

Bench Book
on
Settlement of Claims Involving Minors and
Incompetents
U. S. District Court, Southern District of
California
by
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I. PURPOSE:

This Bench Book is designed to provide an overview of the issues and procedures in dealing with approval of settlements in cases on behalf of minors or incompetents. The Bench Book was originally published in 1999 for use internally by the Judges of the Southern District of California as a guide. 1999 was also the year Local Rule 17.1 was amended to regularize procedure in settlement approval practice. Now twenty years later, the Bench Book is offered to the Bench and Bar alike in the hopes of facilitating the settlement approval process. Unless supported by citation to a statute, rule, or case, all opinions, statements and suggestions are from the author and based on 45 years of experience in these matters. Users of this Bench Book are urged to always check cited authorities to ensure that they are current.

Settlement approval involves two distinct issues: (1) the “fairness” of the settlement, often considered in terms of the best interests of the minor or incompetent and, (2) the structure or format of the plan for the payment and distribution of the assets for the benefit of the minor or incompetent. It is important to note, that the requirement to consider the structure or format of a payment plan or payout is not limited to trusts or other sophisticated arrangements. This requirement applies to cash settlement as well, both large and small.

The focus here is specifically the format or structure for the payment and distribution of settlement proceeds. No attempt is made to deal with the issue of “fairness” of the settlement.

The policy of the court is to reasonably protect the assets belonging to minors or incompetents. The policy is promulgated and implemented in Local Civil Rule 17.1.

Principles related to Special Needs trusts are also applicable to severely disabled, but competent, adults who wish to protect their eligibility for public benefits. The need for court review can arise by request from the disabled individual who wants to utilize a Special Needs Trust in a settlement of a federal case. The same review concepts set forth herein would apply in order for the Special Needs trust to have its contemplated effect. While California Probate Code § 3600, et. seq. does not address this circumstance specifically; federal law does not limit Special Needs Trusts to minors and incompetents (See 42 U.S.C. §§ 1381-1383d). Absent a request by a litigant, however, there is no duty for the court to require a petition for approval of a settlement of a competent disabled adult.

II. ROLE OF THE DISTRICT COURT:

A. **State Law Principles.** State law generally provides that minors and incompetents cannot sue or defend an action brought against them in their own names. Instead, litigation ordinarily must be conducted through a court appointed guardian or conservator of the estate of the minor or incompetent or a guardian ad litem. Cal. Code Civ. P. § 372 (“CCP”).

B. **Federal Jurisdiction.** Federal courts are courts of limited jurisdiction. Unlike state courts, they have no inherent or general subject matter jurisdiction. They can only adjudicate those cases which the Constitution and Congress has authorized. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Jurisdiction is also subject to special jurisdictional limitations. These include the case or a controversy requirement, standing, mootness and ripeness.

Unlike the state court, which has general and inherent jurisdiction to deal with all issues dealing with minors and incompetents, the federal court can only act where jurisdiction is appropriate. Subject matter jurisdiction is usually well established by the time of a settlement under traditional concepts. In the case of American General Life Insurance v. Saad, 03cv1621 K (POR), an insurance company sought direction on the payment of undisputed proceeds to a minor. In an attempt to avoid the California Probate Code scheme for distributions to a minor, the insurance company sought the federal court’s approval to distribute a significant sum of money directly the custodial parent. In ruling that the situation lacked actual case or controversy within the meaning of Article III, Judge Keep dismissed the case for lack of jurisdiction. The parties should have taken the case to the probate court, where general and inherent jurisdiction existed to resolve the dispute.

C. **Federal Rule 17.** The federal courts also require an appointed representative. Fed. R. Civ. P. 17(c) (“FRCP”). Under FRCP 17(c), a general guardian or conservator (appointed in a state court proceeding) or a guardian ad litem appointed by the district court will sue or defend on behalf of the minor or incompetent.

D. [Local Civil Rule 17.1](#). Under Civil Local Rule 17.1 (“LR”), no action brought on behalf of a minor or incompetent can be settled, compromised, voluntarily discontinued, dismissed or terminated without court order or judgment. The question of the best interests of the minor or incompetent is therefore placed in the responsibility of the judges of the court.

E. [Issues Presented](#). Regarding settlement, the court is called upon to consider not only the fairness of the settlement, but the structure and manner of how the settlement is to be paid, held and maintained for the minor or incompetent. The 1999 amendments to LR 17.1 have placed the responsibility to review the structural components of the settlement in the jurisdiction of magistrate judges. Under LR 17.1, parties must submit the settlement to a magistrate judge for preliminary review of the structural components. The structural considerations include how and where the settlement funds will be held for the minor or incompetent and how and when it will be dispersed. This would include annuities to be purchased and the schedule for disbursements therefrom. The parties may also consent to the jurisdiction of the magistrate judge to approve the entire settlement under 28 U.S.C. § 636(c). Where the party’s consent, the magistrate judge also considers the issue of fairness to the minor or incompetent under the facts and circumstances in the case.

F. [Document Approval](#). The preliminary review will include the approval of the documents creating the necessary and proper trusts and special needs trusts. Guardianship petitions would be reviewed and acted upon by the appropriate state court prior to disbursement of the settlement funds. [LR 17.1 (b)(2)]. The guardianship itself is under the supervision of the state court.

III. [COORDINATION WITH STATE COURT AND STATE STATUTES:](#)

A. [In General](#). LR 17.1 incorporates California Probate Code § 3600 et. seq. regarding the various alternatives available to hold the funds of a settlement of a minor or incompetent. (See Appendix A.) These alternatives include:

1. Blocked Accounts or Deferred Annuities;
2. Payment to a Guardianship or Conservatorship;
3. Payment to a Regular Trust;
4. Payment to a Special Needs Trust;

5. Payments Under Transfers to Minors Acts; or,
6. Payment to a custodial parent.

B. **Out of State Residents.** LR 17.1.b.1 provides that where the recipient of the money is not a California resident, disbursement shall occur pursuant to court restrictions which are similar to California Probate Code § 3600, et. seq. For this reason, this bench book will focus on the California statutes in these regards.

C. **State Court Review.** The magistrate judge may require approval of the form of any necessary trusts by an appropriate judge of the state court in the jurisdiction where the minor or incompetent resides. LR 17.1. While general guardianships (as contrasted to a guardian ad litem status) can only be created by a state court after review by an appropriate state court judge, there is no requirement of a state court review before creation of a trust. In some cases, state court review of the trust document may be helpful.

IV. SETTLEMENT ALTERNATIVES UNDER THE CALIFORNIA PROBATE CODE (§ 3600. et. seq.)

A. Blocked Account or Deferred Annuity

1. **In General.** Upon petition by the guardian/guardian ad litem on behalf of the minor/incompetent, the funds may be deposited in an **insured account or a deferred annuity** subject to withdrawal only upon Court Order [(Probate Code § 3602(c)(1)].

a. **Blocked Account.** This method works best where a relatively small lump sum is involved or where immediate need of the money is anticipated. This may be the case where a non-disabled minor is close to age 18 and has some immediate use of the money for education or other valuable purposes. The money is available to the minor at age 18. Withdrawals are permitted before the minor is 18 years old by court order for good cause. Good cause is typically based upon some extraordinary circumstances involving the welfare of the child. This can be medical or educational needs in special circumstances. The parents are under a general

obligation for the support of the child, and requests for support type expenses or non-critical expenses should routinely be denied.

b. Insured Accounts. A federally insured bank account should be used. This blocked account arrangement is **not** permitted and does not work with brokerage accounts, mutual funds or other investments. These securities type accounts are not federally insured and are subject to investment “risk.” As such, they are not appropriate for use under these circumstances.

