special proceeding’ under G.S. Rule 17(b), then the Clerk had statutory authority to appoint the guardian *ad litem*.”); *accord Carraway v. Lassiter*, 139 N.C. 145, 153, 51 S.E. 968, 971 (“We can see no good reason why the clerk, who acts as and for the court, may not do the same [i.e., appoint a GAL] in special proceedings pending before him.”).

298. *Franklin Cnty. v. Jones*, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957).

299. *Id.* (“When the court acquired knowledge of the disability of some of the parties [minors], it was proper for the court to appoint some competent and discreet person to act for those under disability.”).

300. *Tate v. Mott*, 96 N.C. 19, 27, 2 S.E. 176, 179–80 (1887) (ruling that a proceeding involving a minor, in the absence of a next friend, was not void, but merely voidable where the minor’s legal guardian, who was not appointed as a next friend or GAL, “did irregularly what was necessary and proper to be done by a next friend,” and “the court recognized him as serving a proper purpose—that of a next friend—and acted upon the appearance of the infants by him”).

301. *Abbott v. Hancock*, 123 N.C. 99, 102, 31 S.E. 268, 269 (1898); *Tate*, 96 N.C. at 23, 2 S.E. at 178 (noting that the court may remove a next friend if he is unfit for such purpose).

302. *Cobb v. E. Clearing & Grading, Inc.*, 1 N.C. App. 327, 161 S.E.2d 612 (1968); *see also infra* section II.A.3. regarding the GAL’s conflicts of interest.

The minor is not entitled to notice that a proceeding has been filed on his behalf to approve a settlement.³⁰³ Thus, it would appear that the minor is not entitled to notice of the proceeding to appoint a GAL.³⁰⁴

There is also a presumption that the appointment of a GAL is proper.³⁰⁵ The appointment is not subject to collateral attack,³⁰⁶ and only a party with standing may appeal the appointment.³⁰⁷

2. *Persons who may serve as GAL*

“[T]he court possesses the overriding discretionary power to appoint any person whom it considers suitable, whether related or not, to act as next friend of an infant plaintiff.”³⁰⁸ The GAL is most commonly a family member, such as a parent. As stated by one court:

It is . . . usual to appoint his near relation, who it is supposed cares particularly for his good; but, as it sometimes happens that such relation may have some interest some interest adverse to his, or be unfriendly to him, the court may, in its sound discretion, designate any discreet and fit person to act as next friend.³⁰⁹

Other authority notes that lawyers also often serve as the minor's GAL. Our Supreme Court wrote:

Thus, under the statutory law and traditional practice of this State, the minor parties to a civil action or a special proceeding must be represented by a guardian *ad litem* who may defend pro se or employ

303. *Gillikin v. Gillikin (Gillikin II)*, 252 N.C. 1, 6, 113 S.E.2d 38, 42 (1960) (“It is not necessary, however, for such minor to know that an action or special proceeding is brought in his behalf.”).

304. *Hagins v. Redevelopment Comm'n of Greensboro*, 275 N.C. 90, 165 S.E.2d 490 (1969) (indicating that an order appointing a GAL without notice to an incompetent person is void). Where a GAL is appointed to represent an incompetent plaintiff, notice must be given to the plaintiff of the appointment of the GAL. *Id.*

305. *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954) (“As the contrary does not appear in this case, it must be assumed that the court made the appointment of the next friend upon the written application of Campbell because no person closely connected with the plaintiff Billy Stone would apply.”).

306. *Sumner v. Sessoms*, 94 N.C. 371, 376 (1886) (“The presence of a next friend or guardian *ad litem* to represent an infant party, as the case may be, and his recognition by the Court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding . . .”).

307. *Carroll v. Montgomery*, 128 N.C. 278, 279, 38 S.E. 874, 874 (1901) (“[Court's selection of next friend] is not a matter from which the defendant could appeal. It did not concern him.”).

308. *Lovett*, 239 N.C. at 206, 79 S.E.2d at 479 (1954).

309. *Tate v. Mott*, 96 N.C. 19, 23, 2 S.E. 176, 177–78 (1887).

counsel.³¹⁰ A traditional practice has been to appoint licensed attorneys as guardians *ad litem*, and, even then, in the more complicated matters, for the guardian *ad litem* to employ separate counsel.³¹¹

3. Conflicts of Interest by GAL

The court and the parties should be wary of a potential conflict of interest between the GAL and the minor. Where the parent and the child are competing for assets which are not sufficient to satisfy both of their claims, there is a conflict, and the parent cannot serve as GAL. Thus, for example, where a judgment in a minor's action represents the father's claim for medical expenses and also the minor's separate claim for his injuries, and the judgment gives priority to the father for any payment on the judgment, the father has a conflict with his child.³¹² In a proceeding before the clerk for the distribution of funds paid toward the judgment, the father cannot serve as the minor's GAL due to the conflict.³¹³

An ethics opinion from the North Carolina State Bar suggests that where the insurance proceeds are insufficient to pay all of the claims of a parent and a minor, the parent has a conflict of interest with the child, which precludes the parent from serving as the GAL.³¹⁴ The opinion states that an independent GAL must be appointed, and, "To be independent, a guardian *ad litem* should have no separate claim of his or her

310. This sentence could be interpreted to mean that a non-lawyer could serve as the GAL and could defend the minor in the absence of legal counsel. This raises a question as to whether the service of such a guardian would constitute the unauthorized practice of law. This issue is beyond the scope of this Article and is therefore not addressed in depth herein. Some authority indicates that the non-lawyer GAL cannot prosecute a case for the minor. "The necessity of employment of an attorney by a guardian *ad litem* who is not himself a lawyer is . . . that no person who is not an attorney may represent another in a legal proceeding." *Torres v. Friedman*, 215 Cal. Rptr. 604, 607 (Cal. Ct. App. 1985) (citation omitted) (internal quotation marks omitted); see also discussion of *Torres* and another California case *infra* note 443.

311. *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981). In other contexts, the GAL must be an attorney. See N.C. GEN. STAT. § 15-11.1(b) (regarding appointment of a GAL for, e.g., "unknown or unapprehended defendants" in a criminal proceeding).

312. *White v. Osborne*, 251 N.C. 56, 59-60, 110 S.E.2d 449, 452 (1959) ("It is apparent that the pecuniary interests of the father and the pecuniary interests of the infant plaintiff were in sharp and irreconcilable conflict in relation to whether the father, individually, was entitled to such priority.") The case was remanded for further proceedings in which the minor was to have a disinterested GAL. *Id.* at 60, 110 S.E.2d at 452.

313. *Id.*

314. Council of the N.C. State Bar, RPC 251 (1997), available at <http://www.ncbar.com/ethics/ethics.asp>.

own to pursue, including a claim for medical expenses for a dependent child.” In a federal case in North Carolina, however, the court held that the parents could adequately represent their children’s interests, notwithstanding a limited source of funds, because “nothing else appearing, the Court can presume that the parent will look after the interests of her child.”³¹⁵

Similarly, if there is a factual issue on which the GAL and minor have conflicting interests, the GAL is disqualified. Thus, in an action before the Industrial Commission to determine whether a deceased worker was the father of two children, which affected whether the children or their mother received the death benefits, the mother could not serve as the GAL for the minors.³¹⁶ The GAL also has a conflict where she does not want to pursue a claim against a tortfeasor based on familial or other ties.³¹⁷

Where the GAL has a conflict of interest, the resulting judgment can be void or voidable. The case law on this point is somewhat conflicting. Many of the cases on this issue involve a minor’s interest in land. In one case, the GAL had an impermissible interest and should have been disqualified to represent the minor in the proceeding, in which the minor’s real property was transferred to pay the debts of an estate.³¹⁸ The court held that the proceeding “is extremely irregular, but the judgment is not void—but voidable.”³¹⁹ The court held that the

315. *Seibels, Bruce & Co v. Nicke*, 168 F.R.D. 542, 544 (M.D.N.C. 1996). In an interpleader action by an insurance company against a minor and her mother for personal injuries sustained in an automobile accident and against other passengers in the car, the court denied a motion to appoint guardians *ad litem* for minors, and ordered the mother to show cause why she should not represent the interests of her daughter, even though “there is a small interpleader fund and many claimants.” *Id.* at 544.

316. *Cobb v. E. Clearing & Grading, Inc.*, 1 N.C. App. 327, 332, 161 S.E.2d 612, 616 (1968). The mother was appointed as next friend for the minors, and the Industrial Commission ruled that the minors were not children of the employee: “Obviously, if the children were found to be entitled to benefits, the widow’s award would be reduced. If they received no award, the mother and next friend would receive a larger award. There is an obvious conflict of interest.” *Id.* at 332–33, 161 S.E.2d at 616. The court remanded for appointment of another next friend who had the right to petition to reopen the matter within sixty days. *Id.* at 333, 161 S.E.2d at 616.

317. Council of N.C. State Bar, 2006 Formal Ethics Op. 9 (2006) (addressing situation where minor’s mother serves as GAL and opposes filing claim against minor’s grandmother).

318. *Graham v. Floyd*, 214 N.C. 77, 197 S.E. 873 (1938).

319. *Id.* at 82, 197 S.E. at 876.

judgment could not be vacated because the purchasers of the land were innocent.³²⁰

Another case, however, held that where the minor's GAL had a conflict, a judgment was void. In *Butler v. Winston*,³²¹ the testator died, leaving a will transferring her real property to her minor granddaughter. The testator's daughter filed a caveat proceeding to challenge the will in an effort to obtain the land through intestacy.³²² The daughter's husband was appointed next friend for the minor in the caveat proceeding, and he consented to a judgment declaring the will to be invalid.³²³ The land was thereby transferred to the daughter and was ultimately sold to a third party.³²⁴ The minor then filed an action to determine ownership of the land.³²⁵ The lower court ruled for the plaintiff, and the North Carolina Supreme Court affirmed.

The court recognized the "antagonistic interests" between the minor and her GAL in the caveat proceeding.³²⁶ If the will were declared invalid, the GAL would obtain an interest in the property.³²⁷ "The manner of thus bringing into court [the minor] was insufficient and unauthorized by law and the judgment rendered must be disregarded as void."³²⁸ The court noted, "If he (the next friend) has any interest at all in the suit it must be thoroughly consistent with that of his wards. Even his attorney must be equally disinterested, and a mere colorable interest is a sufficient disqualification for either, if at all adverse."³²⁹ The court declared that the judgment rejecting the will was void.³³⁰ "[S]uch judgments are subject to collateral attack, and will be treated everywhere as a nullity."³³¹ The court further found that the purchasers were not inno-

320. *Id.* at 81, 197 S.E. at 876 (noting that the purchaser was innocent, where "one examining the title is [not] held to constructive knowledge of so minute details"); see also *Cobb*, 1 N.C. App. 327, 161 S.E.2d 612 (1968) (holding that even though GAL had an improper interest, the decision of the Industrial Commission was not reversed; instead, the matter was remanded for appointment of another next friend who had the right to petition to reopen the matter within sixty days).

321. *Butler v. Winston*, 223 N.C. 421, 27 S.E.2d 124 (1943).

322. *Id.* at 424, 27 S.E.2d at 125.

323. *Id.*

324. *Id.* at 423, 27 S.E.2d at 125.

325. *Id.*

326. *Id.* at 424, 27 S.E.2d at 126.

327. *Id.*

328. *Id.*

329. *Id.* (citation omitted).

330. *Id.*

331. *Id.* at 426, 27 S.E.2d at 127.

cent purchasers because the blemish on the title “appeared on the records and were easily discoverable upon examination.”³³²

In *White v. Osborne*,³³³ the father served as the GAL for his son and had antagonistic interests because the funds to pay the minor and to pay for medical expenses were limited. The North Carolina Supreme Court, in a portion of the opinion that appears to be dicta, stated, “[u]nder the circumstances, a question arises as to whether [the presiding judge] lacked jurisdiction in respect of such conflict on the ground that the infant plaintiff was not then represented with reference thereto.”³³⁴ If the trial court lacks jurisdiction, any resulting judgment is generally void.³³⁵

Where the minor’s lawyer believes that the GAL has a conflict and is not adequately representing the minor, the lawyer may ask the court to remove the GAL.³³⁶

There is some authority that where the minors have conflicting interests, they should have separate GALs.³³⁷ In the context of minors with personal injury claims, whether a conflict exists between minors requiring them to have separate GALs should be decided on a case-by-case basis. There is some authority that the family can work together to arrive at a reasonable and fair settlement for all of the minors notwithstanding a conflict of interest,³³⁸ and therefore there should not be a *per se* rule prohibiting one GAL from representing several minors.³³⁹

332. *Id.* at 427, 27 S.E.2d at 128.

333. *White v. Osborne*, 251 N.C. 56, 110 S.E.2d 449 (1959).

334. *Id.* at 59–60, 110 S.E.2d at 452.

335. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 703, 208 S.E.2d 676, 677 (1974) (“A personal judgment rendered by a court which has no jurisdiction over a defendant is void.”).

336. Council of N.C. State Bar, 2006 Formal Ethics Op. 9 (2006) (addressing situation where minor’s mother serves as GAL, and opposes filing claim against minor’s grandmother, stating that “[a]s an alternative to withdrawal, if Lawyer believes GAL is failing to fulfill her fiduciary duties, Lawyer may seek to have GAL removed and replaced by an independent guardian *ad litem* who can evaluate the action against the truck driver and the claim against Grandmother objectively and make an unbiased decision about the conduct of the litigation”); *see also infra* Part II.D. for further discussion of this opinion.

337. *See Riemer v. Riemer*, 270 N.W.2d 93, 96 (Wis. 1978) (ruling that one GAL could not represent two minors born to the same mother because minors had different interests and should have had separate GALs, as younger child would be disinherited upon a finding that he was not a child of the father).

338. *See Seibels, Bruce & Co v. Nicke*, 168 F.R.D. 152, 544 (M.D.N.C. 1996) (allowing minor’s parent to represent minor in interpleader action, even though parent also had a claim to limited funds by determining “it may be presumed that a parent acts in the best interest of the child”); Council of N.C. State Bar, RPC 251 (1997) (noting that a lawyer can represent several minors even though the insurance proceeds are insufficient to pay all of the claims); Council of N.C. State Bar, RPC 123 (1992) (noting that a lawyer can represent parents and a minor notwithstanding a conflict between them as to alloca-

4. Duties and Powers of GAL

The duties of the GAL are defined by case law and, to a lesser extent, by the Rule 17 of North Carolina's Rules of Civil Procedure. Other than stating that the GAL shall "file and serve . . . pleadings,"³⁴⁰ the rule is silent as to the GAL's duties, and there are no statutes setting forth his duties.

Some authorities set forth the duties of the GAL. "The appointment of the guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding."³⁴¹ A case from another jurisdiction described the role of the GAL in a personal injury case as follows:

After a thorough investigation, the guardian *ad litem* has a duty to evaluate: (i) the damages suffered by the minor, (ii) the adequacy of the settlement, (iii) the proposed apportionment of settlement proceeds among the interested parties, (iv) the proposed manner of disbursement of the settlement proceeds, and (v) the amount of attorneys' fees charged by the minor's attorney. Based on the guardian *ad litem*'s evaluation, the *ad litem* shall make a recommendation to the district court on the minor's behalf. Consequently, a guardian *ad litem* has a legal obligation to be careful and diligent in his representation of the minor's interests.³⁴²

The GAL must act diligently and in good faith.³⁴³ A court in another jurisdiction has written, "As a fiduciary, the guardian *ad litem* shall: (i) use the skill and prudence that an ordinary, capable, and careful person would use in the conduct of his own affairs, (ii) use diligence and discretion in representing the minor's interests, and (iii) be loyal to his fiduciary."³⁴⁴ A recent North Carolina case held that the GAL in a proceeding to terminate parental rights (TPR) is not required to be present at the

tion of a settlement offer, "[g]iven the fact that the attorney's clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation.").

339. See also ATWELL MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE IN CIVIL CASES § 255 (1929) ("As in the case of next friend, one person may act as guardian *ad litem* for several infants, if there is no conflict in their interests, and he may also be a defendant himself, if the interests are the same.").

340. N.C. GEN. STAT. § 1A-1, Rule 17(2) (2011).

341. *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981).

342. *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App. 1994) (citation omitted).

343. *Franklin Cnty. v. Jones*, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957) (noting that minors' GAL did not assert defense to action affecting minors' interest in land, and stating, "[i]f . . . the lands were not in fact properly listed, the guardian *ad litem* should have made that defense").

344. *Byrd*, 891 S.W.2d at 706-07.

hearing.³⁴⁵ The GAL “is not required to do the impossible or create a defense where none exists.”³⁴⁶ The GAL should assess the propriety of the lawsuit.³⁴⁷ The GAL’s duties generally do not include collection.³⁴⁸

The GAL’s duties are limited to those purposes for which he is retained. Thus, where a next friend was appointed in a suit filed by the county to obtain a deed to land to pay delinquent taxes, the next friend’s appointment required him to defend the tax suit, but he was not required to represent the minors in a cross action filed by the bank to foreclose on the property for nonpayment of the mortgage.³⁴⁹ “A next friend is not an all-time and all-purpose representative The scope of his representation lies within and is determined by that purpose [for which he was appointed], the necessities of its prosecution and the procedure reasonably incident thereto.”³⁵⁰ Further, “the powers of a guardian *ad litem* [are] limited to the particular case in which the GAL was appointed.”³⁵¹ The GAL’s duties are complete at the time his purpose is accomplished.³⁵²

There is some authority from other jurisdictions that the GAL should not take a very active role in the case, such as attending depositions. “The GAL is not to serve as the attorney for the minor and duplicate tasks already being performed competently by plaintiff’s attor-

345. *In re J.H.K.*, 365 N.C. 171, 177, 711 S.E.2d 118, 121 (2011) (“[W]e cannot agree that the General Assembly intended by the use of the word ‘represent’ to obligate the volunteer GAL to appear in court during the TPR hearing unless the attorney advocate or the trial court deems the GAL’s presence necessary to protect the minor’s best interests.”).

346. *Franklin Cnty.*, 245 N.C. at 279, 95 S.E.2d at 868 (1957).

347. *Tate v. Mott*, 96 N.C. 19, 24, 2 S.E. 176, 178 (1887) (“The guardian *ad litem* or next friend must determine the necessity for and the propriety of bringing [the action] . . .”).

348. *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964) (holding that the ten year statute of limitations for collection of judgment did not begin to run until minor attained age of majority, even though minor had a next friend representing him in an action to obtain judgment); see also *Byrd*, 891 S.W.2d at 710 (“Typically, the guardian *ad litem*’s duties and powers end when a final judgment is entered.”).

349. *Johnston Cnty. v. Ellis*, 226 N.C. 268, 279, 38 S.E.2d 31, 38 (1946).

350. *Id.* at 278, 38 S.E.2d at 38.

351. *Sharp v. Hanceville Nursing Home, Inc.*, 719 So. 2d 243, 244–45 (Ala. App. 1998) (ruling that a GAL for an incompetent person in an action by a nursing home for non-payment did not have authority to release nursing home for ward’s claim for wrongfully discharging him from facility).

352. *Johnston Cnty.*, 226 N.C. at 279, 38 S.E.2d at 38 (1946) (“Moreover, the record discloses that Ellis had successfully accomplished his mission as next friend, performed all the duty imposed upon him by law, and his office as next friend had become *functus officio*.”).

neys.”³⁵³ On the other hand, other authority states, “The guardian *ad litem* participates in the case to the extent necessary to adequately protect the minor’s interests. Accordingly, the guardian *ad litem* has considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary to that effort.”³⁵⁴

North Carolina seems to have adopted the view that the GAL can be a full advocate for the minor. In *In re Clark*,³⁵⁵ the Superior Court held that the North Carolina procedures for terminating a parent’s rights were unconstitutional because they did not provide for an attorney to be appointed to represent the parent and child. At the trial level, the minor and her mother were represented by GALs who were attorneys.³⁵⁶ On appeal, the Supreme Court wrote:

Thus, in the case before us both the indigent respondent-mother and her minor child were in fact represented by competent and conscientious counsel and therefore were in no way deprived of the right to counsel. Where, as here, the guardians *ad litem* are licensed attorneys and actively defend their client’s interests, the resulting procedure is fundamentally fair and in accord with both the State and Federal Constitutions.³⁵⁷

The Court in *In re Clark* essentially held that the GAL can simultaneously serve the role of GAL and attorney for the minor, but did not address the possibility that the minor’s lawyer and her GAL can have conflicting roles.³⁵⁸ Other jurisdictions have struggled with the issue of whether the GAL is a true advocate for the minor, or has a neutral role in investigating the matter and advising the court.³⁵⁹ Our cases recog-

353. *Jocson v. Crabb*, 196 S.W.3d 302, 308 (Tex. App. 2006) The court further stated that “it is not necessary or appropriate for a guardian *ad litem* to review discovery motions and depositions and to participate in pretrial discovery and hearings without regard to their relevance, or irrelevance, to the potential conflict of interest regarding the settlement proceeds.” *Id.*

354. *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App. 1994).

355. *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

356. *Id.* at 595–96, 281 S.E.2d at 50–51.

357. *Id.* at 599, 281 S.E.2d at 53; *see also id.* at 601, 281 S.E.2d at 54 (“Such entitlement to counsel may ordinarily be satisfied by the appointment for said parent of a guardian *ad litem* who is a licensed attorney.”).

358. *Id.*

359. *See In re Christina M.*, 908 A.2d 1073, 1085 (Conn. 2006) (“Although there is often no bright line between the roles of a guardian *ad litem* and counsel for a minor child, the legal rights of a child may be distinct from the child’s best interest . . . the guardian *ad litem* should refrain from acting as a second attorney for the child.”); *State v. Switzer*, 656 N.W.2d 253, 261 (Neb. 2003) (“As counsel for the juvenile, the attorney is bound to advocate for the juvenile’s expressed interests; but, as guardian *ad litem*, the attorney is bound to present what he or she believes to be in the child’s best interests.

nize that “[t]he guardian *ad litem* is the officer of the court.”³⁶⁰ One case stated that the GAL in a TPR case had a “supervisory role[] in seeing to [the minor’s] best interests.”³⁶¹ This language may suggest that the GAL has a more neutral role. On the other hand, in another TPR case, the court wrote that the GAL “has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party.”³⁶² Older authority also indicated that the next friend could take an active role in the case.³⁶³ Further case law may be needed to expound on the role of the GAL, and the potential conflicts when she serves as the lawyer for the minor.

