Sanford Jossen
INDEPENDENT MEDIATOR AND ARBITRATOR

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2021

Mediating cases for children, the most delicate plaintiffs

FROM APPOINTMENT OF A GUARDIAN TO THE STRUCTURING OF THE SETTLEMENT AGREEMENT, A LOOK AT MEDIATING THE EMOTIONALLY INJURED CHILD'S CASE

Mediating cases involving an injured child presents unique issues and challenges. An attorney who represents a child must recognize that the approach to a child's case raises issues and requires case development that typically does not exist in the case of an injured adult.

How a child is represented

The necessity for a guardian ad litem appointment

A child cannot independently appear as a party in a case. If the child is not emancipated (Fam. Code, § 7000 et seq.) or incompetent, a claim must be presented through a guardian ad litem. Pursuant to Code of Civil Procedure section 372, subdivision (a)(1), minors and incompetents lack the capacity to sue in their names. Likewise, they lack the capacity to settle a claim in their names.

Under Code of Civil Procedure section 372, representation of minors, and settlement of minor's claims, must be conducted through a guardian, conservator of the estate, or guardian ad litem. *This is true even if there is an existing guardianship or conservatorship* for the minor or incompetent individual. In short, before you go to mediation, you must have a court-appointed guardian ad litem, so there is someone with the legal capacity to speak for the minor and the legal authority to settle the minor's case. *The fact that the minor has parents is not enough*. Even though the child has a parent, the parent has no legal right to settle the minor's claim *until the parent is appointed by the Court as guardian ad litem for the minor in the action*.

Until a guardian ad litem is appointed by the Court, not even the parent has the right to compromise the minor's claim or sign the settlement agreement. (See Prob. Code, § 3500.) This is why it is essential to have a guardian ad litem appointed *before* mediation takes place. That person will then have the authority to negotiate a settlement amount, power struggles between the parents will be minimized (especially if they are separated or divorced), and opposing counsel cannot object to negotiations. Additionally, both parents may not be involved or agree on the disposition or direction of the child's case. That issue must be worked out before mediation and having a guardian ad litem with court-granted authority to act for the child focuses who decides on the direction of the case.

The law regarding guardians ad litem begins at Code of Civil Procedure section 372, which describes how a guardian ad litem is appointed, the powers of the guardian ad litem to act on behalf of the minor, and the power to settle the minor's case. Under Code of Civil Procedure section 372 and 374, minors 12 years and older can appear in court in certain specific circumstances, but these do not include appearing in a personal injury case.

Obtaining the guardian ad litem appointment

A guardian ad litem is appointed by filing Judicial Council Form CIV – 010. The application is downloadable at the California Court's website (www.courts.ca.gov). The form is self-explanatory and must be signed by the proposed guardian ad litem. Probate Code section 3500 sets forth where the Petition for Compromise of the Disputed Claim for the Minor must be filed once the case has been settled, so that statute should provide guidance as to where the Application for Appointment of Guardian ad Litem should be filed. (The Petition for Compromise will follow the Application for Appointment of Guardian ad Litem at a later time.)

Usually, the Application for Appointment of a Guardian ad Litem is presented to the court at the same time a complaint is filed, but that is not always the case. An Application for a Guardian Ad Litem can be made before filing the complaint. Where a lawsuit has already been filed, an independent proceeding need not be commenced. The guardian ad litem can be appointed as part of the same lawsuit in which the minor is a party. (*Sarracino v. Superior Court* (*Sarracino*) (1974) 13 Cal.3d 1.) If the minor (plaintiff) is at least 14 years old, the Application for Appointment of the Guardian ad Litem must be made *by the minor* (meaning the minor must sign the application). An application on behalf of a younger child may be made by any parent, relative, or friend. (Code Civ. Proc., § 373 (a).) Keep in mind that where a lawsuit is filed, the court will not issue summons until the guardian ad litem has been appointed.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2021

The above describes the legal requirement that a guardian ad litem be appointed, but the role of a guardian ad litem is not in the statutes. Parents often tend to think that the case is theirs. Counsel for a minor has to emphasize to the parents that it is not just the attorney's role to act in the best interests of the minor, it is also the role of the guardian ad litem.

