Appointment of a GAL Starts the Clock on a Minor's Med Mal Action

Earlier this month the North Carolina Supreme Court issued its opinion in King v. Albemarle Hospital Authority, holding that a GAL appointment starts the running of the statute of limitations for a minor's medical malpractice claim. During her birth in 2005, the plaintiff, Desiree King, suffered a severe brain injury. In 2008, just under three years later, a medical malpractice action was filed on her behalf by the guardian ad litem (GAL) who had been appointed for her earlier the same day pursuant to Rule of Civil Procedure 17(b). A few months later, the GAL voluntarily dismissed the action without prejudice as permitted by Rule 41(a). Instead of refiling Desiree's action within one year as Rule 41(a) allows, the GAL refiled in 2015, about six years later. On the hospital's motion, the trial court dismissed Desiree's action as time-barred.

So, if Rule 41(a) requires that a previously-dismissed case be refiled within *one* year, why would a GAL wait *six* years and not expect the court to dismiss it with prejudice? The answer lies in G.S. 1-17. Although G.S. 1-15(c) provides a three-year statute of limitations for medical malpractice actions, G.S. 1-17(b) tolls that period for minors until they reach a certain age. At the time Desiree filed her case, that age was 19. [In 2011, the tolling age was lowered from age 19 to age 10 for most minors.] So, in Desiree's case, the notion was that, even though her GAL had filed her case before she reached age 3, and even though it had been dismissed without prejudice under Rule 41(a), she had until age 19 to file it again without running afoul of the statute of limitations.

The Court of Appeals agreed with this argument and reversed the trial court's dismissal in a unanimous, unpublished opinion. The court explained that the "clear and unambiguous" language of G.S. 1-17(b) provides that if the general three-year statute of limitations "expire[s] before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years." Thus the court held that Desiree's claim is not time barred until she turns 19. In so holding, the court rejected an argument that the initial appointment of a GAL in 2008 removed her disability (the "disability" of being a minor), and thus commenced the running of the three-year limitations period. The court noted that the "removal of the disability" language appears only in the *general* tolling provision in G.S. 1-17*(a)*, not in G.S. 1-17*(b)*, which applies specifically to *medical malpractice actions* (such as Desiree's), and that G.S. 1-17*(b)* in fact begins with the phrase "Notwithstanding the provision of subsection (a)…".

In a 4-3 split, the North Carolina Supreme Court reversed the Court of Appeals. The majority opinion rejected the argument that the "removal of the disability" language applies only to G.S. 1-17*(a)* and not also to G.S. 1-17*(b)*, and held that appointment of a GAL for purpose of filing a minor's malpractice action removes the minor's age disability. So, when Desiree's action was filed in 2008 and then dismissed without prejudice, the one-year refiling period in Rule 41(a) applied, and her counsel could not rely on G.S. 1-17(b) to extend her limitations period to her 19th birthday. [The vigorous three-justice dissent argued that the majority's analysis was contrary to

the “clear, unambiguous language used by the legislature” and that the majority had “graft[ed] additional terms onto subsection 1-17(b) that stem from provisions of *general applicability*” when 1-17(b) indeed “direct[s] the reader to disregard those provisions.” Those three justices, therefore, would have allowed the action to be brought before Desiree’s 19th birthday per the language of 1-17(b).]

As noted above, G.S. 1-17 was amended in 2011 to shorten the tolling period for minors’ medical malpractice claims from 19 years to 10 years. But for those children under 10, the Supreme Court’s decision in *King* still applies to eliminate tolling whenever a GAL is appointed. Practitioners representing these young minors should note the effect of having a GAL appointed and be prepared to proceed without relying on the tolling that G.S. 1-17(b) would have provided, especially if they anticipate filing a motion to dismiss under Rule 41(a). [For a discussion of other Rule 41(a) pitfalls, see here and here.]