The role between the GAL and her counsel is addressed briefly in 2002 Formal Ethics Opinion 8, promulgated by the Council of the North Carolina State Bar.³⁶⁴ This opinion states:

As a party, the guardian *ad litem* may choose to be represented by legal counsel and permit legal counsel to make decisions about the strategy for the litigation. See Rule of Professional Conduct 1.2, cmt. [1] (“In questions of means, the lawyer should assume responsibility for technic-

Usually, when an actual conflict of interest develops between the two roles, separate counsel should be appointed for the child.”); *In re Baby Girl Baxter*, 479 N.E.2d 257 (Ohio 1985) (“The role of guardian *ad litem* is to investigate the ward’s situation and then to ask the court to do what the guardian feels is in the ward’s best interest. The role of the attorney is to zealously represent his client within the bounds of the law.” (citations omitted)); see also Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 190 (1997) (“[T]he trend appears to lean toward requiring the GAL to act as a zealous advocate for the minor plaintiff. . . . The GAL should serve only as an officer of the court to ensure that the minor is represented fairly and responsibly. . . . The role as advocate is reserved for the attorney *ad litem*.”). It should be noted that a GAL in a TPR case in North Carolina is bound to pursue the “best interests” of the minor, N.C. Gen. Stat. § 7B-1108(b) (2011), whereas in other states the GAL pursues the “expressed interests” of the minor.

360. *Carraway v. Lassiter*, 139 N.C. 145, 153, 51 S.E. 968, 970 (1905); see also *Stanton v. Sullivan*, 4 A.2d 269, 270 (R.I. 1939) (“A guardian *ad litem* is not an attorney for the infant, but an officer appointed by the court to assist it in properly protecting the interests of the infant.”).

361. *In re J.G.*, 186 N.C. App. 496, 507, 652 S.E.2d 266, 273 (2007) (noting that minor’s GAL filed a motion to compel DSS to use minor’s social security benefits to pay for mortgage on and repairs to house).

362. *In re A.S.Y.*, 703 S.E.2d 797, 802, 2010 N.C. App. LEXIS 2442, at *16 (2010) (quoting ALAN D. WOODLIEF, JR., SHUFORD NORTH CAROLINA CIVIL PRACTICE & PROCEDURE § 17:20 (6th ed.2003)).

363. *Teele v. Carr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964) (“It is his duty to represent the infant, see that the witnesses are present at the trial of the infant’s case, and to do all things which are required to secure a judgment favorable to the infant.”).

364. Council of N.C. State Bar, 2002 Formal Ethics Op. 8 (2003).

al and legal tactical issues. . . .”). The fact that the guardian *ad litem* is a lawyer does not make him or her co-counsel for the purpose of litigating the case.³⁶⁵

This opinion further states that where the GAL is a lawyer, she must “exercise professional judgment in making decisions about matters that are within the purview of the guardian *ad litem* such as whether a settlement proposal should be accepted.”³⁶⁶ Another ethics opinion suggests that the lawyer is obligated to follow the strategy of the GAL, or else must withdraw.³⁶⁷

A few cases address the powers of the GAL. The GAL does not have the power to waive the minor’s rights, especially without consideration.³⁶⁸ The GAL may hire legal counsel, but he cannot enter a binding contract for compensation.³⁶⁹ The issue of the minor’s attorney’s fees is addressed in Part II.D.2. of this Article.

A case from 1904 held that the GAL may not submit the minor’s dispute to arbitration.³⁷⁰ It should be noted, however, that in modern

365. *Id.*

366. *Id.*

367. See Council of N.C. State Bar, 2006 Formal Ethics Op. 9 (2006). The opinion states that when a minor’s mother is the GAL, and the GAL refuses to pursue a claim against the minor’s grandmother, but instead wishes to pursue a weak claim against another tortfeasor, “[i]f, based upon his expert’s analysis, Lawyer believes that Minor does not have a claim against the truck driver and the litigation against the truck driver is, therefore, frivolous, Lawyer must file a motion to withdraw.” *Id.* The opinion also notes that the lawyer may attempt to remove the GAL. *Id.*

368. See, e.g., *Narron v. Musgrave*, 236 N.C. 388, 73 S.E.2d 6 (1952) (“The duty of a GAL, and in fact the object of his appointment, is to protect the interest of his wards; and he has no power to waive any substantial right, especially when such waiver is entirely without consideration.” (quoting *Spence v. Goodwin*, 128 N.C. 273, 38 S.E. 859 (1901)); *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 11 S.E.2d 464, (1940) (“A guardian *ad litem* has no authority, without valid consideration, to relinquish rights of the infant defendants whom he represents . . . even though the parents of the named infants and unborn issue have assigned, transferred and conveyed to [plaintiff] . . . all of their contingent right, title, interest and estate in and to property in the trust in question, and even though the interest of such infants and unborn issue be remote, their guardians *ad litem*, in the absence of valid consideration therefor, are without authority to relinquish those rights to the immediate beneficiary of the trust estate.”).

369. *In re Stone*, 176 N.C. 336, 97 S.E. 216 (1918).

370. *Millsaps v. Estes*, 134 N.C. 486, 492, 46 S.E. 988, 990 (1904) The court overturned the ruling from the prior action, where a minor sued defendant to determine ownership of land, and parties consented to sending issue of value of land to arbitrators, and court entered judgment upon finding of arbitrators because “[t]he infants in this action were the real parties to the suit, and . . . an infant cannot give his consent to a submission of his cause to arbitration, and any attempt to do so for him is absolutely void.” *Id.* at 491, 97 S.E. at 990.

times, agreements to arbitrate are favored, and the Court could reach the other conclusion if presented with this issue today. Courts from other jurisdictions have recognized the parent's ability to consent to arbitration,³⁷¹ and thus a GAL presumably can consent to arbitration if the parents can do so. The GAL may waive a trial by jury.³⁷²

5. *Liability of GAL*

Most authority in North Carolina indicates that the GAL can be fully liable for a breach of his duties, including a duty to act with diligence.³⁷³ Further, a breach of the duty of good faith can support a claim for fraud against the GAL.³⁷⁴ By statute, a GAL in a TPR case is immune from suit for mere negligence.³⁷⁵ Neither Rule 17 of North Carolina's

371. *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 387 (N.J. 2006) (upholding arbitration provision entered by parents, prior to injury, because “[a]s opposed to a pre-injury release of liability, a pre-injury agreement to arbitrate does not require a minor to forego any substantive rights,” noting cases from other jurisdictions authorizing arbitration); see also Douglas P. Gerber, *The Validity of Binding Arbitration Agreements and Children's Personal Injury Claims in Florida after Shea v. Global Travel Marketing, Inc.*, 28 NOVA L. REV. 167 (2003) (analyzing *Shea v. Global Travel Marketing, Inc.*, 870 So. 2d 20 (Fla. App. 2003), *rev'd* by *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 405 (Fla. 2005) (“[W]e hold that an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor or minor's estate in a tort action arising from the contract.”)).

372. *Blades v. Spitzer*, 252 N.C. 207, 213, 113 S.E.2d 315, 320 (1960) (“A GAL and his attorney may waive jury trial.”).

373. See *Franklin Cnty. v. Jones*, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957) (“When [GAL] accepted the appointment, it was his duty not only to act in the utmost good faith, but to act diligently. For any failure to properly perform the duty he undertook, he became liable to those he represented for any loss that they might sustain.”); *Travis v. Johnston*, 244 N.C. 713, 722, 95 S.E.2d 94, 100 (1956) (“One who accepts appointment as guardian *ad litem* of a person under disability owes a high duty to his ward. He should carefully investigate the facts and must exercise diligence in the protection of the rights and estate of his ward.”); see also *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 12, 93 S.E. 374, 376 (1917) (“If the compromise or release is made without justification or fraudulently or upon a grossly inadequate consideration, the guardian will be answerable for it in his accounts.”).

374. *Graham v. Floyd*, 214 N.C. 77, 82, 197 S.E. 873, 876 (1938) (ruling that where the GAL had conflict, the sale of land pursuant to court order was voidable unless purchaser was innocent because if the GAL's wife made a \$500 bid “for the land, and he, acting as guardian *ad litem*, knew that the real value of the land greatly exceeded that amount, and stood by and permitted it to be sold to his wife, this would be a breach of faith and considered on the issue of fraud”).

375. N.C. GEN. STAT. § 7B-1204 (2011) (“Any volunteer participating in a judicial proceeding pursuant to the program authorized by this Article shall not be civilly liable

Rules of Civil Procedure nor any other rule or statute addresses the liability of a GAL representing a minor in a personal injury claim.

In a case from 2003, however, the Court of Appeals held that a GAL is entitled to quasi-judicial immunity.³⁷⁶ In *Dalenko v. Wake County Dep't of Human Services*, the court appointed a GAL for Mr. Dalenko in a proceeding to declare him incompetent.³⁷⁷ He later died and his estate sued his GAL, alleging that she “negligently failed to fulfill her duty to Dalenko as guardian *ad litem* by failing to advocate for his best interests.”³⁷⁸ The estate also alleged that the GAL presented false information to the court, that the GAL caused Dalenko to be separated from his daughter, and that the attempted removal of Dalenko from his daughter's house caused emotional distress to Dalenko.³⁷⁹ The lower court dismissed the suit, and the Court of Appeals affirmed.³⁸⁰ The appellate court stated:

Although the courts of this State have not yet specifically addressed whether guardians *ad litem* perform judicial functions such that they are entitled to quasi-judicial immunity, several other courts, including the United States Court of Appeals for the Fourth Circuit, have held that guardians *ad litem* are entitled to the absolute bar of quasi-judicial immunity.³⁸¹

The court concluded that the GAL was entitled to quasi-judicial immunity, and affirmed the dismissal of the case on this basis.³⁸²

The court relied heavily on *Fleming v. Asbill*,³⁸³ from the Fourth Circuit Court of Appeals. A review of that case, however, reveals that it ruled that a GAL has immunity for a claim under 42 U.S.C. § 1983, based on federal authority. The court then held that the GAL was in fact not entitled to immunity under South Carolina law, stating, “[w]e conclude, then, that South Carolina yet adheres to the . . . line of cases [holding that] a paid guardian *ad litem* must answer to his ward if his

for acts or omissions committed in connection with the proceeding if the volunteer acted in good faith and was not guilty of gross negligence.”).

376. *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 578 S.E.2d 599 (2003).

377. *Id.* at 52, 578 S.E.2d at 601.

378. *Id.* at 53, 578 S.E.2d at 602.

379. *Id.* at 52–53, 578 S.E.2d at 601–02.

380. *Id.* at 53, 578 S.E.2d at 602.

381. *Id.* at 57, 578 S.E.2d at 604.

382. *Id.* at 57–58, 578 S.E.2d at 604–05.

383. *Fleming v. Asbill*, 42 F.3d 886 (4th Cir. 1994).

negligent acts cause the ward damage. We therefore reverse the dismissal of Todd's common-law claims against Asbill."³⁸⁴

Two of the six other cases cited by the *Dalenko* court support its conclusion.³⁸⁵ The remaining four cases cited do not, however, support the proposition that a GAL is immune from liability.³⁸⁶

Some well-reasoned opinions from other jurisdictions hold that the GAL is not immune from suit. One such court wrote, "[b]ecause the guardian *ad litem* is not acting as an agent of the court, the policy rationale for extending absolute immunity to the guardian *ad litem* is not present."³⁸⁷ Many courts adopt a functional analysis in determining whether the GAL has immunity, based on the role of the GAL.³⁸⁸

The *Dalenko* case is not necessarily applicable to a GAL representing a minor in a personal injury action, but there is nothing in the *Dalenko* opinion which would limit its holding to the liability of a GAL in incompetency proceedings. In fact, *Dalenko* cited two cases rendering the GAL immune in the context of a minor's personal injury claim.³⁸⁹ Further, the *Dalenko* case does not distinguish the long line of cases in North Carolina stating that GALs, or next friends, are liable for

384. *Id.* at 890.

385. *McKay v. Owens*, 937 P.2d 1222, 1233 (Idaho 1997) (noting that a GAL for a minor in a lawsuit was entitled to immunity); *Barr v. Day*, 879 P.2d 912, 919 (Wash. 1994) (ruling that a GAL in a settlement proceeding for an incompetent adult is immune from suit).

386. *Miller v. Gammie*, 292 F.3d 982, 991 (9th Cir. 2002) (ruling a child's social worker and therapist have absolute immunity), *rev'd en banc*, *Miller v. Gammie* 335 F.3d 889, 900 (2003) (ruling that whether social worker and therapist have absolute or qualified immunity requires further factual showing); *Lambert v. McGinnis*, No. 2:99-CV-36-BO(2), 2000 U.S. Dist. LEXIS 11848, at *1 (E.D.N.C. Feb. 11, 2000) (noting that the Clerk of Court and the District Attorney are "entitled to absolute immunity from federal suits for damages involving their official duties"); *Richards v. Bruce*, 691 A.2d 1223, 1225 (Me. 1997) ("No harm resulted from the guardian's delayed arrival at the hearing."); *Lythgoe v. Guinn*, 884 P.2d 1085, 1088-89 (Alaska 1994) (holding that a court-appointed psychologist was entitled to absolute quasi-judicial immunity).

387. *Byrd v. Woodruff*, 891 S.W.2d 689, 708 (Tex. App. 1994) ("The guardian *ad litem* is not an agent of the court and has no delegated authority to act in the name of the court.").

388. See Susan L. Thomas, Annotation, *Liability of Guardian Ad Litem for Infant Party to Civil Suit for Negligence in Connection with Suit*, 14 A.L.R.5TH 929 (1993).

389. See *McKay v. Owens*, 937 P.2d 1222, 1233 (Idaho 1997) (noting that a GAL for a minor in a lawsuit was entitled to immunity); *Barr v. Day*, 879 P.2d 912, 919 (Wash. 1994) (ruling that a GAL in a settlement proceeding for an incompetent adult is immune from suit).

failing to exercise diligence.³⁹⁰ The *Dalenko* case, as it appears to conflict with prior cases from the North Carolina Supreme Court, and as many of the cases cited for its holding do not support the holding, therefore appears to stand on shaky footing.

6. Payment of GAL

In many instances, the minor's parent can serve as GAL, in which event the parent typically does not request a fee for serving as GAL. Where the dispute settles prior to suit being filed and a GAL who is not the parent is needed, the liability insurer can probably pay that fee. The liability carrier can pay for an attorney to represent the minor unless the "payment arrangement will adversely affect [the GAL's] representation of the minor and the minor's family."³⁹¹

The court has the authority to tax the fees of the GAL as costs.³⁹² In one case involving the administration of an estate, the clerk appointed a GAL to represent minor heirs.³⁹³ The clerk ordered that the GAL fees be paid from the estate, and the Administratrix appealed.³⁹⁴ The court of Appeals affirmed, rejecting the notion that the Clerk "was powerless to compel the payment of the necessary expenses from the estate to which the heirs would potentially benefit."³⁹⁵

390. See *supra* note 378 and accompanying text. In the *Dalenko* plaintiff's Reply Brief to the Court of Appeals, she expressly cited to and quoted from *Franklin County v. Jones*, 245 N.C. 272, 95 S.E.2d 863 (1957), but the court did not address this case. Responsive Brief for Plaintiff-Appellant at 10, *Dalenko v. Wake Cnty. Dep't of Human Servs.*, 157 N.C. App. 49, 578 S.E.2d 599 (2003) (No. COA02-377), available at http://www.ncappellatecourts.org/show-file.php?document_id=13174.

391. Council of N.C. State Bar, RPC 167 (1994).

392. N.C. GEN. STAT. § 6-20 (2011) (indicating that the court may "allow" costs in its discretion, pursuant to section 7A-305(d) of North Carolina's General Statutes); N.C. GEN. STAT. § 7A-305(d)(7) ("The following expenses, when incurred, are assessable or recoverable . . . [f]ees of . . . guardians *ad litem* . . ."); see also *Van Every v. McGuire*, 125 N.C. App. 578, 582, 481 S.E.2d 377, 379 (1997) ("Having properly appointed the GAL, the trial court was within its discretion to assess as an item of costs the fees of the GAL and to tax those fees to either party or apportion them between the parties."); *In re Clark*, 303 N.C. 592, 601, 281 S.E.2d 47, 54 (1981) (noting that in a TPR action, fees for attorneys appointed as GAL are paid by the Administrative Office of the Courts); Council of N.C. State Bar, 2002 Formal Ethics Op. 8 (2003) ("Whether a GAL [representing a minor in a settlement hearing] who is a lawyer is entitled to a court-awarded fee is a question for the court and not for the Ethics Committee.").

393. *In re Estate of Sturman*, 93 N.C. App. 473, 477, 378 S.E.2d 204, 206 (1989).

394. *Id.* at 474, 378 S.E.2d at 204.

395. *Id.* at 477, 378 S.E.2d at 206 (citing *In Re Stone*, 176 N.C. 336, 97 S.E. 216 (1918)).

B. Joinder of Claims

Under modern pleading rules, the parent and child can file their claims jointly.³⁹⁶ The parent and child are not, however, required to join their claims.³⁹⁷ Where the suit is filed by the child alone for his injuries, his parents are not parties to the minor's suit.³⁹⁸

One case has held that where the parent sues a first-party insurer to recover the child's medical expenses, the minor is the real party in interest and must be substituted for his parents.³⁹⁹ This ruling seems, however, to be at odds with the notion that the parents (and not the child) own the claim for medical expenses. The court did not provide any analysis for its conclusion. This case further appears to be contrary to an earlier case, which held that the child does not "incur" these expenses and thus he cannot sue to recover them from an insurance company.⁴⁰⁰

C. Res Judicata and Collateral Estoppel Effect of Minor's Action

Where the minor's case is litigated, he is bound by the judgment.⁴⁰¹ Several cases address the interplay between the parent's action and the

396. N.C. GEN. STAT. § 1A-1, Rule 20(a). Under older procedural rules, the guardian and the parent could not assert their claims in the same action. *Ellington v. Bradford*, 242 N.C. 159, 161, 86 S.E.2d 925, 926 (1955) ("[T]o combine the two in one action would be a misjoinder."). If the parent and child joined their claims, then the defendant could require that they be brought separately, "provided he makes objection to the joinder in apt time." *Id.* at 162, 86 S.E.2d at 927. This result is effectively abrogated by Rule 20 of North Carolina's Rules of Civil Procedure.

397. *West ex rel Farris v. Tilley*, 120 N.C. App. 145, 147-48, 461 S.E.2d 1, 2 (1995) ("[T]he interests of plaintiff and her mother were not so united as to require joinder of [the mother] under Rule 19(a)."); *cf.* *Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 300 N.C. 295, 303-04, 266 S.E.2d 818, 823 (1980) ("For all these reasons, we hold that a spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.").

398. *Stark v. Ford Motor Co.*, 204 N.C. App. 1, 12-13, 693 S.E.2d 253, 260 (2010) (ruling that where a minor sued an automobile manufacturer, and defendant argued that the minor's father's misuse of seatbelt barred the claim under section 99B-3, such a defense was inapplicable because the father was not a "party," which is required to invoke said defense).

399. *Freeman v. Blue Cross & Blue Shield of N.C.*, 123 N.C. App. 260, 264, 472 S.E.2d 595, 598 (1996).

400. *Compare id.*, with *Lane v. Aetna Cas. & Sur. Co.*, 48 N.C. App. 634, 642, 269 S.E.2d 711, 716 (1980).

401. N.C. GEN. STAT. § 1A-1, Rule 17(2) ("After the appointment of a GAL under any provision of this rule and after the service and filing of such pleadings as may be required by such GAL, the court may proceed to final judgment, order or decree against any party

minor's action, and the effect of a judgment involving a minor on other claims of the minor or her parents.

Where the parent files suit to recover for her own bodily injuries and the medical expenses of her child, and she receives an adverse verdict, that verdict and judgment does not bar a subsequent suit by the minor to recover for the minor's injuries, even if her mother serves as the GAL in her child's suit.⁴⁰² Similarly, in *Rabil v. Farris*,⁴⁰³ the father sued as the next friend for his minor and the jury returned a verdict against the minor. The father then brought a second suit to recover medical expenses and loss of the minor's services, and the court held that the father was not bound by the first verdict, because he was not a party in the first action.⁴⁰⁴ Where the child's mother served as the next friend in the child's action and lost at trial, the father was not barred from bringing a suit for medical expenses and lost earnings.⁴⁰⁵

On the other hand, the court in *Thompson v. Lassiter*⁴⁰⁶ held that where the father serves as the GAL in the first suit, defending a claim against his son, an adverse verdict is binding on the father in a subsequent suit by the father to recover medical expenses of the minor. The court emphasized that the father controlled the litigation in the first action, and that he had an interest in the first action as he was potentially liable under the family purpose doctrine.⁴⁰⁷

The doctrine of *res judicata* does not apply to persons who are not a party to the minor's case. Thus, where the minor's first attorney was not a party to the action in which the minor's claim was settled, findings as to the reasonableness of a second lawyer's fee from that action were not binding on the first attorney when he filed an action against the second

so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.”).

402. *York v. N. Hosp. Dist. of Surry Cnty.*, 96 N.C. App. 456, 461–62, 386 S.E.2d 99, 102 (1989).

403. *Rabil v. Farris*, 213 N.C. 414, 196 S.E. 321 (1938).

404. *Id.* at 416, 196 S.E. at 322.

405. *Kleibor v. Rogers*, 265 N.C. 304, 307, 144 S.E.2d 27, 30 (1965).

406. *Thompson v. Lassiter*, 246 N.C. 34, 39–40, 97 S.E.2d 492, 497 (1957).

407. *Id.* at 39, 97 S.E.2d at 496. The *Thompson* case distinguished *Rabil* on these factors. *Id.* It should be noted, however, that *Rabil* was a 4-3 decision, with a vigorous dissent, and *Thompson* may reflect a desire to curb the result of *Rabil*. See *Rabil*, 213 N.C. at 418, 196 S.E. at 323 (Barnhill, J., dissenting) (“It appears to me as being unconscionable to now permit him [the father] to again undertake to establish negligence before another jury to the end that he personally may recover of the defendant.”).

law firm for a portion of the fees awarded.⁴⁰⁸ In a suit brought by a minor through a GAL, the minor (and not the GAL) is the “real party” for purposes of *res judicata* and collateral estoppel.⁴⁰⁹

Where a suit is filed against a minor who has a potential claim against another party in the case, and the plaintiff obtains a consent judgment, the consent judgment will not impair the minor defendant's rights under the doctrine of *res judicata* unless the court made proper inquiry as to whether the judgment was fair to the minor defendant.⁴¹⁰ Such a judgment is voidable in order to protect the minor's rights.⁴¹¹

Where a minor obtains a judgment solely for the purpose of approving a settlement, satisfaction of the judgment will not bar the minor's claims against other tortfeasors, even though satisfaction of a judgment generally precludes recovery against other persons.⁴¹²

A settlement made in good faith between the minor claimant and a tortfeasor generally will not bar the minor's claims against other tortfeasors.⁴¹³ Further, a finding at the minor's settlement proceeding that the settlement was made in good faith for the purpose of approving that settlement, may support a finding that the settlement was in good faith for the purpose of allowing the minor to pursue other tortfeasors.⁴¹⁴

408. *Pryor v. Merten*, 127 N.C. App. 483, 487, 490 S.E.2d 590, 592–93 (1997). *Pryor* might be better viewed as involving the companion doctrine of collateral estoppel, or issue preclusion.