Parent involvement

How do you handle a case where both parents are not involved or don't agree? Code of Civil Procedure section 376 is the answer to that question. Even experienced practitioners may be surprised to know that where a minor has both parents and one is not involved, they must be joined as defendants in the lawsuit.

In most cases where a parent is involved, a parent may qualify as a guardian ad litem if:

• The claim of injury is not against the parent; and,

• The parents are not living separately and apart; or if they are separated, the parent compromising the claim on behalf of the minor has care, custody, and control of the minor. (See Prob. Code, § 3500.)

It is important when taking the case of a child to determine who the adult is that is bringing the case to you. In the case of foster children, there must be a guardian ad litem appointed other than a parent, because parents are temporarily divested of their parental rights when the minor is under the jurisdiction of the Dependency Court. Natural parents cannot hire counsel on behalf of their child for a personal injury action during the time their child is in the foster care system. In the case of separated or divorced parents, who has custody and legal guardianship? In cases where there is no family member (or family conflict), a volunteer guardian ad litem can be obtained through Public Counsel.

Another consideration in applying for a guardian ad litem is the nature of the case. Where the case involves sexual molestation, abuse, or other circumstances that could be embarrassing to the child or the parents or both, Code of Civil Procedure section 367.3 provides a process for using pseudonyms for the child. In some cases, the identification of the parent can lead to the identification of the child. Code of Civil Procedure section 372.5 sets forth the procedure for the appointment of a guardian ad litem under a pseudonym. This may be necessary to protect the identity of the minor where the parent will be the guardian ad litem, and the parent's name will relate to the child's name. These sections should be read by the practitioner when preparing the Application for Appointment of Guardian ad Litem. Due to the sensitive nature of certain allegations, courts have permitted plaintiffs to be identified by initials or other means to preserve confidentiality and privacy. (See *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767; *People v. Ramirez* (1997) 55 Cal.App.4th 47.)

Parents need to be told that it is the child's case, not theirs. In cases where parents are involved, it must be explained to them as early as possible that settlement money belongs to the minor, the parents do not get access to it, nor do the parents have the right to control or invest it. Parents must be educated to understand that the court has final approval of any child's settlement and disposition of the settlement proceeds. Probate Code section 3602 is very specific about where settlement funds for minors must be deposited.

When a child is traumatized, it naturally affects the parents. There may be feelings of guilt, inadequacy, or inability to protect the child felt on the part of the parents. Attorneys need to be aware of these things because they will be part of the gestalt of representation, mediation, and settlement. In other cases, parents may be overwhelmed. This is particularly true when children are autistic, have special needs, or are catastrophically injured. While the parents or guardian ad litem are not specifically the client, their feelings and concerns need to be managed as well. All of these issues need to be addressed from the commencement of the representation so that they do not surface for the first time at the mediation.

Unfortunately, in some cases, the attorney must protect the child from parents. This is why it is important to get to know the child and ascertain what is tolerable for the child in connection with the case. Conflicts can arise between parents and children concerning the disposition of the case and other decisions. Ultimately, the attorney must be guided by the best interests of the child.

Developing damages for presentation at mediation

This article does not address the demonstration of damages for physical injuries. Readers here are sufficiently sophisticated in knowing how to present such damages.

