

A Different Approach to Intra-Family Allocation of Settlement Awards

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Introduction

A Man Who Carries A Cat By the Tail Learns Something He Can Learn In No Other Way

Mark Twain

Recently, our firm has requested appointment of a Special Master when petitioning for approval of settlements on behalf of protected persons where the underlying actions have intra-family plaintiffs. Our principal reason for seeking appointment of a Special Master is to provide the court with expert and neutral analysis regarding the allocation of settlement proceeds and appropriateness of attorney's fees. We do not suggest that the Special Master, though a quasi-judicial actor, supplant the authority of the probate judge. Rather, for our purposes the Special Master is a "super guardian *ad litem*": one who performs a best interest analysis for all parties for the purpose of allocating a limited pot of money within a family unit. We are nominating Special Masters who have extensive tort litigation experience

In this paper, I shall describe briefly and generally what makes the settlement approval process so difficult, and address the relative dearth of authority on the approval process. Next I will explain in greater detail specific problems with the approval process. Finally, I suggest how using a Special Master might offer better results for our clients and those of us doing this work.

I. Background:

a. Why Settlement Approval is Difficult.

Some of our thorniest cases are personal injury settlement approvals for protected persons where the settlement proceeds are apportioned amongst intra-family plaintiffs. Consider the Smith's case:

Mary, a 26 year-old developmentally disabled adult, was sexually assaulted at a business adjacent to her vocational rehabilitation training program in 2000. (Mary had gone to this business to use the restroom because her program's bathroom was out of order.) Mary was physically battered and had severe post-traumatic stress symptoms for some time. Her counseling and health care, respectively, are covered through the state's Division of Developmental Disabilities and through her father's medical insurance, a plan that covers Mary indefinitely. Mary receives Social Security Disability benefits (SSD). She has always lived with her devoted parents, both of whom are 52.

Mary's parents, her long-time guardians, battled to get their daughter's rapist prosecuted (the prosecutor was reluctant; the developmentally disabled are said to make notoriously poor witnesses), even though they knew that Mary would relive some of her trauma during the criminal trial. After the rapist's conviction, Mary's parents civilly sued their daughter's training program, the owner of the business where the rape occurred and the rapist for Mary's injuries and their loss of their daughter's consortium. During this process, they endured long discussions about the insurance adjustor's claim that Mary didn't need policy limits since the state was already providing all the counseling she would ever need. Their relationship with their daughter was scrutinized in detail.

Three years after Mary's assault, the various defendants' insurers made what seemed reasonable settlement offers. Mary's parents sought appointment as Mary's conservators and to have the settlement amount, their proposal for allocation of proceeds and use of Mary's funds approved. The parents proposed that Mary receive 80% and that they receive a combined 20% of the net proceeds after fees and costs were paid. They wished to purchase a structured settlement with the bulk of Mary's funds while keeping a "rainy day fund" in a restricted account. Mary's court-appointed attorney, a competent probate attorney with virtually no knowledge of personal injury suits, argued that the parents' proposed allocation was too large. She had no real suggestion for an alternative allocation.

At the initial hearing for the settlement approval, evidence was offered regarding Mary's needs and the parent's claim. The probate court required three additional hearings at which it requested detailed information about: the various structures considered, authority for parental loss of consortium claims regarding adult children, the parents' estate plans, their health care and life insurance benefits, and Mary's living options should she no longer reside with the parents. Ultimately, the court cut the parents' allocation and refused to approve the

structured settlement saying that it was too inflexible.

Fortunately, not all of the cases in which we seek court approval for settlement or compromise involve serious injury. However, a significant percentage of cases in which we seek settlement approval involve adults who are incapacitated due to the event that underlies the tort action, or children who sustain catastrophic injuries. These cases frequently have family members with loss of consortium/companionship claims. They are tragic cases, each in its own way.

The physical insults and/or losses of the initial injury, treatment decisions regarding acute care, arrangements for rehabilitative and chronic care, lost wages, hospital liens and other mounting debts, long hours spent with the personal injury attorney, etc., can quickly drain family resources, financial and psychological. If any injury presents a permanent disability for a family member, others in the family often serve as caretakers. Family life may revolve around care-taking schedules. Feelings of guilt over the accident or events leading up to it sometimes cause family break-ups.