2. Deferred Annuities.

a. Structured Settlements. Deferred annuities include the well-known concept of “structured settlements.” These can provide a stream of payments to or on behalf of a plaintiff over time. These are typically handled in a manner that provides a tax-exempt receipt of the settlement funds and future earnings on the annuity. The tax-exempt status is dependent upon the settlement occurring in an appropriate case¹ and where the settlement is within strict compliance of 26 U.S.C. § 130.

b. Application. With minors, the structured settlement can provide future payments for education or other needs after the age of 18. It allows the funds to be protected in a custodial type setting deferring distribution until the age of majority. With minors, as well as incompetents, the stream of payments can be utilized for necessary expenses during the period of “incapacity” addressing various medical needs or other support issues. The most common use of interim distributions is funding special needs trusts so that public benefit status can be retained. See Section D, below. Payment streams can be created in any form that best serve the interests of the plaintiff. It is important to make sure that the interim

¹ Damages for personal injury or sickness are excludable from gross income under 26 U.S.C. § 104(a)(2). This statute was held unconstitutional in so far as it permits taxation of an award of damages for mental distress and loss of reputation. *Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006).

payments of the annuity will be adequate for the precise needs of the beneficiary. In many cases, smaller amounts of the settlement should be annuitized allowing more ready cash for ongoing needs.

c. Insurance Company Ratings. Deferred annuities through insurance policies should be placed with insurance companies rated A+ by the A.M. Best Co. Many times, these pay out in installments starting at age 18, or thereafter. The payment schedule is typically set to meet the future needs and desires of the minor by the guardian ad litem.

d. Payout to Minors or Incompetents. If the annuity is going to payout during the minority or incapacity, then some other alternative like a guardianship or trust should be considered and used in conjunction with the annuity. The guardian ad litem is not authorized by law to receive or handle these funds, so an appropriate representative for that purpose must be established.

B. Payment to a Guardianship or Conservatorship

1. In General. The funds may be delivered to the appointed **guardian of the estate of the minor or conservator of the estate of an adult disabled person**. The guardianship or conservatorship itself is created in a separate proceeding in state court for the purpose of administering the settlement funds. This places continued supervision in the state court for bond, accounting, budgets and investment issues [Probate Code § 3602(c)(2)].

2. Limited Authority of the Guardian Ad Litem. Note, the guardian ad litem is **not** authorized by law to handle the proceeds of a settlement or judgment once the litigation is concluded. CCP § 372, FRCP 17. The guardian ad litem is appointed as a representative to act for the minor in a case. Their limited authority is to engage counsel, file suit and to prosecute, control and direct the litigation on behalf of the minor. Dacanay v. Mendoza, 573 F.2d 1075 (9th Cir. 1978).

3. Filing of Letters of Guardianship or Conservatorship. LR 17.1(b)(2) requires that a certified copy of the guardianship or conservatorship “letters” be filed in federal court before the settlement funds are distributed. This will help insure that an adequate bond has been filed and that the requisite state court requirements have been met. Future supervision in state court is also assured.

4. Use of an Existing Guardianship. Another approach for holding and administering the funds is for an **already existing guardian/conservator** to petition the state court to establish a regular trust or a special needs trust. Probate Code § 3602(d). In these circumstances the state court would have the jurisdiction to review and approve the petition to establish the trust. The issue of fairness of the settlement would still be before the federal court. A copy of the trust must be filed with the federal court before settlement proceeds are distributed. LR 17.1(b)(3)(c).

C. Payment to a Regular Trust.²

1. General Requirements. Where **no** guardian or conservator has been appointed, the court may authorize the transfer of funds to the trustee of a trust created for that purpose. [Probate Code § 3611(g)]. This is a suitable vehicle where the beneficiary is not disabled and on public benefits. If disabled and on public benefits, a special needs trust may be more appropriate. See, Section D, below. LR 7.1(b)(3) sets out the basic requirements of the petition for approval and the terms of the trust, as follows:

- a. The Ex Parte Petition For Approval of Terms of Trust should generally contain the following information:
 - i. Identity of the petitioner;
 - ii. The terms and total amount of the settlement and the amount to go into the trust;

² For these purposes, a regular trust would be something other than a special needs trust. The Special Needs Trust is discussed in further detail in Section D, below.

- iii. The circumstances giving rise to the settlement or judgment, and a general description of the plaintiff's injuries and needs;
- iv. Suggested amount of bond;
- v. Any other information that may be required.

b. A Proposed Order must be submitted by the attorney for the petitioner and must comply with the requirements of this rule and California Probate Code § 3600, *et seq.*, and include the following:

- i. An order for the appropriate bond;
- ii. An order that the first accounting, if required, be filed within one year of the establishment of the trust with the San Diego Superior Court. If the recipient of the money or property is not a California resident, the accounting must be made to the appropriate court in the jurisdiction where the minor or incompetent resides;
- iii. If the order is for the approval of the terms of a Special Needs Trust, it should contain:
 - (A) A statement that the petitioner will provide proof that all liens have been satisfied prior to the establishment of the trust by the court; and,
 - (B) A statement that the “court makes no specific finding or order with respect to whether the Special needs trust for the Benefit of

satisfies or complies with applicable federal laws or regulations.”

- iv. The order must provide that the terms of the trust are approved, and those terms will be fully set forth within said Order, not as an attachment. The parties are further directed to proceed with settlement approval hearings or the entry of judgment as appropriate. See Appendix E for a sample order.

2. Comparison to State Law. LR 17.1 closely follows San Diego Superior Court Local Rule 2.4.6 and the San Diego Superior Court Guidelines. (See Appendix B.)

3. Revocable Nature of the Trust. A trust under Probate Code § 3602(c)(3) is revocable by the minor upon attaining the age of 18 years. If the minor is incompetent at age 18, a conservatorship would need to be established through a state court proceeding, and the state court could continue the trust under the power of “substituted judgment” under Probate Code § 2580. A trust of this type for an incompetent is revocable if competency occurs. As noted hereinafter, Special Needs Trusts are irrevocable.

4. Testamentary Provisions. Sometimes trusts will contain provisions disposing of the remaining assets in the trust upon the minors/incompetent’s death. A disposition other than to the “heirs at law” is contrary to law. A minor/incompetent lacks testamentary capacity and the estate must pass by intestate succession. The only exception to this rule is where the Court exercises “substituted judgment” as discussed below.

5. Substituted Judgment. The California Superior Court has authority under Probate Code § 2580 to allow testamentary provisions in an existing guardianship or trust. This concept is called “substituted judgment.” This issue should be left for the state court to handle under their prescribed procedures. For purposes of federal court approval, no testamentary provisions other than passage by intestate succession should be allowed.

6. Surety Bonds. The Superior Court typically requires a surety bond in an amount at least equal to the amount of the settlement funds plus one year of income. The amount of the surety bond is within the discretion of the court and can be waived. Factors to be considered include the financial strength and sophistication of the surety whether an individual or a corporate entity. The cost is typically \$50 per \$10,000 in coverage (i.e. \$500 for \$100,000 coverage) and would be an appropriate expense of the trust or an appropriate reimbursement to the trustee.

7. Trustee Selection:

a. Corporate Trustees. Large settlements typically require corporate trustees given the risk, investment needs, record keeping, tax returns and court accounting requirements. A corporate trustee is typically a bank or trust company. It is difficult to locate a corporate trustee in settlements under \$500,000.00. Surety bonds are not necessary when a corporate trustee is involved.

b. Professional Fiduciaries. Professional fiduciaries are available to serve as trustees as well. They typically handle settlements from \$200,000.00 and above. Surety bonds are required where a professional fiduciary is involved.

c. Individuals. Smaller settlements and high special needs (i.e. a lot of activity) may be better handled by a family member as trustee. This also saves on the expense of trustee's fees. Even though bonded, there is increased risk in these situations. Care should be used to find a family member with some degree of professional sophistication and financial stability.

