

Court Approval of the Settlement of Claims of Persons Under Disability

by C. Jean Stewart

Trust and Estate articles are sponsored by the CBA Trust and Estate Section. They focus on trust and estate law topics, including trust and estate planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

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This month's article was written by Hon. C. Jean Stewart, Presiding Judge of the Denver Probate Court—jean.stewart@DenverProbateCourt.org. Judge Stewart gratefully acknowledges the assistance of her law clerk, Sarah Leah Golombek, in working on settlement cases, creating the Packet for Attorneys on the Denver Probate Court's website, and editing this article.

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Obtaining court approval of a settlement of a claim for a protected person can be procedurally complex. This article provides practitioners with procedural suggestions for filing petitions under Rule 16 of the Colorado Rules of Probate Procedure and for conducting hearings on these petitions.

Under Rule 16 of the Colorado Rules of Probate Procedure ("Rule 16"), a guardian, conservator, or next friend of a minor or disabled person (referred to in Rule 16 as the "ward") can seek court approval of a proposed settlement of the ward's claim. Rule 16 details the requirements of the Petition for Approval of a Settlement and hints at the issues that will be addressed by the probate judge hearing the petition.¹ This article provides an overview of the procedure for filing Rule 16 petitions and conducting hearings, and issues that may arise with respect to Rule 16 petitions. It also discusses some of the current concerns faced by probate judges who hear these cases and fiduciaries who act on behalf of wards.

Case Types

Rule 16 petitions are filed most often in connection with personal injury, wrongful death, or medical malpractice cases; life insurance proceed payments; and distribution of decedents' estates. Most Rule 16 petitions are filed by counsel for a fiduciary of the ward. The fiduciary is a guardian, conservator, or next friend of the ward, and usually is a parent when a minor child is involved.²

When a minor child or a disabled adult is to receive payments after the settlement of a claim, a favorable ruling on a Rule 16 petition provides the payor (generally an insurance company, a defendant, or the insurance company for a defendant) with final court approval of the terms, conditions, and amount of the payment, as well as an order authorizing and binding a fiduciary to provide a receipt for the payment and sign a binding release. These court actions are of obvious value to the payor.

Paradoxically, Rule 16 is directed at the fiduciary or prospective fiduciary who must petition the court for approval of the payment and for authorization to

execute the releases, receipt for the payment, establish the protective arrangement required by the court, and carry out the long-term duties of protection and accounting. This odd contradiction of purpose and procedure creates an occasional fault line in the system, which is addressed in more detail below.

Filing the Petition

There currently is no Colorado Supreme Court-approved form for a Rule 16 petition. The Denver Probate Court provides a form on its website,³ along with a detailed instruction packet and proposed orders for attorneys intending to file a Rule 16 petition. (See the accompanying appendix entitled "Denver Probate Court Sample Rule 16 Petition.") In addition, Rule 16 itself contains extensive details on what must be included in the petition. Practitioners should follow these instructions when preparing Rule 16 petitions.

Conflicts of Interest

Before filing a Rule 16 petition, an attorney should consider what potential conflicts of interest might be present. Parents often have inherent conflicts with their minor children when the parent and child have been injured in the same accident and both have potential claims against the tortfeasor. For example, parents sometimes have personal or subjective reasons for wanting to settle a minor child's claims against a close relative or friend. The court will sort out the reasons for settlement and will separate possibly inappropriate concerns that motivate the parent/petitioner to settle from appropriate considerations in determining if the settlement is in the minor's best interests.

Conflict also can be present after the death of one parent, leaving life insurance proceeds to a minor child, where child support is due or past due to the surviving, divorced parent. Thoughtful consideration of these circumstances, although beyond the scope of this article, obviously is required.

Setting and Preparing For the Hearing

All Rule 16 petitions are set for an evidentiary hearing. Because they are considered "protective proceedings" in the probate code, the procedures set out in the Colorado Uniform Guardianship and Protective Proceedings Act ("UGPPA")⁴ apply to hearing procedures. Attorneys who represent plaintiffs in personal injury and medical malpractice cases generally do not have extensive experience in probate or protective proceedings and, as a result, procedural problems often emerge.