Settlement of tort claims should be some relief; settlement brings a sure distribution of monies to family members without an arduous trial and subsequent appeals. However, allocation of the settlement award is a new challenge. With disparate injuries come disparate allocations. Greater allocation to any given intra-family plaintiff means a reduction in the allocation to another plaintiff – a child, parent, or sibling.

The personal injury attorney may have lived and breathed her case for years. The “settlement attorney,” however, is generally called upon at the last minute and expected to produce court approval hastily for an exhausted family unit. Although the court approval is technically in the interest of the protected persons only, the proceeding necessarily affects the entire family.

b. What Drives the Approval Process

Nationwide, the settlement approval process varies, jurisdiction to jurisdiction and court to court. In many states, settlement approval for a minor or incapacitated adult falls within the general ambit of a conservator’s statutory authority.¹ Several states have promulgated rules within their

¹Arizona is such a state. See A.R.S. Section 14-5424(D).A conservator may act with court approval to compromise a personal injury or wrongful death claim for a protected person. The conservator may act with court approval to release an alleged

Administrative Orders or various court rules (civil procedure, probate, special proceedings) that require presentation of a specific and detailed set of information in a petition for settlement approval.² In some states, the court division to which the tort case is assigned will also address the settlement approval. In others, the probate court has exclusive jurisdiction over the settlement. Courts differ as to whom may/shall represent the protected person in the approval process – next friends, guardians, guardians *ad litem*, attorneys. Perhaps the insurance industry gives as much national guidance for settlement approvals involving protected persons as any sort of authority. We routinely fashion court orders to meet the company’s specifications in order to secure distribution of funds.

Little statutory guidance exists on the apportionment of settlement awards³, no doubt because the valuation of damages is an extremely inexact science. The factors considered in the valuation of damages are readily identifiable – past and future medical expenses, lost earning capacity, physical impairment, disfigurement, physical pain, mental anguish, loss of consortium, etc.– but what any of these are worth in a given case cannot be reduced to a simple calculation/formula.⁴ Some states have statutes directing that whatever allocation of proceeds there is in a settlement offer be made clear so that claims of distinct parties cannot be satisfied through payment of a single,

tortfeasor if the release is
in the best interest of the protected person...

² e.g.: Colorado Probate Rules, Rule 16, *Court Approval of Settlement of Claims of Persons Under Disability*; Florida Probate Rules, Rule 5.636, *Settlement of Minor’s Claims*; Florida’s Eighth Judicial Dist. Administrative Order No. 6.100, *Procedures for Settlements Requiring Court Approval*; Michigan Court Rules, Chapter 2, Rule 2.420, *Settlements and Judgments for Minors and Legally Incapacitated Persons*; Philadelphia Co. Pennsylvania, First Judicial Dist. Joint General Court Regulation No.97-1, *Procedure for Approval of Compromises Involving Minors, Incapacitated Persons, Wrongful Death and Survival Actions*. Washington Superior Court Special Proceeding Rules, Rule 98.16W, *Settlement of Claims of Minors and Incapacitated Persons*.

³ The Arkansas high court held that the factors set forth in Ark. Code Ann. 16-62-102(f), those that a jury might consider in allocating damages, also guide the probate court’s determination of the apportionment of settlement proceeds in cases where the damages issue is not tried. *Bell v. Estate of Bell*, 318 Ark. 483 (1994) (Here, a decedent’s spouse challenged the allocation of wrongful death proceeds as between herself and two minor children.)

Washington’s Rule 98.16W, mentioned in the previous note, *supra*, addresses allocation through the mandatory report of the guardian *ad litem* at paragraph (2)(e)10.

⁴ For discussion of valuation for settlement purposes, see Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1 Journal of Dispute Resolution 1991.

undivided sum.⁵

There is a rather small body of case law about disputes over settlement approvals involving minors or incapacitated adults. A few of these cases have an intra-family plaintiff with capacity charging that her/his allocation was inadequate,⁶ several illustrate the pitfalls of failing to follow settlement approval procedures;⁷ too many show why there will never be a shortage of disciplinary actions against lawyers based on non-waivable conflicts of interest.⁸ There is a general paucity of scholarly work regarding the settlement approval process.⁹

II. Challenges

⁵ i.e., Florida Rule of Civil Procedure 1.442(c)(3) requires settlement proposals to state the terms attributable to each party. See also *Dudley v. McCormick*, 799 So.2d 436 (Fla.App. 1 Dist. 2001) (No allocation in defendant's settlement prevented award of attorney's fees though defendant prevailed at trial.)

