

Settling the disputed claim or pending action of a minor or adult person with a disability

By Jake Douglass and Greg Lederman

According to a report issued by the Judicial Council of California, there were 141,250 unlimited civil cases that settled during fiscal year 2016-2017, representing 78% of all unlimited cases that were filed during that fiscal year. (2018 Court Statistics Report, State-wide Caseload Trends, 2007-2008 through 2016-2017; available at: <https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf>.) What's more, that same report found that there were 341,723 limited civil cases that were settled, representing 92% of all cases filed. (*Id.*) Statistics such as these highlight the importance of the personal injury practitioner having at least a working understanding of the mechanics involved in properly settling a disputed claim or pending action when the injured party is a minor or a disabled adult. Settlements for minors or disabled adults are complex *because court approval is required* to properly effectuate a settlement. (Prob. Code §§ 3600 et seq. and C.C.P. § 372.) Although there are many complicated steps that you must take in properly procuring court approval of a settlement for a minor or a disabled adult, the authors of this article are only going to focus on a limited number of the issues involved. Specifically, we will be addressing: (1) For whom court approval must be sought; (2)

the basic mechanics of court approval and the compromise hearing; (3) the proper court in which to file; (4) available alternatives for placement and management of settlement monies belonging to a minor or disabled adult; and (5) approval of your attorney's fees. There are many other issues associated with procuring court approval of a settlement for a minor or disabled adult (i.e. lien resolution, description of the nature of the accident and injury, and description of the treatment received for the injuries sustained). However, those issues are beyond the scope of this article.

The mechanics of court approval and the compromise hearing

First, in a very large majority of cases, you must utilize mandatory Judicial Council Form MC-350, which is known as the Petition to Approve Compromise of Disputed Claim or Pending Action of a minor or Adult with a Disability ("Form MC 350" or "Petition for Compromise").¹ (CRC 7.950.) Many paragraphs in Form MC-350 allow the use of an attachment for additional information. We recommend using an attachment whenever possible to provide a clear and easy-to-understand breakdown of the settlement proceeds for the court.

After the full breakdown of the disbursement of the settlement proceeds and net amount to the minor or disabled adult is disclosed, Form MC-350 asks the petitioner to disclose how the minor or disabled adult's settlement will be managed. The options for funding the minor or disabled adult's portion of the settlement proceeds is discussed in detail in its own section below.

Once the Form MC-350 is drafted, including attaching all necessary supporting documentation, it is imperative that you review the Petition for Compromise with the petitioner before the hearing. As stated in the petition itself, the petitioner (typically the guardian ad litem) must acknowledge that this settlement is final and binding and sign the Form MC-350 under penalty of perjury. It is your responsibility to ensure that the petitioner fully understands the breakdown of the settlement, fully agrees to it, and understands that the settlement cannot change once approved by the court.

Both the petitioner and the minor or disabled adult must attend the hearing on the Petition for Compromise unless the court, for good cause, dispenses with a personal appearance. (CRC 7.952.)

At the hearing, the court will inquire on a handful of issues, typically by questioning the petitioner under oath. The court, or you, will question the petitioner (and sometimes the minor or disabled adult, if possible) about the minor or disabled adult's present physical condition and recovery. Most importantly, the court will inquire and confirm that the petitioner has read the Petition for Compromise and understands its contents, agrees to the settlement's terms and distribution of proceeds, understands the finality of the settlement, and has no questions or doubts regarding the settlement.



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If, after reviewing the Petition for Compromise and conducting the hearing, the court is satisfied with the distribution of the proceeds and that the Petitioner understands and consents to such distribution, the court will sign the order approving the settlement. The Order Approving Compromise is a mandatory Judicial Council Form (“Form MC-351”). Sometimes, the court will continue the hearing, seeking additional supporting documents (typically related to the requested attorneys’ fees), or a modified distribution of the settlement proceeds.