Notice

After securing a hearing date and time, attention must be given to proper notice procedures. Under the UGPPA, notice to the respondent in any protective proceeding must be by personal service. Without such notice, the court lacks jurisdiction to proceed.⁵ The only known exception to this rule is notice to a minor child under the age of 12, who must be given notice by mail.⁶ The respondent cannot waive the notice requirement.⁷ Failure to give personal service to the respondent ten days⁸ prior to the Rule 16 petition hearing will result in the hearing date and time being vacated; lack of jurisdiction here is fatal.

Notice to others also is required. Interested persons under the UGPPA include the "persons listed in the petition."⁹ This would include, in a personal injury settlement case:

- the tortfeasor(s)
- the insurance company
- any party having a subrogation right (including medical providers or attorneys who played a prior role in negotiating the settlement)
- any governmental agency paying or planning to pay benefits to the ward¹⁰
- parents (if a minor is involved)
- other related parties (if a conservatorship is being sought)
- "any other person as ordered by the court."¹¹

Notice to these persons can be made by mail, electronic filing, fax, or hand delivery. Any or all of these persons can waive notice by filing a waiver.¹² Failure to provide proper notice to interested persons other than the ward is not fatal to jurisdiction, but can result in a delay in obtaining final orders.¹³

Hearing Procedures

Judges in each district of Colorado handle Rule 16 hearings in their own way. In Denver, the focus of the hearing is to establish whether the proposed settlement is in the best interests of the minor or disabled adult. Thus, judges try to identify prejudices and personal interests that may be interfering with or influencing the petitioner or counsel for the petitioner to advocate for the settlement.

At the hearing, the judge talks with the child or disabled adult to the extent possible to discuss the injury or circumstances, and weighs the evidence to reach a considered decision as to whether the proposed settlement is in the best interests of the ward under the circumstances. When appropriate, a guardian *ad litem* or an independent expert is appointed to investigate and make recommendations to the court regarding this decision.

Attorney Fees

One of the responsibilities of the court in a protective proceeding is setting an appropriate attorney fee.¹⁴ Contingent fee agreements can be offered as evidence and will be considered by the court; however, they do not prevail over the court's responsibility to ensure that the fee is reasonable.¹⁵ Although it is never easy to reduce an attorney's fee request, it sometimes is necessary. An example of this would be when an insurer has tendered policy limits before a civil action is filed, yet counsel requests a 40 percent contingency fee.

Forms of Settlement

In assessing a proposed form of settlement, the court must take into account solely what is in the best interests of the ward. In addition to conservatorships, restricted accounts, trusts, and annuities,¹⁶ the court may be asked to consider approval of a structured settlement. Structured settlements often fail to address a family's circumstances and resolve how to handle the day-to-day medical expenses and other needs while future payments remain unavailable.

Practitioners should take into consideration the realities of a family dealing with a devastating disability and put less emphasis on sophisticated structured settlements and more on day-to-day realities. The court is not obliged to accept or approve a settlement structure that, in the court's judgment, does not meet the best interests of the ward in the short and long term.

Tax and legal considerations arising under disability and public benefits law sometimes dictate the creation of a special needs trust or a disability trust. Also, contribution into a pooled fund, such as the Colorado Citizens with Disabilities or other appropriate vehicle, should be considered to secure the ward's future care. Many of these structures require the participation of expert specialists in Medicaid, tax, and disability law and should not be undertaken by the novice. Where public benefits are a consideration, notice to the Colorado Department of Health Care Policy and Finance is mandatory.¹⁷

Protective Orders

In drafting their protective orders, courts must identify and resolve a variety of issues presented in carrying out the court's obligations to the vulnerable ward. The ward's family may demonstrate convincingly through their own testimony that they lack the background or experience to deal appropriately with a large sum of money. Some admit that they do not understand the duties of a fiduciary; some have criminal or credit histories that suggest a lack of appreciation for the high level of fidelity and care necessary to discharge the duties of a custodian, agent, conservator, or other fiduciary; and some struggle with burdens from injury or their life circumstances such that they could not be expected to appropriately attend to fiduciary duties.

Although the statute requires that the court impose a bond when appointing a conservator,¹⁸ judges also are aware that local bonding companies generally are not willing to bond parents acting as fiduciaries for their own children. A possible solution is to select a professional, non-family member as a fiduciary. This is preferred, but families often object to the costs and the loss of privacy and control attendant to the use of an independent, professional fiduciary. Although parents understandably resent the implication that they are not appropriate

custodians of their children's funds, the anecdotal evidence over the years indicates that courts have reason to be concerned. Countless parents are cited in Show Cause Orders, many have been held in contempt, and a few are jailed each year for surreptitiously or brazenly helping themselves to their children's funds. Regrettably, these parents often are unable to answer in damages and the funds simply are lost.

