When a Child Loses a Parent: The Wrongful Death Claims of Minor Children

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Posted: September 26, 2026 · Read online at CalWrongfulDeathLawyer.com

When a parent is killed, the children left behind lose more than anyone can measure. They lose the person who would have raised them, taught them, provided for them, and watched them grow up.

California law recognizes that loss. A child has a wrongful death claim of their own. But a child cannot settle a claim the way an adult can. Every settlement for a minor must be approved by a judge, and the judge also decides how the lawyer is paid and where the child's money goes.

That process shapes the whole case: how a settlement is negotiated, how long it takes to finish, and whether the money is still there to help the child at 18, in college, and when buying a first home.

This article explains how it works, and how a well-designed settlement can protect a child for decades.

A Child Has a Claim of Their Own

A decedent's children are among the first people Code of Civil Procedure section 377.60 lists as heirs who may bring a wrongful death claim. Each child has "a personal and separate cause of action" for their own loss. (*Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690, 692–693.)

A child's deadline to sue is also protected in a way an adult's is not. When a person entitled to sue is under the age of majority, "the time of the disability is not part of the time limited for the commencement of the action." (Code Civ. Proc., § 352, subd. (a).) In *Cross*, the Supreme Court held that the running of the limitations period against adult heirs "does not affect the rights of minor plaintiffs in a wrongful death action." (60 Cal.2d at p. 693.)

There is an important exception. That protection does not apply to claims against a public entity or public employee that require a government claim. (Code Civ. Proc., § 352, subd. (b).) When a city, county, or the State may be responsible, the child's claim is on the same short timeline as everyone else's, and waiting can be fatal to the claim.

What a Child Can Recover

A child's damages follow the same categories as any wrongful death damages, but for a child they often weigh the most. Under CACI No. 3921, the jury instruction for the death of an adult, they include:

- The financial support the parent would have contributed, measured over the parent's life expectancy or the child's, whichever is shorter.
- Gifts or benefits the child would have expected to receive.
- The reasonable value of household services the parent would have provided.
- The loss of the parent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support.
- The loss of the parent's training and guidance.

California permits recovery in a child's wrongful death action for loss of a parent's consortium. (*Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992, 997–998.) And the loss does not depend on a paycheck. In *Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423, four minor children lost their mother. The evidence showed her "discipline and training of the children," help with their schoolwork, and participation in their activities, and the court upheld an award for each child even without evidence that she contributed money to the family.

When a child shares the recovery with a surviving parent or siblings, the total is divided by each heir's own loss. We explain that process in how a wrongful death recovery is divided among the heirs.

A Child Needs a Guardian ad Litem

A minor cannot sue in their own name. The child "shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court." (Code Civ. Proc., § 372, subd. (a)(1).) When the child is the plaintiff, the appointment must be made before the summons is issued, on the application of the child if 14 or older, or otherwise of a relative or friend. (Code Civ. Proc., § 373, subd. (a).)

The guardian ad litem, usually called the GAL, makes decisions for the child in the case. That person must disclose "any known actual or potential conflicts of interest" and any family relationship, and must promptly disclose new conflicts as they arise. (Code Civ. Proc., § 372, subds. (d), (e).)

When the Surviving Parent Is Also an Heir

In most families, the natural choice for GAL is the surviving parent. But in a wrongful death case, the surviving parent is often also an heir with a claim to the same recovery. A surviving spouse and a child are both paid from one settlement, so every dollar allocated to one is a dollar not allocated to the other.

Courts have recognized that conflict. In a case where a mother was killed, the Court of Appeal observed that the father “had a conflict of interest with his daughters because he also sought his own recovery,” and that “a parent with a conflict of interest is not entitled to select the guardian ad litem or control the tactical or strategic” decisions of the children’s case. The court upheld the grandmother as the children’s GAL. (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36.) In another wrongful death case, the trial court noted “a potential conflict between the minor and … his guardian ad litem,” the child’s grandfather, who was also a plaintiff, and appointed a substitute. (*Collins v. Hemet Valley Hosp. Dist.* (1986) 186 Cal.App.3d 922, 925.)

A parent is not automatically disqualified. But the conflict must be disclosed, and the settlement petition requires the parent to state whether they are a plaintiff in the same action, whether they will receive money from the settlement, how the settlement is apportioned among the plaintiffs, and the reasons for that apportionment. (Judicial Council form MC-350, item 11b.) A parent also may not compromise a child’s claim that is against that parent. (Prob. Code, § 3500, subd. (a).) When the split between parent and child is not clearly fair, the judge may appoint someone else to protect the child.

No Settlement Is Final Until a Judge Approves It

A child’s settlement is not binding on the child until the court approves it. The GAL may compromise the claim only “with the approval of the court.” (Code Civ. Proc., § 372, subd. (a)(3).) When no lawsuit has been filed, a parent’s compromise “is valid only after it has been approved, upon the filing of a petition, by the superior court.” (Prob. Code, § 3500, subd. (b).)

Until then, the compromise is “voidable at the election of the minor through his guardian ad litem unless and until ‘the court’s imprimatur has been placed on it.’” (*Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1606.) The requirement protects the child, not the defendant: it “is a ‘shield’” for the minor and “was not enacted to be a ‘sword’ for a defendant.” (*Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333, 1339.)

The petition must be verified and “must contain a full disclosure of all information that has any bearing upon the reasonableness of the compromise.” (Cal. Rules of Court, rule 7.950.) The petitioner and the child generally must attend the hearing unless the court excuses them. (Cal. Rules of Court, rule 7.952.) The shorter, expedited petition is not available for wrongful death claims. (Cal. Rules of Court, rule 7.950.5(a)(2).)