For whom court approval must be sought

A. A minor

In essence, court approval must be sought for anyone who lacks legal capacity. (Prob. Code §§ 3600 et seq. and C.C.P. § 372.) Although there is some authority for the proposition that a minor has the legal capacity to enter into a personal injury settlement, the settlement is voidable at the

option of the minor. (*Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333.) A compelling argument could be made that a minor has *no capacity* to enter into a personal injury settlement pursuant to Family Code Section 6701 (c). We believe it is absolutely critical, if not legally necessary, to have all personal injury settlements where the plaintiff is a minor approved by the court. What’s more, it is highly unlikely, and practically inconceivable, that a defendant insurer will ever agree to settle a matter involving a minor without court approval.

B. A “disabled adult”

The other category of persons who must have their personal injury settlements approved by the court is disabled adults. (Prob. Code §§ 3600 et seq. and C.C.P. § 372.) The term disabled adult is defined in Probate Code Section 3603 and provides that an adult is disabled if the plaintiff is a person for whom a conservator could be appointed. (Prob. Code § 3603.) A conservator of the estate can be appointed if they

are substantially unable to manage their financial affairs or resist fraud or undue influence. (Prob. Code § 1801(b).)

Assuming that the disabled adult does not meet this standard (i.e., that they are a person for whom a conservator could be appointed), it is possible that they can still be disabled as that term is set forth in Probate Code Section 3603 (b)(1-4). However, notwithstanding that the adult suffers from a disability as defined in Probate Code section 3603 (b)(1-4), if the adult has the mental capacity to consent to the terms of the settlement, court approval is not required. (Prob. Code § 3613.) For example, although a person may be a quadriplegic, if they have the mental capacity to consent to the settlement, court approval is not required.

Where to file and who has standing to file

Often, you may be uncertain as to the proper court division in which to seek approval of the disputed claim or pending action. For example, should approval be sought in the civil court or probate court? Whether you’re dealing with a disputed claim or pending action is always the starting point in determining which court is the proper court in which to file and the appropriate person with standing. Also, you must consult the court’s local rules on the hearing on compromise to ensure there are no additional procedures or filings required. (For example, LASC LR 4.115; SDSC LR 4.2.6.)

Then, once you ascertain the appropriate court to seek approval, you must address who has *standing* to seek approval of the disputed claim or pending action. For example, does the parent of a minor have standing? Does a spouse have standing? Does a conservator (or, in the instance of a minor, a guardian) need to be appointed? Does a guardian ad litem need to be appointed?

A. Disputed claim

A “disputed claim” is a dispute between two parties *prior* to the filing of a lawsuit. For example, if you have a client that was struck by an automobile and the defendant’s insurer pays out policy limits in response to your demand letter, your claim is a “disputed claim.” In this

instance, a lawsuit did not need to be filed and the “disputed claim” can be resolved pre-litigation.

A minor with a “disputed claim”

Probate Code Section 3500 enumerates those persons with standing to file a Form MC-350 to compromise the minor’s disputed claim. (Prob. Code § 3500.) That section provides that (1) the guardian of the minor’s estate; (2) either parent if the parents of the minor are not living apart and (3) the parent having the care, custody, or control of the minor if the parents of the minor are living separate and apart all have standing to file on behalf of the minor. (*Id.*) Note that a guardian ad litem does not have standing to file a petition to compromise the minor’s disputed claim pursuant to C.C.P. Section 372 because a guardian ad litem *can only be appointed when there has been a lawsuit filed and an action pending.* (C.C.P. § 372.)

The petition to compromise the minor’s disputed claim can *only* be filed in the probate court. Because there has been no lawsuit filed and, thus, *no action is pending*, the petition cannot possibly be filed in the civil court.