409. *King v. Grindstaff*, 284 N.C. 348, 357, 200 S.E.2d 799, 806 (1973); *accord* *Ellington v. Bradford*, 242 N.C. 159, 160, 86 S.E.2d 925, 926 (1955) (“Neither a parent nor a stranger who acts as next friend in bringing a suit for an infant becomes thereby a party to the cause.”). Similarly, hearsay statements of the father made at the scene of an accident are not admissible against the minor, even if the father serves as the GAL. *Cook v. Edwards*, 198 N.C. 738, 739, 153 S.E. 323, 324 (1930).

410. *Smith v. Price*, 253 N.C. 285, 287, 116 S.E.2d 733, 734 (1960).

411. *Id.*

412. *Payseur v. Rudisill*, 15 N.C. App. 57, 63–64, 189 S.E.2d 562, 566 (1972) (holding that a judge-approved settlement against one defendant, where the judgment was entered in docket and satisfied, did not constitute a satisfaction of judgment under section 1B-3(e) of North Carolina's General Statutes because the minor should not be penalized because his settlement must be approved by the court, when such a settlement by an adult would not bar further claims).

413. N.C. GEN. STAT. § 1B-4(1) (2011).

414. *See generally* *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 552 S.E.2d 674 (2001).

D. Minor's Attorney

There is some authority that the GAL must hire an attorney.⁴¹⁵ Other jurisdictions have held that the minor must have an attorney.⁴¹⁶ It is not clear, however, if this extends to a suit which is filed solely to approve a settlement. Some authority seems to recognize the validity of a court-approved settlement where the minor does not have a lawyer.⁴¹⁷ If the parents have settled the claim prior to suit, and suit is filed only to approve the settlement, then there seems to be little reason for a *per se* rule requiring the minor to have a lawyer, as the settlement is not binding unless it is approved by the court.⁴¹⁸ Where the GAL is a lawyer, this should adequately serve to protect the minor's interests.⁴¹⁹

The minor typically has an attorney to pursue his claims, especially in cases with significant injuries. The authorities do not expressly address the manner in which the attorney is retained. Almost invariably, the minor's parents will retain a lawyer to represent the minor, and also possibly to simultaneously represent the parents. Presumably the parents have this authority based on their general authority to act for the welfare of their child.⁴²⁰ The parents do not, however, have the authority to enter a binding agreement for legal fees.⁴²¹

415. *In re Stone*, 176 N.C. 336, 338, 97 S.E. 216, 217 (1918) ("While the next friend has power to employ counsel to prosecute the action, and it is his duty to do so . . . [i]t is essential that he have the assistance of counsel learned in the law.").

416. *Shields v. Cape Fox Corp.*, 42 P.3d 1083, 1086 n.3 (Alaska 2002) ("While we have not addressed the question of whether a guardian *ad litem* can represent a child without retaining a lawyer, all other circuit courts addressing the issue have held that the guardian or parent cannot bring a lawsuit on behalf of a minor in federal court without retaining a lawyer.") (quoting *Johns v. Cnty. of San Diego*, 114 F.3d 874, 876–77 (9th Cir. 1997)).

417. *See, e.g., Patrick v. Bryan*, 202 N.C. 62, 72, 162 S.E. 207, 212 (1932). This opinion held that a prior settlement, reached in a legal action, would bar a subsequent action by minor if the settlement was "just and righteous." *Id.* Although not expressly stated in the opinion, the inference is that the minor did not have an attorney in the prior action.

418. *See infra* Part III.B.

419. *See* discussion *supra* Part II.A.4; *In re Clark*, 303 N.C. 592, 602, 281 S.E.2d 47, 54 (1981) (holding that providing the minor in a TPR case with a GAL who is an attorney satisfies any obligation to provide her with a lawyer).

420. *See* discussion *infra* note 500 regarding parent's general authority over minor; *see also Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999) ("[A] law firm or attorney may not represent a client without the client's permission to do so.").

421. *See infra* Part II.D.2.

After the parents retain the lawyer to represent the minor, the minor is the attorney's client.⁴²² Of course, the parents can also be the client for the purpose of pursuing the parents' own claims, assuming that there are no conflicts.

Even though the parents normally retain the lawyer for the minor, an ethics opinion suggests that a lawyer can represent the minor and pursue the minor's claim contrary to the wishes of the parents. An ethics opinion by the North Carolina State Bar addresses a situation where a minor's father originally hires a lawyer to pursue the minor's claim arising from an automobile accident involving the child's mother and another motorist.⁴²³ The father later informs the lawyer that he does not want to pursue the claim because the lawyer will likely have to pursue a claim against the child's mother (who is the father's wife), and the parents are concerned that this will raise their insurance rates.⁴²⁴ The opinion states that the lawyer can satisfy his ethical duty by telling the father that the claim might not affect their rates and further advising the father that he (the father) "has an ethical and moral duty to proceed."⁴²⁵ The opinion then states that it would be "permissible for Attorney X to seek the appointment of an independent guardian *ad litem* to represent A's [minor's] interests. This would be consistent with Attorney X's primary duty to represent the interest of A, who is the real party in interest."⁴²⁶ The opinion further states that the lawyer can "proceed with filing suit after the independent guardian *ad litem* has reviewed the case and agrees that Attorney X should proceed."⁴²⁷ This opinion raises myriad issues, all of which cannot be addressed in this Article.

This opinion could result in the lawyer representing the minor in a claim against his mother, contrary to the wishes of the minor's parents. This would likely result in an untenable situation. The minor presumably would give great deference to the wishes of his parents, and might not consent to pursuing the claim. The minor might not be willing to communicate or cooperate with the lawyer or with the GAL, which would render it nearly impossible to pursue the claim; this could also

422. *Branham v. Stewart*, 307 S.W.3d 94, 101 (Ky. 2010) ("[T]he attorney retained by an individual in the capacity as a minor's next friend or guardian establishes an attorney-client relationship with the minor and owes the same professional duties to the minor that the attorney would owe to any other client.").

423. Council of N.C. State Bar, RPC 163 (1994).

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

jeopardize the attorney-client relationship, assuming one to exist after the father terminates that relationship.⁴²⁸

This opinion's reference to a GAL raises further issues. The opinion states that the lawyer may "seek the appointment of an independent guardian *ad litem* and proceed with filing suit after the independent guardian *ad litem* has reviewed the case and agrees that Attorney X should proceed."⁴²⁹ First, it is questionable whether the attorney has the authority to seek the appointment of a GAL, as that must be done by a relative or "friend" of the minor, or by the court.⁴³⁰ Further, it is not clear how the lawyer can obtain a GAL for the minor prior to deciding whether to file suit. The definition of "guardian *ad litem*" implies that the matter is already before the court.⁴³¹ It is not clear how a civil action or a special proceeding could be filed for the sole purpose of appointing a GAL.

Perhaps the opinion intends to mean that the lawyer should find a prospective GAL. This would still result in the GAL attempting to represent the minor against the wishes of his parents, possibly against the wishes of the minor, and possibly without any consultation with the minor; it also leaves open the question of how the GAL could be appointed without a request from a relative or friend of the minor.⁴³² If a

428. *Dunkley v. Shumate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999) ("[A] lawyer cannot properly represent a client with whom he has no contact.").

429. Council of N.C. State Bar, RPC 163.

430. N.C. GEN. STAT. § 1A-1, Rule 17(c)(1) (2011) ("When an infant or insane or incompetent person is plaintiff, the appointment shall be made . . . upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion."). The lawyer could attempt to have the court appoint a GAL, but the court still needs some action or proceeding to have jurisdiction, and the appointment should be made before or at the time the action is filed. *Id.* There is thus a conundrum in attempting to have a court appoint a GAL when an action has not been filed.

431. *Roberts v. Adventure Holdings, LLC*, 703 S.E.2d 784, 2010 N.C. App. LEXIS 2417 (2010); accord BLACK'S LAW DICTIONARY 774 (9th ed. 2009) (defining GAL as a "guardian . . . appointed by the court to appear in a lawsuit or on behalf of an incompetent or minor party"); BALLENTINE'S LAW DICTIONARY 540 (3rd ed. 1969) (defining GAL as a "person appointed by a court during the course of litigation, in which an infant or a person mentally incompetent is a party, to represent and protect the interests of the infant or incompetent"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1007 (2002) (defining GAL as "a guardian appointed by a court to represent in a particular lawsuit the interests of a party who is minor").

432. Other puzzling aspects of this opinion include that the opinion also does not address the father's claim for medical expenses, which in practice would almost invariably be raised. Further, the minor in this opinion is seventeen years old; hence in only one year he can make his own decisions about proceeding with a claim against his mother,

lawsuit had already been filed and the GAL became adverse to the minor's claim, then in that context it would make sense for the lawyer to seek to replace the GAL.

Once the attorney-client relationship is established, the Rules of Professional Conduct provide some guidance for the lawyer who represents a minor. Rule 1.14 addresses clients with a "diminished capacity," which apparently includes minors.⁴³³ The rules and commentary, however, seem to apply more to an incompetent client. The "lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" having a diminished capacity.⁴³⁴ Where the client's interests are at risk and the client "cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem* or guardian."⁴³⁵ These rules are difficult to apply to a minor client because: the lawyer typically communicates with the minor's parents and not with the minor, a GAL cannot be appointed in the absence of a lawsuit, and a general guardian cannot be appointed unless the minor does not have a natural guardian.⁴³⁶

The commentary to Rule 1.14 further provides, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."⁴³⁷ Where the client is a minor, the term "legal representative" presumably refers to a general guardian or a GAL. "In matters involving a minor, whether the lawyer should look to the parents as natural guar-

without the introduction of a GAL, which could disrupt family harmony. Comment 4 to Rule 1.14 states that, "[i]n taking any protective action, the lawyer should be guided by . . . respecting the client's family and social connections." N.C. RULES OF PROF'L CONDUCT R 1.14, cmt. 5 (2011). The opinion seems to acknowledge implicitly that the father's conduct terminates the attorney-client relationship, as it states that the lawyer has met his ethical duties by advising the father to proceed, and does not require the lawyer to continue pursuit of the claim. Council of N.C. State Bar, RPC 163. After the father discharges the lawyer, the minor is no longer a "client," but instead a former client, and thus it is not clear how the lawyer has any authority to purport to act for the minor.

433. See N.C. RULES OF PROF'L CONDUCT R 1.14(a) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason . . .").

434. *Id.* Rule 1.14(a).

435. *Id.* Rule 1.14(b).

436. N.C. GEN. STAT. § 35A-1224(a) ("The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.").

437. *Id.* Rule 1.14, cmt. 4.

dians may depend on the type of proceeding or matter in which the lawyer is representing the minor.⁴³⁸ The import of these rules and the commentary, which is consistent with common practice, seems to be that the lawyer should communicate with the minor as much as feasible regarding the status of the claim, but the lawyer will typically discuss the status of the case and make settlement decisions with the minor's parents. The lawyer can therefore look to the minor (the client), his GAL, or his parents for decisions about settling or pursuing the minor's claim. As discussed further in section III.A. of this Article, any of these persons can enter a tentative settlement of the minor's claims.

The extent to which the lawyer can withdraw from representing the minor in a pending action is not clear. An ethics opinion from the North Carolina State Bar seems to suggest that the lawyer can simply file a motion to withdraw.⁴³⁹ The opinion in 2006 Formal Ethics Opinion 9 addresses a situation where the minor's GAL wants the lawyer to continue to pursue a case against a truck driver, even though an expert's analysis is favorable to the trucker.⁴⁴⁰ The GAL does not want to pursue a claim against the minor's grandmother, even though that claim has merit.⁴⁴¹ The opinion states, "[i]f, based upon his expert's analysis, Lawyer believes that Minor does not have a claim against the truck driver and the litigation against the truck driver is, therefore, frivolous, Lawyer must file a motion to withdraw."⁴⁴² This opinion does not, however, address the implications of such a withdrawal. Unless new counsel is obtained, at a minimum the minor, to whom the lawyer owes his "primary duty," will be left without skilled legal representation; his interests cannot conceivably be adequately represented in a case involving experts and a GAL who refuses to pursue another tortfeasor against whom the case is stronger. Further, such a withdrawal raises serious questions as to whether this would likely result in the unauthorized practice of law by the GAL.⁴⁴³

438. *Id.*

439. Council of N.C. State Bar, 2006 Formal Ethics Op. 9 (2006).

440. *Id.*

441. *Id.*

442. *Id.*

443. Some cases have recognized the problems arising from counsel withdrawing in this situation:

The withdrawal of counsel as distinguished from the substitution of qualified counsel leaves the guardian *ad litem* in the untenable position of perhaps committing a misdemeanor: practicing law without a license. Thus, a trial judge should not ordinarily permit an attorney to withdraw unless other qualified counsel has been obtained.

The minor's lawyer can be liable to the minor for her negligence (malpractice) in handling the minor's claim. Further, a finding in the underlying case that the minor's settlement was fair and reasonable probably will not protect the lawyer in a subsequent action by the minor.⁴⁴⁴

1. *Conflicts of Interest*

The minor's "attorney must be equally . . . disinterested [as the GAL], and a mere colorable interest is a sufficient disqualification for" the attorney.⁴⁴⁵ Further, the minor's lawyer must be vigilant for a conflict of interest between his clients if he also represents the minor's parents or represents other injured persons arising out of the same incident.

The North Carolina State Bar has issued a few ethics opinions addressing these conflicts. In one opinion, where the tortfeasor makes a joint offer to the minor for personal injuries and to the parents for emotional distress arising from the child's injuries, without allocating the offer among the claimants, the parents and the child have a conflict of interest.⁴⁴⁶ In this same opinion, the tortfeasor "tells law firm A to disburse the funds between the parents and the child as the attorneys see fit."⁴⁴⁷ According to the opinion, the attorney cannot represent the parents and the child, and he must withdraw.⁴⁴⁸ The opinion further states that "[t]he attorneys may not continue representing either of their clients unless their continuing participation is intelligently consented to by the

Torres v. Friedman, 215 Cal. Rptr. 604, 609 (Cal. Ct. App. 1985) (citation omitted); *accord* Mossanen v. Monfared, 92 Cal. Rptr. 2d 459, 464 (Cal. Ct. App. 2000) ("Here, without counsel, Mateen's guardian *ad litem* was powerless to oppose the motion for summary judgment. She could not represent Mateen's interests without counsel.").

444. Byrd v. Woodruff, 891 S.W.2d 689, 699 (Tex. 1994) ("The parties [in the underlying case] did not litigate any issue about [the lawyer's] legal representation of [the minor] in the prior suit. Collateral estoppel does not apply."); Cook v. Connolly, 366 N.W.2d 287, 289 (Minn. 1985) (rejecting argument that "prior court order approving a minor personal injury settlement bars, by collateral estoppel, a subsequent malpractice suit by the injured person against her attorney for an allegedly inadequate settlement"); *accord* Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 192 (1990) (noting that plaintiffs who sued lawyers for improper fee were not barred by a prior action in which settlement was approved by the court, because "[t]he focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement reached with the opposing party was fair to the minors involved").

445. Butler v. Winston, 223 N.C. 421, 423, 27 S.E.2d 124, 126 (1943).

446. Council of N.C. State Bar, RPC 109 (1992).

447. *Id.*

448. *Id.*

other client, and this is impossible under the facts stated.”⁴⁴⁹ Additionally, the lawyer cannot “petition the court to hear evidence of the separate claims of parents and child and make a distribution of the funds.”⁴⁵⁰

A similar fact pattern was addressed in another ethics opinion issued on the same date, stating that a lawyer can represent both clients prior to the defendant making an offer.⁴⁵¹ Regarding the situation presented when a joint offer is made, the opinion states:

Should the defendant make a joint offer requiring the plaintiffs to divide the proceeds, the potential conflict of interest would become actual. Given the fact that the attorney’s clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation. In some instances it may also be appropriate for an attorney to attempt to assist his clients in evaluating their respective claims and in amicably agreeing to an equitable and appropriate division which could then be presented to the court for its approval. Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other.⁴⁵²

This opinion further states, “[i]t is conceivable that the attorney may continue to represent one or the other with the consent of the former client whose case he relinquishes.”⁴⁵³ Although this opinion expressly states that it is “not intended to contradict the advice given in response to the specific facts recited in RPC 109,”⁴⁵⁴ it is difficult to reconcile these two opinions. Pursuant to RPC 109, where the tortfeasor makes a joint offer for the claims of the parents and the minor, there is a conflict requiring the attorney to withdraw from the case.⁴⁵⁵ Pursuant to RPC 123, the lawyer apparently has some discretion in continuing to represent all of the claimants after a joint offer is made.⁴⁵⁶ It is not clear whether the approach under RPC 123 is contingent upon the settlement being approved by a court.⁴⁵⁷

449. *Id.*

450. *Id.*

451. Council of N.C. State Bar, RPC 123 (1992).

452. *Id.*

453. *Id.* (citation omitted).

454. *Id.*

455. Council of N.C. State Bar, RPC 109.

456. Council of N.C. State Bar, RPC 123.

457. There is a slight distinction in the manner in which the offer is made in these two opinions, but this distinction should not make a difference. Where the lawyer is asked to allocate the settlement funds among his clients, he clearly cannot do this. He

Another ethics opinion states that a lawyer can represent several minors (and can represent a minor and his parents) even though the insurance proceeds are insufficient to pay all of the claims.⁴⁵⁸ The parents must give informed consent to the multiple representation at the outset. The opinion further states that the minor must have an independent GAL who consents to the multiple representation.⁴⁵⁹ The presence of a true GAL implies that a suit has been filed, or at least that suit is imminent as the GAL has been appointed for the purpose of prosecuting the action. This leaves the question of whether the lawyer can represent these persons prior to the filing of a lawsuit, which is required to give the court jurisdiction to appoint a GAL. One logical interpretation of this is that the attorney can represent these parties prior to the appointment of a GAL, and that a GAL who is later appointed (after suit is filed) can ratify the representation. Another interpretation would be that the lawyer should find a prospective GAL, who consents to the multiple representation, prior to his appointment as the GAL.

2. Attorney's Fees

It is generally understood that the court can review the fee paid to the lawyer from the settlement for the minor.⁴⁶⁰ Determining the appropriate legal fee is a complex issue.

The common practice is for the minor's parents to sign an agreement with the lawyer that authorizes the lawyer to represent the minor. This agreement sets for the fee arrangement, which is typically a contingent fee. The case law indicates, however, that the GAL cannot enter a binding agreement for compensation of the lawyer.⁴⁶¹ Presumably the parents likewise cannot enter such a binding contract.

In *In re Stone*, the minor obtained a settlement of a claim arising from the death of his father.⁴⁶² The minor's lawyer had been retained "by

should, however, be able to simply convey this information to his clients, or to instruct the offeror that the offeror must either allocate the settlement amount or rephrase the offer, which yield the same result as if the offer was simply a joint offer (without asking the attorney to allocate the offer).

458. Council of N.C. State Bar, RPC 251 (1997).

459. *Id.*

460. See E.D.N.C., LOCAL RULES OF PRAC. & PROC., R 17.1(c) (2011) ("[T]he court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties.").

461. *In re Stone*, 176 N.C. 336, 338, 97 S.E. 216, 217 (1918) ("While the next friend has power to employ counsel to prosecute the action, and it is his duty to do so . . . he cannot make a binding contract for compensation.").

462. *Id.*

direction of the court,⁴⁶³ and the minor's funds were held by his mother, as his guardian.⁴⁶⁴ The minor's attorney then filed a motion for an award of legal fees.⁴⁶⁵ The attorney had obtained \$6,500 for the minor, and the Superior Court awarded \$1,000 to the lawyer.⁴⁶⁶ On appeal, the North Carolina Supreme Court wrote, "The court may fix the attorney's compensation without regard to any contract."⁴⁶⁷ The Supreme Court reduced the fee to \$500.⁴⁶⁸ The court wrote:

Attorneys, being officers of the court, are sometimes compelled to render laborious service for no fee, and to the credit of the legal profession be it said such service is rendered most willingly. When serving under the direction of the court to protect the rights of an infant, their compensation is to be measured by the standard of official emoluments rather than by that of the prices demanded and paid between individuals free to contract at will.⁴⁶⁹

The court also wrote, "There is no place here for the doctrine of an implied promise upon a quantum meruit."⁴⁷⁰ It is not clear whether some of the court's holdings in this case are dependent on the attorney being retained "by direction of the court." The portion of the case stating that the GAL cannot enter a binding contract for fees should, however, adhere even where the minor's parents retain the lawyer.

In another case, the minor's first attorney (who was discharged) sued the second attorney (who received the legal fee), and the court held that the first attorney had a claim against the second attorney based on a theory of quantum meruit.⁴⁷¹ This case therefore could suggest that quantum meruit is an acceptable measure of fees to be awarded to the

463. *Id.* at 339, 97 S.E. at 218.

464. *Id.* at 337, 97 S.E. at 217.

465. *Id.*

466. *Id.*

467. *Id.* at 338–39, 97 S.E. at 217.

468. *Id.* at 340, 97 S.E. at 218.

469. *Id.* at 339–40, 97 S.E. at 218. In this case, the mother had been appointed as a general guardian for her son, and she received the settlement funds and invested them in real estate. *Id.* at 340, 97 S.E. at 218 (Clark, C.J., dissenting). She was ordered to pay legal fees to the court from the minor's funds. *Id.* at 338, 97 S.E. at 217. She was also ordered to pay the costs of the appeal personally, and not from the minor's funds. *Id.* at 340, 97 S.E. at 218.

470. *Id.* at 339, 97 S.E. at 217 (citing *Cole v. Superior Court of San Francisco*, 63 Cal. 86, 90 (Cal. 1883)) (internal quotation marks omitted).

471. *Pryor v. Merten*, 127 N.C. App. 483, 487–88, 490 S.E.2d 590, 593 (1997) ("We believe the more equitable result is to allow the discharged attorney to proceed against the new attorney for the prior attorney's rightful share of the total attorney's fees.").

attorney from the minor's recovery.⁴⁷² These two cases are the only North Carolina cases addressing the method for computing the minor's attorney's fee to be taken from the minor's settlement. Neither of these cases involved a routine minor's settlement, in which the two parties have simply settled the case and are presenting the tentative settlement to the court for review. Therefore, cases from other jurisdictions addressing this issue are useful.