8. Trustee and Trust Attorney Fees. Fees for the services of trustees and trust attorneys associated with the administration and accounting for the trust will seldom be the concern of the federal court. Since it is the court's custom and practice to require accountings and administrative issues to be heard in the appropriate state court, the state court will deal with those issues. There are, however, several old cases in the courthouse

where accounting to the federal court was required by a district judge. In those cases, you can encounter requests for trustee's fees and attorney's fees for accounting and trust administration issues. The trustee fees for corporate or professional fiduciaries are typically one percent of the value of the trust assets per annum. Nonprofessional trustees are typically compensated for the reasonable hours spent at minimum wage or other reasonable appropriate rates concerning their particular skill or expertise as well as the services provided. Extraordinary fees can be awarded for appropriate reasons and upon a declaration detailing the efforts provided and the reasonable value of those fees.

9. Investment Duties of the Trustee.

a. California Law. The Probate Code sets forth the statutory duties for trustees (Probate Code §§ 16045-16054) as well as the trustee powers (Probate Code §§ 16200-16490). The Probate Code provisions §§ 16045-16054 are known collectively as the California Uniform Prudent Investor Act. These provisions are extensive and rarely come into issue before the federal court. The Probate Code does allow the settler of the trust to expand or restrict the prudent investor rule by express provisions in the trust document. Since the court deals with incompetents and minors the majority of the time, it is hard to justify allowing the exercise of any discretion in this regard, and the prudent investor rule should be applied as promulgated by statute.

b. Federal Law. Portions of the IRS Code and regulations relate to trustees. These include requirements to file annual income tax returns; and, personal liability for payment of any unpaid estate tax on assets directed elsewhere, e.g., distributed to trust beneficiaries.

10. Accountings. LR 17.1(b)(4)(B)(iii) requires that the order approving the trust include a provision that the first accounting be filed within one year of the establishment of the trust with the San Diego Superior Court for California residents, or other appropriate court for non-residents. This requirement ensures that the trust will be brought within the jurisdiction of the

appropriate state court for future management and oversight. Filing for the first accounting will be a new petition to the state court and an initial filing fee will apply, where applicable.

D. Special Needs Trust.

1. In General. The court may authorize the transfer of funds to a **Special Needs Trust (SNT)** created for that purpose. Basic requirements for the petition and the order for approval are found in LR 17.1(b)(4). Special requirements for these trusts are set forth in paragraphs 17.1(b)(4)(A)(V) and 17.1(b)(4)(B)(iii). These relate to the allegations in support of the determination required under California Probate Code § 3604(b) as well as the proof of satisfaction of liens prior to establishment of the trust as well as specific provisions which must be included in the order of approval.

a. Special Notice Required. Specialized language and fifteen (15) days' notice to the appropriate government agencies are essential to ensure that public benefits (Medi-Cal, Medicaid or SSI), otherwise payable, are not lost. [See Probate Code §§ 3602(e), 3604 and 3611(c)].

b. Required Court Findings. The Court must make specific findings pursuant to Probate Code § 3604(b). These are:

i. That the minor or incompetent person has a disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap;

ii. That the minor or incompetent person is likely to have special needs that will not be met without the trust;

iii. That money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or incompetent person.

c. Pleading Requirements. The Petition for Approval and any proposed order must comply specifically with L.R. 17.1. See, Section C.1., *supra*. in this regard.

2. Applicability and Purpose. The SNT allows a disabled individual to retain eligibility for **needs based** government assistance programs. Properly created, the SNT assets are excludable from the \$2,000 limit on resources imposed for SSI eligibility. 42 U.S.C. § 1396p (d)(4)(A) or for individual trusts or ©) for pooled trusts.

a. Statutory Limits. The statute describes the trust as one:

containing the assets of an individual **under age 65** who is disabled and which is established for the benefit of such individual by a parent, grandparent, legal guardian, or the court³ if the state will receive all amounts remaining in the trust on the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a state plan...

b. Requisite Disability. The definition of “disabled” is the same as used for eligibility for SSI. See 42 U.S.C. § 1382c(a)3(A).

³While others may create the trust under the statute like the parent, grandparent or legal guardian of the individual, in a settlement context it is the court directed trust that is the focus of this bench book.

i. Specifically, “the individual must be unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months” (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

ii. There is a difference between the federal definition of “disabled” and the California Probate Code section definition supplied in Probate Code § 3604(b)(1). The state definition is more onerous. Custom and practice is that a claimant who has satisfied the federal standard and is receiving SSI or SSDI and Medi-Cal (Medicaid) satisfies the state court definition.

c. Benefit. The individual doesn’t have to give up all the public benefits due to the settlement, since the assets in the SNT are not counted as assets when calculating financial need, and the settlement funds can be used for medical needs and services not covered by public benefits in whole or in part.

d. Burdens and Limitations. There are substantial limitations on the use of the funds as described herein, the lien for Medicare and Medicaid must be paid at the time of settlement, the trust is irrevocable, and on termination, the public agency is entitled to be repaid for benefits extended during the life of the individual. The right to be repaid is limited to the amount remaining in the trust.

3. **Notice to Public Agencies.** Fifteen (15) days' notice of the time and place of hearing ***and*** a copy of the petition to approve the compromise and create the SNT ***must*** be given to the State Director of Health services, the Director of Mental Health, and the Director of Developmental Services at the office of each director in Sacramento. Prob. Code § 3602(f). The general 30-day notice provision of Probate Code § 17203 does not apply to these matters. For out of state resident minors/incompetents notice must be given to the appropriate public benefit state or federal office. Failure to provide notice will lead to the settlement being considered a resource for eligibility purposes and the disqualification of the individual until the settlement proceeds are otherwise spent.
4. **Agency Response.** The agency will typically provide a written response acknowledging notice and commenting upon their review of the trust. The agencies are keenly interested in payment of the current lien and a future reimbursement for further expenses on the death of the individual covered by the trust.
5. **Constructive Receipt Issue.** Proceeds establishing the trust should pass from the defendant to the trust without receipt, constructive or otherwise, by the plaintiff. Receipt will compromise eligibility for public benefits.
6. **Attorney Trust Accounts.** Placing the settlement proceeds in an attorney's client trust account is constructive receipt by the client.
7. **Amount in Trust.** The proceeds paid into a SNT should be in an amount reasonably necessary to meet the special needs of the minor/incompetent. Excess funding could render the SNT invalid as an exempt asset for eligibility for public benefits. In order to evaluate this potential, the petition to approve the compromise should provide the necessary details in this regard. This is usually done by presenting a copy of a "life care plan" or a financial analysis regarding the needs of the minor/incompetent.
8. **Applicability to Disabled Competent Adults.** SNT's are available to competent disabled adults who wish to preserve their

eligibility for public benefits. They are subject to all the same requirements and considerations set forth herein. These may arise in settlements in federal cases. Where a litigant seeks approval of a settlement and the creation of an SNT, the same procedures for approval of the trust must be followed. The specific findings required by Probate Code § 3604(b)(1) must be met. As previously noted, qualification for SSI and Medi-Cal is accepted by the San Diego Superior Court as evidence sufficient to make the finding relative to the requisite disability and the finding that a SNT is required.

9. Expenditures:

a. Authorized Expenses. The trustee is authorized to exercise discretion to pay for **medical costs** not typically provided by public benefits. These include expenses for attendant care, rehabilitation, special facilities and equipment, and transportation. Because payment is discretionary, the government remains the primary payer.

b. Inappropriate Expenses. Expenditures for food or shelter, can be counted as “income” to the recipient, reducing their public benefit.

c. Automobiles. An **automobile** of any value if modified for operation by or transportation of a disabled person are excluded from the eligibility analysis. 20 C.F.R. § 416.1218(B)(2).

d.

d. Real Property. A **home** is not counted for eligibility purposes if it is the person’s **principal place of residence**.⁴ 20 C.F.R. §416.1212 (a).

i. California allows the trust to own the home. The advantage here is that the trust can then pay the upkeep expenses. The disadvantage is that the home would be subject to the government reimbursement right on the disabled person’s death.

⁴Note, some severely disabled individuals are not able to live at home.

ii. If the disabled person owns the home, the home is free of the reimbursement claim by the government. In this case, however, payment of the ongoing expenses or upkeep for the home (versus special improvements to accommodate the disabled person) will be treated as income.