⁶ i.e., *Bell v. Estate of Bell*, *supra* at note 4; *Enochs v. Brown*, 872 S.W. 2d 312 (Tex.App.-Austin 1994) (A father challenged his loss of companionship award regarding his profoundly disabled child as being too low; he received \$15,000 and his child received \$1.9 million).

⁷ *Bowden v. Hutzler Hospital*, 252 Mich App. 566; 652 N.W.2d 529 (2002) (Settlement set aside because no evidentiary hearing was conducted pursuant to MCR 2.420(B)); *Riemer v. St. Clares's Riverside*, 300 N.J. Super. 101; 691 A.2d 1384 (1997) (Dismissal of a complaint against a medical malpractice defendant due to the infant's GAL failing to produce a required expert's report pursuant to N.J. settlement procedure was reversed due to the GAL providing inadequate protection of the child's interests.)

⁸ See discussion of *Nault* and *In re Sherman*, below in text; also *Evans v. Luebke*, 2003 WI App 202, 02-2210; 671 N.W. 2d 304, (Ct.App.2003); *Matter of Fox*, 327 S.C. 293; 490 S.E.2d 265 (1997). (Attorney misconduct in representing multiple plaintiffs in minors' settlement approvals).

⁹ There are, however, a few thoughtful contributions in this area, e.g.: Ellen Smith Pryor, *After the Judgment*, for "Symposium: Liability for Inchoate and Future Loss" 88 Virginia Law Review 1757(2002); Hon. Milton L. Mack, Jr., *Settlements for Minors and Legally Incapacitated Persons: Protect Your Client; Protect Yourself*, 77 Mich Bar Journal 1288 (1998); Jennifer L. Anton, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU Law Review 161 (Sept/Oct 1997); Chris A. Milne, *The Child's Tort Case: Ethics, Education and Social Responsibility*, 30 Suffolk University Law Review 1097 (1997) Texas personal injury attorney Fred Misko, Jr., publishes on his website a series of short papers, including *The Role of the Guardian Ad Litem in Personal Injury Litigation – The Plaintiff's Perspective*. This is a fine distillation of the settlement/allocation process. <http://www.misko.com/>

a. Representation for the Protected Person – Damned if You Do...

In Pima County, Arizona, our firm's home, all settlement approvals for protected persons are heard by the probate court and most often occur in concert with an initial conservatorship petition. The court's policy is to appoint an attorney for an adult protected person to review the settlement proposal that the petitioner presents to the court. An attorney is nearly always appointed for a minor when the settlement approval involves an apportionment of settlement monies. Our probate court rarely appoints guardians *ad litem* in these cases, and never a guardian *ad litem* alone.¹⁰ A lay investigator is appointed for settlement approvals for incapacitated adults. The investigator's report is typically a cursory summary of a brief interview with the family members with emphasis on the relationship between the protected person and the proposed fiduciary.

Our probate court seeks to protect those with legal disabilities in settlement approvals, as in other protective proceedings, by insuring their representation by counsel. In other jurisdictions, guardians *ad litem* are routinely appointed, or appointed upon request by any interested person, when a conflict may exist between the next friend or guardian and the protected person. The guardian *ad litem* does not act as an attorney, but rather as a personal representative, or an evaluator of the protected person's best interests.¹¹ As in many other jurisdictions, counsel appointed by our local court generally come from a list maintained by the court. Just a handful of attorneys on our court's appointment list themselves do the settlement approval work routinely.

Most counsel on the appointment list must rely on limited court-sponsored training in working with those with disabilities. No particular education on the settlement approval process *vis a vis* the worlds of the personal injury case, structured settlements, public benefits, etc., is offered as

¹⁰ GAL appointments are generally disfavored in Pima County for all but the youngest children in any proceeding. Our family law bench, for instance, has a policy against GAL appointments in favor of referral for guardianship appointment when capacity appears to be at issue. Children old enough to express an opinion receive an attorney and not a GAL in juvenile court.