Psychological injuries

It is critical to demonstrate the full extent of the child's injuries at mediation. Attention has to be made to long-term injuries involving significant sequelae such as the psychological components of burns or disfigurements, molestation, or physical or emotional injuries that are not fully resolved. The more challenging aspect of demonstrating damages in children, especially young kids, is where they are psychological. Often, a child may not directly or expressly communicate his or her suffering or despair as a result of the incident. How do you discover and draw out the effects of deep violations, fears, humiliation, and pain? This takes both getting to know the child and sensitizing the parents or guardians to be aware of the conduct of the child. Attorneys have to advise the parents to be observant and report to counsel any changes in the child's behavior as a result of the incident as these are all indicative of psychological harm. Many types of conduct reflect distress. Attorneys should ask the parents or guardians whether the child is demonstrating any of the following:

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2021

1. Depression, languid, flat affect;
2. Loss of interest in activities;
3. Weight loss or weight gain;
4. Fatigue or lack of energy;
5. Bed-wetting;
6. Insomnia or hypersomnia;
7. Anger, irritability, temper, oppositional defiance, sudden rebelliousness;
8. Agitation or retardation;
9. Cutting or other self-destructive behavior such as pulling out hair;
10. Feelings of worthlessness or excessive guilt;
11. Diminished or inability to think or concentrate, indecisiveness, lack of motivation;
12. Suicidal ideation;
13. Reclusiveness, isolation;
14. Drug or alcohol use;
15. Changes in conduct at school or with grades;
16. Hallucinations, delusions, obsessive, compulsive, or paranoia;
17. Any variation in baseline conduct including educational performance; and
18. Skin rash and/or skin alopecia. Have the guardian ad litem document whether these modes of conduct are recurrent or single incidents. Sometimes it can help by having the parents keep a journal. In other cases where a child is nonverbal, a seizure log or log of behavior should be maintained to document the child's distress. These should be provided to the forensic experts discussed below.

To demonstrate psychological and other behavioral damages, it may be necessary to obtain the child's educational records to show a baseline pre-incident and resultant deterioration post-incident. If the child is nonverbal or special needs, these pre-incident records, including any Regional Center or other psychological records, are critical to show deterioration of the child's psychological condition as a result of the incident.

Before a mediation, a child suffering psychological injuries must be referred for a forensic psychological evaluation by a credible and experienced professional. Logs of the child's behavior, educational records, and any other documentation of the child's baseline should be given to a forensic psychologist for consideration as part of a psychological evaluation of the child client. In such cases, a life care or other plan should be prepared for presentation to the mediator by a forensic psychologist and other relevant experts which includes anticipated duration and cost of therapy for the child client. Prognosis, recommendations for treatment, and the costs, therefore, including projected future care, costs, and present value. The expert report[s] must be provided to the mediator (on a confidential basis if necessary) to demonstrate the full extent of a child's psychological injuries.

In certain cases, there may be police interview videos of the child. Any such video should be given to the forensic experts as well as the mediator. Such videos can be powerful at mediation.

Meeting the injured child

Having the mediator or defense counsel and adjusters meet the child client can be powerful at mediation. In certain cases, I have made my child client available to meet the mediator. I would never select a mediator who would be insensitive to a child, so harm to the child has not been a concern. However, the child has to be prepared for and amenable to meeting the mediator.

I generally believe the phrase "out of the mouths of children" can be valuable and enhance the value of the settlement by having the defense counsel and adjuster meet the child at mediation. This can be as simple as an introduction, or more, depending on the child. Even if a deposition has been given, the adjuster has not met the child. It helps to have the person writing the check see the plaintiff child with their own eyes. Putting a human face to the case in addition to an expert's evaluation helps to encourage maximum compensation for the child.

Psychologically it can be difficult for opponents to say "no" in negotiations after meeting a child that has been seriously harmed and who comes across in a genuine way. Where a child is young, their innocence and damage will be poignant when it is expressed to the other side. I think this helps and strengthens the negotiation at mediation. It has always been my theory that if I see the truth in the child, others including the mediator or jury will as well. The question is whether the child is willing and capable of meeting others without sustaining further harm or distress. In cases where a child may not be amenable, a video presentation can be used, but a personal and spontaneous meeting has a greater effect on the mediator and those evaluating the child. Where a child is older and perhaps a teenager, they are certainly capable of deciding whether they want to speak to the mediator or defense counsel and adjusters. Some children find it empowering, some find it cathartic and some find it terrifying.