10. Trustee Selection:

a. Corporate Trustees. Large settlements typically require corporate trustees given the risk, investment needs, record keeping, tax returns and court accounting requirements. It is difficult to locate a corporate trustee (typically a bank or trust company) in settlements under \$500,000.00. Surety bonds are not necessary when a corporate trustee is involved.

b. Professional Fiduciaries. Professional fiduciaries are available to serve as trustees as well. They typically handle settlements from \$200,000.00 and above. Surety bonds are required where a professional fiduciary is involved.

c. Individuals. Smaller settlements and high special needs (i.e. a lot of activity) may be better handled by a family member as trustee. This was particularly prior to 2006, when no option for a pooled trust existed locally. See Special Need Trust Foundation, below. Having a family member as trustee also saves on the expense of trustee's fees. Even though bonded, there is increased risk in these situations. Care should be used to find a family member with some degree of professional sophistication and financial stability. Misfeasance or malfeasance are very real issues with family members. The lack of sophistication is a big part of the issue, especially in investment strategies, fiduciary duties and accounting requirements. The other issue is a tendency to stick to the discipline of use of the funds for the beneficiary's use, and not the use of the family as a whole.

d. Special Needs Trust Foundation. The Special Needs Trust Foundation (SNTF) was formed in 1991. It is a cooperative of nonprofit organizations which serve the disabled community. In 2006, the SNTF started handling “self-settled” Special Needs Trusts. These are the types of trusts used in litigation settlements. Other pooled trust companies now exist as well. The salient feature of the SNTF and similar organizations is that it “pools” separate trust funds together allowing very small amounts of money to be managed through a trust vehicle for a better return on investment. The amount of money involved in a given case, is often too small to justify the expense of having an individual special needs trust. This type of trust is also suitable where there is no appropriate trustee available. Statutorily, self-settled “pooled” special needs trusts are authorized and created under 42 U.S.C. § 1396(b)(d)(4)(C).

The minimum amount for an account with the Special Needs Trust Foundation is \$5,000.00. The administrative fee associated with this organization will be 1 percent of the funds in the pool of trusts, with a minimum of \$5,000.00. This compares favorably to private fiduciary fee. *See below.* These fees do not include the expenses for providing court accountings or any extraordinary legal services to or on behalf of the beneficiary.

11. Surety Bonds. The Superior Court typically requires a surety bond in an amount at least equal to the amount of the settlement funds plus one year of income. The amount of the surety bond is within the discretion of the court and can be waived. Factors to be considered include the financial strength and sophistication of the surety whether an individual or a corporate entity. The cost is typically \$50.00 per \$10,000.00 in coverage (i.e., \$500.00 for \$100,000.00 coverage) and would be an appropriate expense of the trust or an appropriate reimbursement to the trustee.

12. Accounting. LR 17.1(b)(4)(B)(iii) requires that the order approving the trust include a provision that the first accounting be filed within one year of the establishment of the SNT with

the San Diego Superior Court for California residents, or other appropriate court for non-residents. This requirement ensures that the SNT will be brought within the jurisdiction of the appropriate state court for future management and oversight. Filing for the accounting will be a new petition to the state court.

13. Subsequent Settlements and Other Additions to the Trust.

a. Multi Party Cases. In multiparty cases with successive settlements, the same trust may be used for each settlement. Where a minor or incompetent has subsequent non-related cases, the same trust may also be used for the respective recoveries. In each settlement, however, a new petition pursuant to LR 17.1 must be filed and notice must be again provided to the public agency. The public agencies are again entitled to secure their lien rights. The court will again need to make the findings required by law and as set forth in Probate Code § 3604.

b. Subsequent Federal Cases. Where a party has subsequent federal cases, not related to each other, the same trust may be used to provide for the “special needs” of the plaintiff. For any subsequent settlement, however, a new petition pursuant to LR 17.1 must be filed and notice must be provided to the public agency. The public agencies are, again, entitled to secure their lien rights. The Court will again need to make the findings required by law as set forth in Probate Code § 3604. But, where the court has previously reviewed and approved the form of the trust, the disability status of the individual, and the existence of special needs, the inquiry may simply be that the money to be paid to the trust is not in excess of the amount that would be reasonably necessary to meet the special needs of the party.

c. Subsequent Additions in General. Subsequent additions to the special needs trust not related to a federal case are within the jurisdiction of the state court which has oversight of the trust after creation. Thus, where a special needs trust is approved by the Federal Court as

part of a claim, any subsequent additions not related to other federal claims need to be dealt with in the state court.

d. Annuity Contract Payments. Where initial settlement is in the form of an annuity contract with a sequence of future payments, those “additions” to the trust are authorized under the initial order of the court and separate court orders authorizing the additions are unnecessary.

14. Irrevocable Nature of the SNT. The SNT is irrevocable under Probate Code § 3602(c)(3). It terminates on the death of the disabled individual or as prescribed by law. This issue would be within the jurisdiction of the state court.

15. Testamentary Provisions. Sometimes trusts will contain provisions disposing of the remaining assets in the trust upon the minor’s/incompetent’s death. A disposition other than to the “heirs at law” is contrary to law. A minor or incompetent lacks testamentary capacity and the estate must pass by intestate succession. The only exception to this rule is where the Court exercises “substituted judgment” as discussed below.

16. Trustee and Trust Attorney Fees. See the discussion in Section IV.C.8.

17. Investment Duties of the Trustee. See the discussion in this regard in Section IV.C.9.

E. California Uniform Transfers to Minors Act (“CUTMA”)

1. Applicability. Small amounts (usually less than \$20,000) may be transferred to the custodian for a minor, usually the parent, under the California Uniform Transfers to Minors Act (“CUTMA”) [Probate Code §§ 3602(c)(2), 3611(f), and 3900, et. seq.]. The transfer is irrevocable.

2. Uniform Gift Acts. The Uniform Gift to Minors Act or a substantially similar act of another state may apply to a minor residing outside the State of California.

3. **Transfer Dates to the Minor.** The money belongs to the minor and is transferred to the custody of the minor at age 18, unless at the time of the original transfer a later distribution date, not later than the minor's 25th birthday, was designated. Probate Code § 3920.5

4. **Lack of Court Supervision.** The custodian has specific statutory fiduciary duties set forth in Probate Code § 3912, but there is **no ongoing supervision** by the court, **nor any regular accounting** to the court. A minor age 14 or older (through specified representatives) may petition the state court for an accounting. Probate Code § 3919.

F. **Payment to a Minor's Custodial Parent.**

1. **Applicability.** Under Probate Code § 3611(e), very small amounts of money (not exceeding \$5,000.00 under any circumstance) payable for the benefit of the minor can be paid to the parent of a minor, without bond, pursuant to the provisions of Probate Code § 3401.

2. **Probate Code § 3401 Requirements.** The parent of the minor entitled to the custody of the minor may receive the money in trust for the minor until the minor reaches the age of majority if certain requirements are satisfied:

a. The total estate of the minor, including the money or the property to be paid to the custodial parent does not exceed \$5,000.00 in value; and,

b. The parent receiving the money gives the person making the payment a written assurance, under oath, stating that the minor's total estate, including the money to be paid, does not exceed \$5,000.00.

3. **Legal Effect.** The party paying the funds to the parent, upon receipt of the written assurance under oath, is acquitted of the obligation. Probate Code § 3402. Beyond that, the parent holds a trust obligation to the minor, with the minor owning the property and having an entitlement to it at the age of majority.

No court supervision or regular accountings are imposed under these circumstances.