A disabled adult with a “disputed claim”

There are rare occasions where you can have a disabled adult with a disputed claim. In these limited instances, it will be necessary to have a conservator of the estate appointed so that someone has standing to file the petition for approval of the disabled adult’s disputed claim. (Prob. Code § 2504.) Just like a minor with a disputed claim, there is no way to have a guardian ad litem appointed pursuant to C.C.P. Section 372. Accordingly, *approval must be sought in the probate court where the conservatorship is pending in light of the fact that no lawsuit was filed and there is no civil action pending.*

It is worth noting that Form MC-350 *is not* available for use when you are seeking to compromise a disputed claim of a disabled adult. As such, a petition on pleading paper would simply be filed in the probate court with citations to the relevant statutes.

B. Pending action

A “Pending Action” is a dispute between two parties where one party has filed a lawsuit against the other party. For

example, if you have a client that was struck by an automobile and you are forced to file a lawsuit against the defendant, there is an action *actually pending*. The large majority of claims of minors and disabled adults will be pending actions because a lawsuit will need to be filed to reach a settlement.

A minor with a “Pending Action”

C.C.P. Section 372 (a)(1) provides that a guardian of the estate or a guardian ad litem has standing to file a petition to compromise a minor’s pending action (Form MC-350). Moreover, this petition shall be heard in the civil court. (Prob. Code §§ 3601(a), 3611, 2504 and 2505.) Please note that the procedure utilized in Probate Code Section 3500 would not apply because that section only applies to disputed claims and *not* pending actions. The practical effect is that a parent *does not* have standing to compromise a pending action of their minor child and the parent would instead have to be appointed as the guardian ad litem or guardian of the estate.

A disabled adult with a “pending action”

Just like pending actions of a minor, the proper venue to hear and approve the petition to approve compromise of the disabled adult’s pending action (MC-350) is the civil court. (*Id.*) Those with standing to pursue such approval are: a guardian ad litem or conservator of the estate. (C.C.P. § 372.)

Available options for handling and management of a minor’s or “disabled adult’s” settlement monies

Once you ascertain the proper court in which to file, and the appropriate person with standing to file, you must be able to counsel your client on the permissible receptacles of the settlement monies. By virtue of the fact that you are dealing with a minor or a disabled adult, as a matter of law, they do not have the legal capacity to manage their own finances. As such, the settlement monies, in almost every situation, must go to a third party who will manage and administer the settlement monies in the best interests of the minor or

disabled adult. For frame of reference, the issue as to where the settlement monies of a minor or disabled adult will be directed is addressed at Section 19 of the Form MC-350. The structural options available to hold and manage a minor or disabled adult's settlement monies are set forth in California Probate Code Sections 3602 and 3611. Probate Code Section 3602 provides available options if there is already a conservator or guardian appointed. Probate Code Section 3611 sets forth the options available if there is no guardian or conservator in place.

A. Options available for minors

The structural options available to hold a minor's settlement monies are as follows:

1. *Guardianship of the estate*

A guardian of the estate is a third party appointed by the probate court to hold and manage a minor's money. (Prob. Code § 1510.) The guardian is required to post a bond and file court accountings with the court (this is known as the guardianship being under "court supervision"). (Prob. Code §§ 2320 and 2620.) The guardian is limited in what the money can be invested in and must seek prior court approval before performing certain acts such as purchasing real property. (Prob. Code §§ 2571, 2572 and 2574.) Upon the minor turning 18, the guardianship of the estate terminates. (Prob. Code § 1600.) Specifically, the guardian files a final account and

report with the court. Upon approval, the monies are released to the former minor. (Prob. Code § 2627.)

2. *Blocked account*

Settlement monies may be placed into a blocked account for the benefit of the minor. (Prob. Code §§ 3602(c)(1) and 3611(b).) Upon attaining the age of majority, the settlement monies (with prior court approval) can be released to the minor. (CRC § 7.954.) In our opinion, this option only makes financial sense if the minor is not going to have a financial need for any of the settlement monies prior to the age of 18. If the minor is going to require the use of settlement monies prior to the age of 18, a blocked account is an unworkable and (potentially) very expensive option because prior court approval is required for even the most modest distribution.