¹¹ See Jennifer Anton's description in *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, *supra*, at 171.

There are several reported cases that address conflict between the GAL and the court. *Zukerman v. Piper Pools, Inc.*, 232 N.J. Super. 74, 556 A.2d 775 (1989) is an interesting case in which a parent GAL was removed by the trial court for refusing to take a settlement offer that the court believed prudent to accept.

of yet as part of the training. While some attorneys on the appointment list are seasoned practitioners, many are relatively new attorneys looking to gain courtroom experience. Even experienced probate attorneys with years of guardianship or decedent's estate experience may never have dealt with issues related to damages in a personal injury action or the tax benefits of structured settlements. The public benefits landscape is foreign to most private practitioners. The report of the court investigator is unlikely to offer counsel for the protected person insight beyond his own knowledge since, as mentioned above, the investigator's focus is generally on the suitability of the fiduciary.

The *modus operandi* of every attorney trained in our adversarial system include shades of 'my client needs to win' and 'my client needs more.' Each counsel or guardian *ad litem* for a protected person can rightly argue that a greater allocation of settlement funds is intrinsically better for his client. Yet, in our experience locally, these attorneys are generally ill-equipped to give little other foundation for her arguments; there is indicia that in some states guardians *ad litem* are far better equipped.¹² The standard adversarial mode of advocacy is ill-suited to promote an accurate evaluation of the appropriateness of the proffered settlement/allocation. An adversarial posture makes the

¹² NAELA member Barbara Isenhour tells us that Washington state's GAL training is comprehensive. It is unclear how Texas addresses the training of the GAL, though case law suggests that the Texas GAL for minors must have a clear depth of knowledge/experience to fulfill the court's expectations. *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.* *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App., Dallas, 1994), citation omitted.

Case law also suggests that this knowledge will legitimately cost the defendant. The Court of Appeals of Texas, Houston, a year ago upheld the award of a large fee awarded to GAL Joe Crabb. Crabb billed fees of \$120,077.75 in a medical malpractice case wherein he was appointed GAL for the minor plaintiff, who had severe disabilities from a delivery gone bad. *Jocson v. Crabb*, 98 S.W. 3d 273 (Tex.App.-Houston 2003). The child's parents were also plaintiffs. The defendant in the tort action was ordered to pay Crabb's fees directly and appealed due in part because there was no conflict between the child and her parents, her next friends. Crabb attended 50 depositions, read at least 60 depositions, and attended 10 hearings. His records reflect that he worked for 585.75 hours at \$200 an hour for a total of \$117,150. In addition, Crabb testified that he had independently and sought legal counsel regarding the creation of a trust for the child-plaintiff and spent some \$3000 in so doing.

process adversarial; settlement becomes a competition amongst family members.

Protected persons may well bear the cost of counsel from their own settlement proceeds, particularly in cases with low settlements where the plaintiffs were unrepresented by counsel in dealing with an insurance company. A court-appointed attorney who lacks knowledge and/or experience and who is also adversarial may well generate fees that represent a significant percentage of the protected person's recovery. In the Smith's case above, the cost of individual representation for each minor child could be onerous given the small settlement available.

Another of our cases had the following facts:

X was 38 in 2001 and had recently immigrated to this country when he was left a total care patient due to extended oxygen deprivation following a severe allergic reaction. X's physicians believe that X is not in a true persistent vegetative state, but perhaps worse, that he has "Locked-In Syndrome." X is a permanent resident alien who will qualify for Medicaid in approximately two years. X's wife, Y, is his primary care-giver since X qualifies only for the county's indigent care program which provides approximately 8 hours of weekly care. X and Y have 2 daughters, now 11 and 9. M is unable to work outside of the home; the family had no savings and has no current income. The family survives completely on extended family support and community charity. Y and the children are citizens and receive health benefits.

One of the defendants in the medical malpractice action just offered her rather modest malpractice policy limits as settlement of the family's claims. Y is her husband's conservator and seeks appointment as her daughters' conservator. She has proposed an allocation of damages between her husband, her daughters and herself in her petition for settlement approval in which X receives 70% of the net settlement proceeds; the daughters receive 20% of the total allocation, and she, Y, gets 10% for their respective loss of consortium claims. Y wishes the daughters' proceeds to come in the form of a structured settlement that will first pay-out when each girl is 18. Y insists that X valued nothing more than the girls' education; she concurs that college money is far more important than anything else.