V. PAYMENT TO A MINOR'S CUSTODIAL PARENT IN MEXICO

A. *In General.* With the close proximity to the border, there are circumstances where a minor's claim involves people who principally reside in Mexico. They may have limited ability, if any, to enter and transact business in the United States. There also may be no family member with the ability to access the U.S. Courts who could otherwise serve as a suitable guardian of the estate. Entry or access into the United States would be critical for supervision over a minor's estate given the accountings and other proceedings that take place over time. A request could be made to distribute the proceeds directly to the custodial parent under the laws of Mexico. While this is typically problematic, in terms of the risk to the funds that would benefit the minor, there may be circumstances that would warrant use of this format.

Before considering such a drastic step, it may well be that a corporate or professional fiduciary can be retained by the estate to administer the funds. In particular, where large settlements are involved, the skill of the fiduciary in managing the money would be an additional benefit. Small estates, as stated herein, are difficult to place with professionals and resort to this more novel approach may be an only option.

B. *The Role of the Parent as Guardian in Mexico.* Under the laws of Mexico, the legal representatives of the assets of a minor is always the parents. Article 425 of the Mexican Civil Code provides that "those who exercise parental authority (the "patria potestas") are legitimate representatives of those under the same, and have the legal administration of their assets, according to the provisions of this code." As a result, by statute Mexico has authorized a custodial parent to serve as legal administrator of the minor's assets. This is in contrast to the law in California, under California Probate Code § 3600, *et seq.*, where specific relationships must be specially authorized or formally structured for someone to deal as a legal representative with a minor's property.

C. *Ownership of the Property of a Child in Mexico.* Mexican law also provides, that property of the child, while under parental authority is divided in two groups: that which the child acquires by labor, and that acquired in some other manner. Article 428. Property acquired under subparagraph 2 of

Article 428, (i.e., property acquired in some other manner including settlement proceeds) belongs exclusively to the child, but one half of the income from the property belongs to the parent exercising parental control. Article 430. In essence, in these cases, one half of the earnings of the minor's property will be the parents' assets in any event. This may have some impact on the decision to allow for this type of distribution.

D. [Mexico's Requirement for Accounting, Management of the Funds, and Payment on Majority](#). Finally, the Mexican Civil Code provides for an accounting where requested by the minor (Article 439), a duty to effectively manage the funds where ordered by a court (Article 441), and a duty to turn over the custodial funds to the minor upon the age of majority (Article 442). These mirror, in many respects, their requirements and duties imposed by the state courts in the United States.

Therefore, under the laws of Mexico, the parents are the authorized representatives for purposes of handling the child's funds, and in fact have a proprietary interest in one half of the income earned on the proceeds. The parents are subject to the duties to account, faithfully manage, and deliver the proceeds to the minor upon reaching the age of majority, much like a traditional fiduciary relationship through a formal guardianship in the United States. While this arrangement should be discouraged in favor of a court's ongoing supervision, under appropriate circumstances, it may be the only workable solution.

VI. [THE QUALIFIED SETTLEMENT FUND "QSF" UNDER 26 U.S.C. § 468\(B\)](#).

A. [In General](#). The QSF is an alternative vehicle for settlement funding provided under federal law at 26 U.S.C. § 468(B). Unlike the other alternatives discussed in this bench book, the QSF is more temporary in nature. The QSF is effectively an "escrow" account that allows the plaintiff to set up whatever trusts, special needs trusts, or deferred annuities that would best suit their needs. The advantage to the plaintiff is that the plaintiff can set up deferred annuities or traditional trusts through a QSF without the defendant's participation. The plaintiff receives the same taxable income status of the settlement funds in appropriate cases.⁵ This vehicle also helps

⁵ Whether a distribution to a claimant is includable in the claimant's gross income for income tax purposes is generally determined by reference to the nature of the claim. 26

preserve the plaintiff's eligibility status for public benefits since the plaintiff is not receiving the settlement funds if the requirements of a QSF are strictly followed.

B. **Application.** While traditionally utilized in class action lawsuits as a means for administering the claims, these can be advantageous to the individual claimant as well. There are three general situations where the QSF is useful. These include:

1. Where the Plaintiff wants to select the annuity company rather than having the Defendant bring in a company of their choosing;
2. Where the Plaintiff is not sure of the benefit structure at the time of settlement and needs time to consider structural options and plans; and,
3. Where there are competing claims in cases involving multiple claimants, or a variety of liens that must be adjusted before disbursements can be made.

In each of these circumstances, the parties want to settle now. The QSF has the particular advantages of allowing this to occur and maximizing the settlement potential for all. The income tax exempt status of the funds is retained (See footnote 1), because the QSF, itself, becomes the "party to the suit or agreement" required under the Internal Revenue Code for compliance with 26 U.S.C. § 130(c) which preserves the tax benefits. As a recognized taxable entity (See, 26 C.F.R. § 1.468B-2) public benefit eligibility is not affected. As a "party" the QSF, with court approval, can purchase the necessary annuities and fund the necessary trusts for the plaintiff just like the traditional defendant.

C. **Requirements.** The requirements are set forth in the governing statute (26 U.S.C. § 468(B)) and under 26 C.F.R. § 1.468B-1. The three principal criteria are as follows:

C.F.R. § 1.468B-4. Damages for personal injury or sickness are excludable from gross income under 26 U.S.C. § 104(a)(2).

1. The QSF must be established by order of a government entity (i.e., the court) and remain subject to the continuing jurisdiction of that entity;
2. The QSF must be established to resolve one or more claims, including those under CERCLA (42 U.S.C. § 9601, *et seq.*), as well as tort or contract claims; and,
3. The QSF funds must be kept in a segregated account.

D. Advantages. As stated, the defendant still achieves the advantage of a full release and an immediate tax deduction for payment of the settlement proceeds. The plaintiff has the advantages of retaining the tax exempt status of the payment under the Internal Revenue Code and eligibility for public benefits. Finally, the plaintiff has the opportunity to create the various trusts or annuities best fitting plaintiff's needs.

The administration of the QSF is directed by an administrator who handles the financing of any trusts or structured settlements, as well as any payments made directly to injured parties, lien claimants or cases expenses and attorney fees. The QSF is a taxable entity under the law (26 C.F.R. § 1.468B-2) and is required to file tax returns and pay tax on accumulations on the trust funds, even though the principle settlement itself was not considered taxable income. Taxes are calculated on the same schedule as corporate returns.

E. Practical Concerns. There are professional administrators that specialize in QSFs, and a professional should be utilized given the complex legal and tax issues involved. A bonded and insured administrator is the best protection against misappropriation of the money.

The ultimate funding and distribution of funds remains under the court's control and supervision. The administrator should be tasked with the job of submitting a proposed plan in a timely fashion for court approval to minimize the protracted supervision of the QSF by the federal court. To the extent that trusts, special need trusts, guardianships or conservatorships are part of the distribution plan, the continued supervision and accountings in those regards should be directed to the appropriate state court.

VII. ATTORNEY FEES, COSTS AND LIEN CLAIMS:

A. **Typical Fees.** Fees are typically controlled by statute, local rule or local custom.

1. **Federal Tort Claims Fee Statute.** Federal Law in these cases provides for 20% of administrative settlements and 25% of settlements after commencement of an action. 28 U.S.C. § 2678;

2. **Medical Malpractice Claims.** Fees in medical malpractice cases (under FTCA or otherwise) are controlled by MICRA (Business & Professions Code § 6146a) in California. The fee schedule is:

40 % of the first \$50,000 recovered;
33 % of the next \$50,000 recovered;
25 % of the next \$500,000 recovered; and,
15% of any amount exceeding \$600,000.

“Recovered” means the net sum after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. (B&P Code § 6146[c][1]).

3. **Local Custom and Practice.** In general, fees in minor’s cases have historically been limited to 25% of the gross recovery. At one time this was codified in San Diego Superior Court Civil Rule 2.4.6. B. The rule has been amended however and now reads:

“At the time of the (Minors Compromise) hearing, the court will determine the amount of costs, expenses, and attorney's fees to be allowed from the proceeds of the settlement.”

B. **Confirmation of Costs.** The petition to approve the minor’s compromise should provide a detailed listing of the costs of the attorney or guardian ad litem when reimbursement is requested.

