Workers' Compensation, Guardianship & Settlements

Angela N. Warren, *Associate Attorney*

If you practice workers' compensation for any length of time, you will inevitably encounter situations while attempting to settle a claim that cause you to question whether an individual has capacity to enter into the settlement. Determining whether a guardianship is appropriate can be a daunting task; however, it does not have to be intimidating. It is better to have a binding contract than run the risk a settlement will be set aside by a judge finding an individual lacked capacity to enter into the settlement.

Florida Statutes state the Judge of Compensation Claims or the Division of Administrative Hearings, depending upon whether a claim has been filed, may require appointment of a guardian or other representative by a court of competent jurisdiction for any person who is mentally incapacitated or a minor. Fla. Stat. § 440.17 (2008). The guardian or representative may exercise the powers granted to, or perform the duties required of, such person under Chapter 440. *Id*.

Guardianship is appointment by the probate court of an individual (the guardian) to make decisions on behalf of a person who lacks the ability to make his or her own decisions (the ward). The guardian can be a family member, a friend, or a professional or public guardian. Guardianships can be limited if the ward lacks capacity to make some, but not all decisions. Alternatively, they can be plenary if the ward lacks capacity to make any decisions.

Once a guardianship is established, the guardian must seek approval of the probate court to enter into the workers' compensation settlement. Fla. Stat. § 744.441 (2008). The appropriate documentation may be signed by the guardian on behalf of the incapacitated individual if approved by the probate court. The guardian may then receive the settlement funds on behalf of the incapacitated individual.

Establishing and maintaining a guardianship can be expensive. The guardianship does not end when the workers' compensation settlement is approved. A guardian is required to be represented by an attorney, must file annual reports and accountings, and must petition the probate court for approval of major purchases. *See generally* Fla. Stat. Chapter 744.

When settling a workers' compensation claim, questions arise as to which party is responsible for paying the fees and costs associated with establishing the guardianship and paying the guardian's fees. The workers' compensation statute is silent on this issue. The case law however, has interpreted the statute as requiring guardianship and attorney's fees be paid by the employer/carrier when there is a causal relationship between the workers' compensation accident and the mental disorder. *Southeastern Concrete Floor v. Charlton*, 584 So. 2d 574 (Fla. 1st DCA 1991) (holding fees are "awardable only to the extent they are incurred in and about the handling of the [injured worker's] rights, duties, and responsibilities under Chapter 440.") In addition, the probate code provides that the expenses of establishing and maintaining the guardianship and payment of the attorneys' fees and guardian's fees are payable from the incapacitated individual's assets. Fla. Stat. § 744.105 and § 744.108 (2008). Although not required, many employer/carriers will agree to pay the costs of establishing the guardianship, but not ongoing fees and costs. The parties should establish prior to settlement who will be responsible for specific payments and at what point that responsibility will end. To aide in our discussion, consider two scenarios.

First scenario: An individual suffered a compensable workers' compensation accident when she fell ten feet from a ladder. The injured worker was diagnosed with two herniated discs and underwent a fusion. The injured worker was also diagnosed with panic disorder, depression, and chemical dependence as a result of the work accident. The parties decided to settle the workers' compensation claim. However, the employer/carrier had reservations due to indications in the psychiatrist's records that the injured worker needed assistance managing her finances and had difficulty with comprehension.

Several factors should be weighed in determining whether a guardianship is appropriate in such situations. It is imperative to remember that an individual with a mental illness is not automatically precluded from entering into a settlement. The individual has a right to enter into a settlement until the probate court declares the individual incapacitated and removes the individual's right to contract.

If capacity is at issue, however, the best practice is to conference with the authorized treating psychiatrist. The conference can be held jointly with opposing counsel or individually. The parties should obtain the psychiatrist's opinion regarding whether the injured worker has the ability to enter into the contract and whether she is capable of managing her finances. The injured worker may understand the significance of entering into a contract, but may have poor judgment when it comes to handling money. In such cases, guardianship would not be necessary. The parties should consider whether a structured settlement or financial advisor may be appropriate. The parties could even request the Judge of Compensation Claims appoint a representative to receive payment on the injured worker's behalf. Fla. Stat. § 440.17 (2008).

Back to our scenario: You and opposing counsel decided to conference with the psychiatrist. The psychiatrist opined the injured worker would not be able to understand the ramifications of entering into a contract and could not handle financial matters. Guardianship may still be inappropriate. Guardianship should be established only if there are no lesser restrictive alternatives. Fla. Stat. § 744.1012 (2008).

Before petitioning the probate court to declare the injured worker incapacitated, you should consider whether the injured worker has a Durable Power of Attorney, Designation of Health Care Surrogate, or other Advance Directive in place. These documents are written delegations of authority from one person to another, called the attorney-in-fact or surrogate, relating to financial and medical decisions. A Durable Power of Attorney should be carefully reviewed to determine if the injured worker extended the authority to the attorney-in-fact to enter into contracts, handle lawsuits, and settle any claims. A guardianship is not needed if the proper authority is extended in the Durable Power of Attorney. When the proper authority is not extended or a Durable Power of Attorney does not exist, guardianship would be appropriate.

Second scenario: The injured worker was standing on scaffolding when it collapsed. He fell eighty feet to his death. He was survived by a wife, two natural children and two stepchildren. He had not adopted the stepchildren. All four of the children were minors and dependent upon the injured worker. After several months of receiving death benefits, the wife decided she wanted to settle the workers' compensation claim and receive a lump sum instead of receiving smaller monthly payments. All parties agreed.

The children of the decedent would be entitled to a portion of the death benefits. Fla. Stat. § 400.16. As minors, the children do not have capacity to enter into the settlement. To ensure the settlement is binding, the interest of the minor children must be considered and approved by the probate court. *See Hernandez v. United Contractors Corp.*, 766 So. 2d 1249 (Fla. 3rd DCA 2000) (tort action not barred by doctrine of election of remedies as minor children were not a part of the workers' compensation settlement; even if they were, settlement not binding because it was not approved by probate court).

Although natural guardian and mother to all four children, the wife cannot sign the settlement agreement on their behalf without being appointed guardian of the property of the minor children. The guardian of the property of the minor children can be the wife or another individual, family member, friend, or professional guardian. The probate court *may* also appoint a *guardian ad litem* to represent the minor's interest when the gross settlement of a minor's claim exceeds $15,000.00. Fla. Stat. § 744.3025(1)(a) (2008). However, the probate court *shall* appoint a *guardian ad litem* to represent the minor's interest when the gross settlement of a minor's claim equals or exceeds $50,000.00. Fla. Stat. § 744.3025(1)(b) (2008).

A guardianship would be needed for the two biological children as well as the two stepchildren. Under the probate code, stepchildren are excluded from the definition of child of a decedent. Fla. Stat. § 731.201 (2008). Section 440.16, Florida Statute, states the biological children of the deceased are entitled to death benefits. Fla. Stat. § 440.16(1)(b)(2) (2008). However, the workers' compensation statute defines child to include stepchildren when they were dependent upon the deceased. Fla. Stat. § 440.02(6) (2008).

All of these issues should be considered when settling a claim with an individual of questionable capacity. Although guardianship can create more paperwork, cause some delay in the settlement, and add fees and costs, this should not be considered a hindrance in reaching a reasonable, binding resolution of the claim. A claim only gets more expensive if a settlement is set aside because the appropriate steps were not taken.

Original publication: The Florida Bar Workers' Compensation Section, News & 440 Report, Summer 2009, Vol. XXX, No. 2