In *In re Abram & Abrams*, the Fourth Circuit held that the district court has the "discretion to review the settlement here, including the contingency fee, for reasonableness."⁴⁷³ In that case, the attorneys reached a settlement for the minor for \$18,000,000.⁴⁷⁴ The attorneys had entered a fee agreement with the parents providing for a fee of one-third of the recovery.⁴⁷⁵ The settlement was presented to the Eastern District Court of North Carolina, in which the attorneys sought a fee of \$6,000,000.⁴⁷⁶ The district court awarded the attorneys \$600,000 based on their hours invested in the case at an hourly rate of \$300 per hour.⁴⁷⁷ The district court wrote, "The proposed legal fee of \$6,000,000.00 would be unconscionable in light of the work performed and the lack of adversity in pursuing this claim."⁴⁷⁸ On appeal, the Fourth Circuit Court of Appeals reversed, concluding that the district court abused its discretion in failing to give due weight to the contingency agreement, stating: "The chief error in the district court's analysis was its failure to recognize the significance of the contingency fee in this case."⁴⁷⁹

Although this case was apparently decided under federal law,⁴⁸⁰ the court stated, "We are not convinced, however, that the law of either state

472. Under "quantum meruit," the plaintiff recovers the "reasonable value of material and services rendered by the plaintiff." *Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992).

473. *In re Abrams & Abrams*, P.A., 605 F.3d 238 (4th Cir. 2010).

474. *Id.* at 242.

475. *Id.* at 241.

476. *Id.* at 242.

477. *Id.* at 242–43.

478. *Pellegrin v. Nat'l Union Fire Ins. Co.*, 598 F. Supp. 2d 724, 731 (E.D.N.C. 2009), *rev'd*, 605 F.3d 238 (4th Cir. 2010).

479. *In re Abrams*, 605 F.2d at 245.

480. There is ample authority that the issues decided in a hearing to approve a minor's settlement are governed by state law. *See, e.g., Burke v. Smith*, 252 F.3d 1260, 1266 (11th Cir. 2001) ("Alabama law requiring a fairness hearing in order to bind a minor to a settlement agreement is a matter of state substantive law."). The *Burke* court also cited to cases from the Ninth and Sixth Circuits for the conclusion that state law governs the issue presented. *Id.* at 1266 n.8. The lower court properly applied state law in allowing relief from prior dismissal, in which court had not determined whether dismis-

[North Carolina or Louisiana] is so different from the federal standard as to make a difference.⁴⁸¹ The court wrote that the fee should be reviewed pursuant to twelve factors, derived from federal cases awarding fees to the plaintiff.⁴⁸² Those twelve factors are:

(1) the time and labor required in the case, (2) the novelty and difficulty of the questions presented, (3) the skill required to perform the necessary legal services, (4) the preclusion of other employment by the lawyer due to acceptance of the case, (5) the customary fee for similar work, (6) the contingency of a fee, (7) the time pressures imposed in the case, (8) the award involved and the results obtained, (9) the experience, reputation, and ability of the lawyer, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship between the lawyer and the client, and (12) the fee awards made in similar cases.⁴⁸³

The court focused its analysis on whether the contingent agreement was reasonable, stating: “The proper question involved, not some hourly rate in the abstract, but whether thirty-three percent was an acceptable fee for the contingency-based personal injury work performed by Pellegrin’s counsel.”⁴⁸⁴ The court remanded for further proceedings, to consider other factors.⁴⁸⁵ The federal court therefore presumably held that the contractual fee arrangement was binding, subject only to an analysis of whether that contingent fee arrangement was reasonable.

Many courts disregard the fee agreement altogether, on the basis that neither the minor, his parents, nor his GAL can enter a binding contract for fees.⁴⁸⁶ “The attorney and next friend should simply recognize

sal and settlement were fair to minors. *Id.* at 1266. Most of the federal cases cited in this subsection regarding the manner of determining attorneys’ fees were based on state, and not federal, law.

481. *In re Abrams*, 605 F.2d at 244. This Article suggests that North Carolina and the majority of other jurisdictions give little or no weight to the fee agreement between the attorney and the minor’s parents. The law of Louisiana, however, is generally to the contrary, and appears to readily enforce such agreements. See *S. Shipbuilding Corp. v. Richardson*, 372 So. 2d 1188, 1191 (La. 1979) (enforcing contingent fee entered by mother of minor beneficiaries, prior to formal appointment to represent estate, based on practical considerations).

482. *In re Abrams*, 605 F.2d at 244.

483. *Id.*

484. *Id.* at 248.

485. *Id.* at 249.

486. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 185 (Tenn. 2011). The court wrote:

Therefore, the trial court shall not consider the fee agreement between the attorney and the minor’s next friend, because any such agreement does not bind the minor. In determining the fee, attorneys representing minors must, on the

that the court will disregard any agreement concerning fees and set a reasonable fee at the conclusion of the case.”⁴⁸⁷ The courts reject arguments that such action by the court “interferes with the right of the attorney and his client to establish the attorney’s fee by mutual agreement.”⁴⁸⁸ The North Carolina Supreme Court in *In re Stone* cited to a California case which stated that the GAL “has no power by specific agreement with the attorney to fix such compensation absolutely. An attorney accepting employment, and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation.”⁴⁸⁹

The approach taken by the Fourth Circuit in *In re Abrams* is peculiar in a few respects. As noted in the preceding paragraph, its emphasis on the fee arrangement is at odds with other federal authority. Reliance on cases regarding statutory fees for a prevailing plaintiff may be inapplicable in a case where fees are taken from a minor’s tort settlement. Further, those cases utilizing the twelve factors cited in *In re Abrams* tend to diminish the fee arrangement in setting legal fees. The origin of the twelve factors in the *Abrams* case is *Johnson v. Georgia Highway Express, Inc.*⁴⁹⁰ Regarding the role of the contingent fee agreement, that court wrote:

The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney’s fee expectations when he accepted the case. But . . . [s]uch arrangements should not determine the

one hand, receive sufficiently reasonable fees to ensure that they have the necessary incentive to accept such cases in the future.

Id. The court affirmed an award of attorneys’ fees which was based on ten factors for determining reasonableness of fee from rules of professional conduct. *Id.* See *Johnson v. Clearfield Area School District*, 319 F. Supp. 2d 583, 589 (W.D. Pa. 2004), where the court held: “Thus, even though a contingency agreement exists, the Court will still follow the [Pennsylvania process for determining fees].” In this case, the court denied a proposed settlement where, *inter alia*, the petition did not adequately describe services rendered and counsel’s hourly rate. *Id.* See also *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 673 (6th Cir. 1988) (reversing approval of settlement where lower court looked only at fee agreement in awarding legal fees). “When a court is called upon to approve the settlement as is in the best interest of the minor, it must consider and then determine what constitutes fair and reasonable compensation to the attorney regardless of any agreement specifying an amount, whether contingent or otherwise.” *Id.*

487. *Wright*, 337 S.W.3d at 186.

488. *Cappel v. Adams*, 434 F.2d 1278, 1280 (5th Cir. 1970). The lower court awarded a fee of one-fifth, rather than one-third, for the lawyer’s services. *Id.* at 1279. The court rejected the lawyer’s argument because the court has discretion to set a fee, which must be reasonable. *Id.* at 1280–81.

489. *Cole v. Super. Ct. of San Francisco*, 63 Cal. 86, 89–90 (Cal. 1883).

490. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

court's decision. The criterion for the court is not what the parties agreed but what is reasonable.⁴⁹¹

Ironically, the *Johnson* case was later overturned by the United States Supreme Court, which held that a prevailing plaintiff in a case under 42 U.S.C. § 1988 was entitled to legal fees based on the attorney's actual time in the case (which is exactly what the District Court did in *In re Abrams*), subject to an adjustment based on the other factors noted in *Johnson*, rather than a contingent amount.⁴⁹² Thus, the federal authority in fact seems to diminish the significance of the contingent fee agreement in setting a legal fee for the plaintiff's counsel, in a case in which fees are awarded by statute, which accords with North Carolina law.⁴⁹³

Some courts recognize the fee agreement as a presumptive award for the minor's attorney's fees, but then deviate from the agreement based on other factors.⁴⁹⁴ Where the court honors the contingent fee

491. *Id.* at 718.

492. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (holding that the District Court erred in limiting fee to contingent amount). The Court said, "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Id.* at 94. "*Johnson's* 'list of 12' thus provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees; but the one factor at issue here, the attorney's private fee arrangement, standing alone, is not dispositive." *Id.* at 93.

493. *See, e.g., Epps v. Ewers*, 90 N.C. App. 597, 600, 369 S.E.2d 104, 105 (1988) ("This Court has twice held, however, that a contingent fee contract does not control the trial court's determination and, when a statute provides for a 'reasonable' fee, the amount of the fee should be based upon the actual work performed by the attorney.").

494. *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 461 (C.D. Cal. 1978) (noting that a fee is determined by principles of quantum meruit and rules of professional conduct and imposing a "downward modification" on contractual one-third recovery to fifteen percent based on (1) lack of attorney's time records, (2) duplicate services for multiple clients arising from the same incident, and (3) negligible risk of nonrecovery). The court acknowledged that plaintiff's counsel often does not maintain records of time devoted to a case. *Id.* at 465. *See also Abel v. Tisdale*, 619 P.2d 608, 609 (Okla. 1980), where in a wrongful death suit the deceased had a wife and two minor children, and the lower court approved a settlement reducing attorney's fees for each minor by \$27,720 to \$32,000. The court noted, "[C]ourts have refused to enforce contingent fee arrangements when the amount of the fee seemed excessive." *Id.* at 611. The court remanded for an evidentiary hearing on the reduction of attorneys' fees for each child, saying:

The record, while containing evidence of the fairness of the contracted fee and the amount of work done by the attorneys, is void of evidence upon which the trial court could base his fee reduction. While the trial court has the authority to reduce a child's attorney fee, such reduction must be supported by evidence; it cannot be arbitrary and must be as a result of an adversary proceeding.

Id. at 612.

and the minor's recovery includes an annuity, one court held that the fee should be based on the amount used to purchase the annuity, rather than the present value of the annuity.⁴⁹⁵

Most cases evaluate the reasonableness of the lawyer's fee in relation to the amount received by the minor. One court, however, suggested that the focus should be on whether the "net recovery" to the minor was reasonable, rather than on the amount of the legal fee.⁴⁹⁶

Where the fee agreement is unlawful, it will not be honored. Thus, a fee arrangement which includes improper fee-splitting is not enforceable, and the court will not award fees pursuant to such an agreement.⁴⁹⁷

A finding that the attorneys' fees are reasonable, contained in the order approving the settlement, does not necessarily preclude the client from challenging those fees in a later claim against the lawyer.⁴⁹⁸

495. *Johnson v. Sears, Roebuck & Co.*, 436 A.2d 675 (Pa. Super. Ct. 1981) (reversing the lower court's award of an attorney's fee based on one-third of present value of projected future annuity payments). The court held, "We find that the most equitable method of valuing an annuity for the purpose of determining the amount of attorneys' fees due is by the cost of the annuity." *Id.* at 630.

496. *Robidoux v. Rosengren*, 638 F.3d 1177, 1182 (9th Cir. 2011) (holding that the lower court erred when it found that a fee of 56% of recovery for minors and adults was unreasonable because the lower court erroneously followed California procedures which place "undue emphasis" on legal fees rather than net recovery). The court noted, "If the net recovery of each minor plaintiff under the proposed settlement is fair and reasonable, the district court should approve the settlement as presented, regardless of the amount the parties agree to designate for adult co-plaintiffs and attorney's fees." *Id.*

497. *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84 (2d Cir. 2010) (holding that the district court could look beyond contingency agreement with plaintiffs and consider the fee splitting agreements among the attorney and firms in determining the appropriateness of attorneys' fees); *In re Estate of Brandon*, 902 P.2d 1299, 1317 (Alaska 1995) (remanding for further findings on whether minors' attorneys had impermissible conflicts and improperly split fees). The court in *Brandon* noted, "[T]he general rule has been that once a conflict of interest or other ethical violation has been established, the attorney is prohibited from collecting fees for his or her services." *Id.*

498. *Barr v. Day*, 879 P.2d 912, 915-16 (Wash. 1994). In *Barr*, where an incompetent adult settled a claim which was approved by the court, including approval of attorneys' fees, and adult's spouse later sued lawyers for, *inter alia*, charging excessive fees in said proceeding, she was not precluded by collateral estoppel from asserting that fees were excessive. *Id.* at 913, 916. The court noted:

The issues presented in the two proceedings were not identical since the main issue in the settlement hearing was whether the proposed settlement as a whole, including attorney fees, was reasonable. Whether the attorneys made a full and fair disclosure to the Barrs on all matters relating to the fees, or whether any fiduciary duties were violated, are distinct issues.

III. SETTLEMENT OF MINOR'S CLAIM

The settlement of a minor's claim raises issues that are not present with an adult claimant. This includes identifying those persons having authority to settle the minor's claim, the need for court-approval of the settlement, and the handling of the minor's settlement funds.

A. *Persons Having Authority to Enter Settlement for Minor*

There is scant legal authority identifying those persons having the power to settle a claim for a minor, revealing the source of that power, and addressing the potential conflicts between the various persons involved in the settlement decision. As noted in the next section of this Article, a settlement is not binding unless it is approved by a court.⁴⁹⁹ In order for a court to approve a settlement, however, there must be some tentative settlement in the first instance.

The decision to settle a minor's claim is typically made by the minor's parents. The parent's ability to settle the minor's claim is consistent with the general authority given to parents to handle the affairs of their children. A parent can, for example, make important decisions about schooling and medical treatment, and the State cannot intervene in these decisions, unless the parent's conduct amounts to abuse or neglect.⁵⁰⁰

Id. at 915–16; *accord* *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 192 (1990). In *Beckwith*, a plaintiff who sued her lawyers for improper fee was not barred by prior action in which the settlement was approved by the court, because “[t]he focus in the prior case was not whether the attorneys had taken advantage of their client but whether the settlement reached with the opposing party was fair to the minors involved.” *Id.* at 574, 391 S.E.2d at 191–92.

499. *Sell v. Hotchkiss*, 264 N.C. 185, 191, 141 S.E.2d 259, 264 (1965) (holding settlement by mother is not binding); *Hagins v. Phipps*, 1 N.C. App. 63, 159 S.E.2d 601 (1968) (holding GAL's settlement is not binding).

500. *See* N.C. GEN. STAT. § 7B-3400 (2011) (“Notwithstanding any other provision of law, any juvenile under 18 years of age, except as provided in N.C. Gen. Stat. 7B-3402 and N.C. Gen. Stat. 7B-3403, shall be subject to the supervision and control of the juvenile's parents.”); *In re R.T.W.*, 359 N.C. 539, 543, 614 S.E.2d 489, 492 (2005) (“Parents have a fundamental right to the custody, care, and control of their children.”); *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997) (“A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.”).

Both the GAL⁵⁰¹ and a general guardian have authority to settle the minor's claim.⁵⁰² There are also instances where the minor directly enters such a settlement, but this is fairly rare.⁵⁰³

In a few cases from other jurisdictions, the minor's attorney has attempted to settle a case without the consent of the parents or the GAL. Courts have consistently overturned settlements made in this manner.⁵⁰⁴ In one case, the court removed the father as the GAL and proceeded to settle the case.⁵⁰⁵ The appellate court reversed, stating, "The guardian *ad litem* under the circumstances here must of necessity have the sole right to accept or reject a settlement offer. Our rules and practice do not contemplate that the court can or should force a settlement on either

501. *Reynolds v. Reynolds*, 208 N.C. 578, 621, 182 S.E. 341, 367 (1935) ("When infant's property rights are involved in litigation, the general guardian or guardian *ad litem* may negotiate for a compromise of the litigation, and, if the court approves it after an examination of the facts, the judgment or decree will be binding on the infants.") (citation omitted) (internal quotation marks omitted).

502. *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 12, 93 S.E. 374, 376 (1917). In *Bunch*, the court wrote, "He [guardian] stands in the same position as any other trustee, who may, generally, acting in good faith, compound and release a debt due the trust estate; and such composition or release for a valuable consideration is prima facie valid and effectual." *Id.* at 12, 93 S.E. at 376 (quoting *Ordinary v. Dean*, 44 N.J.L. 64 (N.J. 1882)). The court found settlement of the minor's claim by the guardian fraudulent, and therefore ineffectual. *Id.* at 12, 93 S.E. at 376. The court also noted that the effect of such a settlement of a minor's claim, without court approval, was suspect. *Id.*

503. *Daubert v. Mosley*, 487 P.2d 353, 356 (Okla. 1971) (holding release by emancipated minor was binding as it pertained to necessities). "Generally, however, emancipation does not make an infant sui juris for all purposes . . ." *Id.* Under Oklahoma law, an emancipated minor can enter into a binding contract, including a release, only for necessities. *Id.*

504. *Blake v. Pepsi-Cola Bottling Co. of Lyons*, 740 P.2d 79, 82 (Kan. 1987) (holding that minor's attorney did not have authority to accept settlement, where "conservators" had not agreed to settlement, and hence attorneys' purported acceptance of offer was invalid). In *Blake*, the defendant sought court approval of settlement with minor's attorney prompting minor and new attorneys and conservators to object to the settlement at the hearing. *Id.* at 81. The appeals court noted, "The district court, in effect, forced an unwanted settlement upon the plaintiff and her conservators. Such is clearly not the purpose of a hearing seeking court approval of the settlement of a minor's personal injury litigation." *Id.* at 82; see *Edionwe v. Hussain*, 777 N.Y.S.2d 520, 522 (N.Y. App. Div. 2004). In *Edionwe*, the court reversed approval of a minor's settlement noting, "Outgoing counsel is seeking to enforce a settlement contrary to the wishes of his former clients . . ." *Id.*; see also *Speights v. Motor Vehicle Accident Indem. Corp.*, 348 N.Y.S.2d 691, 693 (N.Y. Civ. Ct. 1973) ("It is clear that there is no statutory right of the attorney to compel settlement of any infant's claim without the consent of the infant's parent or guardian.").

505. *Zukerman ex rel Zukerman v. Piper Pools, Inc.*, 556 A.2d 775, 787 (N.J. Super. Ct. App. Div. 1989).

side.”⁵⁰⁶ If the GAL recommends a settlement over the parents’ objection, the court can approve the settlement.⁵⁰⁷ The ethics opinion RPC 163 from the North Carolina State Bar, discussed earlier in Part II.D., likewise indicates that a GAL can file a lawsuit for the minor contrary to the wishes of the parents; this suggests that the GAL could likewise settle the case against the parents’ wishes.⁵⁰⁸ There is authority that the court can appoint a GAL who can accept a settlement offer over the parents’ objections.⁵⁰⁹ Fortunately, however, disputes between the parents, GAL, and attorney are rare.

B. Need for Court Approval

A minor’s claim can be conclusively settled only with the approval of the court. “Judgment or compromise settlement negotiated by next friend or guardian *ad litem* without investigation and approval of court is invalid.”⁵¹⁰ There is no true requirement that a minor’s settlement be approved by the court. There is, thus, no illegality or unethical conduct in settling a minor’s claim without court approval,⁵¹¹ and this practice is

506. *Id.*; see also *id.* at 786 (noting the mere rejection of settlement offers does not warrant removal of GAL). The court said,

[A] mere difference of opinion, such as existed in this case, as to whether or not a proposed settlement offer was sufficient, or should be accepted because of the inherent risks of a trial on liability or damages, or both, is neither misconduct nor such conflict of interest as would warrant the court’s interference to in effect compel a settlement.

Id.

507. *Roberts v. Parrish*, 567 S.W.2d 581, 584–85 (Tex. App. 1978) (“The GAL is appointed in cases of this nature to assist the court in protecting the rights and effecting the best interests of the minor plaintiff.”). In *Roberts*, the parents, as next friends, sued a motorist for injuries to mother and to child and the judge appointed a GAL due to potential conflict. *Id.* at 581–82. The GAL recommended a settlement of \$1,500, even though the parents sued for \$250,000 and objected to the settlement. *Id.* at 582–83. Approval of the settlement was affirmed, even though the parents’ attorney offered to pay \$1,500 into a fund for the minor to ensure that the minor was not harmed by a trial of the action. *Id.* at 583–85. The court reasoned, “[I]n the absence of the complete record made on that hearing, we must presume the record supported the court’s refusal to accept the parents’ \$1,500.00 tender and non-suit the child’s case, and its approval of the settlement agreement, as being in the best interests of the child.”). *Id.* at 585.

508. *Accord* Council of N.C. State Bar, 2006 Formal Ethics Opinion 9 (2006) (noting that a lawyer can seek to remove a minor’s mother as GAL, in order to sue GAL’s mother for the minor).

509. See *Ott v. Little Co. of Mary Hosp.*, 652 N.E.2d 1051 (Ill. App. 1995).

510. *Ballard v. Hunter*, 12 N.C. App. 613, 619, 184 S.E.2d 423 (1971).

511. In other jurisdictions, approval of the minor’s settlement might be required, and the failure to obtain court-approval might constitute misconduct. See *Disciplinary*

common when claims are settled for fairly small amounts. Such a settlement may, however, be rescinded by the minor. In such a case, the tortfeasor is entitled to a credit for the amounts paid in settlement.⁵¹²

Whether the court approves the settlement is determined variously by whether the settlement is “fair,”⁵¹³ “reasonable,”⁵¹⁴ in the “best interest” of the minor,⁵¹⁵ or “just and righteous.”⁵¹⁶ Some cases say only that there must be a judicial “adjudication” of the settlement.⁵¹⁷ Other cases say that the settlement is binding only if it has the “sanction and approval” of the court.⁵¹⁸ The modern trend is to approve the settlement if it is fair, reasonable, and in the best interests of the minor.⁵¹⁹

Counsel v. Folwell, 951 N.E.2d 775, 777 (Ohio 2011) (per curiam) (suspending an attorney who, *inter alia*, settled minor's claim without court approval, and disbursed the fees to himself). The court noted, “Respondent had not represented a minor in a personal-injury action before and did not know that an attorney for a minor cannot settle a minor's claim without probate court approval.” *Id.*

512. Bunch v. Foreman Blades Lumber Co., 174 N.C. 8, 93 S.E. 374 (involving payment to general guardian who apparently had a bond). See also *Ambrose v. Graziani*, 247 S.W. 953, 954 (Ky. 1923), where a minor's lawyer was obligated to reimburse a tortfeasor for payment on a settlement that was not approved by court, when the minor later repudiated settlement. The court remarked:

Assuming his motives were of the best, and that he intended to have a GAL qualify for the infant and pay the money to the guardian *ad litem* and thereby effectuate the settlement, upon his failure to do so, he knew this appellant had parted with his money without consideration and must have known it was his duty to repay the same to him.

Id. at 954.

513. Reynolds v. Reynolds, 208 N.C. 578, 631–32, 182 S.E. 341, 374 (1935) (affirming settlement that was found to be “fair, just, and equitable in regard to the property rights of these infants”).

514. Oates v. Tex. Co., 203 N.C. 474, 478, 166 S.E. 317, 318 (1932) (affirming settlement that was found to be “just and reasonable”).

