Avoiding a Legal Malpractice Trap Created by a Legislative Oversight

By Martin Jacobson, Esq.

In 2005, the New York State legislature amended EPTL 5-4.6 to create a mechanism pursuant to which plaintiff's counsel in a wrongful death case is able to have the settlement sum paid into escrow after "settlement" has been reached in the trial court, but prior to the Surrogate having reviewed the settlement or the proposed allocation (between personal injury and wrongful death) and proposed distribution. [For purposes of this article, I will use "Supreme" Court interchangeably with "trial court," keeping in mind that EPTL 5-4.6 applies to all "trial" level courts.] Additionally, the amended statute provides a mechanism for attorneys' fees and expenses, incurred in the course of the prosecution of the wrongful death action, to be paid from escrow to the plaintiff's attorneys without Surrogate's review.[1]

The purpose of the statute, it seems, is to expedite payment from defendant to an (interest bearing) escrow account established for the benefit of the estate's distributees, and to allow fees, expenses and liens to be paid/satisfied many months before the Surrogate's Court will issue its final decree.

This statute, as amended, will help plaintiffs and counsel avoid numerous potential pitfalls, which could occur under the former procedure where defendants had the continued use of the settlement sum until the Surrogate approved the settlement. For example, during the pendency of the proceeding in Surrogate's Court, the defendant or its carrier might fail, declare bankruptcy, become insolvent, fall into liquidation, or otherwise lose the ability to pay the settlement, even though sufficient funds were available to pay the settlement at the time settlement was agreed upon in Supreme Court. Further, the attorneys who spent years prosecuting the wrongful death claim and who finally brought it to a successful settlement have to wait perhaps another year or more for reimbursement of expenses and for payment of fees under the former procedure. And all the while, the settling defendant has continued use of the plaintiff estate's (and hence the distributees') money, money that should be working for the distributees... although not yet in their hands.

As will be shown below, however, the statute creates a potential legal malpractice trap when a structured settlement has been agreed upon between the parties in Supreme Court (or where a structure is in the best interests of the infant distributees of the plaintiff estate).

PROCEDURAL HIGHLIGHTS OF § 5-4.6

First: The Supreme Court must pass on plaintiff's application for approval of the settlement in a timely manner. As EPTL § 5-4.6 (a) mandates, "Within sixty days of the application . . . the court shall . . . either disapprove the application or approve in writing a compromise . . ."

Second: The Supreme Court approval includes the plaintiff's attorney's fee and expenses. EPTL § 5-4.6 (a).

Third: The Supreme Court " . . . shall order the defendant to pay all sums payable under the order of compromise . . . [pursuant to the time frames required by CPLR 5003-a] . . . to the [plaintiff estate's] attorney . . . for placement in an interest bearing escrow account for the benefit of the distributees . . ."

Fourth: The Supreme Court order of compromise "shall also provide . . ." as follows:

A. "Upon collection of the settlement funds," the plaintiff's attorney shall pay all "due and payable expenses, excluding attorneys fees, approved by the court, such as medical bills, funeral costs and other liens on the estate." EPTL § 5-4.6 (a)(1).

B. "All attorneys fees . . . [for prosecution of the wrongful death action] . . . inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court [of] proof of filing of a petition for allocation and distribution in the surrogate's court . . ." EPTL § 5-4.6 (a)(2).

C. The plaintiff attorney who receives payment under EPTL § 5-4.6 must continue to " . . . serve as attorney for the estate until the entry of a final decree in the surrogate's court." EPTL § 5-4.6 (a)(3).

Fifth: The Supreme Court " . . . shall determine whether a guardian ad litem is required . . ." EPTL § 5-4.6 (b). [2]

Sixth: Surrogate's court filing fees are determined without regard to the amount of payments made pursuant to EPTL § 5-4.6 (i.e., the dollar amount of the gross estate excluding the amount of settlement). EPTL § 5-4.6 (c).

Seventh: The Supreme Court's written approval of the settlement " . . . is conclusive evidence of the adequacy of the compromise in any proceeding in the surrogate's court for the final settlement of the account . . ." EPTL § 5-4.6 (d).

Eighth: Plaintiff's counsel is not required to use the new EPTL § 5-4.6 procedure, and may instead petition the surrogate's court for approval of the proposed compromise. EPTL § 5-4.6 (e).