C. **Third Party Liens.** The petition to approve the minor's compromise should provide a detailed listing of the third-party liens.

1. **Constructive Receipt Issue.** Payment of the third-party liens should be carefully structured to avoid receipt problems for public benefit eligibility purposes or concerns that the funds could be misused by the attorney.
2. **Payment options.** Where feasible, the defendant could provide payment directly to the lien claimant with proof of payment to the plaintiff. The court registry could also be utilized to ensure that the liens are paid. Where payment is made by the plaintiff's attorney, the court could require the filing of proof of payment with the court, within a prescribed period, to protect the interests of the plaintiff.
3. **Outstanding Liens.** Where non-government liens are still subject to negotiation, the settlement could still be approved in some circumstances with the proviso that residual sums saved by compromise of the liens be paid into an annuity, a SNT, a regular trust, guardianship estate or a blocked account as appropriate. This is not acceptable where a government lien is the issue and a SNT is used since, the applicable statutes [Prob. Code § 3604(d) and Local Civil Rule 17.1] require that the public agency liens be satisfied first.
4. **Notice to Lien Claimants.** Some medical benefit providers are entitled to "Notice of Suit" and/or "Notice of Settlement." See Section VIII in this regard.
5. **Laws, insurance plans and contracts also create recovery rights for medical care providers, even without a notice requirement.** Common among these are Tricare (under the Federal Medical Cost Recovery Act- 42 U.S.C. §§ 2651-2653 (the "FMCRA)) or the Veterans Administration, also under the FMRCA.
6. **An attorney has an ethical duty to competently represent a client's interests.** See, California Rules of Professional Conduct Rule 1.3. This duty clearly includes

ensuring that all lien claims, and outstanding liabilities are resolved.

VIII. ISSUES REGARDING APPOINTMENT OF THE GUARDIAN AD LITEM.

A. **In General.** Federal Rule of Civil Procedure 17 deals with the capacity of a person to sue or be sued. Subsection (c) deals with capacity as it relates to minors or incompetents. Subsection (c) provides:

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative **MAY** sue by a next friend or by guardian ad litem. The court shall appoint guardian ad litem for an infant or incompetent person not otherwise represented in an action **OR** shall make such other order as it deems proper for the protection of the infant or incompetent person. (Emphasis added.)

This language raises issues regarding the necessity for a guardian ad litem in every case. Because the statute is written in a passive form (see the bold language above) current case law does not require a guardian ad litem in all cases. Westcott v. United States Fidelity and Guaranty Co., 158 F.2d 20 (4th Cir. 1946). “We cannot agree with the contention ... that the word ‘or’ in that last sentence really means ‘and,’ thus making the appointment of a guardian ad litem mandatory.” Id. at 22. As set forth below, state law is in contrast, and the better practice for federal courts is to appoint a guardian ad litem when a duly appointed representative does not otherwise exist. A failure to appoint a guardian ad litem has been found to not render a judgment void where the Rule 17(c) concerns were substantially complied

with by a “next friend.” Till v. Hartford Accident and Indemnity Co., 124 F.2d 405, 408-09 (10th Cir. 1941).

1. When a Guardian Ad Litem Is Required. In the absence of a “duly appointed representative” (i.e., a general guardian or conservator), Rule 17(c) does not “require” appointment in all cases. Westcott, 158 F.2d at 20; Till, 124 F.2d at 405; Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001). Burke states, “unless a conflict of interest exists between the representative and minor, a district court need not even consider the question of whether a guardian ad litem should be appointed. Id.”

2. The Next Friend. Essentially, the concept of a “next friend” is a satisfactory representative for bringing or defending a suit in federal court. The essential difference in current terms, is that the guardian ad litem is appointed specifically by the court. While the Burke Court espouses the principle that the court need not consider the question of appointing a guardian ad litem, the weight of authority is to the contrary. In Burke, greater care was obviously needed. In that case, the settlement and dismissal were overturned under Rule 60(b) where a fairness hearing for the minor was not held, no guardian had been appointed, no duly appointed representative otherwise existed, and the minor’s mother failed to distribute any proceeds to the minor on her majority. The leading case in the area, Till, made a specific finding as to the adequacy of the representation by the “next friend.” In Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958), the court put the explicit rule in Till that was embraced in Westcott into perspective. In so doing, the court stated that the rule meant: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is necessary,

though only after the court has considered the matter and made a judicial determination that the infant is protected without a guardian. Roberts, 256 F.2d at 39. A guardian ad litem appears necessary except where the representative's interest and the child's interest are one in the same and there is no apparent conflict of interest.

3. Proper Procedure. As a matter of proper procedure, the court should usually appoint a guardian ad litem. Westcott, 158 F.2d at 20; Roberts, 256 F.2d at 35. The court may appoint a guardian ad litem sua sponte, Wenger v. Canastota Cent. School Dist., 146 F.3d 123 (2d Cir. 1998). With Roberts and other cases indicating that the court needs to consider what best protects the minor's interest, the procedure of requiring a formal guardian ad litem is the soundest.

4. State Court Representatives. Federal Rule of Civil Procedure 17(c) references general guardians and conservators as appropriate representatives. The jurisdiction to appoint a general guardian or conservator is within the state court where the child resides. If the state has appointed a representative in this regard, that meets the requirements of the federal rule. Slade v. Louisiana Power and Light Co., 418 F.2d 125 (5th Cir. 1969); *cert. denied*, 397 U.S. 1007 (1970). The federal courts lack authority to appoint a general guardian or conservator. United States v. Maryans, 803 F. Supp. 1378 (N.D. Ind. 1992). Federal courts lack probate jurisdiction, even in cases that otherwise would fall within diversity jurisdiction. The appointment of a general guardian by the federal court would raise serious concerns of principles of federalism. Markham v. Allen, 326 U.S. 490 (1946); Dragan v. Miller, 679 F.2d 712 (7th Cir. 1982).

5. Is Counsel a Sufficient "Representative." Rule 17(c)'s reference to the infant or incompetent being "not otherwise represented" does not embrace the concept that counsel alone would be an appropriate representative dispensing with the need to appoint a guardian ad litem. Zaro v. Strauss, 167 F.2d 218 (5th Cir. 1948).

6. State Law. A Minor, an incompetent person, or a person for whom a conservator has been appointed shall appear either by a guardian, conservator, or by a guardian ad litem appointed by the court in which the action or proceeding is pending. California Code of Civil Procedure § 372; San Diego Superior Court Local Rule 2.4.6(A). Unlike the federal court, the state law in California is specific with regard to the mandatory need for an appointed representative.

7. Emancipated Minors. A minor who has been emancipated under the laws of the state court may sue in his or her own name. In California, the provision for emancipation of a minor is California Family Code § 7504. See also, Jolicoeur v. Mihaly, 5 Cal.3d 565, 582 (1971).

B. Selection of the Guardian Ad Litem.

1. Case Law Standards. The person appointed must be an appropriate alter ego for the minor or incompetent. If no qualified parent or other family member is available, a non-relative may be appointed. Ultimately, the person must be suitable to represent the child's interests should be appointed. T.W. v. Brophy, 124 F.3d 893, 896 (7th Cir. 1997).

2. In General. A "next friend" must prove that the minor or incompetent lacks the capacity to pursue his or her own cause; and, must show some relationship or other evidence that demonstrates that the next friend is truly dedicated to the interests of the real party in interest. Ford v. Haley, 195 F.3d 603 (11th Cir. 1999).