515. Sigmund Sternberger Found., Inc. v. Tannenbaum, 273 N.C. 658, 677, 161 S.E.2d 116, 130 (1968) (affirming settlement that was “for the best interests of the infant defendants”); *Gillikin II*, 252 N.C. 1, 4–6, 113 S.E.2d 38, 41–42 (1960) (affirming dismissal of suit where the lower court found that a prior settlement amount was “equal to or more than would have been awarded by a jury under the facts disclosed to the court,” and the court that originally approved the settlement found that “the interest of the minor, Clyde O’Neal Gillikin, would be promoted by authorizing the proposed compromise”).

516. Patrick v. Bryan, 202 N.C. 62, 72, 162 S.E. 207, 212 (1932) (noting that a prior settlement will bar a subsequent action by the minor if the settlement was “just and righteous”).

517. Sell v. Hotchkiss, 264 N.C. 185, 191, 141 S.E.2d 259, 264 (1965).

518. Rector v. Laurel River Logging Co., 179 N.C. 59, 62, 101 S.E. 502, 504 (1919) (“[A] next friend is without authority to compromise and adjust a claim of this character without the sanction and approval of the court on investigation of the facts.”). The court

The rule that renders the settlement of a minor's claim, without court approval, voidable derives from a desire to protect the rights of minors. "From our earliest history infants have been regarded as entitled to the especial protection of the State and as wards of the court."⁵²⁰ "The court looks closely into contracts or settlements materially affecting the rights of infants."⁵²¹

Thus, where a minor plaintiff accepted and filed a confession of judgment, the judgment "could not bind the minor plaintiff unless accepted on her behalf by someone authorized and empowered by law to do so."⁵²² "In the case of infant parties, the next friend, guardian *ad litem* or guardian cannot consent to a judgment or compromise without the investigation and approval by the court."⁵²³ A verdict entered with the consent of the parties, and without inquiry by the court, is not binding.⁵²⁴ A voluntary nonsuit by the court in connection with a settlement is not effective without proper court approval.⁵²⁵

held that whether prior judgment, entered by consent, precludes later action by the minor required a further hearing. *Id.*

519. See, e.g., M.D.N.C. RULES OF PRAC. & PROC., R. 17.1(e)(2) (2011) ("The judgment presented should provide . . . that the Court has found that the proposed compromise settlement is fair, reasonable, and in the best interest of the minor or incompetent . . .").

520. *Latta v. Trustees of General Assembly of Presbyterian Church*, 213 N.C. 462, 469, 196 S.E.2d 862, 866 (1938).

521. *Sigmund Sternberger Found., Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968).

522. *Ballard v. Hunter*, 12 N.C. App. 613, 618, 184 S.E.2d 426 (1971).

523. *Id.* at 618, 184 S.E.2d at 426–27 (citation omitted). In *Ballard*, a minor's acceptance of confession of judgment from one defendant, which was recorded as a judgment, did not constitute a true judgment, and a second tortfeasor could not argue that the minor's claim against the second defendant was extinguished by satisfaction of the judgment. *Id.* The court noted that the result is the same even if the judgment results from an offer of judgment or a consent judgment. *Id.* at 618, 184 S.E.2d at 426.

524. *Ferrell v. Broadway*, 126 N.C. 258, 261, 35 S.E. 467, 467 (1900). The court noted that where parties reach settlement and do not present facts to court, "[T]he court would have no knowledge of the facts, and therefore could not exercise any supervision over the interest of the infants." *Id.* The plaintiffs alleged that the prior judgment, during minority, adjudicating their rights to property was by consent, and the court remanded for findings as to what issues were submitted to the jury and as to the land-purchaser's knowledge of proceedings. *Id.*

525. *Hagins v. Phipps*, 1 N.C. App. 63, 65, 159 S.E.2d 601, 602–03 (1968). The trial court entered judgment of voluntary nonsuit, upon the motion of the next friend. *Id.* at 64, 159 S.E.2d at 602. The North Carolina Court of Appeals reversed, saying, "This judgment reveals that it is a consent judgment. There is no finding or adjudication that it was investigated or approved by the court. We hold that the next friend in this case had no more, nor less, authority than the next friend of an infant." *Id.* at 65, 159 S.E.2d at 602–03. Nonsuit was error because "[i]n the case of infant parties, the next friend,

An interesting example of this rule was presented in *Creech v. Melnik*.⁵²⁶ In this case, the minor's attorney was exploring a potential medical malpractice case and spoke with one of the minor's treating doctors.⁵²⁷ The doctor contended that during the conversation, the minor's attorney "assured her that if she spoke with him concerning the events surrounding Justin's birth, plaintiffs would not sue her."⁵²⁸ She stated that with that assurance, she gave information and opinions concerning the care provided for Justin.⁵²⁹ The minor later sued that doctor.⁵³⁰ The jury ruled for the doctor based on a theory that the minor impliedly contracted not to sue the doctor.⁵³¹ The Court of Appeals reversed, finding that the promise was not enforceable because it was not approved by the court.⁵³² The court noted:

Since it is well established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court, we must reverse the jury's finding of a contract on behalf of the minor not to sue Dr. Melnik, and remand for a new trial.⁵³³

Where the court approves the settlement, the settlement is binding, and the minor may not litigate the claim.⁵³⁴ This assumes, of course, that the court has jurisdiction. This also assumes that the tortfeasor consummates the settlement with payment.⁵³⁵ Further, an order approving such a settlement, as with any order, is subject to further review by appropriate motion or appeal. These challenges to such a settlement are addressed primarily in Part III.F. of this Article.

GAL, or guardian cannot consent to a judgment or compromise without the investigation and approval by the Court." *Id.* at 65, 159 S.E.2d at 603.

526. *Creech v. Melnik*, 147 N.C. App. 471, 556 S.E.2d 587 (2001).

527. *Id.* at 472, 556 S.E.2d at 589.

528. *Id.* at 473, 556 S.E.2d at 589.

529. *Id.* at 473, 556 S.E.2d at 589.

530. *Id.* at 472, 556 S.E.2d at 588.

531. *Id.* at 473, 556 S.E.2d at 589. The jury rejected an argument that the minor was equitably estopped from suing the doctor. *Id.* at 473 n.1, 556 S.E.2d at 589 n.1.

532. *Id.* at 475, 556 S.E.2d at 590.

533. *Id.* at 478, 556 S.E.2d at 592.

534. *Gillikin II*, 252 N.C. 1, 6, 113 S.E.2d 38, 42 (1960) (holding that where court approved settlement for \$7,000, and insurer paid funds to clerk, the settlement was valid and binding and barred subsequent action by a minor filed after the minor reached majority).

535. *Gillikin v. Gillikin (Gillikin I)*, 248 N.C. 710, 713-14, 104 S.E.2d 861, 863-64 (1958) (holding that dismissal of action based on prior settlement was error where the record did not show whether the settlement amount had been paid by the tortfeasor).

One of the leading cases recognizing the binding effect of a settlement approved by the court is *Gillikin II*.⁵³⁶ In this case, the minor was injured in an automobile accident when he was seventeen years old.⁵³⁷ His father retained a lawyer, and the lawyer settled the claim, which settlement was approved by the court.⁵³⁸ The minor turned the age of majority and sued the defendant (tortfeasor), and the defendant raised the previous settlement as a bar to the action.⁵³⁹ The plaintiff's primary response seems to have been that the petition seeking judicial approval of the settlement in the prior action was not verified by the next friend.⁵⁴⁰ The court held that the action was barred because of the previous settlement, which had been approved by the court, and rejected the challenges to the procedure used to approve the settlement.⁵⁴¹

The cases do not always clearly indicate the theory upon which a prior settlement, approved by the court, precludes a second claim by the minor. In some of the cases, the defendant asserted the doctrines of "res judicata" and "estoppel by judgment."⁵⁴² Other cases simply refer to a "settlement,"⁵⁴³ and other cases refer to "pleading the judgment."⁵⁴⁴ Where the defendant defends an action based on a prior settlement, this is an affirmative defense, and the burden is on the defendant to "establish all facts necessary to support such plea."⁵⁴⁵

The rule that the settlement of a minor's claim is not binding unless approved by the court applies to any settlement affecting a minor's claim for damages. Thus, where the minor agrees to split the future proceeds of a pending wrongful death action with other potential beneficiaries,

536. *Gillikin II*, 252 N.C. 1, 113 S.E.2d 38.

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.* at 7, 113 S.E.2d at 43 (concluding that verification is not required).

541. *Id.* at 8–9, 113 S.E.2d at 44.

542. *Id.* at 6, 113 S.E.2d at 42. In *Gillikin II*, the minor settled action, with court approval, and then brought suit for damages. *Id.* at 2, 113 S.E.2d at 39. The court noted, "Defendant's plea in bar, whether considered as a plea of estoppel by compromise and settlement, or as a plea of res judicata, or a combination of both, is an affirmative defense." *Id.* at 6, S.E.2d at 42 (citations omitted).

543. *Patrick v. Bryan*, 202 N.C. 62, 68, 162 S.E. 207, 210 (1932) (holding that where minor settled an action with court approval and brought a second action for injuries, the second claim was barred by "compromise settlement").

544. *Oates v. Tex. Co.*, 203 N.C. 474, 477, 166 S.E. 317, 318 (1932) (holding that where minor settled a claim with court approval and filed a suit for damages, the claim is barred on Defendant's "pleading in bar the judgment").

545. *Gillikin II*, 252 N.C. at 6, 113 S.E.2d at 42 (citation omitted).

that settlement (in addition to the wrongful death settlement) must be approved by the court.⁵⁴⁶

By statute, the settlement of a wrongful death claim in which a beneficiary is a minor must be approved by the court.⁵⁴⁷ In one case, the lawyer for an estate settled a wrongful death claim with a tortfeasor, and did not obtain such court approval, even though a minor was a beneficiary.⁵⁴⁸ The estate later sued the tortfeasor, who raised the two-year statute of limitations.⁵⁴⁹ The estate attempted to argue that the tortfeasor was estopped from asserting the statute of limitations because he failed to have the settlement approved.⁵⁵⁰ The court disagreed on the basis that the administrator, not the tortfeasor, "has a duty to seek judicial approval."⁵⁵¹

Although the settlement of the minor's claim requires court approval, other decisions short of settlement that can impair the minor's rights are binding even if not approved by the court. For example, when the minor's attorney fails to object to the introduction of evidence at trial, the minor waives any challenge to the admissibility of the evidence on appeal.⁵⁵² The trial court is not required to approve such a decision, even though it can impair the minor's rights.

A related issue is whether the court can review a decision by the minor's parents or attorney to reject a settlement offer, and whether the court has any authority to refuse to allow the minor's attorney and par-

546. *In re Estate of Brandon*, 902 P.2d 1299,1314 (Alaska 1995) (concluding that where decedent died in airplane crash, and his putative minor daughter and his parents reached settlement regarding distribution of wrongful death proceeds from pending litigation, and said allocation was not specifically approved by court in paternity action, said allocation was not binding following settlement of wrongful death action). In this case, the lower court erred in failing to determine if purported allocation was fair and reasonable. *Id.* at 1309. The appellate court indicated that unless decedent's parents had more than a negligible chance of defeating minor's claim for paternity, minor should receive entire settlement. *Id.* at 1314.

547. N.C. GEN. STAT. § 28A-13-3(a)(23) (2011).

548. *Boomer v. Caraway*, 116 N.C. App. 723, 724–25, 449 S.E.2d 215, 216–217 (1994), *affd.*, 342 N.C. 186, 463 S.E.2d 230 (1995) (clarifying that determination of which party has a duty to seek judicial approval is matter of law, and cannot be shown by production of evidence).

549. *Id.* at 724, 449 S.E.2d at 216.

550. *Id.* at 725, 449 S.E.2d at 216.

551. *Id.* at 725, 449 S.E.2d at 217.

552. *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 178, 552 S.E.2d 674, 677 ("[B]y not objecting to . . . publication [of school records] to the jury the [minor] plaintiffs forfeited the right to appeal the question of the admissibility of the school records.").

ents to reject a settlement offer. The rejection of a settlement offer can affect the minor's interests as much as a decision to accept a settlement offer and release the tortfeasor.⁵⁵³

In a case from another jurisdiction, the minor's medical malpractice trial began, and during trial the judge procured an offer from the defendant to settle for two million dollars, after stating that he (the judge) would settle the case for that amount.⁵⁵⁴ The minor plaintiff, through his attorney and parents (one of whom was the "next friend") had demanded four and a half million dollars and objected to the proposed settlement.⁵⁵⁵ The judge met with the parents and their lawyer, but they would not agree to the settlement.⁵⁵⁶ The judge then stated, "This case is settled for two million dollars according to a revised structured settlement, which I find satisfactory, and a guardian *ad litem* will be appointed in place of the father to accept the settlement."⁵⁵⁷ The judge then told the parents that he could not "let anybody, no matter how well-intentioned or sincere in their convictions, gamble for this child."⁵⁵⁸

The court-appointed GAL reviewed the proposed settlement and found that it was in the minor's best interest.⁵⁵⁹ The judge approved the settlement.⁵⁶⁰ The appellate court affirmed, stating, "when the court believes settlement to be in the minor's best interest, the court may order a prior-appointed guardian or conservator to effectuate settlement, and if that person refuses, may appoint a guardian *ad litem* to settle the case on the minor's behalf."⁵⁶¹ The court further wrote:

In the case of a minor, as noted above, however, the trial court has a duty to prevent the rejection of settlement offers which in the minor's best interests should be accepted. This duty necessarily impedes upon the minor's parents/guardians *ad litem's* ability to control direction of the case as well as to choose the vehicle for ultimate determination of the minor's rights of recovery.

. . . When the court has made such an examination and has determined that settlement, rather than the uncertainties of trial, is in the best

553. See *Ott v. Little Co. of Mary Hosp.*, 652 N.E.2d 1051 (Ill. App. 1995).

554. *Id.* at 1054.

555. *Id.* at 1054–55.

556. *Id.* at 1055.

557. *Id.*

558. *Id.*

559. *Id.* at 1055–56.

560. *Id.* at 1056.

561. *Id.* at 1057.

interest of the minor; and when that determination is supported by the record, it will be affirmed.⁵⁶²

The result in this case is rather extreme in that the minor's claim was settled contrary to the wishes of his parents and his lawyer, but it is a logical result of the principles that the court can appoint a GAL, that the GAL can recommend a settlement, that the court reviews a proposed settlement in the best interest of the minor, and that the court's decision is reviewed for abuse of discretion. If the GAL had recommended that the settlement be rejected, then presumably the court could not have imposed the settlement.⁵⁶³ It is not clear whether the reasoning of this case implies that the court should be apprised of all significant settlement offers, so that that the court can review the rejection of the offer.

C. *Repudiation of Settlement Pending Approval*

Most of the law in North Carolina indicates that until the settlement is approved by the court, the minor can repudiate the settlement. In other words, the settlement is not binding if the minor repudiates the settlement prior to the court's approval of the settlement. North Carolina does not have any cases specifically addressing whether the minor can repudiate the settlement once the parties have begun the process for seeking court approval. More broadly, North Carolina does not have any case law addressing the time in which the parties should seek approval of the settlement. In one case, however, the court held that a settlement, which was not approved by a court, could be reviewed for its reasonableness and approved after the minor attempted to repudiate it.

In *Patrick v. Bryan*, the minor was injured and her father settled the claim with the defendant's insurance company.⁵⁶⁴ The insurance company hired an attorney to represent the defendant, and this attorney arranged for the filing of a "friendly lawsuit" by a next friend against the defendant.⁵⁶⁵ A jury rendered a verdict in accord with the settlement.⁵⁶⁶

562. *Id.* at 1058.

563. See cases discussed *supra* Part III.B, regarding the court's inability to settle the minor's claim without the consent of the parents or the GAL.

564. *Patrick v. Bryan*, 202 N.C. 62, 68, 162 S.E. 207, 210 (1932).

565. *Id.*

566. This process appears in some of these older cases. Although research has revealed no discussion of this process, it appears that a jury was empanelled, the case was submitted to the jury, the lawyers informed the jury of the amount of the settlement, and the jury returned a verdict for the amount of the tentative settlement. A similar procedure occurred in *Ferrell v. Broadway*, 126 N.C. 258, 35 S.E. 467 (1900).

The liability carrier then paid money to fund the settlement.⁵⁶⁷ There is no indication that the court conducted any investigation into the settlement, and the court did not find that the settlement was fair or reasonable.⁵⁶⁸ Eighteen months after this settlement, a new lawyer, appearing for the minor, filed a motion asking that the prior judgment be vacated as irregular and void.⁵⁶⁹ The precise basis for the motion is not entirely clear, but it appears that the lawyer contended that the insurance company's lawyer exercised undue influence over the minor's parents, that the trial court had not been apprised of all the facts, and that the proceeding was "contrary to the course and practice of our courts."⁵⁷⁰ The lower court allowed the motion and vacated the judgment.⁵⁷¹ The defendant appealed, and the Supreme Court remanded.⁵⁷² The court in *Patrick* wrote,

[T]his real fact should be found: Was the compromise settlement made by the father of the minor for the minor, and the insurance company for the defendants, a just and righteous one? Has the minor suffered no substantial injustice? Why set aside a compromise settlement made by the father of the minor if it is just and righteous and not prejudicial to the interest of the minor?⁵⁷³

The court thus implicitly held that the minor could not repudiate the settlement, even though the settlement had not been approved by the trial court.

In all other cases in North Carolina, however, the courts allow the minor to repudiate the settlement at any time prior to approval by the court. For example, in *Creech v. Melnik*, the minor's attorney agreed not to sue a doctor for malpractice, in exchange for which the doctor spoke with the minor's attorney.⁵⁷⁴ The Court of Appeals held that this agreement was unenforceable because it had not been approved by the court.⁵⁷⁵ The appellate court did not remand the case for a determination as to whether that agreement was fair and reasonable.⁵⁷⁶ In all of the cases cited in this Article in which the court declared a settlement

567. *Patrick*, 202 N.C. at 72, 162 S.E. at 212.

568. *Id.* at 70, 162 S.E. at 211.

569. *Id.* at 65, 162 S.E. at 208.

570. *Id.* 70, 162 S.E. at 211.

571. *Id.* at 69–70, 162 S.E. at 210–11.

572. *Id.* at 72, at 162 S.E. at 212.

573. *Id.*

574. *Creech v. Melnik*, 147 N.C. App. 471, 472–73, 556 S.E.2d 587, 589 (2001).

575. *Id.* at 475, 556 S.E.2d at 590.

576. *See id.* at 478, S.E.2d at 592.

invalid due to the absence of court approval, the court did not hold that the settlement could nevertheless be approved after the minor repudiated it.⁵⁷⁷

In most jurisdictions, the minor can repudiate the settlement at any time before it is approved by the court.⁵⁷⁸ One court, however, held that the settlement is in a “suspended” state pending approval by the court, and the minor cannot void the settlement.⁵⁷⁹ Another court held that if the GAL repudiates the settlement arbitrarily or capriciously, the court may nevertheless approve the settlement if it is in the best interest of the minor.⁵⁸⁰

Where the minor settles with the tortfeasor and then files suit against the tortfeasor, the courts generally regard this as a repudiation of the settlement by the minor.⁵⁸¹ It is therefore difficult to square the *Patrick* case, which permits the settlement to be approved after the minor attempts to repudiate it, with other cases that simply hold that if the minor's settlement is not approved by the court, the minor can repudiate it.

577. See, e.g., *Rector v. Laurel River Logging Co.*, 179 N.C. 59, 62, 101 S.E. 502, 504 (1919) (holding that a prior consent judgment does not bar a subsequent action unless said judgment was with “sanction and approval of the court on investigation of the facts”).

578. *White v. Allied Mut. Ins. Co.*, 31 P.3d 328, 330 (Kan. Ct. App. 2001) (“And courts in other jurisdictions have applied this rule to permit minors to repudiate or withdraw from a settlement *prior to* its approval by the court.”).

579. *Danes v. Auto. Underwriters, Inc.*, 307 N.E.2d 902, 906 (Ind. Ct. App. 1974). *Danes*, the minor, filed suit to declare void the release of his claims against an uninsured motorist insurer, pursuant to settlement entered by his parents. *Id.* at 903. However, the evidence did not compel the conclusion that fraud, actual or constructive, was present in obtaining the release; and the court only suspended enforceability of the compromise and the release accompanying it pending approval of the settlement by a court of competent jurisdiction. *Id.* at 906; see also *Hansen v. Bussman*, 601 P.2d 794 (Or. 1979). In *Hanson*, the minor obtained judgment for \$500,000 and defendant appealed; on appeal, parties entered into a high-low agreement in which defendant would pay \$450,000 if judgment were affirmed. *Id.* at 795. Prior to the hearing to approve the high-low agreement, which parties planned, the tort verdict was affirmed, and the minor sought to recover entire \$500,000, while defendant sought to pay only \$450,000. *Id.* The court held that the parties reached a binding agreement, based in part on statute that gave the minor's conservator authority to settle the claim without court approval. *Id.* at 796–97. The court also noted that the conservator had a duty to follow through with the settlement, as “it is well established that a party to a contract cannot take advantage of his own failure to perform,” and the settlement likely would have been approved. *Id.* at 797.

580. *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978).

581. *Iverson v. Scholl Inc.*, 483 N.E.2d 893, 899 (Ill. App. Ct. 1985) (“[T]he filing of suit is sufficient evidence of plaintiff's desire to disaffirm any purported discharge given by her under the cajoling influence of her father.”).

It is noteworthy that the tortfeasor cannot repudiate the settlement. The minor can repudiate the settlement prior to approval by a court, but the tortfeasor is bound by the settlement.⁵⁸² Where the tortfeasor is concerned that the minor might await other developments to decide whether to rescind the settlement, prior to approval by the court, the tortfeasor can condition the settlement upon a prompt judicial approval.⁵⁸³

D. Release of Claims

In a typical personal injury claim, upon a settlement of the claim, the tortfeasor (or his insurer) will insist that the claimant sign a release, which is essentially a contractual agreement that the claimant will not pursue other claims against the tortfeasor arising out of the incident giving rise to the claimant's injuries. Most of the cases addressing the validity and preclusive effect of a minor's settlement focus on whether the settlement was approved by the court, while only a couple of cases address the role of the release in the settlement process. The cases in North Carolina that have held that the settlement of a minor's claim, with court approval, bars a subsequent action by the minor do not even make reference to a release.⁵⁸⁴

582. *Grange Mut. Cas. Co. v. Kay*, 589 S.E.2d 711, 715 (Ga. Ct. App. 2003) (holding that an insurer cannot avoid settlement prior to approval of the settlement by the court). The court noted that "the procedural protections afforded to minors . . . are intended for their benefit, not for the benefit of third parties seeking to avoid contracts with them." *Id.* at 715; see also *White*, 31 P.3d at 332 ("The executory accord is binding on Allied, . . . [but] the resulting agreement was not binding on Elizabeth until a court approved it, [and] Allied was bound not to revoke or attempt to withdraw its offer prior to the friendly hearing that it undertook to schedule."); *Dengler ex rel. Dengler v. Crisman*, 516 A.2d 1231, 1233 (Pa. Super. Ct. 1986) ("Such a settlement is binding on the negotiators but voidable as to the minor, pursuant to Rule 2039 [which requires that a GAL represent the minor's interests].").