Ninth: No letters of administration may be issued which will serve to abrogate the ability of the administrator or personal representative of the decedent's estate or their attorney from seeking approval of a settlement from the trial court. EPTL § 5-4.6 (f).

HYPOTHETICAL FACT PATTERN - CASH SETTLEMENT

During jury selection, your Supreme Court wrongful death case has just settled.

The decedent left surviving him a spouse and adult children. The spouse and all children are educated professionals. In fact, the surviving spouse herself is an executive with a large international investment banking firm. During settlement negotiations the subject of a potential structured settlement was raised, but rejected by the surviving spouse. The case settled for $6,000,000.00.

In previous cases in the same county, due to the backlog of Surrogate's Court petitions, you and other clients of your firm have had to wait in excess of one year before settlement was approved and an allocation and distribution was made. In addition, you are concerned about rumors that the defendant's carrier is teetering on the brink of insolvency, and may be seized by the NYS Insurance Department Liquidation Bureau.

To avoid the obvious delays that would otherwise occur by virtue of the inherently slow procedure required to be followed in Surrogate's Court, and because of the additional delay that would result if the carrier was to become the subject of a liquidation proceeding, you file an application with the trial court seeking immediate approval of the settlement pursuant to the streamlined procedure now available pursuant to EPTL § 5-4.6.

The Trial Court Must Act

As noted above, the trial court must approve or disapprove of the settlement within 60 days. Additionally, the court must include your reimbursable disbursements and attorney's fee in its compromise order. Other reimbursable non-attorneys' liens on the estate should be included in the order.

The compromise order must require the defendant to pay the full $6,000,000.00 within 21 days (of receipt of the order and a release) pursuant to CPLR 5003-a. [The time period will be longer if the defendant is a municipality or other entity that is allowed a longer statutory time period in which to pay.]

Establishment of Special Escrow Account and Payment of Estate Liens

The $6,000,000.00 has to be deposited by you into an interest bearing escrow account, established for the benefit of the distributees. Once you have deposited the defendant's money into the escrow account, all liens on the estate and other expenses that are due and payable and have been approved in the compromise order must be paid by you from the escrow account. However, attorneys' fees and expenses may NOT be paid just yet.

Filing of Petition in Surrogate's Court for Approval of the Allocation and Distribution

As noted above, in order for you to be able to pay your attorney's fee and reimbursable disbursements to your firm, you must first file proof with the trial court that you have filed a petition with the surrogate for approval of the allocation and distribution on behalf of the decedent's estate. You must also continue to serve as attorney for the estate until a final decree has been entered in the surrogate's court. However, payment to your firm of fees and expenses is conditioned upon your submitting proof to the trial court that you have filed a petition in Surrogate's Court. Consequently, even if the final decree in Surrogate's Court takes a year or more to obtain, your firm will have already been paid. The risks associated with protracted delays will have been avoided. Finally, the net amounts payable to the distributees of the estate will be earning interest for them during the many months of delay as the Surrogate's Court proceedings run their course.

Ethical Queries

♦ If you fail to employ the streamlined procedure now available pursuant to EPTL § 5-4.6, might you run the risk of a claim that failure to do so deprived the estate and its distributees of the interest that would have been earned on the deposit into the special interest bearing escrow account? [This is not the legal malpractice trap to which I refer in the title.]

♦ If you fail to seek approval of the settlement in the trial court and the defendant's carrier becomes insolvent during the pendency of the Surrogate's Court proceedings, with the result that additional years of delay ensue during liquidation proceedings, or worse, that a smaller settlement sum is all that is ultimately available during the liquidation of the carrier, might you run the risk of a claim that this could have been avoided had you employed the expedited procedure available under EPTL § 5-4.6?

It seems obvious that when a cash settlement has been reached it behooves counsel for plaintiff to seek approval of the settlement from the trial court where the action was pending.

HYPOTHETICAL FACT PATTERN - STRUCTURED SETTLEMENT

The plaintiff you represent is the estate of a deceased mother of four. She leaves surviving her a husband and four infant children, all under the age of 14.