Knowing your client and the case will enable the attorney to decide what is best for the case and the client as far as making the child client available to the mediator and defense. In the end, the question of whether to involve the child directly in the mediation is determined based upon the best interests of the child.

Earning capacity

Other aspects of a child's damages may include future lost earnings or impaired earning capacity. These are important elements to consider when a child's injuries are catastrophic. "Where a very young child suffers catastrophic injury, such as brain injury or paralysis, it precludes any work, it is nonetheless reasonably probable that the child was fit and qualified to do something in the work force. Hence, damages for impaired earning capacity may be assessed based on the average earnings of all workers in the work force. *Licudine v. Cedars-Sinai Medical Center* 3 Cal.App.5th at 896... The evidence is normally developed through analysis of gross population statistics..." (Personal Injury [Rutter Group] at section 3:596.) So, for purposes of mediation of a catastrophically psychologically or physically injured child, it may be necessary to have a report for the mediator from an economist and a vocational rehabilitation specialist (See: BAJI 1431; CACI 3903D) to enhance and further substantiate damages.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2021

Pain and suffering damages

How can one show pain and suffering damages when the child is an infant or incapable of testifying? Many injuries cause pain and suffering throughout a person's lifetime. These may include flareups, humiliation, anxiety, or psychological recurrence.

It should be pointed out to the mediator that the trier of fact *can infer* future pain-and-suffering from the type of injury involved in the pain experienced. (*Loper v. Morrison* (1944) 23 Cal.2d 600.) Future pain-and-suffering must appear reasonably certain to occur. (*Sylvester v. Scanlon* (1934) 136 Cal.App. 107; Civil Code section 3283; see CACI 3901, 3905A; BAJI 14.13.)

To show a child's pain-and-suffering damages, the best practice at mediation is to offer medical opinion evidence of the probability and duration of continued disability and symptoms. Failing to substantiate and present these damages at mediation will result in a reduced evaluation of the claim.

Procedure when a settlement is negotiated at mediation

Settlement at mediation

To conclude a case for a minor, a Petition for Compromise of Disputed Claim of Minor must be filed and approved by the court. Probate Code section 3500 provides the authority for a parent's right to compromise a minor's claim. The authority to settle is held by the court-appointed guardian ad litem. However, court approval is critical because compromise of a minor's claim is only valid where a petition has been filed *and approved* by the Superior Court.

Signing a settlement agreement is not enough to accomplish a settlement. Without court approval, there is no *binding* settlement. Absent overriding circumstances, before court approval, a settlement is voidable by the guardian (or conservator). (*Scruton v. Korean Air Lines Co., Ltd.* (1995) 39 Cal.App.4th 1596, 1606 to 1608.) So, a negotiated settlement at mediation is always *conditioned* on court approval. A settlement agreement executed by the parties after a successful mediation is not enough. Without court approval, the mediated settlement is unenforceable.

Court approval

Court approval of the settlement starts with a petition to the court on Judicial Council form MC – 350 (Petition to Approve Compromise of Disputed claim of pending action with disposition of proceeds of judgment from minor or person with a disability) or MC – 350 EX (expedited version of petition) [available on the Court's website]. The expedited petition is only good for settlements under $50,000 and does *not* require a court appearance. Whether the standard petition or the expedited petition, the petition, when filed should be accompanied with a proposed Order on Judicial Council form MC-351 (Order Approving Compromise of Minor's or disabled persons Claim), which specifies all disbursements including medical bills, attorney's fees, fees for preparation of a Special Needs Trust and any other disbursements to be made from the settlement proceeds. Put it all in the order, which should mirror the elements of the petition.

If a lawsuit is pending, the petition is filed in the same court. If there is no lawsuit pending, the petition must be filed in the county where the minor resides or where a suit could be brought. (Code Civ. Proc., § 372; Prob. Code, § 3500 (B).) It is not necessary to notice the other parties. (Code Civ. Proc., § 372.) Code of Civil Procedure section 372 confers no right on the settling defendant (or anyone else) to object to the court's approval of the settlement. Typically, the minor must attend the hearing on the compromise unless the court for good cause dispenses with the personal appearance. (California Rule of Court 7.952 (a).)