Recognizing that the bonding requirement¹⁹ cannot be met, the court generally will place the settlement fund into a restricted account in a local federally insured financial institution; require that the attorney for the petitioner/parent return a signed acknowledgment from the financial institution to the court file; and then approve withdrawals per the written, substantiated requests of the ward's family for his or her benefit if special circumstances occur before the ward's twenty-first birthday or throughout the term of the disability.²⁰

Where there are minimal concerns about the family's ability to take on fiduciary obligations, and in situations where the settlement proceeds constitute a large sum, the court may consider appointing a conservator for the minor child or disabled adult, and may, in limited circumstances, appoint a qualified family member. Generally, under UGPPA, a conservator must present the court with an estate inventory²¹ and a proposed financial plan²² within ninety days after appointment, post a bond before Letters are issued, and subsequently file accountings at least annually. These requirements can be modified by the court in individual cases, and the duties of a conservator can be expanded or limited depending on the circumstances, including requiring that a portion of the protected person's estate be placed into a restricted account. Again, a thoughtful attorney can assist here by understanding the family's situation thoroughly and assessing what would provide the most protection to the ward in terms of security of the settlement or insurance fund and also in terms of meeting his or her best interests.

Insurance Company Involvement

Although the vast majority of Rule 16 petitions are filed by counsel for a guardian, conservator, or next friend, there are a few cases each year where an insurance company seeks to pay a claim to a *pro se* claimant or *pro se* parents of a minor child. In such instances, the insurance companies often want the reassurance of a court order and a court-approved release.

It is not ethical for the insurance company's attorney also to represent the minor. Florida Ethics Opinion 76-2, published February 28, 1977, states that:

an Attorney employed by an insurance company may not ethically represent both a minor claimant and the insurer in a 'friendly suit' to gain court approval of a settlement between the two parties.

The Florida court found that:

the interest of the claimant, whether a minor or the representative of an estate, is to secure the highest possible settlement in terms of dollars. The insurance company's interest is in paying as little as possible. In those situations, the lawyer for the insurance company, whether he becomes involved initially or after the settlement has been agreed upon, is employed to seek judicial approval of that settlement. For the lawyer to represent both the claimant and the insurance company in that situation would violate DR-5-105(A) and EC 5-1 and place him in a compromising position as to DR 5-107(B).²³

Thus, it is clear that an insurance company cannot represent the claimant. However, when dealing with claimants who have neither the interest nor the ability to file a Rule 16 petition, set a hearing, give notice, and conduct an evidentiary hearing, the insurance company faces a unique challenge in obtaining the protection of a court order. In a recent abstract of a letter opinion,²⁴ the Colorado Bar Association Ethics Committee clarified that an insurance company cannot mislead the court in an effort to bring a proposed settlement to the attention of the court. For example, it is misleading for an insurance company to ghostwrite and electronically file pleadings on behalf of *pro se* litigants, because the electronic filing system reveals that the attorney filing the pleadings is counsel "to the petitioner." In such situations, a conflict of interest exists and the ethical violation is clear.

Fortunately, the UGPPA has another provision that works well in these limited circumstances—CRS § 15-14-412. This section allows the insurance company to bring the proposed settlement to the court's attention and advocate for its approval by having the insurance company file the petition as the petitioner. This avoids the ethical pitfall of "ghostwriting" and filing pleadings on behalf of *pro se* claimants, wherein the insurer represents that the proposed settlement would be in the best interests of the claimants.

Medical Expenses and Medicaid Claims

Since the expiration of Colorado's no-fault automobile insurance law, courts are seeing more Rule 16 petitions that reveal medical claims in excess of the insurance settlement. Although a minor child's injuries may justify payment of policy limits, the unpaid medical claims, including Medicaid claims, can dwarf the recovery. There is some flexibility to compromise these claims; however, medical providers frequently demand payment and the recovery is consumed entirely, leaving nothing for the injured ward now or in the future.

The court's responsibility in these circumstances, as in all cases, is to be scrupulously careful that every potential source of recovery has been exhausted. Also, every potential claimant, including doctors, hospitals, ambulance services, the Colorado Department of Health Care Policy and Finance, and previous attorneys, should be barred by notice from taking future action against the family or the child for recovery on a claim.