During jury selection, the defendant makes a $6,000,000.00 offer. Prior to the offer being accepted, and because of the infancy of the children, you explain the benefits of a structured settlement to the surviving spouse who is also the administrator of the decedent's estate. The surviving spouse/administrator insists that the infant distributees receive their distributable portion of the settlement in the form of future periodic payments. As mandated by GOL 5-1702(e), plaintiff's own financial advisor, a structured settlement consultant, works up future periodic payment plans for each of the four children. The total cost to the defendant of the future periodic payment portion of the settlement being discussed is $2,000,000.00. The $4,000,000.00 balance of the proposed settlement will be paid in the form of a single up-front cash payment. The defendant's offer is accepted with the proviso that the settlement be in the form of a structured settlement with $4,000,000.00 to be paid in cash and $2,000,000.00 to be structured for the infant distributees pursuant to the plans created by the plaintiff's advisor and selected by the infant's parent. Since the cost to the defendant and/or its carrier is $6,000,000.00, the sum previously offered, the defendant agrees.

As stated above when I posed the cash settlement hypothetical, to avoid the obvious delays that would otherwise occur by virtue of the inherently slow procedure required to be followed in Surrogate's Court, and because of the additional delay that would result if the carrier was to become the subject of a liquidation proceeding, you file an application with the trial court seeking immediate approval of the settlement using the streamlined procedure now available pursuant to EPTL § 5-4.6.

This streamlined procedure also makes sense because of the nature of structured settlement plans, which take advantage of the time value of money in the cost/benefit projection. A plan that starts paying periodic payments at age 18, for example, will pay greater benefits to the recipient the earlier the structured settlement annuity is funded. A delay in Surrogate's Court of even eight months would potentially cost the distributees many thousands of dollars over a lifetime of annuity payments. To say the same thing positively, funding the structured settlement even half a year earlier will mean many thousands of additional dollars in structured settlement benefit payments for the infant distributees. This is simply a factor of the defendant's money working for the distributees for a longer period of time.

The Trial Court Must Act, But What Do You Ask For?

Plaintiff attorneys often ask one or both (or some variant) of the following two questions:

1. Would it be acceptable for a defendant to transfer all of the settlement funds ($6,000,000.00) with the expectation that the plaintiff's attorney would be purchasing the annuity?

2. Are there any factors that would prevent the defendant from paying the full cost of settlement ($6,000,000.00) to the plaintiff's attorney's special escrow account?

Answer to Plaintiff Attorneys' Questions

Based upon the Tax Analysis below, I proffer the following answers to the questions presented:

1. It would not be acceptable for the defendant to transfer all of the settlement funds ($6,000,000.00) to the plaintiff's attorney's escrow account since this would negate the tax advantages of a proper structured settlement. Moreover, any purchase of a taxable annuity for the infants, as would occur if plaintiff's attorney paid for the annuity from the special escrow account, would violate CPLR 1206(c) which permits only proper structured settlements to be employed for infants.

2. The same factors that make it unacceptable for the defendant to transfer all of the funds, including the structured settlement funding, into the plaintiff's attorney's escrow account (see No. 1 above), also prevent the defendant from paying the full cost of settle-

ment to this escrow account – unless the parties, with court approval, wish to negate the structure, deprive the infant distributees of the tax free benefits the structure provides, and enter into a cash lump sum settlement instead.

If you seek the same relief as requested in the hypothetical cash settlement above, and if the relief requested is granted, i.e., the defendant is ordered to pay the full $6,000,000.00 into the interest bearing escrow account you have created for the benefit of the plaintiff estate's distributees, your actions have just deprived the distributees of the ability to obtain a structured settlement. In essence, once the full $6,000,000.00 is paid into an escrow account for the benefit of the plaintiff, any annuity purchase from that account would be considered an investment by the plaintiff rather than a structured settlement with the defendant where the defendant's assignee must purchase a "Qualified Funding Asset" (annuity) for its own account pursuant to Internal Revenue Code Section 130(d). Counsel's error, in this hypothetical, occurred when counsel requested the trial court to pay the full $6,000,000.00 settlement cost into an escrow account for the benefit of the estate's distributees. The $2,000,000.00 intended for the structured settlement must not be deposited in escrow since actual receipt (as well as constructive receipt) will prevent the distributees from receiving a tax free structured settlement.

Tax Analysis of a Proper Structured Settlement

A proper structured settlement has several key components – absolutely required by the Internal Revenue Code ("Code"), the Regs, Revenue Rulings and interpretive Private Letter Rulings pertaining to structured settlements. All the documentation supporting the structured settlement, including the Settlement Agreement and Release ("SA&R"), the Uniform Qualified Assignment ("UQA"), and the Compromise Order ("Order"), as well as any Surrogate's Court Decree ("Decree") approving the distribution, must properly document these key elements. The required components are:

1. The consideration for plaintiff's release includes the defendant's promise to make future periodic payments in amounts and on dates that are fixed and determinable as to timing and amount at the time of settlement;

2. The defendant has the right to make a "Qualified Assignment" pursuant to Code Section 130(c) to an assignee (an affiliate of a life insurance company) thereby transferring its future payment obligation to that assignee; and

3. The assignee then purchases an annuity (using the defendant's money) from its affiliated life insurance company which is issuing the annuity contract as its "Qualified Funding Asset"

These three steps MUST be properly described in all documentation.