583. *Shelton v. Sloan*, 977 P.2d 1012, 1020–21 (N.M. Ct. App. 1999) (holding that a minor can repudiate a settlement where the case is tried to a jury verdict before the settlement is approved by court). The court further stated that:

[T]he non-minor can, to a great extent, protect itself against the vicissitudes of intervening events. If the settlement is pursuant to [an offer of judgment], the non-minor can promptly submit the settlement to the court for approval. Outside the Rule [for an offer of judgment], the non-minor can condition its agreement to settle upon prompt judicial approval of the settlement.

Id.

584. See *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E.2d 259 (1965); *Patrick v. Bryan*, 202 N.C. 62, 162 S.E. 207 (1932); *Rector v. Laurel River Logging Co.*, 179 N.C. 59, 101 S.E. 502 (1919).

It thus appears that a release is not needed to effectuate the settlement. Where the settlement results in a judgment, a release is not necessary, as the doctrine of *res judicata* would bar a subsequent action.⁵⁸⁵ Further, where the court simply approves a settlement, not resulting in a judgment, and the defendant complies with its duty to pay the amount of the settlement, the doctrine of accord and satisfaction should protect the defendant, even in the absence of an express release.⁵⁸⁶ One case from another jurisdiction stated that a court-approved settlement of a minor's claim is akin to a release.⁵⁸⁷

In the two cases in North Carolina addressing the role of the release in a minor's settlement, the release was relevant for determining the ability of the minor to pursue other tortfeasors. In one case,⁵⁸⁸ a lower court approved a minor's settlement with one tortfeasor and entered a judgment for the amount of the settlement. That court also ordered the mother—acting as the minor's GAL—to sign a release.⁵⁸⁹ The release applied only to the claims against the settling tortfeasor, and stated that a second tortfeasor would receive a credit for the amount of the settlement.⁵⁹⁰ The judgment was paid, and the second tortfeasor then argued that the minor's claims against the second tortfeasor were extinguished against him, due to satisfaction of the judgment.⁵⁹¹ The court rejected this argument, and stated, “The release agreement executed pursuant to

585. See *Bernstein v. Kapneck*, 417 A.2d 456, 464 (Md. Ct. Spec. App. 1980) (affirming lower court's decision not to vacate prior settlement, which resulted in a judgment). The court rejected an argument that the lower court should have declared the release void, because “even if, arguendo, we adopted the appellant's position, the most we could do would be to rescind the release and settlement agreement. We would still be left with a judgment which was enrolled for eleven months before this proceeding began.” *Id.*

586. *Dobias v. White*, 239 N.C. 409, 413, 80 S.E.2d 23, 27 (1954). The court noted that

[a]n “accord” is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a “satisfaction” is the execution or performance, of such agreement If the accord is fully performed, the performance satisfies the original claim, and bars a subsequent action to enforce it.

Id. (citations omitted).

587. *Allianz Ins. Co. v. Garrett*, 153 F.R.D. 89, 93 (E.D. Va. 1994) (“[T]he effect of the court approved infants' settlement [with Whalen] was a release of Whalen even though the court's order nowhere uses the word ‘release.’”).

588. *Payseur v. Rudisill*, 15 N.C. App. 57, 189 S.E.2d 562 (1972).

589. *Id.* at 60–61, 189 S.E.2d at 564–65.

590. *Id.* at 61, 189 S.E.2d at 565.

591. *Id.* at 62, 189 S.E.2d at 566.

the order is the controlling factor.”⁵⁹² Because the release applied only to the settling tortfeasor, the court held that the minor could pursue the second tortfeasor.⁵⁹³ The court thus essentially held that the terms of the release trumped a statute, which otherwise would have meant that satisfaction of the judgment extinguished the claims against other tortfeasors.⁵⁹⁴

In another case, the court looked to the settlement document (and not the order approving the settlement) to determine whether the minor could pursue a second tortfeasor.⁵⁹⁵ The issue was whether the document signed by the minor and his GAL was a release or a “covenant not to sue.”⁵⁹⁶ This was relevant because if the minor’s settlement had been consummated through a release, then it could have had the effect of releasing claims against other tortfeasors.⁵⁹⁷ The court held that the order approving the settlement provided for the execution of a covenant, and that, in fact, the parties had used a covenant, and thus the minor’s claim against other tortfeasors was not barred.⁵⁹⁸ Regarding the effect of the order approving the settlement, the court wrote, “Without the subsequent execution of the ‘Covenant not to Sue,’ it [the order approving the settlement] would have been of no effect.”⁵⁹⁹ The court further noted that “The actual instrument executed pursuant to the order is the controlling factor in this situation.”⁶⁰⁰ The only true holding of this case is that the settling tortfeasor entered into a covenant, and therefore the minor could pursue a second tortfeasor. The impact of this holding was

592. *Id.* at 63, 189 S.E.2d at 566.

593. *Id.* at 63–64, 189 S.E.2d at 566.

594. *See* N.C. GEN. STAT. § 1B-3(e) (2011). This section provides:

The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution.

Id.

595. *McNair v. Goodwin*, 262 N.C. 1, 136 S.E.2d 218 (1964).

596. *Id.* at 4, 136 S.E.2d at 220.

597. *Id.* at 3–4, 136 S.E.2d at 220.

598. *Id.* at 4–5, 136 S.E.2d at 220.

599. *Id.* at 5, 136 S.E.2d at 221. Read in context, the court simply meant that the tortfeasor would not be obligated to pay the settlement unless the GAL executed the covenant. *See id.* The order was not, however, without effect in the absence of a covenant; at a minimum, the tortfeasor could enforce the settlement and require the minor’s GAL to sign the covenant. *Id.*

600. *Id.*

largely diminished by case law holding that a court-approved settlement with one tortfeasor does not discharge other tortfeasors.⁶⁰¹

The tortfeasor should generally try to obtain a release signed by the parents and the GAL—as well as the minor where feasible.⁶⁰² The terms of the release are more likely to be upheld if they are also approved by the court. As noted earlier, however, a release does not appear to be necessary to protect the tortfeasor from further liability.

A settlement of the parents' claims is, of course, not required to be submitted to the court for approval.⁶⁰³ The settling parents should therefore sign a release upon settling their claims. The father historically is deemed to have the claim for medical expenses, but the mother can also acquire this claim if she supports the child.⁶⁰⁴ It is therefore preferable to obtain the signature of both parents on the release, but this is not always possible. Due to the peculiar nature of the parents' claims, the insurer should be careful in its representations to the parents as to the scope of the release.⁶⁰⁵

601. See *supra* Part II.C.

602. Some authority indicates that the GAL, and not the parent, should sign the release. See *Julian v. Zayre Corp.*, 388 A.2d 813, 816 (R.I. 1978) (holding that where a release was not signed by the GAL and was not approved by the court, the release was not binding). In this case, the minor reached a court-approved settlement with one tortfeasor and the minor's mother signed a release, which released all persons, including the second tortfeasor. *Id.* at 814–15. The court explained that “in order to make the release valid and binding as to the rights of the minor it must be executed on the minor's behalf by a court-appointed guardian *ad litem* and approved by a court.” *Id.* at 816. The release was effective to bar the mother's claim. *Id.* Other authority indicates that the GAL should not sign the release. Anton, *supra* note 359, at 182 (“As a caveat, the guardian *ad litem* should approve the settlement agreement as to form only and should not sign it on behalf of the minor.”). The best practice would seem to be to have the GAL and the parents sign the release. There is no indication in North Carolina that it would be inappropriate for a GAL to sign the release.

603. See *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 460 (C.D. Cal. 1978) (“The Court concludes that the portions of the D'Asaro and Donnarumma proposed compromise orders dealing with the settlement of the claims of the widows brought in their own behalf and the entire Scarogni proposed compromise order [in which minors have attained age of majority] are not properly before the Court for approval.”).

604. See discussion *supra* Part I.B.2.

605. *Gast v. Ebert*, 739 S.W.2d 545 (Mo. 1987) (en banc) (noting that the minor's parents “sought to rescind the settlement agreement, to obtain damages for medical expenses paid, and to obtain damages for the loss of their daughter's services[,] [t]hey alleg[ed] the agreement was the product of fraudulent misrepresentation,” consisting of the insurer's alleged statement that payment to parents was for medical expenses only).

A release signed by a minor raises additional considerations. Regardless of the validity of a release signed by a minor, however, where the court approves the settlement, the minor cannot thereafter pursue her claim.⁶⁰⁶

As a general matter, a release signed by a minor is voidable at the election of the minor.⁶⁰⁷ Even with an “executed” contract, the minor can void or rescind (or “undo”) the contract.⁶⁰⁸ Thus, where the minor bought a mule for \$375, he could sue the seller three years later for the return of his money.⁶⁰⁹ In another case, the minor was allowed to return a vehicle to the seller, and obtain a full refund, despite the fact that the vehicle was destroyed in a wreck.⁶¹⁰ Thus, a minor who settles his claim and accepts payment can still rescind the settlement. Even if the minor misrepresents his age, he can still disaffirm the contract.⁶¹¹ The other party to the contract cannot assert a claim for fraud or negligent representation, because this is viewed as an end-run around the minor’s inability to contract.⁶¹²

The minor cannot render a contract void if he attains the age of majority and does not repudiate the settlement within a reasonable time.⁶¹³ It is therefore possible that a settlement by a minor could be binding, notwithstanding the absence of court approval, if the minor does not re-

606. See *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E.2d 259 (1965); *Patrick v. Bryan*, 202 N.C. 62, 162 S.E. 207 (1932); *Rector v. Laurel River Logging Co.*, 179 N.C. 59, 101 S.E. 502 (1919).

607. *Hight v. Harris*, 188 N.C. 328, 330, 124 S.E. 623, 624 (1924).

608. *Id.* North Carolina now allows minors to enter into certain entertainment and other contracts that are binding. See N.C. GEN. STAT. § 48A-12(a) (2011) (providing that a minor cannot disaffirm certain entertainment, sports, and other specified contracts approved by a court). Even these, however, require approval by the court to be binding. See *id.*

609. *Hight*, 188 N.C. at 330, 124 S.E. at 624 (noting also that a minor “must restore the consideration received if he still has the same in hand”).

610. *Collins v. Norfleet-Baggs*, 197 N.C. 659, 150 S.E. 177 (1929).

611. *Greensboro Morris Plan Co. v. Palmer*, 185 N.C. 109, 111, 116 S.E. 261, 262 (1923). Where a party lacks the capacity to enter a contract due to his mental condition (and not due to his minority), the agreement is voidable only if the other party to the contract knew that the individual lacked mental capacity and that the agreement was unfair. *West v. Seaboard Air Line Ry. Co.*, 69 S.E. 676, 678 (1910).

612. *Palmer*, 185 N.C. at 118, 116 S.E. at 265.

613. *Creech v. Melnik*, 147 N.C. App. 471, 476, 556 S.E.2d 587, 591 (2001) (holding that the minor’s attorney could not agree—on behalf of the minor—not to sue the doctor who provided information to the attorney based on the agreement not to sue). The court noted, “What is a reasonable time depends upon the circumstances of each case, no hard-and-fast rule regarding precise time limits being capable of definition.” *Id.*

pu diate the settlement within a reasonable time after attaining the age of eighteen.

We rarely see a claim involving an emancipated minor. A minor is emancipated by court order or by marriage.⁶¹⁴ There is little legal authority regarding the effect of emancipation on a minor's claim.⁶¹⁵ Pursuant to statute, the emancipated minor "has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if the petitioner were an adult."⁶¹⁶ The emancipated minor therefore can presumably sign a release and does not need a GAL in a court proceeding. It is not clear, however, whether the requirement that a minor's settlement be approved by the court is affected by the minor's emancipation.

E. *Procedural considerations*

There are several procedural issues that arise in connection with the settlement of a minor's claim.

1. *Procedural Vehicles*

There are no rigid rules regarding the type of proceeding that the parties should use to present the proposed settlement to the court. The court must of course have jurisdiction over the parties and over the proceeding. Where the parties have not properly invoked the jurisdiction of the court, the court cannot rule on the matter.⁶¹⁷ The cases generally recognize that the trial court (i.e., the General Court of Justice, consisting of the Superior and District Courts) has jurisdiction to review the settlement of minors' claims.⁶¹⁸

614. N.C. GEN. STAT. §§ 7B-3500, -3505 (2011) (allowing emancipation to be afforded to a minor 16 or older if it is in her best interests); N.C. GEN. STAT. § 7B-3509 ("A married juvenile is emancipated by this Article.").

615. *Daubert v. Mosley*, 487 P.2d 353, 356 (Okla. 1971) ("Generally, however, emancipation does not make an infant sui juris for all purposes . . ."). Under Oklahoma law, emancipated minors can enter binding contract, including a release, only for necessities. *Id.*

616. N.C. GEN. STAT. § 7B-3507(1).

617. *N.C. Trust Co. v. Taylor*, 131 N.C. App. 690, 693–94, 508 S.E.2d 809, 811–12 (1998) (holding that the parties did not properly invoke jurisdiction of the Court of Appeals where appellant was not an "aggrieved party," as appellant, who was minor's GAL, did not really contest lower court ruling directing payment of proceeds).

618. *Wachovia Bank & Trust Co. v. Buchan*, 256 N.C. 142, 153, 123 S.E.2d 489, 496 (1962) ("[T]he superior court of Wilkes County in the exercise of its equity jurisdiction has jurisdiction over the parties and over the subject matter of this suit concerning the trust property of the infant Mary Elizabeth Buchan, whether vested or contingent,

Most commonly, a settlement is effectuated through a “friendly suit.” This is an action that commences as a typical lawsuit for damages. The minor is the plaintiff, appearing through a GAL, and sues the defendant, who is the tortfeasor. The minor’s parents can also be plaintiffs in the action. After a hearing, the court then enters an order approving the settlement, as addressed in a subsequent section. The approval of the settlement can be entered as a judgment against the defendant, which typically is then satisfied by the defendant’s payment into the clerk’s office. More commonly, however, the order simply recites the terms of the settlement and provides that the defendant, or its insurance company, will pay the settlement to the minor’s attorney, and gives instructions regarding the disbursement of the proceeds. In this situation, there should not be a true “judgment” against the defendant. There are other variations on the logistics of consummating the settlement.

A minor settlement can also be effectuated by a petition in a “special proceeding” pursuant to North Carolina General Statutes, section 1-400.⁶¹⁹ Section 1-402 states that an order of the clerk affecting a minor-petitioner’s rights is not “valid, unless submitted to and approved by the judge resident or holding court in the district.”⁶²⁰ Under this procedure, the settlement should first be submitted to the Clerk of Court and then to a judge for approval.⁶²¹ The use of this proceeding does not result in a “judgment” against the tortfeasor.⁶²²

There are no strict pleading requirements in these cases.⁶²³ Under older procedural rules, allegations about medical bills were improper in

and over the suit.”). Where the parties consent to the settlement proceeding, either the District Court or the Superior Court should be able to rule on the motion to approve the settlement, regardless of the amount in controversy. *See id.* at 152, 123 S.E.2d at 496. The parties should also be able to select their venue. Any irregularities in the selection of venue are readily waivable.

619. N.C. GEN. STAT. § 1-400 (“If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded.”); *see also Gillikin II*, 252 N.C. 1, 113 S.E.2d 38 (1960) (approving a minor’s settlement which was filed pursuant to section 1-400 of the North Carolina General Statutes).

620. N.C. GEN. STAT. § 1-402 (2011).

621. *See, e.g., Gillikin II*, 252 N.C. at 6, 113 S.E.2d at 42 (noting that the clerk heard testimony and found that the settlement was in the minor’s interest and that the settlement was then approved by the judge).

622. *Gillikin I*, 248 N.C. 710, 712, 104 S.E.2d 861, 863 (1958) (“The judgment of January 27, 1955 [approving the minor’s settlement in an *ex parte* special proceeding], does not purport to be a judgment against defendant.”).

623. *Gillikin II*, 252 N.C. at 7, 113 S.E.2d at 43 (noting that the petition need not be verified).

an action by the minor, upon a motion to strike by the defendant.⁶²⁴ This doctrine likely does not remain under modern procedural rules.⁶²⁵

2. *Notice of Proceeding*

There are no North Carolina cases addressing the notice required of a hearing to approve a minor's settlement. Where the hearing is held by consent of the parties, which is typical, the parties do not need formal notice. The minor is not entitled to notice of the proceeding itself,⁶²⁶ and thus arguably is not entitled to notice of the hearing. The minor and his parents will usually be present at the hearing in any event.⁶²⁷

Where a party to the settlement is not properly notified of the hearing, the resulting order is subject to being vacated.⁶²⁸ Other jurisdictions have held that a first-party insurer having subrogation rights to the minor's proceeds should be notified of the proceeding so that it can protect its subrogation rights.⁶²⁹ Where the insurer does not have notice of the proceedings, the order approving the settlement can be vacated.⁶³⁰ There is no authority in North Carolina indicating whether an insurer or health care provider with a subrogation right or a lien has a right to be heard at the minor's settlement hearing.

624. *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955) (“In a suit on behalf of the child in the absence of a waiver of the parent’s right, such allegations are not proper in the complaint, and evidence with respect to such expenses is incompetent.”).

625. See discussion *supra* Part I.A.3.a.ii.

626. *Gillikin II*, 252 N.C. at 6–7, 113 S.E.2d at 42 (“It is not necessary, however, for such minor to know that an action or special proceeding is brought in his behalf.”).

627. See discussion *supra* Part III.E.3.

628. *Scott v. Lipman & Katz, P.A.*, 648 A.2d 969, 976 (Me. 1994) (explaining the Maine rule providing that a minor’s settlement without a hearing must be accompanied by movant’s (i.e., parent’s) affidavit stating that movant was informed of the right to attend a hearing, and that the right to attend the hearing is waived). Where said affidavit was not filed, the parent’s Rule 60(b) motion for relief from an order approving settlement should have been allowed; the parents challenged the award of legal fees in excess of the statutory presumptive amount. *Id.*

629. *Riley ex rel. Swanson v. Herbes*, 524 N.W.2d 523, 527–28 (Minn. Ct. App. 1994) (holding that the lower court did not abuse its discretion in vacating the order approving the settlement and allowing the insurer to assert a subrogation claim, where the insurer did not receive timely notice of the minor’s settlement hearing). The court rejected the argument that a settlement did not include medical expenses, based on language from the policy. *Id.*

630. *Vachon v. Halford*, 484 A.2d 1127, 1129–30 (N.H. 1984) (holding that the lower court erred in striking language pertaining to the insurer’s subrogation claim from decrees approving the minor’s settlements, where the settlement included medical expense).

3. *Presentation of Evidence at Hearing*

There are no rigid rules regarding the presentation of evidence or argument at the hearing to approve the minor's settlement. The parties normally consent to the settlement, and hence the formal rules are typically waived; however, the court must make some investigation into the settlement.⁶³¹ It is difficult to develop bright-line rules regarding the manner in which the court should inquire into the settlement. The court should be afforded great discretion in the manner of proceeding with the settlement hearing.

The cases do not require that the hearing be recorded: many hearings are conducted in chambers, and are not recorded. Some counties have local rules requiring that the hearing be in open court,⁶³² and some counties have rules requiring that the hearing be recorded.⁶³³

The circumstances bearing on the reasonableness of the settlement should be presented at the hearing. This would largely consist of facts pertaining to liability and damages. The court can also consider the burden of litigation.⁶³⁴ In a case that settles for the limits of the tortfeasor's liability policy, the court can also consider whether other insurance or assets are available.⁶³⁵ Some counties have local rules requiring a presentation of the defendant's insurance limits and other assets.⁶³⁶

631. *Ballard v. Hunter*, 12 N.C. App. 613, 619, 184 S.E.2d 423, 427 (1971) (noting that a judgment or compromise settlement of a minor's claim, handled by next friend, is not valid unless the court investigates and approves the settlement).

632. *See, e.g.*, N.C. JUDICIAL DIST. 15B, RULES FOR CIV. SUP. CT., R. 20.1 ("All hearings for judicial approval of minor/ incompetent settlements shall be held in open court.").

633. N.C. 26TH JUDICIAL DIST., SUP. CT. DIV. CIV. R. 20.2, *available at* <http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Documents/813.pdf> ("All settlements will be recorded, either by a Court Reporter or by the audio/video recorder . . .").

634. *Redwine v. Clodfelter*, 226 N.C. 366, 370, 38 S.E.2d 203, 206 (1946) (affirming lower court's approval of settlement of distribution of estate to minors, and in doing so, noting that here was an impending caveat that would disrupt the family "and, in all probability, involve long, costly, and asset-consuming litigation").

635. *Edionwe v. Hussain*, 777 N.Y.S.2d 520, 522 (N.Y. App. Div. 2004) (reversing the approval of a settlement of \$1,000,000 for a minor with eye an injury, which was made contrary to the wishes of the minor's father, where the record did not contain sufficient facts regarding further medical procedures needed for the minor's face, did not reflect "additional insurance or assets against which the infant plaintiff might collect, or concerns about liability if the case is tried"). The settlement was reversed for findings and appointment of new GAL. *Id.*

636. *See* N.C. 26TH JUDICIAL DIST. SUP. CT. DIV. R. 20.4 ("Defense counsel shall state on the record the total and complete amount of insurance coverage afforded to a Defendant in the situation in question."); *id.* at R. 20.5 ("To the extent potential damages ex-

Whether the settlement is fair should be based on the information available at the time of the settlement hearing, even if that information was not present when the settlement was reached.⁶³⁷

The court can also review documents, such as the accident report and the medical records. The minor is usually present at the hearing, but case law does not require her presence. The court may inquire of the minor, his parents, and the GAL as to his physical condition. Some counties have local rules requiring—or strongly encouraging—the presence of the minor and both parents at the hearing.⁶³⁸ Where the child is old enough to have meaningful input, presumably the court should ascertain whether the child deems the settlement reasonable.⁶³⁹

Where an annuity is used,⁶⁴⁰ some counties have a local rule requiring the plaintiff to “certify” the present value of the settlement.⁶⁴¹ Some

ceed insurance coverage, Plaintiff's counsel shall make independent inquiry of Defendant's other assets that are reasonably available, other than insurance, and be prepared to report his or her findings to the Court.”).