3. *California Uniform Transfers to Minors Act*

In extremely rare occasions, a court might be willing to have the settlement monies transferred to an account under the California Uniform Transfer to Minors Act (CUTMA). (Prob. Code § 3602(c)(2) and 3611(f).) In almost every case, the court is reluctant to make such an order because there is no court supervision over the minor's money. The custodian of the account is not required to either post bond or file court accountings for ongoing review. This procedural structure is fraught with risk due to lack of oversight.

4. *Statutory minor's trust*

Probate Code Sections 3602(c)(3) and 3611(g) enable the court to order that the settlement monies of a minor be placed into a revocable trust. This is known as a Statutory Minor's Trust, a 3602(c)(3) Trust, or a 3611(g) Trust. Statutory minor's trusts are subject to court supervision in that the trustee is required to post a bond and file court accountings with the court. (CRC § 7.903.) Once the minor attains the age of majority, the minor has the legal right to revoke the trust and request that the trustee deliver the funds outright. (Prob. Code §§ 3602(c)(3) and 3611(g).)

5. *Special needs trust*

Probate Code Sections 3602(d) and 3611(c) authorize the court to order that the settlement monies of a minor be paid to a trustee of a special needs trust. A special needs trust is a trust that is utilized when the minor is receiving, or anticipated to rely upon, asset-sensitive public benefits such as Supplemental Security Income (SSI) or Medi-Cal. Special needs trusts are also subject to continuing court supervision in that the trustee must post a bond and court accountings must be filed with the court. (CRC § 7.903.)

6. *Settlement monies that do not exceed \$5,000*

In the event that the settlement monies paid out on behalf of a minor do not exceed \$5,000, and the minor does not have a guardian of the estate, the court is authorized to order that the monies be paid directly to the parent who holds the settlement monies for the benefit of the minor. (Prob. Code § 3611(e).) The parent would then hold these monies without being subject to court supervision. (Prob. Code § 3401.)

7. *Settlement monies that do not exceed \$20,000*

In the event that the settlement monies exceed \$5,000, but do not exceed \$20,000, and there is no guardianship of the estate, the court may order that the settlement monies be held on any conditions the court deems appropriate. (Prob. Code § 3611(d).) We have seen the courts approve a variety of conditions, such as the purchase of vehicle or medical equipment to improve the minor's or disabled adult's quality of life.

B. Options available for disabled adults

1. Conservatorship of the estate

A conservatorship of the estate is like a guardianship of the estate in that a third party is appointed by the probate court to manage a disabled adult's money. Further, court supervision is required in that the court-appointed conservator is required to post bond and file court accountings. (Prob. Code §§ 2320 and 2620.) Unlike guardianships, which terminate upon the minor attaining the age of majority, conservatorships are meant to act in perpetuity. As with guardianships, prior court approval is required to make certain types of investments or make certain purchases of property. (Prob. Code §§ 2571, 2572 and 2574.) If you represent a disabled adult on asset-sensitive public benefits such as SSI or Medi-Cal, a conservatorship is most likely not the best option if the asset-sensitive benefits will need to be preserved. To do so would instead require the use of a Special Needs Trust.

2. Special needs trust

As set forth above, the primary purpose of a special needs trust is to preserve asset-sensitive public benefits. When utilizing a special needs trust you must consider what is known as the "sole benefit rule." The sole benefit rule stands for the proposition that the monies in the trust can *only* be used for the primary benefit of the beneficiary of the special needs trust. (POMS SI 01120.2d.F.3.a.) This often presents a problem when the beneficiary of the trust has a legal obligation to provide financial support to others. For example, a parent has a legal obligation to support minor children. (Family Code § 4053.) If

the assets of the trust may only be used for their primary benefit, how does that beneficiary effectuate their legal obligation of financial support to those entitled to it? In light of this, it is absolutely critical to weigh the options of using a special needs trust to preserve asset-sensitive benefits against a less restrictive option, such as a conservatorship of the estate, that would result in the loss of these asset-sensitive benefits.