Conclusion

There are many issues that must be taken into consideration when bringing a settlement of a claim for a protected person before the probate court. These include negotiating liens when appropriate, filing an accurate petition to settle, setting a hearing and effecting proper notice, understanding when a guardian *ad litem* or fiduciary should be appointed, and making a proper recommendation regarding the settlement proceeds. Thinking through these issues in advance of bringing a case before the court, in addition to being familiar with the court's expectations for handling these cases, can be extremely helpful and can make representation in these cases more valuable to the client and to the court.

NOTES

1. Stewart, "Colorado Probate Cases and the Denver Probate Court," 33 *The Colorado Lawyer* 67 (July 2004).
2. See CRS § 15-10-201(19).
3. See <http://www.denverprobatecourt.org>.
4. CRS §§ 15-14-101 *et seq.*
5. CRS § 15-14-404(1).
6. *Id.*
7. CRS § 15-14-114.
8. CRS §§ 15-10-401 and -113(1). As a consequence of recent revisions to Rule 6 of the Colorado Rules of Civil Procedure, attorneys are reminded that counting days for notice and service has changed. The most recent policy of the Denver Probate Court is posted at the court's website.
9. CRS § 15-14-404(2).
10. Rule 16(b)(5)(B); CRS §§ 15-14-116 and -119.
11. CRS § 15-14-404(3).
12. CRS § 15-14-114; C.R.C.P. 8.2.
13. CRS § 15-14-404(2).
14. CRS § 15-14-417.
15. Under its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof. *Anderson v. Kenelly*, 547 P.2d 260 (Colo.App. 1975). The existence of a contingent fee contract is determinative only to the extent that it sets the maximum amount permitted. *Beeson v. Indus. Claim Appeals Office*, 942 P.2d 1314 (Colo.App. 1997).
16. See CRS § 15-14-412 (alternatives to conservatorships or restricted custodial accounts).
17. CRS § 15-14-116.
18. CRS § 15-14-415.
19. *Id.*

20. Under *Matter of Conservatorship of Roth*, 804 P.2d 265 (Colo.App. 1990), the financial institution becomes a quasi-fiduciary by accepting the deposit and by signing the acknowledgement. Every year, courts collect a fair number of repayments from banks that have allowed withdrawals without the certified court order they agreed to require.
21. CRS § 15-14-419.
22. CRS § 15-14-418(3).
23. Florida Ethics Opinion 76-2 (1977), *citing* the former Code of Professional Responsibility/Model Rules.
24. CBA Ethics Committee, "Abstracts of Recent CBA Ethics Committee Letter Opinions," 34 *The Colorado Lawyer* 19 (Dec. 2005).

**Appendix
Denver Probate Court Sample Rule 16 Petition**

PROBATE COURT CITY AND COUNTY OF DENVER, COLORADO City & County Building 1437 Bannock Street, Room 230 Denver, CO 80202	
In the Matter of the Estate of _____ Respondent.	Court Use Only
Name and Address of Petitioner Phone Number: e-mail address:	Case Number: _____
PETITION TO SETTLE PERSONAL INJURY CLAIM	

Petitioner, _____, as (conservator) and/or (natural parent) and/or (next friend) of the above minor incapacitated person, pursuant to Rule 16 of the Colorado Rules of Probate Procedure, files this Petition to Settle Personal Injury Claim as follows:

1. **FACTS**

- A. The respondent's name and address: _____.
- B. The respondent's date of birth: _____.
- C. The name and address(es) of the respondent's parent(s) if the respondent is a minor ((NOTE: if you are asserting that the minor's father is "not known," you should submit a copy of the minor's birth certificate): _____.
- D. The names(s), address(es) and description(s) of duties and limitations of the respondent's custodian or Court-appointed fiduciary: _____.
- E. The date and a brief description of the nature of the event or transaction giving rise to the claim, including the age of the respondent at the time of the event or transaction: _____.