637. *Shelton v. Sloan*, 977 P.2d 1012, 1020 (N.M. Ct. App. 1999) (“Although there is scant authority on the matter, the case law supports the view that the fairness of the settlement should be determined as of the time the matter is presented to the court for decision.”). In *Shelton*, the parties settled the case, and then the case was tried to a jury, but there was apparent confusion as to whether the case had in fact settled. *Id.* at 1013–15. The case had in fact tentatively settled based on acceptance of offer of judgment, and the court, in reviewing reasonableness of the settlement, could look at the actual jury verdict, which was far in excess of the settlement. *Id.* at 1013, 1020. The case was remanded for findings on reasonableness based on factors, including jury's verdict. *Id.* at 1021.

638. N.C. 26TH JUDICIAL DIST., SUP. CT. DIV. CIV. R. 20.3 (“The Minor and his/her Guardian *ad Litem* shall be present at the minor settlement, absent prior excusal by the Court.”); N.C. JUDICIAL DIST. 30B, RULES FOR CIV. SUP. CT., R. 21.3 (“The Minor/Incompetent and his or her Guardian *Ad Litem* must be present at the hearing absent prior excusal by the Court.”).

639. See N.C. RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2011) (“For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”).

640. See discussion of annuities or “structured settlements” *infra* Part III.E.6.b.iii.

641. N.C. JUDICIAL DIST. 15B, RULES FOR CIV. SUP. CT., R. 21.5 (“To the extent a Minor/Incompetent settlement is to be structured, Plaintiff's counsel shall certify to the Court the present value of the settlement to the minor/incompetent.”); N.C. JUDICIAL DIST. 30B, RULES FOR CIV. SUP. CT., R. 21.5; N.C. 14TH JUDICIAL DIST., LOCAL R. AND P. FOR THE CALENDARING OF CIV. CASES IN THE 14TH JUDICIAL DIST. SUP. CT. DIV., R. 9.6, *available at* <http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Documents/1513.pdf> (“To the extent a Minor or other settlement is to be structured, Plaintiff's counsel shall certify to the Court the present value of the settlement . . .”).

counties also require or encourage presentation of evidence of the tax liability to the child arising from the settlement.⁶⁴²

Those instances in which a minor's settlement can be vacated are addressed elsewhere in this Article.⁶⁴³ The settlement is generally more likely to be upheld in a later proceeding challenging the settlement if more information is provided to the judge. This information includes records from doctors, other information as to the child's injuries, and potential conflicts between the parents and the child that bear on the fairness of the settlement.

4. *Rulings on Motion for Approval of Settlement*

The court has a few options when faced with a proposed settlement. The court can, of course, approve the proposed settlement.⁶⁴⁴ Further, “[t]he power of the court to approve such settlements must necessarily imply also the reciprocal power not to approve where it is made to appear to the court that the rights and interests of minor or unborn beneficiaries are not protected.”⁶⁴⁵ In one case, the administrator of a trust settled a claim by a potential creditor, which had the effect of impairing the interests of minors and unborn heirs in the property of the testator.⁶⁴⁶ The court appointed a GAL for the unborn heirs, and this GAL opposed the settlement.⁶⁴⁷ The court, rather than simply approving or rejecting the settlement, determined that the creditor's claim was not valid and ordered that the heirs were entitled to the property pursuant to the will.⁶⁴⁸ In a personal injury case, however, the court will likely have to

642. Memorandum from Senior Resident Superior Court Judge, 26th Judicial Dist., to Members of Mecklenburg County Bar, *available at* <http://www.docstoc.com/docs/99356382/293> (reflecting procedures “followed by many Superior Court Judges in Mecklenburg County,” and “attorneys may wish to be acquainted with and follow them”). The memorandum provides, “If the settlement is ‘structured’, provide an opinion from a tax lawyer or CPA indicating the settlement creates no tax liability to the child.” *Id.* ¶ D; *see also* N.C. 14TH JUDICIAL DIST., LOCAL R. AND P. FOR THE CALENDARING OF CIV. CASES IN THE 14TH JUDICIAL DIST. SUP. CT. DIV., R. 9.6 (“To the extent a Minor or other settlement is to be structured, Plaintiff’s counsel shall certify to the Court . . . the tax liability, if any, to the Minor.”).

643. *See infra* Part III.F.

644. *Hunter v. Newsom*, 121 N.C. App. 564, 568, 468 S.E.2d 802, 805 (1996) (“There can be no question in North Carolina that a court of equity has the power to approve an agreement affecting the rights of infants and unborn beneficiaries in trust funds.”).

645. *Id.*

646. *Id.* at 566, 468 S.E.2d at 804.

647. *Id.* at 566, 468 S.E.2d at 804–05.

648. *Id.* at 570, 468 S.E.2d at 807 (holding that the lower court did not err in determining that the settlement agreement, which provided for payment to a party who was

either simply accept or reject the settlement as proposed, and the court cannot modify the settlement.⁶⁴⁹

The general rule is that the trial court must approve or reject the settlement as proposed: "If, after [the judge] weighs the appropriate factors, he determines it [was] not [in the minor's best interest], he may reject it and schedule the matter for trial."⁶⁵⁰ Thus, the court cannot require the defendant to settle by purchasing an annuity for the minor where the defendant agreed to a cash settlement.⁶⁵¹ The court can, of course, simply reject the settlement and await a further proposed settlement.

Aside from accepting or rejecting the settlement, the court presumably has broad powers in ruling on such a motion. This includes, for example, requiring that further evidence be submitted, or that a new GAL be appointed where appropriate.

5. Order Approving Settlement

Where the order states that the court made an investigation and that the settlement is just and reasonable, the order is probably sufficient to bind the minor.⁶⁵² In one case, the Superior Court recited that it made an investigation and that the settlement was reasonable, but the mother later challenged the settlement on the basis that "no evidence was offered or proof made at the trial either as to the extent of the plaintiff's injuries or as to the question whether the judgment was for the welfare of the plaintiff . . ."⁶⁵³ The court held that the settlement was binding absent proof of fraud, and a mere contention that the claim was

not a valid creditor, would be unfair to the interests of the unborn and unknown heirs of the decedent, or in ordering the estate to be administered according to the will).

649. See cases discussed *supra* Part II.D.2. Some courts will approve the global settlement, but modify the award of legal fees. Such a ruling is nevertheless an acceptance of the proposed settlement between the parties, subject to the court's authority to oversee the award of legal fees, and such a ruling does not increase the defendant's liability.

650. *Impink v. Reynes*, 935 A.2d 808, 815 (N.J. Super. Ct. App. Div. 2007).

651. *Id.* at 813 ("[I]f the parties do not consent to [the court's] suggestions [for settlement], the court's *parens patriae* jurisdiction, as evidenced in the rule, does not authorize it to require one party to the settlement contract to accept a change in the settlement terms without its consent."). In *Impink*, the court held that the lower court erred in this case where a minor, who was injured by a paint ball, settled for \$300,000, and the court, over the defendant's objection, directed the liability insurer to pay settlement funds to obtain structured settlement for the minor. *Id.* at 814–15.

652. *Oates v. Tex. Co.*, 203 N.C. 474, 474, 166 S.E. 317, 318 (1932) (holding the judgment was binding where "the judgment recites an investigation by the trial court and a finding that the settlement was just and reasonable.").

653. *Id.*

worth more than the settlement amount was insufficient to render the order approving the settlement void.⁶⁵⁴

The order should address issues that are highly relevant to the reasonableness of the settlement.⁶⁵⁵ The findings should be supported by the record.⁶⁵⁶

One issue that often arises regarding the order approving the settlement is whether it should recite that the medical bills have been or will be paid. Although the claim for medical expenses is presumptively the claim of the parent, and not the child, there are many cases in which the court has confirmed the settlement of a minor's claim that included the payment of medical bills.⁶⁵⁷ Where the parent has paid the medical bills, and the tortfeasor pays the minor for the medical bills, the parent should have a claim for reimbursement from those funds;⁶⁵⁸ thus, there is no impropriety in an order approving a minor's settlement that provides for payment of the medical bills, either to the parent or to the health care provider.

654. *Id.* at 474, 166 S.E. at 319.

655. *Wachovia Bank & Trust Co. v. Buchan*, 256 N.C. 142, 153–54, 123 S.E.2d 489, 497 (remanding the case where various parties argued that settlement of the estate should be affirmed, based in part on tax savings to the estate that were based on an estimate of the taxable value of estate, but the minor's GAL contested the settlement because the findings of fact and the record “give no definite answer” as to value of estate and the amount of taxes payable).

656. *O'Neil v. O'Neil*, 271 N.C. 106, 113, 155 S.E.2d 495, 501 (1967) (“We are constrained to hold the record submitted does not contain evidence sufficient to support the crucial factual findings upon which the validity of the ‘family settlement agreement’ depends.”). The court vacated the order and remanded the case, which was an action to approve a family settlement pertaining to an estate, where the minors would recover under the will, but the testator's capacity was challenged, and the lower court approved the settlement of the estate, reducing the minors' recovery, based on bona fide controversy as to the validity of the will, but the record was not sufficient to raise a question as to testator's capacity. *Id.* at 107–110, 113, 155 S.E.2d at 496–498, 501.

657. *See, e.g., Gillikin II*, 252 N.C. 1, 9, 113 S.E.2d 38, 44 (1960) (approving a settlement of \$7,000 in a special proceeding by a minor through the father-next-friend, from which medical expenses were paid, and the remainder was to be paid to the minor); *Patrick v. Bryan*, 202 N.C. 62, 71, 162 S.E. 207, 211 (1932) (“Practically all of the \$1,049.91 except \$255.00 paid to John Patrick, the father and natural guardian of the child, was hospital and doctors' bills.”). The court remanded the case, which approved the settlement for \$1049.41, and ordered medical expenses to be paid from that amount. *Id.* at 72–73, 162 S.E. at 212.

658. *See State v. Kornegay*, 313 N.C. 1, 27, 326 S.E.2d 881, 900 (1859) (recognizing that in a criminal action against an attorney for embezzlement from a GAL for her incompetent husband, “Mrs. Stallings [GAL] had been paying her husband's bills, which would give her a claim for reimbursement from the funds deposited in the trust account, and was a ‘person in loco parentis’ . . .”).

The objection to including the medical bills in the order approving the settlement seems to derive from a concern that the minor's funds will be used to pay the expenses of the parents.⁶⁵⁹ Where the order recites that the bills have been or will be paid, however, the order should be construed to mean that these amounts are paid from the parents' portion of the settlement, and not from the minor's funds. Alternatively, where the order recites that the health care provider will be paid from the settlement funds, the order could be viewed to mean that the parent has transferred the claim for medical bills to the child, and thus it would make sense for the child to pay the medical bills. Case law clearly establishes that the minor can recover the medical bills where the parent serves as GAL and waives those claims.⁶⁶⁰ Where the court perceives a conflict of interest between the parents and the child that might be affecting the child's best interest, the focus should be on the potential conflict, rather than on whether the order refers to the medical bills. The only situation where it would be patently inappropriate for the order to recite that the tortfeasor will pay the medical bills, either to the parents or to the provider, is where the parents do not have a valid claim for those expenses,⁶⁶¹ and the health care provider does not have a lien against the settlement proceeds.⁶⁶² In this situation, the minor's settlement proceeds should not be used to pay the debt of her parents, and the tortfeasor is not liable for the medical expenses. One advantage of having the order refer to the medical bills, or at least in having the parties inform the court of whether the bills have been paid, is that the court is vigilant to the possibility of a lien against the minor's recovery: ignoring

659. See, e.g., Memorandum from Senior Resident Superior Court Judge, 26th Judicial Dist., to Members of Mecklenburg County Bar ¶ H, available at <http://www.docstoc.com/docs/99356382/293>. The memorandum indicates:

Parents are responsible for the medical expenses of their minor children. No money will be paid to the parent(s) out of the child's settlement—not even to reimburse the parent(s) for miscellaneous expenses. The only money to be deducted from the minor's settlement is the attorney's fee. If the insurance company wants to settle the parent's claim for medical expenses, o.k. But [i]t will not come out of the money approved by the court as the minor's settlement.

Id.

660. See *supra* Part I.A.3.a.ii.

661. The parents would not have a claim if, for example, their statute of limitations had expired, or if they were contributorily negligent.

662. The provider would not have a lien for unpaid expenses if, for example, it relied on the parents' credit in providing services to the child, or if it failed to perfect their lien. See discussion of liens *supra* Part I.A.3.a.i., and discussion of the "necessaries" doctrine *supra* Part I.A.3.a.i.

the possibility of a lien against the minor's recovery is not in the minor's best interest.

6. *Handling of Minor's Proceeds*

The means of handling the minor's proceeds depends on several factors, including: whether the claim is tried or settled, the preferences of the court, and the minor's representatives regarding investment of the funds.

a. *Judgments*

Where the minor's claim results in a judgment, the funds should be paid to the court or to the child's legal guardian. The North Carolina Supreme Court has explained:

Under our statutes only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant. In practice, the defendant pays the judgment to the Clerk of the Superior Court who holds the funds until the minor becomes [the age of majority]⁶⁶³

The GAL (or next friend) generally will not receive the funds.⁶⁶⁴

The clerk may be liable for wrongful payment of the minor's funds.⁶⁶⁵ The clerk cannot use the minor's funds to pay the debts of another person unless the minor is represented by a GAL in the proceeding, even if the minor consents to the distribution.⁶⁶⁶ Where such a payment is wrongfully made, the minor has a claim against the recipient for unjust enrichment.⁶⁶⁷

663. *Teele v. Kerr*, 261 N.C. 148, 151, 134 S.E.2d 126, 128 (1964) (citations omitted).

664. *Id.* at 150–51, 134 S.E.2d at 128 (“In the absence of a special statute it is the general rule that the next friend of an infant has no authority to receive payment of the judgment he has secured for the infant.”). The court held that the guardian's duties end with litigation, and a bond might be required to receive funds. *Id.* at 151–152, 134 S.E.2d at 128–129.

665. *Page v. Sawyer*, 223 N.C. 102, 105, 25 S.E.2d 443, 445 (1943) (holding that even where the court orders payment to the guardian, the clerk may be exposed to liability where the order of appointment of the guardian was improper).

666. *Parker v. Moore*, 263 N.C. 89, 91, 138 S.E.2d 821, 822 (1964) (“The court cannot authorize such diversion until the infant or incompetent is represented in the manner provided by law.”).

667. *Id.* (holding that a minor was entitled to restitution where the parents and the minor filed a petition with the clerk, and the court approved, a payment of \$500 of the minor's funds to pay for funeral expenses, when she repudiated the payment promptly after attaining the age of majority).

b. Settlements

Where the minor's claim results in a settlement, rather than a judgment, there are more options for handling of the proceeds. The court's role is again to protect the best interests of the minor.

i. Payment to Clerk

Where the minor receives \$25,000 or less in settlement, the clerk is statutorily authorized to receive the funds.⁶⁶⁸ This statute applies to "funds from the settlement of a minor's personal injury suit."⁶⁶⁹ Funds received under this statute are subject to several statutory provisions. The clerk is authorized to disburse the funds as follows:

The clerk is authorized under this section to receive, to administer and to disburse the monies held in such sum or sums and at such time or times as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents or other persons responsible for the child's support and maintenance are financially unable to provide the necessities for such child, and also that the child is in need of maintenance and support or other necessities, including, when appropriate, education. The clerk shall require receipts or paid vouchers showing that the monies disbursed under this section were used for the exclusive use and benefit of the child.⁶⁷⁰

In theory, the funds belong to the minor and should not be used to pay for the obligations of others (including the parents), absent a need by the minor for such a disbursement. "The property of minors can only be used for their support when the parents are unable to properly provide such support."⁶⁷¹

The clerk has broad discretion in determining whether to disburse funds under this statute.⁶⁷² The clerk might want information about

668. N.C. GEN. STAT. § 7A-111(a) (2011) ("Any person having in his possession twenty-five thousand dollars (\$25,000) or less for any minor under 18 years of age for whom there is no guardian *ad litem*, may pay such moneys into the office of the public guardian *ad litem*, if any, or the office of the clerk of superior court of the county of the recipient's domicile.").

669. 2 JOAN G. BRANNON & JAN S. SIMMONS, NORTH CAROLINA CLERK OF SUPERIOR COURT PROCEDURES MANUAL I.B.1(a)(2)(b), at 88.1 (2003).

670. N.C. GEN. STAT. § 7A-111(a).

671. *Lee v. Coffield*, 245 N.C. 570, 573, 96 S.E.2d 726, 728–29 (1957) (holding that the father's duty to pay for his children's medical expenses terminated upon his death, and their mother, and not the father's estate, was liable for those expenses after his death because the father's estate was property of the minors, and payment from estate would wrongly deplete minors' funds).

672. See generally BRANNON & SIMMONS, *supra* note 669, at 88.1–88.8.

whether there are other means of paying for these necessities, such as Medicaid.

Where the minor receives more than \$25,000, there is no statute authorizing the clerk to receive the funds, but it is generally understood that the clerk can receive these funds. These funds are expressly not subject to the requirements for funds received under North Carolina General Statutes, section 7A-111.⁶⁷³ “Funds in excess of \$25,000 received by the clerk for a minor pursuant to a court order are not 7A-111 funds.”⁶⁷⁴ There is no statutory authority regarding the clerk’s ability to disburse these funds. Even though the provisions of section 7A-111(a) do not apply to these funds, it is reasonable for the clerk to apply those provisions when deciding whether to disburse these funds.⁶⁷⁵

There is no authority concerning whether instructions contained in the order approving the settlement from the judge who approved the settlement are binding on the clerk in making disbursements. Section 7A-111 states that the clerk can make those decisions, subject to review for abuse of discretion.⁶⁷⁶ This suggests that the spending of funds of \$25,000 or less cannot be directed by the judge, but only by the clerk; the clerk would nevertheless presumably give great weight to the opinions of the judge who approved the settlement. For settlements over \$25,000, section 7A-111 of North Carolina’s General Statutes does not strictly apply, and therefore the judge may have the ability to direct future payments.⁶⁷⁷

For funds deposited with the clerk (both under and over \$25,000), the clerk charges a one-time fee.⁶⁷⁸ Statutes set forth how the funds can be invested.⁶⁷⁹ Funds invested by the clerk are typically invested very safely, and thus “[f]unds invested by the clerk do not generally yield a high rate of return.”⁶⁸⁰

673. See N.C. GEN. STAT. § 7A-111(a).

674. BRANNON & SIMMONS, *supra* note 669, at 88.1.

675. *Id.* at 88.9 (“Some clerks may allow disbursements after application of the standards in G.S. § 7A-111.”).

676. N.C. GEN. STAT. § 7A-111(a).

677. See *id.*

678. N.C. GEN. STAT. § 7A-308.1(2) (setting fee at five percent of amount deposited, ultimately to be paid by interest earned on funds, with fee capped at \$1,000).

679. N.C. GEN. STAT. §§ 7A-112 to -112.1.

680. BRANNON & SIMMONS, *supra* note 669, at 88.11.

ii. Structured Settlements

The settlement funds can be used to purchase an annuity pursuant to a “structured settlement.” A structured settlement provides that the settlement funds will be paid to a third-party and the third-party will make guaranteed⁶⁸¹ payments to the minor in the future. The payment to the minor can be one lump sum payment, or a stream of payments, and there is great flexibility in the payout arrangement.

Such a settlement generally provides tax advantages.⁶⁸² “A properly configured structured settlement will provide tax-free future payments to the plaintiff. Both the principal and accumulated interest can be excluded from the plaintiff's gross income, because the plaintiff doesn't own or control the funding asset.”⁶⁸³ The plaintiff's attorney should ensure that the settlement complies with all requirements to preserve the tax-free aspects of the settlement. In general, the minor's settlement funds should not be sent to the minor's attorney.⁶⁸⁴

The use of annuities is especially beneficial in a minor's settlement where there are often concerns that the minor might spend the money unwisely upon attaining the age of majority.⁶⁸⁵ The court will sometimes inquire into the financial stability of the company issuing the annuity and the court might inquire as to the present value of the annuity payments.⁶⁸⁶ Once the annuity is purchased, it can be sold by the benefi-

681. The term “guaranteed” in this context means that the return is not dependent on the success of a particular investment or the stock market; those risks are borne by the company agreeing to make the annuity payments. The future payments are, however, subject to the solvency of the entity promising to make the payments. For many such entities, however, the obligation from the structured settlement will be covered by the North Carolina Life and Health Insurance Guaranty Association, up to \$1,000,000, in the event that the entity cannot make the payments. See N.C. GEN. STAT. § 58-62-21(d)(5) (applying to annuities issued by member entities).

682. See generally I.R.C. § 104 (2006) (stating that compensation for injuries or sickness is not included in taxable income); *id.* § 5891 (stating that income from a structured settlement is not taxable).

683. PAUL J. LESTI, STRUCTURED SETTLEMENTS § 2:8, at 2–4 (2d ed. 1993).

684. See 26 C.F.R. § 1.451-2 (2011) (regarding “constructive receipt of income”).

685. See LESTI, *supra* note 683, § 3:11, at 3-9 to 3-10 (“New cars and other material trappings are strong temptations.”).

686. See N.C. JUDICIAL DIST. 15B, RULES FOR CIV. SUP. CT., R. 21.5; N.C. JUDICIAL DIST. 30B, RULES FOR CIV. SUP. CT., R. 21.5; N.C. 14TH JUDICIAL DIST., LOCAL R. AND P. FOR THE CALENDARING OF CIV. CASES IN THE 14TH JUDICIAL DIST. SUP. CT. DIV., R. 9.6.

ciary only as allowed by statute.⁶⁸⁷ An annuity can be used only if the defendant consents to the use of an annuity.⁶⁸⁸

iii. Payment to Guardian or others

The clerk can appoint a guardian of the estate to handle the minor's settlement funds.⁶⁸⁹ The cases recognize that payment may be made to a general guardian.⁶⁹⁰ The funds of the guardian are subject to collection by a creditor.⁶⁹¹

A guardian of the estate generally must obtain a bond.⁶⁹² The guardian of the estate has broad power to handle the minor's funds.⁶⁹³ The guardian can spend estate income on the minor's behalf, but has to petition the court to spend the principal.⁶⁹⁴ The statute also allows the guardian to pay specific expenses, such as insurance, taxes, and legal fees.⁶⁹⁵ The guardian must file periodic inventories with the clerk.⁶⁹⁶ The guardian is required to use skill in handling the minor's property.⁶⁹⁷

687. See N.C. GEN. STAT. §§ 1-543.10 to -543.15 (2011).

688. See *Impink v. Reynes*, 935 A.2d 808, 814 (N.J. Super. Ct. App. Div. 2007) (stating that a court cannot force defendant's insurer to fund annuity for minor). In *Impink*, the insurer expressed "a general concern that it may still be liable at some time in the future should the structure fail." *Id.* at 814. Whether the minor can utilize a "qualified settlement fund" and retain the tax-free aspects of the earnings is beyond the scope of this Article. See I.R.C. § 468B; 26 C.F.R. § 1.468B-1 (2006). One commentator asserts that the use of a qualified settlement fund ("QSF") is permissible. Jeremy Babener, Note, *Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 60 (2010) ("By utilizing a QSF, a claimant can control the purchase of the annuity for their structured settlement, capturing some or all of the benefits of structuring."); see also Richard B. Risk, Jr., *A Case for the Urgent Need to Clarify Tax Treatment of a Qualified Settlement Fund Created for a Single Claimant*, 23 VA. TAX REV. 639 (2004).