X's court-appointed attorney has been involved with the case for more than two years and helped propose the allocation of settlement funds. The daughters have court-appointed attorneys who have spent quite a few billable hours arguing for why their clients should have a much larger percentage of the allocated funds, say 50%. They have also challenged the mother's singular

concentration on securing future educational funds for the girls, claiming that having no funds available for camp or a special trip is against the girls' best interest. The girls' attorneys believe that the children should have a larger allocation because the money will mean so much more to them than to their father.

In this case the family was fortunate to have drawn one attorney well-versed in the tort settlement process, X's counsel. However, the girls' counsel made the settlement approval confusing and insulting for Y and added little for his client's benefit. Y took breaks from her husband's bedside to participate in several discussions in which she felt she needed to justify why her husband really needs as much settlement money as possible. Y felt compelled to engage in a debate with the children's counsel about what is best for her daughter and what her total-care patient husband will need for the rest of his life. The girls' counsel generated a bill of several thousand dollars each. This total fee was an extremely large amount of money to the family.

Still, the Court looks to counsel or GAL for the protected person(s) to guide it given the Court's legitimate worry that the conflict inherent in these cases may put the protected person(s) on the short end of the allocation. The danger of these conflicts cannot be overstated.

b. Damned If You Don't – Inadequate Representation

One personal injury attorney/firm has likely been representing or purporting to represent all family members in pursuing tort claims. It is also likely that little thought has been given to the issue of whether this representation in itself presents any conflicts for the attorney and any individual family member. Often, there may have been no fiduciary, counsel or guardian *ad litem* in place for the protected person(s) up until settlement to evaluate such potential conflicts or appropriately waive them. A parent may have initiated the underlying action as a child's next friend; a spouse may have engaged counsel to sue on behalf of the community.

If it can be said that no conflict has existed because the personal injury attorney was pursuing a common interest in securing the general settlement, the personal injury attorney surely has a conflict in endorsing the allocation of proceeds. The Las Vegas case of Jason Nault is a recent resounding wake-up call for personal injury attorneys regarding: 1) the prudence of relying on a

spouse's inherent authority as agent for a marital community¹³ and 2) the need for appropriate court approval of a settlement.

Jason Nault was 21 and had been married for less than a month when he had outpatient surgery for a hernia repair in June, 1994. Jason suffered a severe anoxic episode during the surgery due to a failure in the anesthesia delivery system. He left the day surgery center a total care patient. Jason's only child, Rene, was born four months after his injury in October 1994. Jason today can move his head slightly, but no other body part. He is able to utter two words only, and it is unclear whether or not he can see.

Louise Nault, Jason's bride, retained counsel to initiate litigation over Jason's injury within days of the accident in June, 1994. First Louise hired attorney Joe Rolston with whom she executed a contingency fee agreement. Approximately a week later, Rolston, who had been in practice for less than a year, referred the case to attorneys Randall Mainor and Richard Harris. Louise also executed a contingency fee agreement with the firm of Mainor Harris. In January 1995, the anesthesiologist and his practice group offered their policy limits of 2 million dollars in settlement of the Nault' claims against them. In February 1995, Louise, through attorney Rolston, became her husband's guardian. It appears that no information regarding the tort litigation was made known to the guardianship (family law) court.

In March of 1996, Louise settled the lawsuit as to the remaining defendants for approximately 17 million dollars. Attorneys Mainor and Harris posted on their firm's website feature, "Our Firm in the News," the Las Vegas Journal-Review story of March 27, 1996 about the settlement in which Mainor

¹³ In 1997, Washington personal injury lawyer Eric L. Freise was sued by Jeffrey Barrett and his limited guardian, John Barrett, in part based on the conflict Freise was alleged to have had in representing Jeffrey and his wife, JoLynn. JoLynn signed the fee agreement as agent for the community and the couple's children after Jeffrey was badly head-injured by a drunk driver. Several months into the tort action against the drunk driver and a tavern owner, JoLynn filed for dissolution. She had received \$100,000 at that point for her family from Jeffrey's underinsured motorist's policy (UIM). Only during the dissolution proceeding did Jeffrey have a GAL appointed.