3. Blocked account

Although a blocked account is an available structural mechanism to hold a disabled adult's settlement monies, in our opinion, it is almost never a recommended course of action. First, as set forth above, all withdrawals require prior court approval; and second, the rate of return on monies in a blocked account is nominal.

4. Settlement monies that do not exceed \$20,000

In the event that the settlement monies do not exceed \$20,000, and there is no conservatorship of the estate, the court may order that the settlement monies be held on any conditions the court deems appropriate. (Prob. Code § 3611(d).)

Getting the maximum amount of your attorney fees approved

Many attorneys (and courts) seem to believe that attorneys' fees in a minor's lawsuit are limited to a twenty-five percent contingency fee as a matter of law. Based on this presumption, some attorneys will turn down a minor or disabled adult's case, especially if it is particularly complex or difficult. However, it is not true

that attorneys' fees in a minor or disabled adult's lawsuit are automatically limited.

To ensure that a minor or disabled adult receives the same quality of legal representation as a non-disabled adult, the courts have the authority to approve any amount of attorneys' fees using a "reasonable fee standard." In doing so, the court must give consideration to the terms of the retainer agreement signed by the attorney and the minor's representative.

In determining whether to approve the full amount of the agreed-upon fees in the retainer agreement, or some lesser amount, the court will use the factors established in California Rule of Court 7.955. These factors include:

1. The fact that a minor is involved and the circumstances of that minor;
2. The amount of the fee in proportion to the value of the services performed;
3. The novelty and difficulty of the questions involved and the skill required to perform the legal services properly;
4. The amount involved and the results obtained;
5. The time limitations or constraints imposed by the representative of the minor or by the circumstances.
6. The nature and length of the professional relationship between the attorney and the representative of the minor;
7. The experience, reputation, and ability of the attorney or attorneys performing the legal services;
8. The time and labor required;
9. The informed consent of the representative of the minor to the fee;
10. The relative sophistication of the attorney and the representative of the minor;
11. The likelihood, if apparent to the representative of the minor when the representation agreement was made, that the attorney's acceptance of the particular employment would preclude other employment;
12. Whether the fee is fixed, hourly, or contingent;
13. If the fee is contingent, (a) the risk of loss borne by the attorney, (b) the amount of costs advanced by the attorney, and (c) the delay in payment of fees and reimbursement of costs paid by the attorney; and
14. Statutory requirements for representation agreements applicable to particular cases or claims.

Form MC-350 requires a declaration from the attorney explaining the basis for the requested attorney's fees, including a discussion of these factors, as an attachment to the petition. This is your opportunity to convince the court that the full amount of the attorneys' fees agreed to in the retainer agreement are warranted.

Even though it is required, take every advantage of this opportunity. Whenever possible, have each and every attorney that worked on the case (from sign-up to settlement) provide a declaration addressing their qualifications and work performed on the case. The declarations should be detailed

and address every applicable factor. Specifically, the declarations should address the financial risks taken when agreeing to represent the minor, the attorneys' experience and credentials related to handling cases involving similar issues or injuries, the time and work put into the case, and the results obtained. Be as inclusive as possible.

Conclusion

Although there are many issues involved with resolving the disputed claim or pending action of a minor or disabled adult, it is imperative that you have an

understanding of what court you need to be in, and who has standing to file the petition. Further, having at least a fundamental understanding of the structural mechanisms available to hold settlement monies of a disabled adult or minor is also essential. Finally, it is important that you are properly and justly compensated for the work that you have performed and the result obtained. ■

¹ To clarify, Form MC-350 is used for several situations depending on the status of the lawsuit, if any, as well as for both minors and some disabled adults.