The Code Section 130(d) "Qualified Funding Asset" (annuity) in a proper structured settlement must be owned exclusively by the Qualified Assignee. The plaintiff may have no ownership, dominion or control, or any rights whatsoever in the annuity, nor may the plaintiff have either actual or constructive receipt of the funds used to purchase the annuity. The annuity is the Qualified Assignee's asset, used as its source of providing future periodic payments to the plaintiff.

The Code Section 130(c) Qualified Assignment is embodied in the UQA. The SA&R contains a self executing novation which provides that when the defendant executes the UQA, it thereupon becomes released from the periodic payment obligation. Additionally, the Order and the Decree should contain decretal paragraphs which mirror and approve these essential provisions of the SA&R. The plaintiff may thereafter only look to the assignee (and the life company issuing the annuity) for payment. The life company issuing the annuity (always an A.M. Best Rated A+ or A++ life insurance company licensed in New York) also issues a written irrevocable guarantee, guaranteeing the performance of the assignee.

At the end of the day, after the SA&R and UQA have been executed and an appropriate Order and Decree have been signed and entered and the defendant has paid the up-front payment as well as the structured settlement funding, the defendant will be completely released from the underlying claim and will have no further obligation to the plaintiff. The structured settlement funding just mentioned must be paid by the defendant directly to the life company (or to the assignment company) and may not be paid to plaintiff's attorney's trust account or to any special escrow account established for the plaintiff.

At first blush, it would appear that the new statutory scheme of EPTL Section 5-4.6 would require the structured settlement funding amount (in this hypothetical $2,000,000.00) to be paid to the plaintiff's attorney's special escrow account. Were this the case, there would be a conflict with federal tax law that would eradicate the ability to provide tax free structured settlement payments to infants and other distributees of a wrongful death decedent's estate. That is clearly not the case, however, provided a proper Compromise Order is issued in the first place.

Remember, EPTL 5-4.6(a) mandates that the defendant pay " . . . all sums payable under the Order of Compromise . . . " to the plaintiff's attorney (to be held in escrow). A proper Order of Compromise in a structured settlement should only order the defendant to pay the up-front cash portion of the settlement to plaintiff's counsel. In this hypothetical, the up-front cash portion of the settlement is $4,000,000.00.

What About the $2,000,000.00 Earmarked for the Structured Settlement?

As noted above, payment for the annuity must be made directly from the defendant to either the assignee or to the life insurance company that is issuing the annuity. Payment to the plaintiff, or into an escrow account established for the benefit of the plaintiff (or any distributee of the decedent's estate), creates an actual receipt problem that would preclude a tax free structured settlement. Unless the Order is drafted to require payment for the annuity to go directly from the defendant to the assignee or life insurance company, the payment for the annuity, from an escrow account established for the distributees, will be the equivalent of the distributees buying their own annuity with a cash settlement. This poses at least two problems: (1) payments that should be tax free will be taxable (the interest portion of each payment will be fully taxable) and (2) CPLR Section 1206 will be violated since only annuities which are part of a structured settlement are permitted when infants' money is involved.

The first problem noted above, i.e., the annuity will not be tax free, is a matter of fundamental tax law. As early as the issuance of Revenue Ruling 79-220 in 1980, Treasury has ruled that the funds used to purchase the annuity must be paid directly from the defendant (or its carrier) to the life insurance company issuing the annuity. These funds may not be received by the plaintiff, either actually or constructively. This is the Doctrine of Constructive Receipt. Constructive receipt occurs when a Compromise Order is entered which gives the plaintiff estate the unqualified right to receive the money that is intended to pay for the structure. Actual receipt will occur when the defendant pays this sum ($2,000,000.00) to the plaintiff's attorney's escrow account.