John, his brother's limited guardian, argued that Jeffrey was unable to waive any possible conflicts in Freise's representation and that the contingency fee agreement JoLynn signed was unreasonable. The Court of Appeals of Washington, Division I, upheld the trial court's ruling in favor of Freise in an unpublished opinion in late 2003. Barrett and *Barrett v. Freise*, 2003 WL 22766045 (Wash.App.Div.I) The trial court was satisfied that the \$100,000 in UIM settlement monies that JoLynn controlled on her husband's behalf were appropriately used for Jeffrey's benefit. Jeffrey received the bulk of the \$500,000 policy limits provided by the drunk driver's insurance company. Finally, while JoLynn accepted \$50,000 to settle her children's and her own claim against the tavern owner, John, on Jeffrey's behalf, turned down the tavern's offer of \$400,000 to settle. Jeffrey, through John, went to trial and the jury returned a defense verdict.

raved over “the largest personal injury settlement in Nevada history.” Louise Nault told the Journal-Review reporter that the large settlement would allow her to bring her husband home. Louise did take Jason home after purchasing a new home. Mainor explained that “if the Nault reach their life expectancy” the settlement could result in a payout of \$80 million dollars.

The Journal-Review reported on January 24, 2002 that while Louise initially took Jason home, she asked her in-laws within months of Jason’s move home in 1996 if they could take Jason to their home. Wendy and Phil Nault, Jason’s parents, took Jason in. In the spring of 1997, Wendy and Phil are said to have noticed financial “irregularities” regarding the settlement proceeds. Soon they obtained a restraining order so that Louise could not take Jason from their home. Approximately one year after Jason was moved to his parents’ home, Jason’s parents became his successor guardians.

After they became Jason’s guardians, Wendy and Phil Nault discovered that Mainor and Harris took a fee of 40% (\$6.8 million) of the recovery from Jason’s and Louise’s settlement. Louise received 38% (\$6.6 million) of the recovery for her loss of consortium claim. Jason was allocated 14% of the settlement; it appears that Jason netted approximately \$2.5 million. Rene Nault, Jason’s and Louise’s daughter, received 3% of the settlement for her “contingent” wrongful death claim. (Nevada does not recognize loss of parental consortium.) Joe Rolston received a referral fee of over 2 million dollars. Wendy and Phil initiated dissolution proceedings against Louise on their son’s behalf. Then, they sued Louise, Rolston and Mainor Harris. (Louise and Rolston settled prior to trial).

On January 25, 2002, a jury awarded Wendy and Phil Nault 3.3 million dollars in their malpractice claim against Mainor Harris. The Nevada Supreme Court *en banc* heard oral argument on the appeal filed by Mainor Harris on February 9, 2004.

Because Jason Nault’ case is yet unreported, many questions are unanswered: Did Jason have an attorney or GAL at any point along the way? Did the civil division of the Nevada court assigned the tort action address the allocation of proceeds or the appropriateness of attorney’s fees? Was there no monitoring of the guardianship after the family court appointed Louise in 1995 until Jason’s parents were appointed successor guardians? What are loss of consortium claims worth on average in similar cases in Nevada? Is any disciplinary action ongoing against Mainor Harris?

It may be that Nault stands mostly for how egregious the treatment of incapacitated clients can be. Nault is not alone, however. The case of Paul K.

Sherman, a Rhode Island man in a persistent vegetative state following a suicide attempt made in a correctional facility 1981, makes for a more unseemly companion. In 1987, Paul Sherman, through his GAL, his mother, prevailed in a negligence suit against the State of Rhode Island and received a jury award of one million seven thousand dollars(\$1,007,000.) (This amount was reduced by some 50% after payment of a medical care lien.)Paul's mother and his personal injury attorney, Thomas Hutton, were appointed co-guardians of Paul's estate. Paul's request of the trial judge, Justice Calderone, that he be awarded pre-judgment interest on the jury verdict was denied. Shortly thereafter, the Rhode Island legislature passed a private law requiring payment of Paul's pre and post judgment interest of the jury award.