2. **Liability**

- A. The name and address of each party who is or may be liable for the respondent's claim: _____.
- B. The basis for the respondent's claim of liability: _____
- C. The defenses, if any, to the respondent's claim: _____
- D. The name and address of each insurance company involved in the claim, the type of policy, who was insured under the policy, and its limits: _____

3. Damages

- A. The nature of the respondent's claim: _____
- B. The nature of the injuries, if any, sustained by the respondent: _____
- C. The amount of time, if any, missed by the respondent from school or employment: _____
- D. A summary of the expenses, if any, incurred for medical or other care provider services as a result of the respondent's injuries: _____.
- E. A summary of the income from work lost by the respondent, if any, as a result of the respondent's injuries: _____.
- F. The nature of the damages, if any, to the respondent's property: _____.
- G. A summary of the expenses, if any, incurred as a result of any property damage to the respondent's property: _____.
- H. The identification of the source of funds for payment of any of the respondent's expenses and a summary of what expenses have been paid and will be paid by each particular source: _____.

4. Medical Status

- A. The nature and extent of the respondent's injuries and the respondent's present condition: _____.
- B. The nature, extent, and duration of the treatment required or anticipated as a result of the respondent's injuries: _____.
- C. The prognosis of the respondent's condition, including, when applicable, the nature and extent of any disability, disfigurement, or impairment: _____.
- D. A written statement by the respondent's physician or other health care provider shall be attached setting forth the information requested by A., B., and C. above. **The Denver Probate Court prefers to receive physician/health care provider statements dated within 90 days of the hearing.** A copy of all relevant medical records relating to the injury should be attached as well.

5. Status of Claims

A. For this claim and any other claim that is relevant to the event or transaction giving rise to the claim, the status of the claim and, if any civil action(s) have been filed, the court, the case number and the parties: _____.

B. For this claim and any other claim that is relevant to the event or transaction giving rise to the claim, the name and address of any party having a subrogation right and any governmental agency paying or planning to pay benefits to the respondent: _____.

NOTE: Counsel will be asked by the Court during the hearing to represent whether there remain any unpaid or unsatisfied claims or potential claims against the proceeds. A recital will generally also be included in the Court's final order holding counsel responsible for these representations.

6. Proposed Settlement and Proposed Disposition of Settlement Proceeds

A. The name and address of the person(s) making and receiving payment under the proposed settlement: _____.

B. The amount of the settlement, terms of payment, and proposed disposition: _____.

C. If a structured settlement, in whole or in part, the type of arrangement (*e.g.* annuity or insurance policy), the name of the annuity or the insurance company, the rating of the annuity or insurance company, and the present cash value and cost of the annuity or insurance: _____.

D. The amount of court costs, legal expenses, and attorneys' fees (**attach a copy of attorney fee agreement as well as all time records and billings**) incurred as a result of the transaction or event giving rise to the respondent's claim: _____.

E. Whether there is a need for continuing court supervision, the appointment of a fiduciary, or the continuation of an existing fiduciary appointment: _____.

F. Whether there are outstanding Medicaid liens and/or Medicare claims arising from care and treatment received as a result of the injury and, if so, in what amount(s) and whether such liens or claims will be satisfied out of the settlement proceeds:

7. Attachments. **The Attachments must be listed in the petition and must include:**

A. Attachments to the petition:

1) a doctor's letter conforming to the requirements of 4(d) along with all relevant medical records relating to the injury;

2) a copy of the proposed Settlement Agreement and Release Agreement between the respondent and the liable party;

3) a copy of the attorney fee agreement and billings or time sheets if periodic billings have not been rendered.

4) Proposed Orders:

(i) Order Approving Petition to Settle Personal Injury Claim;

(ii) Order for Deposit of Funds to Restricted Account if appropriate (with attached acknowledgment form for bank to sign).

5) If a conservatorship is appropriate:

(i) Petition for Appointment of Conservator;

(ii) Order Appointing Conservator or Limited Conservator;

- (iii) Acceptance of Office Form and if applicable, criminal background check and credit report.

WHEREFORE, Petitioner requests that the Court set a time and place of hearing; that after notice and hearing the Court find that the proposed settlement of the personal injury claim is in the best interests of the respondent; and that the Court authorize the acceptance of \$ _____ in full settlement of the respondent's personal injury claim against _____ authorizing \$ _____ to be paid out of the settlement proceeds for attorney fees and costs, and authorizing disposition of the net proceeds of the settlement in the manner set forth in paragraph 6(B) of this Petition.

Respectfully submitted this _____ day of _____, _____.

Signature of Attorney for Petitioner

Type or print name, address, telephone #, and reg. # below)

Signature of Petitioner

Type or print name, address, and telephone # below)

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