3. Limitations. It is error to appoint a stranger who merely has a "ideological" interest in the case. Having no concrete stake in the outcome, such a person could not satisfy the Article III standing requirement. T.W. v. Brophy, 124 F.3d 893. In addition, only one person may act in a representative capacity with respect to a minor or incompetent. Neilson v. Colgate-Palmolive Co., 199

F.3d 642, 650 (2d Cir. 1999). The continued capacity of a guardian ad litem is subject to the discretion and approval of the court. Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

C. Conflicts of Interest.

1. State Law. San Diego Superior Court Local Rule 2.4.6 states that due to a potential conflict of interest, parents asserting individual claims or defenses may not serve as guardian ad litem for their minor children, absent a court order to the contrary. This raises the duty of the court to ensure that the minor or incompetent has conflict free representation. In appropriate circumstances, having the parent serve is within the discretion of the court. Typical situations presenting a conflict of interest where an independent representative should be appointed include:

- a. Where there is an issue as to the parents' liability;
- b. Where limited financial resources are available to settle or pay the claims of both the guardian and the minor; and,
- c. Any division or apportionment of settlement proceeds between the parent and the minor. Geddes v. Cesna Aircraft Co., 881 F. Supp. 94 (E.D.N.Y. 1995)

2. Federal Law. While neither Federal Rule of Civil Procedure 17 or Civil Local Rule 17.1 have similar specificity with regard to conflict of interest issues, these federal rules exist for the protection of the interest of the infant or incompetent person. Eagan by Keith v. Jackson, 855 F. Supp 765, 775 (E.D. Pa. 1994) (court has inherent duty to protect interest of minors). See VI A Charles A. Wright, et al. *Federal Practice and Procedure*: Civil 2d §1571 (2 Ed. 1990). The federal case law is in agreement with the state law concerns and the court's duty is clear. In Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir.

1978), the court states “[i]ndeed, from the time of the early courts of chancery, a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor, who, as we repeat, is a ward of the court.

D. **Scope of Duties.** The guardian ad litem is **not** authorized by law to handle the proceeds of a settlement or judgment once the litigation is concluded. CCP § 372, FRCP 17. The guardian ad litem is appointed as a representative to act for the minor in a case. The guardian ad litem’s limited authority is to engage counsel, file and prosecute, and control and direct the litigation on behalf of the minor. Dacanay, 573 F.2d. at 1075.

E. **Pro Se Representation.** A non-attorney cannot bring a lawsuit or defend an action on behalf of a minor in federal court. Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997). As a result, the appointment of a guardian ad litem would not allow for the guardian ad litem to represent the minor pro se.

VIII. NOTICE OF SETTLEMENT (OR SUIT).

There are particular notice requirements when a settlement involves a Special Needs Trust, and these are covered throughout this Bench Book. In particular see, IV.D.

Notice of settlement is an issue in other ways as well. Whenever the federal, state or local governments provide medical benefits they typically have statutory rights by subrogation or private right of action to recover these and are entitled to notice. These are often referred to as “liens,” but are actually called “recovery rights” Non-governmental entities also have “lien rights” by law or contract. The most common here include workers compensation benefits or private insurance policies. Care should be taken to research the government and third-party payor claims carefully in every case.

Regarding Medi-Cal, in California, Welfare and Institutions Code section 14124.73, et. seq. requires the person receiving benefits or their personal representative (counsel) to report a third-party tort action to the

Department of Health Care Services (DHCS) within 30 days of filing a personal injury claim or action.

Other commonly encountered lien claims with notice requirements include:

1. Victims of crime program, Plaintiffs' counsel must notify the victims compensation and government claims board of any legal proceedings or settlement. See, Gov Code Section 13963.
2. Worker's Compensation benefits in California, the client/client's attorney must notify the employer or employer's insurer "forthwith" upon filing a third-party action (Labor Code 3853) and provide notice before settling with a third-party tortfeasor in time for the employer to protect its lien. See, Labor Code Section 3860(a).
3. Where Medicare pays some of the expenses, the defendant's and their liability insurers must notify the Centers for Medicare & Medicaid services of any third-party litigation involving a Medicare beneficiary. See, 42 U.S.C. Section 1395Y(b)(7)(B).

This list is not exhaustive.

IX. APPROVAL PROCEDURE IN THE SOUTHERN DISTRICT OF CALIFORNIA

A. [The Petition\(s\)](#). Counsel need to get approval of the format of the settlement, the manner and types of ways the settlement funds will be held and invested, and a determination that the settlement is fair and in the best interest of the minor or incompetent. Magistrate Judges are charged with reviewing the settlement format under Civil Local Rule 17.1. District Judges hold the authority to approve the fairness and dismiss the case. This can mean two petitions.

B. [Consent to Magistrate Judge for all purposes](#). Consistent with the party's ability to invest full civil case dispositive jurisdiction in a magistrate judge (28 U.S.C. § 636(c)), Civil Local Rule 17.1 provides that the parties may consent to the magistrate judge for purposes of determining fairness and

entering dismissal orders in the case. Parties following this path only need to have one hearing to conclude the case.

C. [The Petition for Approval](#). The Court needs complete details to make the necessary findings and orders to conclude a minor or incompetent's case by settlement. As a guide, the Petition should include:

- Name, date of birth, age, and sex of the minor child or incompetent;
- Relationship of Petitioner (person filing petition) to minor or incompetent;
- Description of the nature of the claim, including whether a claim has been filed, is pending, or is the result of a judgment;
- A description of the incident, including date, time, people involved, place, facts, and circumstances of the incident, enough to allow the Court to consider the liability issues involved;
- A detailed description of the extent of injuries, treatment and recovery. Residual disability, limitations and restrictions. This includes a detailed summary or attachment of doctor's reports with a diagnosis of the injuries and a report about the minor or incompetent's current condition; Note, if a Special Needs Trust is involved, provide the Court with enough detail to find:
 - i. That the minor or incompetent person has a disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap;
 - ii. That the minor or incompetent person is likely to have special needs that will not be met without the trust;
 - iii. That money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or incompetent person.

- A detailed description of the anticipated cost of the future medical needs, services, and losses reasonably expected. Attach any Life Care Plan and forensic accounting analysis, if applicable;
- An acknowledgement by Petitioner that the settlement is both final and binding;
- A description of the amount of the settlement, as well as all terms, including where any settlement proceeds are coming from;
- An accounting of all medical expenses incurred and those that will be paid or reimbursed with the settlement or award;
- Proof of Notice to all appropriate government agencies to ensure that public benefits (Medi-Cal, Medicaid or SSI), otherwise payable to the minor or incompetent, are not lost. [See Probate Code §§ 3602(e), 3604 and 3611(c)], and proof of notice to any lien claimants, or a statement as to the absence of lien claimants.
- Disclosure of any requested attorney's fees and manner of calculation (e.g. percentage/lodestar), and itemized court costs;
- State the entire amount of the settlement agreement, including amounts for other plaintiffs involved in the suit;
- Disclose in detail how the proceeds will be distributed (all payee's including for other plaintiffs involved in the suit) and how proceeds for the minor or incompetent will be handled (e.g. structured settlements, trusts, guardianship of the estate, blocked accounts, etc.);
- A description of the details of any company carrying any annuity contracts and their industry rating details, and the timing, amounts and duration of all future payments under the annuity contract.

- A statement that the settlement is fair, reasonable, and in the best interests of the minor;
- Signatures of the attorneys, parties, and petitioner under penalty of perjury.