Late in 1987, Justice Antonio Almeida was assigned to hear the post-trial issues regarding determination of gross and net proceeds and apportionment of proceeds as between Paul and Hutton, his attorney. At the hearing, Justice Almeida awarded Paul pre-judgment interest of \$600,000 and approved an apportionment of 55% of the net award to Paul and 45% of the gross award to Hutton. In 1989, the Supreme Court of Rhode Island vacated Justice Almeida's award of pre-judgment interest and found Hutton's fee unreasonable. *In re Sherman*, 565 A.2d 870 (R.I. 1989).¹⁴

In 1991, it came to light that Hutton was embezzling from Paul's estate. In addition Paul's mother learned that in 1987, Hutton had met with Justice Almeida prior to the apportionment hearing and offered him a bribe of \$18,000 in exchange for the excessive award of attorney's fees. In 1992, Paul's mother sued Justice Almeida, among others, in his official capacity as justice of the Rhode Island Superior Court. In 2000, the Supreme Court of Rhode Island upheld the lower court's judgment that Almeida, disbarred and stripped of his pension, was immune from civil liability in his official capacity, concluding that "there is no possible set of facts in this case that would permeate the barrier of

¹⁴ Justice Murray wrote for the Court:

We find this conclusion (that the attorney is entitled to an amount equivalent to 76% of the net verdict) to be unreasonable as a matter of law. If plaintiff's theory were carried to its logical conclusion, the attorney's fee agreement could exceed the actual recovery ... In considering the figures in this case, we believe that the current arrangement jeopardizes Paul's future. The 1985 private act, the jury verdict, and the lawsuit itself were all intended to benefit the incompetent Paul. We fail to see how Paul could benefit from an arrangement wherein the attorney collects more than the individual whose interest and future the attorney is hired to protect. *In re Sherman* at 873.

judicial immunity.” *The Estate of Paul K. Sherman v. Antonio S. Almeida et al*, 747 A.2d 470 (R.I. 2000).

III. The Special Master

Obviously, the conflicts inherent in the representation of multiple clients are serious; minors and incapacitated persons are the most vulnerable to exploitation through these conflicts. These plaintiffs must be protected, but their protection in settlement approvals means more than having an appointed attorney simply argue for a bigger piece of the pie. The representation of protected persons in our settlement approval system has left much to be desired.

In our use of the Special Master thus far, he/she among other things summarizes for the court the underlying action, the plaintiffs’ claims for damages, the settlement offer, his/her knowledge of compensation for similar injuries, the conservator’s proposed plan for managing and or utilizing the protected person’s funds, and the reasonableness of the personal injury attorney’s fees. And, the Special Master proposes an allocation of the settlement award. What we have asked of the Special Master appears to approximate what it appears guardians *ad litem* do in part in states such as Washington in settlement approvals. However, as mentioned at the start of this paper, we ask that the Special Master provide an analysis of the family unit as a whole since the interests of the protected person(s) are inextricably bound with other family members who are plaintiffs.

So far, we have a small number of Special Master candidates. What they share is a deep history of personal injury trial work, either as a judge hearing such actions, or as counsel on both the plaintiff’s and defendant’s sides. We find that only experienced tort practitioners/judges can assess on the basis of similar cases what reasonable damage valuations might be. We also find that the Special Master assists us to better evaluate the use of monies allocated to the protected persons and minors. By allowing us to focus on the future needs of the protected persons and not on the mysteries of damages valuations, we as “settlement attorneys” help make the most of the payoff that these family members may have waited to receive for years. The Special Master assists the court by presenting in advance of the hearing more information more efficiently presented than what the court would likely find through a long evidentiary hearing. The Special Master thus furthers judicial economy.

Three times now we have asked for appointment of a Special Master in lieu of appointment of multiple attorneys for minor siblings in settlement of

various actions.¹⁵ Two cases involved serious injuries to multiple family members sustained in car accidents; one involved the ill-effects of residential lead poisoning for four siblings. Surely by cutting down on the number of attorneys involved, we have saved fees. But we have also saved time and good will by having the family members avoid engaging through counsel in a fight for the spoils of settlement. The idea of using a Special Master is neither novel, nor complicated, it is simply prudent.

¹⁵ So far, all appointments of Special Master have been made with the Court reserving judgment on the need for counsel for the minors until it has reviewed the Special Master's report.