All of these problems can be avoided, however, by the trial court issuing a Compromise Order which provides that all of the cash portion of the settlement be paid to the plaintiff's attorney's escrow account

($4,000,000.00) and that the structured settlement funding ($2,000,000.00) be paid directly by the defendant to the life insurance company providing the annuity. The Compromise Order should further provide that no annuity benefit payments may be paid to any distributee until the surrogate has approved the allocation and distribution. This is precisely what the compromise order requires as regards payment to distributees of the funds held in escrow.

Legislative Oversight

It is obvious that when the legislature amended EPTL § 5-4.6, it did not take structured settlements into consideration. Had it done so, the statute would have described the procedure to be followed in such cases. Clearly, the statute would have provided that only the up-front cash portion of any settlement be paid into the escrow account established for the benefit of the decedent's distributees. Moreover, it would have been equally simple for the statute to have provided for the defendant to pay all annuity funding directly to the life insurer providing the annuity.

The failure of the legislature to include specific annuity funding language in EPTL § 5-4.6 does not, however, preclude the trial court from ordering the defendant to fund (pay for) the annuity in the same compromise order in which it approves the settlement and orders the up-front cash to be placed in escrow. The statute itself, although failing to include structured settlement funding language, clearly requires the trial court to "either disapprove...or approve in writing a compromise..." reached by the parties. Hence, if the parties agreed to settle for cash plus future structured settlement payments, EPTL § 5-4.6 (a) requires the trial court to approve or disapprove such compromise. Approving a "structured settlement," by definition, means a settlement that contains all of the tax provisions described above. Indeed, Code Section 5891(c)1 defines a structured settlement as an:

> agreement for the periodic payment of damages excludable from the gross income of the recipient under section 104 (a) (2) . . . and payable by a person who is a party to the suit or agreement . . . or by a person who has assumed the liability for such periodic payments under a qualified assignment in accordance with Section 130.

As I explained above in the Tax Analysis section of this article, a proper structured settlement means direct funding from the defendant to the Qualified Assignee or the issuing life insurer, without any actual or constructive receipt by plaintiff. Had the legislature intended to prohibit the trial court from approving structured settlements, it would have said so.

The legal malpractice trap I referred to in the title should now be obvious. If plaintiff's counsel successfully seeks payment of defendant's entire settlement cost into an escrow account, the estate's distributees will be deprived of the benefits of a structured settlement.

Practical Considerations: Follow Matter of Kaiser

It is suggested that when designing structured settlements for the decedent's distributees, Matter of Kaiser,198 Misc. 582,100 N.Y.S.2d 281 (Sur. Ct., Kings Co. 1950) be closely followed. Kaiser requires an apportionment among distributees based upon the number of years and months of support the surviving spouse and all surviving children would have received from decedent (had she not died due to defendant's neglect) going forward from the date of death. Although Kaiser is not mandatory, its formula is presumptively correct, and barring special circumstances should be followed.

Apportioning the settlement in accordance with Kaiser reduces or eliminates the chance that the surrogate will alter the distribution when approval of the allocation and distribution is sought in Surrogate's Court.

By suggesting that you follow Kaiser, I do not mean to suggest that you ask the trial court to make a determination on issues of distribution. Indeed, you should not. You only need ask the trial court to approve the adequacy of settlement. The surrogate will check your Kaiser calculations.

Prepare for the Unexpected

It is always possible that a distributee theretofore unknown to you, and possibly unknown to the surviving spouse, comes forward to claim his or her share of the settlement in Surrogate's Court. Any cash being held in escrow pending the surrogate's approval of the distribution is easy to deal with. All one need do is recalculate each distributable amount in accordance with the surrogate's decision and incorporate such amounts in the final decree. But what about the structure? The solution is equally simple.

The trial court's compromise order should contain a decretal paragraph that states that the settlement is approved "subject to the surrogate's approval of the allocation and distribution" or similar language. Should a "new" distributee surface requiring adjustment or reapportionment of the structured settlement, the issuing life insurance company will adjust the structure as required by the surrogate.

The following is the text of a letter recently issued by an issuing life insurance company making it clear that it would adjust the structure, including returning all or part of the annuity premium in accordance with the surrogate's final decree:

"To address the concerns of all parties, in a settlement requiring a Court's approval in which a structured settlement has been funded prior to the approval, if that Court rejects the settlement currently under consideration, ABC Life Insurance Company of New York (ABCLNY) will promptly return all funds to the obligor upon notice of the disapproval.