Disposition of settlement funds

In settling the case for a minor, there are specific and limited choices for the disposition of settlement proceeds. Probate Code sections 3602, 3610, and 3611 set forth the various dispositions of settlement proceeds available which include a deposit in a bank, or a single premium deferred annuity subject only to withdrawal upon approval of the Court. Citation to these statutes can be used to dispel any parent or guardian's desire to personally control, acquire or invest the child's settlement proceeds. A good discussion of the various options available for disposition of settlement proceeds can be found at sections 4:1530 to 4:1543 of the Rutter group on Personal Injury. In the end, the court must approve the location for deposit of settlement funds.

Disposition of a minor's funds again depends on knowing your client. While a blocked account is one vehicle available, the funds become available to the minor when the minor turns 18. We would all agree that an 18-year-old receiving a lot of money is not a good idea. Additionally, receipt of those funds may make a minor ineligible for college loans and grants, which is another consideration.

An alternative to a blocked account is a structured settlement, also known as an annuity, where arrangements can be made for disbursement of the funds periodically determined by the guardian ad litem and/or the attorney. This method of receipt avoids constructive receipt and accomplishes guaranteed, tax-deferred interest under Federal and State law. Under Probate Code section 3611, subdivision (g), a trust (other than a Special Needs Trust discussed below) can be set up for the minor. This provision can be helpful to request that the court permit deposit of minor's settlement funds in a directed brokerage account, which may earn more interest in the current economic climate than Certificates of Deposit or structured settlements. There should be some guaranteed interest or mechanism to preserve principle to win court approval of this type of trust, as it is always the court's concern that the funds are protected and preserved for the child.

In certain cases, a Special Needs Trust is necessary. Probate Code section 3604 provides the authority for the establishment of a Special Needs Trust.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2021

Special Needs Trusts are required where your child client is receiving public benefits and you want or the child needs to maintain them. This is because where a child has more than $2,000 in its possession it will be divested of public benefits. Loss of public benefits can be avoided by the use of a Special Needs Trust. Court approval is required to establish a Special Needs Trust. (Note: when the minor reaches 18, a Cal/Able account allows an annual deposit of $15,000, which does not reduce future public benefits.) The cost to establish the Special Needs Trust should be deducted from the minor's settlement and included in accounting within the Petition for Compromise of Minor's Claim. In certain instances, the trustee will have to be bonded, and these costs should also be built into the accounting included in the Petition for Compromise of the Minor's claim.

Conclusion

Successful mediation of a child's case takes not only one's lawyering skills but also a deep sensitivity and humanity to elicit information from one's client and present one's client's case in the most effective and valuable manner, all while not harming the child client. Sometimes a parent or guardian ad litem questions or objects to the amount of a settlement offer – no amount of money is enough. In such circumstances, I have confronted the parent or GAL and explained the trauma the child may endure at trial and the negative consequences of a trial gone badly. When confronted with these potential negative consequences, the parent (or guardian ad litem) is forced to see their child's case from a different perspective, (through the eyes of the child), which often leads to awareness and settlement.

Sanford Jossen is a University of San Diego School of Law graduate. He has practiced for over 39 years, 35 of which have been devoted to the representation of sexually molested, abused, or seriously injured children. He was twice appointed as an As Needed Referee and sat in every Delinquency and Dependency Court in Los Angeles County. He served for 10 years on the Judicial Task Force for Tort Reform of the Dependency Court at the invitation of Presiding Judge Michael Nash and helped write the current Tort Policy. Mr. Jossen has litigated children's cases through appeal and was instrumental in amending Health & Safety Code section 1527 involving the Small Family and Foster Family Home Insurance Fund. He has served as an Arbitrator and Mediator since 1987 for thousands of cases at the request of both plaintiff and defendant firms. Email: jossenlaw@aol.com He welcomes referrals both to represent injured children and for arbitration and mediation.