689. *Valles de Portillo ex rel. Portillo Valles v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 717-18, 518 S.E.2d 555, 557 (1999) (stating that the clerk can appoint a guardian of the estate under Chapter 35A to receive death benefits under workers compensation law); N.C. GEN. STAT. § 35A-1221 (regarding application for appointment of guardian of the estate and guardian of the person).

690. See *In re Stone*, 176 N.C. 336, 337, 97 S.E. 216, 217 (1918) (noting that mother received \$6,500 as guardian, and that she had obtained a bond as guardian); *Bunch v. Foreman Blades Lumber Co.*, 174 N.C. 8, 12, 93 S.E. 374, 376 (1917).

691. *Bitting v. Goss*, 203 N.C. 424, 427-28, 166 S.E. 302, 303 (1932) (ordering money held by a guardian, arising from a minor's settlement, to be paid for the child's medical bills even though the recovery did not include medical bills).

692. N.C. GEN. STAT. § 35A-1230.

693. *Id.* § 35A-1252.

694. *Id.* § 35A-1252(9).

695. *Id.* §§ 35A-1252(6), (7), (11).

The settlement funds can probably be paid into an account for the use of the minor, subject to the control of the parent. Such an arrangement must of course be found to be in the best interest of the minor. This can probably be accomplished through the provisions of Chapter 33A, consisting of North Carolina's adoption of the Uniform Transfer to Minors Act.⁶⁹⁸ The custodian of the funds has broad ability to spend the funds,⁶⁹⁹ and is not required to obtain a bond.⁷⁰⁰

There is in fact no case law or statute that specifically prohibits the payment of the minor's settlement funds directly to the parents for the use and benefit of the minor. In a claim paid to a minor under the worker's compensation laws, the rules specifically provide that the minor's funds may be paid directly to the parents.⁷⁰¹ A court should, of course, exercise caution in authorizing such a distribution. With all decisions of the court regarding the handling of the minor's funds, preservation of the funds generally takes priority over a greater rate of return.⁷⁰²

c. Implications of Settlement on Minor's Eligibility for Government Programs

Where the minor has been severely injured, the minor's representatives might want to consider whether the funds received by the minor will affect his ability to receive benefits under government programs. One's eligibility for benefits under government programs, such as Medi-

696. *Id.* §§ 35A-1261, -1264.

697. *Id.* § 33A-12(b) ("In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.")

698. *See id.* § 35A-1227(d). Section 35A-1227(d) is entitled "Funds owed to minors" and provides, "Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes." *Id.*; *see also* Thomas E. Simmons, *Using Trusts to Settle Lawsuits*, 19 PROB. & PROP. 52, 54 (2005) ("The use of an UTMA or conservatorship to manage a minor's settlement funds is tax neutral.")

699. *See* N.C. GEN. STAT. § 33A-14(a) ("A custodian may . . . [spend funds] without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.")

700. *Id.* § 33A-15(c).

701. 4 N.C. ADMIN. CODE 10A.0409(e)(1)(A) (2011) ("[A]ny benefits due to a minor . . . may be paid directly to the parent as natural guardian or the minor for the use and benefit of the minor . . .").

702. *See In re Estate of Mede*, 177 Misc. 2d 974, 983 (N.Y. Sur. Ct. 1998) ("[A] desire to obtain a higher rate of return of an infant's investments is of secondary importance.")

caid or Supplemental Security Income (SSI), may be dependent on the assets or resources of the applicant. While the broad issue of eligibility under these programs is beyond the scope of this Article, the minor's receipt of settlement funds can affect his eligibility for these programs. One case held that monthly payments from a settlement constituted "unearned income" of the minor that affected his SSI benefits.⁷⁰³ The judge ruled against the minor, notwithstanding that "[t]he court recognizes that plaintiff may well have entered into the settlement provision with the understanding that his economic losses would continue to be compensated by receipt of his SSI benefits."⁷⁰⁴ Another case held that the proceeds of the minor's settlement were available as an asset of the minor for the purpose of determining his eligibility for Medicaid.⁷⁰⁵

Some disabled persons can place their settlement proceeds in a trust such that they will not be counted as resources for purposes of calculating SSI or Medicaid.⁷⁰⁶ This is often called a Supplemental Needs Trust (or Special Needs Trust) and will apply only if the applicant meets a certain definition of disability. For purposes of SSI, a minor is disabled if he "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be ex-

703. *LaBeaux v. Sullivan*, 760 F. Supp. 761, 762–63 (N.D. Iowa 1991) (holding that where a minor settled a medical malpractice claim that included monthly payments of \$550 and HHS determined that the minor was eligible for SSI benefits because of his severe mental retardation, began making payments, and later learned of settlement, the payments were "unearned income," and the minor had been overpaid; HHS's determination was reasonable and was affirmed).

704. *Id.* at 765.

705. *See, e.g., In re Welfare of K.S.*, 427 N.W.2d 653 (Minn. 1988) (holding where child received a settlement paid into a savings account to be distributed when the minor reached eighteen, and child was placed in county institution, said funds could be used to determine Medicaid eligibility). The court also held that funds could be used to reimburse the county pursuant to statute authorizing the county to be paid by "resources attributable to the child." *Id.* at 660; *accord In re Welfare of Sayles*, 407 N.W.2d 414 (Minn. Ct. App. 1987) (holding that funds are "liquid assets" of a minor pursuant to statute for determination of public medical assistance where the minor's settlement funds were in a savings account and parents had previously successfully petitioned the court for release of funds for child's medical needs).

706. 42 U.S.C. § 1396p(d)(4)(A) (2006) (exempting "[a] trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title"); *id.* § 1396p(d)(4)(C) (regarding "pooled trusts," which is an alternative to a Supplemental Needs Trust).

pected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁷⁰⁷ Care must be taken in establishing such a trust. Unless the trust strictly complies with the statutory requirements, the assets will be deemed resources of the minor (either during minority or upon attaining the age of majority), and these resources can affect his right to benefits under government programs.⁷⁰⁸

F. *When Order Approving Minor's Settlement may be Reversed, Overturned or Vacated*

Whether an order approving the settlement of a minor's claim can be overturned or vacated requires an analysis of the grounds and procedure for challenging such an order. North Carolina cases addressing the validity of a proceeding determining a minor's claim, whether by adjudication or by settlement, tend to fall into three categories: judgments that are void, judgments that are voidable due to fraud, and judgments that are voidable due to irregularities in the proceeding. Most of these cases were decided before our current Rules of Civil Procedure, but they should nevertheless be instructive in analyzing whether an order approving a settlement may be vacated.

Where the court lacks jurisdiction over the proceeding affecting the minor's rights, the judgment is void.⁷⁰⁹ Such a judgment can be challenged at any time, and can be challenged collaterally in a subsequent proceeding.⁷¹⁰

Some cases hold that the absence of a GAL for the minor renders the court without jurisdiction.⁷¹¹ One case, involving a deed to land,

707. *Id.* § 1382c(a)(3)(C)(i). A minor who “engages in substantial gainful activity” is not disabled. *Id.* § 1382c(a)(3)(C)(ii).

708. *See, e.g.,* *Hunt v. Astrue*, 581 F. Supp. 2d 238, 243 (D. Mass. 2008) (affirming ruling that proceeds from a minor's settlement are deemed a resource of an applicant for SSI). In *Hunt*, the applicant had the ability to revoke the trust and thus the trust did not qualify as exempt property. *Id.* at 241–42.

709. *See Johnston County v. Ellis*, 226 N.C. 268, 279–80, 38 S.E.2d 31, 38–39 (1946) (holding order void where lower court lacked jurisdiction over foreclosure proceeding, which affected minors' interest in property, and minors did not have a GAL); *Butler v. Winston*, 223 N.C. 421, 427, 27 S.E.2d 124, 127 (1943) (holding judgment for the sale of real property void where a minor with an interest in the property was not appointed a GAL until the next day).

710. *Ellis*, 226 N.C. at 279, 38 S.E.2d. at 39.

711. *See* Part II.A.

held that where the GAL did not adequately present the minor's position to the court, the resulting order was void.⁷¹²

A judgment affecting the minor's rights can also be challenged for irregularities that do not affect jurisdiction. Where a court that adjudicated the minor's settlement has jurisdiction, its judgment can be voided only if there was an irregularity that harmed the minor.⁷¹³ The party challenging the voidable judgment must also timely assert his rights; the failure to do so will defeat his motion to invalidate the judgment.⁷¹⁴

The judgment can be challenged for irregularities only by a motion in the action in which the settlement was approved; such a judgment may not be challenged collaterally.⁷¹⁵ In *Gillikin II*, the court held that the absence of a GAL for the minor renders the judgment only voidable.⁷¹⁶

712. *Wyatt v. Berry*, 205 N.C. 118, 123, 170 S.E. 131, 133 (1933) (holding that a prior action determining the validity of a deed, which affected minor's interest in land, was void). In *Wyatt*, the minor could recover the land, and was not bound by prior a consent judgment. *Id.* “[I]f it be conceded that the plaintiff was a party defendant [in the prior action] by virtue of the order of the court, and the appointment of the guardian *ad litem* for her, the judgment is void.” *Id.* A settlement for a minor is binding only with “investigation and approval by the court.” *Id.* Where the GAL's answer in prior action did not describe the minor's interest in land, “the interests of the infant in the subject-matter of the action were not presented to the court in good faith by the guardian *ad litem*, and passed upon by the court.” *Id.*

713. *Tate v. Mott*, 96 N.C. 27, 28, 2 S.E. 176, 180 (1887) (holding that where minors filed a petition to sell land, the court should have appointed next friends for them, but the court's ruling requiring the sale of the property was not void). The court indicated further, “nothing is alleged or proven, that could warrant the court in setting them aside. It is not alleged that . . . the infants suffered injury or prejudice by them.” *Id.*; see also *Cherry v. Woolard*, 244 N.C. 603, 94 S.E.2d 562 (1956) (holding that where a father was appointed GAL for his children, the father refused to serve as GAL and was removed, and minors were then served with process and a second GAL was appointed, any irregularity resulting from the appointment of the father as GAL before any of the infants were served was cured).

714. *McRorie v. Shinn*, 11 N.C. App. 475, 482, 181 S.E.2d 773, 777 (1971) (where minors did not show that a motion in the cause was filed in a timely manner, they could not render the judgment void).

715. *Gillikin II*, 252 N.C. 1, 8, 113 S.E.2d 38, 44 (“If the court had jurisdiction of the subject-matter, and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached.”). The court also noted that fraud was not alleged at the court below. *Id.*

716. *Id.* at 8, 113 S.E.2d at 43.

Where the judgment affirming the settlement is “procured by fraud,” it may be challenged in a collateral action.⁷¹⁷ The cases are somewhat unclear as to what constitutes “fraud” in this context. One case held that fraud was shown where the court failed to investigate and approve the consent judgment affecting the minor’s rights.⁷¹⁸ Another case, however, held that even if the “facts necessary for a fair, just and legal determination of the rights of the infant . . . were withheld” from the court that entered a judgment on the settlement, this was not an “imposition on the court” justifying setting the order aside, because “it was merely an error of judgment on the part of the attorney.”⁷¹⁹

Under modern procedural rules, an order approving a settlement can be vacated on a motion for relief under Rule 60(b) of the North Carolina Rules of Civil Procedure.⁷²⁰ A judgment that was “voidable” under the older procedure is presumably subject to a motion for relief under Rule 60.⁷²¹

Under this rule, a party may obtain “relief” from a judgment or order based on, *inter alia*:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; [or]

717. *Houser v. W.R. Bonsal & Co.*, 149 N.C. 51, 58, 62 S.E. 776, 778 (1908) (explaining that where the minor’s claim was settled before a justice of peace, and then the minor instituted a new action for injuries alleging that the previous judgment was procured by fraud, “the present action should be considered and held as a direct proceeding to assail the judgment, and the issues arising on the pleadings should have been submitted to a jury”); *accord Menzel v. Menzel*, 250 N.C. 649, 655, 110 S.E.2d 333, 337 (1959) (“When it is sought to set aside a judgment for fraud, that must be done by an independent action, because it depends upon extraneous facts, which the parties are entitled to have found by a jury. The judgment is not void for fraud, but voidable.”).

718. *See Rector v. Laurel River Logging Co.*, 179 N.C. 59, 63, 101 S.E. 502, 504 (1919) (“The issue of fraud is sufficiently raised in the pleadings . . .”).

719. *Patrick v. Bryan*, 202 N.C. 62, 73, 162 S.E. 207, 212 (1932).

720. The phrase “motion in the cause” was used more frequently prior to the current Rules of Civil Procedure. The better terminology today is probably a “motion for relief” pursuant to Rule 60(b), but the cases use these phrases somewhat interchangeably. *See, e.g., Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (“[P]laintiff’s remedy—if any—was by a motion in the cause under N.C. Gen. Stat. 1A-1, Rule 60(b), and not by appeal.”).

721. *See Butler v. Weisler*, 23 N.C. App. 233, 240, 208 S.E.2d 905, 909 (1974) (explaining that orders were not void, but “were voidable and were subject to be set aside upon a timely motion under Rule 60(b)(6) of the Rules of Civil Procedure”).

...

(6) Any other reason justifying relief from the operation of the judgment.⁷²²

A Rule 60 motion must be made “within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.”⁷²³ The order may also be set aside if it is void.⁷²⁴ “[A] void judgment can also be challenged collaterally. As we have long held, a void judgment has no legal effect; it is a legal nullity that may be challenged at any time.”⁷²⁵

The only North Carolina case addressing a Rule 60 motion to vacate a settlement involving a minor’s claim is *Goodwin v. Cashwell*.⁷²⁶ In this case, the parties settled a wrongful death claim, where the settlement included the funding of an annuity to make various periodic payments to a minor who was the daughter of the decedent.⁷²⁷ After the court approved the settlement, the defendant discovered that the annuity company made a mistake regarding the minor’s age and that the annuity presented to the court would cost \$130,000 more than the defendant anticipated.⁷²⁸ The defendant filed a motion under Rule 60(b)(1) asserting that the settlement was the result of a mistake.⁷²⁹ The lower court denied the motion, and the appellate court affirmed, on the basis that the mistake was not mutual.⁷³⁰

A few cases from other jurisdictions are instructive on those instances where an order approving a minor’s settlement can be set aside on a motion by the minor.⁷³¹ Where the consequences of the injury are

722. N.C. GEN. STAT. § 1A-1, Rule 60(b)(2011).

723. *Id.*

724. *Id.* § 1A-1, Rule 60(b)(4).

725. *Boseman v. Jarrell*, 364 N.C. 537, 547, 704 S.E.2d 494, 501 (2010) (holding that an order from an adoption proceeding entered by a court that was lacking jurisdiction did not bind a subsequent court ruling on visitation).

726. *Goodwin v. Cashwell*, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

727. *Id.* at 276, 401 S.E.2d at 841.

728. *Id.*

729. *Id.* at 277, 401 S.E.2d at 842.

730. *Id.* at 277–78, 401 S.E.2d at 842.

731. *See Vachon v. Halford*, 484 A.2d 1127, 1129–30 (N.H. 1984) (holding that the lower court erred in striking language pertaining to the insurer’s subrogation claim from decrees approving the minor’s settlements, where settlement included medical expense); *Riley ex rel. Swanson v. Herbes*, 524 N.W.2d 523, 527–28 (Minn. Ct. App. 1994) (holding that the lower court did not abuse its discretion in vacating the order approving the settlement and allowing the insurer to assert a subrogation claim, where the insurer did not receive timely notice of the minor’s settlement hearing).

greater than the parents contemplated at the time of the settlement, the order approving the settlement generally will not be set aside.⁷³² Minors have been successful, however, in vacating a settlement where the court that approved the settlement was not sufficiently apprised of the facts bearing on the reasonableness of the settlement.

In one case, the judge was not provided with a letter from a doctor indicating that the child sustained a cognitive injury, and the judge approved the settlement.⁷³³ The child later sought to rescind the settlement, and argued, *inter alia*, that he should be allowed to revive his claim because the judge had not been given all of the relevant information.⁷³⁴ The judge who approved the settlement filed an affidavit stating that he would have appointed a GAL if he had known of this injury.⁷³⁵ The lower court denied the motion for relief, and the appellate court held that the lower court abused its discretion and that the minor was entitled to have the judgment approving the settlement vacated.⁷³⁶

In another case, the judge was not given any information about the extent of injuries or the defendant's potential liability in a medical malpractice case and the settlement was later set aside.⁷³⁷ "Evidence before the [court below] showed that the prior proceedings were flawed and not in the best interest of the minor child. Specifically, the petition for settlement was incomplete, and there was no witness testimony on the minor's injury or damages."⁷³⁸

732. See *Myers v. Fecker Co.*, 252 N.W.2d 595 (Minn. 1977) (stating that the lower court did not err in denying parents' motion to vacate settlement based on consequences to known injury, but that the result could be different if the minor sustained an injury that was unknown at time of settlement).

733. See *In re Guardianship of Matyaszek*, 824 N.E.2d 132, 137 (Ohio App. 2004).

734. *Id.* at 138.

735. *Id.* at 149–50. Pursuant to the rule, the settlement did not require a GAL due to the amount of the settlement. *Id.*

736. *Id.* at 150 (noting also that the father did not deposit the settlement check into a bank account as ordered, but instead used the proceeds for the child's expenses, and that the judge was not aware of a separate and slightly generous settlement of the father for property damage, and that the father did not provide meaningful representation to the minor at the settlement hearing).

737. *Carpenter v. Berry*, 58 So.3d 1158, 1164 (Miss. 2011) (affirming the decision to set aside an order pursuant to Rule 60(b) where a minor settled a medical malpractice claim for \$25,000 against one of several defendants, but his attorney provided no information to the judge as to the substance of the claim or the damages incurred, other than that the bills were \$400,000 and that the defendant's involvement was "negligible," and the judge approved the settlement). The parents primarily argued that they were not aware of a larger insurance policy covering the defendant. *Id.* at 1160.

738. *Id.* at 1164 (requiring a petition for approval of settlement to include the reason for the settlement, and requiring witnesses to be present at the hearing).

In another case,⁷³⁹ a minor sustained an aortal aneurysm in a motor vehicle accident, which his own doctors did not diagnose. The defendant's lawyers, however, hired a doctor to review the medical records, and he found the aneurysm.⁷⁴⁰ The parties then settled the case, with the court's approval, but the minor and his attorneys did not know about the aneurysm.⁷⁴¹ When the minor later discovered the aneurysm, he filed a motion to vacate the prior order approving the settlement.⁷⁴² The court held that even though the defendant's lawyer did not have an ethical duty to disclose the aneurysm, their knowledge of this condition "opened the way for the court to later exercise its discretion in vacating the settlement."⁷⁴³ The lower court's decision to vacate the settlement was approved.⁷⁴⁴

An order approving a settlement can be appealed directly as long as a timely notice of appeal is filed and the objections to the settlement are preserved. In such an appeal, if the order does not address issues that are highly relevant to the reasonableness of the settlement, then the case may be remanded for further findings.⁷⁴⁵ Where the evidence in the record does not support the findings of the court approving the settlement, the case on appeal likewise may be remanded for further findings.⁷⁴⁶

On appeal, errors of law by the lower court in approving a settlement should be reviewed *de novo*. The review of the lower court's decision to approve a settlement should be reviewed for abuse of discre-

739. Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).

740. *Id.* at 707.

741. *Id.* at 708.

742. *Id.* at 707.

743. *Id.* at 710.

744. *Id.* The court explained:

[T]he court in its discretion may vacate such a settlement, even though it is not induced by fraud or bad faith, where it is shown that in the accident the minor sustained separate and distinct injuries which were not known or considered by the court at the time settlement was approved.

Id. at 709. The lower court also set aside releases signed by the minor and his parents. *Id.* at 711; see also Mo.-Kan.-Tex. R.R. Co. v. Pluto, 156 S.W.2d 265, 267 (1941) (allowing settlement to be set aside where "the minor's case was not properly laid before the court, by collusion, neglect, or mistake"). After the minor's claim was settled, the minor filed suit for injuries, and the jury found that the minor's injuries had not been fully disclosed to the court at the hearing, next friend negligently failed to disclose injuries, and tortfeasor knew or had reason to know the extent of the injuries. *Id.* at 266-67.

745. See Wachovia Bank & Trust Co. v. Buchan, 256 N.C. 142, 153-54, 123 S.E.2d 489, 497 (1962).

746. See O'Neil v. O'Neil, 271 N.C. 110, 113, 155 S.E.2d 495, 501 (1967).

tion.⁷⁴⁷ There is also authority that the appellate courts can take an active role in protecting the interests of a minor,⁷⁴⁸ and that the appellate court can actually review and weigh evidence.⁷⁴⁹ Absent compelling circumstances, however, the appellate court should generally defer to the trial court on issues involving the weight of evidence and the best interests of the minor.

CONCLUSION

Minor's claims and settlements continue to present complex issues for the practitioner and for the courts. The practitioner must be aware of the potential claims of the minor and of his parents, and the defenses to these claims. Further, she must be familiar with the procedural issues arising in suits by minors. The lawyer must also be vigilant to identify any conflicts of interest between the minor and his parents. The courts must ensure that the minor's interests are fully protected. Ongoing developments in case law from North Carolina courts as well as rulings from the North Carolina State Bar should continue to provide guidance on these issues. Many of these issues can also be addressed by legislation.

747. See *Robidoux v. Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011) ("This court reviews a district court's decision to approve or reject a proposed settlement for abuse of discretion."); *Shelton v. Sloan*, 977 P.2d 1012, 1021 (N.M. Ct. App. 1999) ("We defer to the trial judge in assessing fairness to the children.").

748. See *Buchan*, 256 N.C. at 154, 123 S.E.2d at 497. The court explained:

The Supreme Court in the exercise of its supervisory powers, and acting *ex mero motu* is of the opinion that a GAL should be appointed to represent the possible issue of Mary Elizabeth Buchan, and a GAL should be appointed to represent the heirs at law of H. C. Buchan, Jr., so that their contingent interests can be protected.

Id.

749. *Id.* at 153–54, 123 S.E.2d at 497 ("Assuming that in this equity proceeding we have the right to review and weigh all the evidence in the case and find the facts . . .").