A. [The Proposed Order for Approval](#). Counsel must file a proposed order with their petition which must comply with CivLR 17.1. and California Probate Code § 3600, et. Seq. CivLR 17.1.b.4.b. As a guide, the Proposed Order should include:

- That notice was provided as required by California Probate Code Section 3602(f)[Notice to the State of California Department of Health Care Services], by California Probate Code Section 3604(d) [Notice to the State of California Department of Health Care Services specifically regarding Special Needs Trusts] by Medi-Cal, Medicare, or third party lien claimants where notice is required by law (e.g., Worker’s Compensation), insurance contract or agreement;
- A statement that the compromise and terms of the settlement as set forth in the Petition are in the best interests of the minor/incompetent person and are approved;
- The distribution plan for the settlement proceeds, by payee and amount;
- Where a special Needs Trust is involved, the findings required by Probate Code Section 3604:
 - i. That the minor or incompetent person has a disability that substantially impairs the individual’s ability to provide for the individual’s own care or custody and constitutes a substantial handicap;
 - ii. That the minor or incompetent person is likely to have special needs that will not be met without the trust;
 - iii. That money to be paid to the trust does not exceed the amount that appears reasonably

necessary to meet the special needs of the minor or incompetent person.
(See III.D. above);

- An order for the appropriate bond;
- In a settlement involving a trust, guardianship, or conservatorship, a requirement that the first accounting, if required, be filed within one year of the establishment of the trust, guardianship or conservatorship, with the San Diego Superior Court. If the recipient of the money or property is not a California resident, the accounting must be in the court of general jurisdiction where the minor or incompetent resides;
- A directive that the petitioner will provide proof that all liens have been satisfied prior to the establishment of the trust;
- Where a Special Needs Trust is involved, attach a copy of the trust, and have a statement in the order as to the approval of the Trust terms and provisions;
- A statement that the “court makes no specific finding or order with respect to whether the Special Needs Trust for the Benefit of satisfies or complies with applicable federal laws or regulations”
- A statement the Special Needs Trust will be subject to the provisions and requirements of California Probate Code Sections 3604 and 3605 as well as 42 U.S.C. 1396(d)(4)(A).

APPENDIX A

Civil Rule 17.1 Actions Involving Minors or Incompetents

- a. Order or Judgment Required. No action by or on behalf of a minor or incompetent will be settled, compromised, voluntarily discontinued, dismissed or terminated without court order or judgment. All settlements and compromises must be reviewed by a magistrate judge before any order of approval will issue. The parties may, with district judge approval consent to magistrate judge jurisdiction under 28 U.S.C. § 636(c) for entry of an order approving the entire settlement or compromise.

- b. Payment and Disbursement of Funds.
 1. Money or property recovered by a minor or incompetent California resident by settlement or judgment must be paid and disbursed in accordance with California Probate Code Section 3600, et. seq. If the recipient of the money or property is not a California resident, disbursement must occur pursuant to court restrictions which are similar to those of Section 3600 et. seq.

 2. Should a guardian be necessary a certified copy of guardianship letters and a state court certificate must be filed with the clerk prior to any distribution to the guardian unless otherwise ordered by the court. The certificate will verify that the guardian has filed a surety bond in an amount to be determined by the court.

 3. Should money or property be held in a trust for a minor or an incompetent, the proposed trust instrument must be submitted to a magistrate judge on an ex parte petition for review and approval before the settlement is approved or the judgment is entered. The magistrate judge may require approval of the form of the documents by an appropriate state judge in the jurisdiction where the minor or incompetent resides. The parties may also consent to magistrate judge jurisdiction to approve the entire settlement under 28 U.S.C. § 636(c). Where the parties consent to magistrate judge jurisdiction to approve the entire

settlement, the approval of the trust documents and the settlement may be consolidated in one properly noticed hearing.

4. Any withdrawals or disbursements from the trust must be made in accordance with the procedures and applicable laws of the state.

a. The Ex Parte Petition for Approval of Terms of Trust should generally contain the following information:

1. Identity of the petitioner;
2. The terms and total amount of the settlement and the amount to go into the trust;
3. The circumstances giving rise to the settlement or judgment, and a general description of the plaintiff's injuries and needs;
4. Suggested amount of bond;
5. If for a Special Needs Trust, the petition should make the allegations to support the determinations required under California Probate Code §3604(b) for the establishment of the trust; and,
6. Any other information that may be required.

b. A Proposed Order must be submitted by the attorney for the petitioner and must comply with the requirements of this rule and California Probate Code §3600, et seq. and include the following:

1. An order for the appropriate bond;
2. An order that the first accounting, if required, be filed within one year of the establishment of the trust with the San Diego Superior Court. If the recipient of the money or property is not a California resident, the

accounting must be made to the appropriate court in the jurisdiction where the minor or incompetent resides;

3. If the order is for the approval of the terms of a Special Needs Trust, it should contain:
 - a. A statement that the petitioner will provide proof that all liens have been satisfied prior to the establishment of the trust by the court; and,
 - b. A statement that the “court makes no specific finding or order with respect to whether the Special Needs Trust for the Benefit of satisfies or complies with applicable federal laws or regulations”
4. The order will provide that the terms of the trust are approved, and those terms will be fully set forth within said order, not as an attachment. The parties are further directed to proceed with settlement approval hearings or the entry of judgment as appropriate.
5. A copy of the executed trust document, as approved pursuant to this rule, along with a certification by the that any court ordered surety bond is in force, must be filed with the court prior to any distribution to the trust.

APPENDIX B

Rule 2.4.6 Minors/Incompetents/Conservatees (Rev. 1/1/2017)

1. **Guardian ad Litem:** As provided in the Code of Civil Procedure section 372, a guardian ad litem must be appointed for a minor, incompetent person, or a person for whom a conservator has been appointed. Due to potential conflicts of interest, parents asserting individual claims or defenses may not serve as guardians ad litem for their minor children, absent a court order to the contrary. Petitions for appointment of a guardian ad litem must be filed at the same time as the underlying complaint is filed.

Guardian Ad Litem applications must include San Diego Superior Court form CIV-383 stating whether: a) the minor is subject of a juvenile dependency proceeding; b) the minor is the subject of probate guardianship; c) the proposed guardian is also asserting individual claims or defenses in the proceeding; and d) all of the minor's parents have been given notice of this proceeding. If a custody order is in effect, the most recent order must be attached.

2. **Petitions to Compromise the Claim of a Minor:** A petition to compromise claims on behalf of minors may be filed in a limited civil case only if an action is already pending in that case. Otherwise, it must be filed as an unlimited civil case. Any petition meeting the requirements of California Rules of Court, rule 7.950.5(a) will proceed in an expedited manner pursuant to California Rules of Court, rule 7.950.5 (b) and (c). In all other circumstances, the petition must be filed and set for hearing in the department designated by the presiding or supervising department unless the case has been assigned to a judge or independent calendar department, in which case the petition must be filed and heard in that department.

The person compromising the claim on behalf of the minor and the minor must be in attendance at the hearing of the petition, unless the court orders otherwise.

At the time of the hearing, the court will determine the amount of costs, expenses, and attorney's fees to be allowed from the proceeds of the settlement. The funds must be distributed in accordance with the order approving the settlement. It is the duty of

the attorney to ensure that the minor's funds are deposited in accordance with the court order referenced above. Attorney's fees are not due or payable unless and until the money is deposited in the blocked account and a receipt executed by the depository is returned to the court.

3. **Trusts:** In all cases where a petition to approve the compromise of a claim of a minor or person with disability filed under Probate Code section 3600 et. Seq. proposes to have settlement funds distributable to the minor or person with disability administered under a guardianship, conservatorship, discretionary trust or special needs trust, as provided in Probate Code sections 3602, 3604, or 3611, the petition to establish the guardianship, conservatorship, discretionary trust or special needs trust must be filed for approval in the Probate Department of the Court. Except as provided in subdivision 2 below, no payment or transmittal of the proceeds of the settlement agreement or judgment distributable to the minor or person with disability shall be made to the guardian, conservator or trustee until a certified copy of the Order appointing the guardian, conservator, or trustee has been filed in the Civil Department of the Court approving the compromise and settlement under Probate Code section 3600 et. Seq.

In any proceeding to approve the compromise of a claim of a minor or person with disability filed under Probate Code section 3600 et. seq., the judge in the civil proceeding approving the compromise petition may order that the settlement funds distributable to the minor or person with disability be distributed to a temporary guardian, temporary conservator or temporary trustee appointed by a judge of the Probate Department of the court, pending Probate court determination of the petition to establish the guardianship, conservatorship, discretionary trust or special needs trust. In no event shall any funds distributable to a minor or person with disability in a proceeding under Probate Code section 3600 et. seq. be distributed to any person not authorized by court order pursuant to the provisions set forth in Probate Code section 3602, 3604 or 3611.