In addition, if the Surrogate Court ultimately rejects the settlement as it stands today, ABCLNY will revise the proposed annuity providing periodic payments to the surviving distributees to the extent necessary to comply with the Surrogate Court's findings. ABCLNY will be agreeable to reallocating the funds to provide for all heirs as determined by the Surrogate Court, or would refund, either in part or in full, if necessary, to comply with the Court's Order.

ABCLNY understands that the defendant intends to fund the settlement, including purchase of the annuities, upon the approval of the trial court of the adequacy of the settlement as a whole, even if the trial court declines to allocate the distributee's shares or approve the two annuities. In the event that the trial court so declines, and the task of allocation is left to the Surrogate's Court, if Surrogate's Court rejects the settlement as currently funded, ABCLNY will reallocate the funds to provide for periodic payments consistent with the Surrogate's decree and promptly return all funds to the obligor that are in excess of what is required to fund annuities pursuant to the Surrogate's decree upon notice of the disapproval of the periodic payment obligation as contained in the order of the trial court."

Similar language may also be inserted in the trial court's compromise order providing further assurance that the periodic payment portion of the settlement will be adjusted if required by the surrogate. Since the structured settlement provisions of the settlement are not final until the surrogate's decree is entered, such potential adjustment of the periodic payments poses neither a constructive receipt problem nor a violation of the "fixed and determinable rule" which requires all future payments to be fixed and determinable as to timing and amount at the time of settlement. Code Section 130(c)(2)(A).

Conclusion

In all wrongful death settlements, plaintiff's counsel should make application to the trial court for approval of the adequacy of the settlement and immediate payment of all cash sums into plaintiff's counsel's escrow account as well as immediate funding of all periodic payments. Trial courts should issue a compromise order in all such cases where it deems the settlement adequate, ordering the defendant to pay the cash sums and the annuity funding within the timeframe mandated by CPLR 5003-a, leaving all issues of allocation and distribution to the Surrogate's Court. Care should be taken to avoid ordering defendant to pay the structured annuity funding into escrow for distributees as this would vitiate the ability to provide structured settlement benefits to decedent's distributees.

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1. § 5-4.6 Application to compromise action

(a) Within sixty days of the application of an administrator appointed under 5-4.1 or a personal representative to the court in which an action for wrongful act, neglect or default causing the death of a decedent is pending, the court shall, after inquiry into the merits of the action and the amount of damages proposed as a compromise either disapprove the application or approve in writing a compromise for such amount as it shall determine to be adequate including approval of attorneys fees and other payable expenses as set forth below, and shall order the defendant to pay all sums payable under the order of compromise, within the time frames set forth in section five thousand three-a of the civil practice law and rules, to the attorney for the administrator or personal representative for placement in an interest bearing escrow account for the benefit of the distributees. The order shall also provide for the following:

(1) Upon collection of the settlement funds and creation of an interest bearing escrow account, the attorney for the administrator or personal representative shall pay from the account all due and payable expenses, excluding attorneys fees, approved by the court, such as medical bills, funeral costs and other liens on the estate.

(2) All attorneys fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court proof of filing of a petition

for allocation and distribution in the surrogate's court on behalf of the decedent's estate.

(3) The attorney for the administrator or personal representative in the action for wrongful act, neglect or default who receives payment under this section shall continue to serve as attorney for the estate until the entry of a final decree in the surrogate's court.

(b) If any of the distributees is an infant, incompetent, person who is incarcerated or person under disability, the court shall determine whether a guardian ad litem is required before any payments are made, in which case the court will seek an immediate appointment of a guardian ad litem by the surrogate's court or, if the surrogate's court defers, the court shall make such appointment. Any guardian appointed for this purpose shall continue to serve as the guardian ad litem for the person requiring same for all other purposes.

(c) The filing fee in the surrogate's court shall be computed based on the amount of the gross estate prior to any payments made under this paragraph.

(d) The written approval by such court of the compromise is conclusive evidence of the adequacy of the compromise in any proceeding in the surrogate's court for the final settlement of the account of such administrator or personal representative.

(e) Nothing in this section shall be deemed to preclude the attorney for the administrator or personal representative from petitioning the surrogate's court for approval of a compromise and for allocation and distribution thereof.

(f) No letters of administration shall be issued which will in any way serve to abrogate the rights or obligations of an administrator or personal representative or an attorney representing an administrator or personal representative under this section.

2. If the Supreme Court determines that a guardian ad litem is required, EPTL § 5-4.6(b) spells out the procedure for appointment