How the Approval Process Shapes the Settlement

Because a judge must sign off, a good settlement is negotiated with the approval hearing in mind from the start. The terms have to answer the questions the judge will ask:

- Is the total fair for this child’s loss?

- Is the split between the child and any adult heirs justified?
- Are the attorney's fees and costs reasonable?
- Are medical or other liens identified and resolved?
- Where will the child's money be held, and when will the child receive it?

The release is not effective until the money is deposited as the court orders. (Prob. Code, § 3500, subd. (d).) A settlement that ignores these questions can be delayed, sent back for changes, or rejected.

How Long It Takes

For a petition to approve a settlement reached without a lawsuit, the court must schedule a hearing within 30 days of filing, and if the petition is unopposed, decide it at the conclusion of the hearing. (Prob. Code, § 3505.) In a pending lawsuit, timing depends on the court's calendar and local practice.

After approval, the deadlines are short. The standard order requires the check for a blocked account to be deposited within 48 hours of receipt and the bank's receipt to be filed with the court within 15 days of the deposit. (Judicial Council forms MC-351, item 9; MC-355, item 6.) Some courts also set a compliance hearing to confirm the money arrived where it was ordered.

In practice, the approval process adds weeks and sometimes months to the end of a case, depending on the court, the complexity of the allocation, and how quickly an annuity or account can be set up. Planning for it early keeps the delay to a minimum.

The Judge's Discretion

The judge is not a rubber stamp. The court's "primary concern is whether the compromise is sufficient to provide for the minor's injuries, care and treatment," and the statute "bestows broad power on the court … to say who and what will be paid from the minor's money." (*Goldberg v. Superior Court* (1994) 23 Cal.App.4th 1378, 1382.) The GAL's job is to protect the child, "but it is the duty of the court to see that such rights are protected." (*Scruton*, *supra*, 39 Cal.App.4th at p. 1605.)

That discretion reaches the division among heirs. A court "may allocate the settlement proceeds other than on a 50-50 basis if it determines the proposed 50-50 split is not equitable." (*Collins*, *supra*, 186 Cal.App.3d at pp. 928–929.) It reaches the fees, which the court must find reasonable. And it reaches the plan for the money itself. The court may require witnesses at the hearing. (Cal. Rules of Court, rule 7.952(b).)

Attorney's Fees From a Child's Share

Every fee paid from a child's recovery must be approved by the court. The court orders the payment of "costs, and attorney's fees, as the court shall approve and allow." (Prob. Code, § 3601, subd. (a).) Unless the fee agreement was approved in advance, "the court must use a reasonable fee standard," considering factors such as the time and labor required, the difficulty of the case, the results obtained, and for a contingency fee, the risk of loss, the costs advanced, and the delay in payment. (Cal. Rules of Court, rule 7.955(a)–(b).) The attorney must file a declaration addressing those factors. (*Id.*, rule 7.955(c).)

There is no fixed percentage in the rule. Before 2010, many courts had local rules that set a baseline fee of 25 percent for minors, and the Judicial Council preempted them. (Cal. Rules of Court, rule 7.955(d); *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167.) A court must decide the fee under the rule, not by a local schedule. (*Gonzalez v. Chen* (2011) 197 Cal.App.4th 881.) At the same time, the Court of Appeal has noted that a court "may of course reasonably determine that 25 percent is an appropriate percentage in a given case," and it reversed a fee cut to 10 percent in a wrongful death case involving four minor children as outside the reasonable range. (*Schulz*, *supra*, 27 Cal.App.5th 1167.)

In practice, 25 percent remains the general benchmark many courts apply to a child's share when the claim resolves without litigation. When a case is heavily litigated, with the added work, risk, costs, and delay that brings, courts often allow fees above 25 percent. The judge decides on the facts of each case.

One statute does set lower fees before a lawsuit is filed: Business and Professions Code section 6146 limits fees in professional negligence claims against health care providers to 25 percent before a complaint is filed and 33 percent after. That statute applies only to medical negligence. Our firm does not handle medical negligence cases.

Where the Money Goes: Blocked Accounts

The court decides how a child's net recovery will be held. The most common choice for cash is a blocked account: money "deposited in an insured account in a financial institution in this state … subject to withdrawal only upon the authorization of the court." (Prob. Code, § 3611, subd. (b).)

Before 18, withdrawals require a verified petition showing the balance and "a justification for the withdrawal." (Cal. Rules of Court, rule 7.954(a).) At 18, the standard order directs the bank, "without further order of this court," to pay the former minor "all funds, including interest." (Judicial Council form MC-355, item 5b.)

That is the weakness of a blocked account. On an 18th birthday, a young adult who has lost a parent may receive the entire balance at once, with no plan and no one required to help manage it.

The court has other options, including a guardianship of the estate, a custodianship under the California Uniform Transfers to Minors Act, a trust revocable by the child at 18, and for a child with a disability, a special needs trust. (Prob. Code, §§ 3604, 3611.) Each has its own rules about control and timing.

Structured Settlements: Paying the Child Over a Lifetime

A structured settlement pays part of the recovery over time instead of in one lump sum. California describes it as "an arrangement for periodic payment of damages established by settlement or judgment in resolution of a tort claim," paid "in periodic tax-free payments rather than a lump-sum payment." (Ins. Code, § 10134, subd. (j).) Typically the defendant or its insurer funds an annuity from a life insurance company that makes the payments on a schedule written into the settlement. The petition must show both the total and the present value of any installment payments. (Judicial Council form MC-350, item 10c.)

The schedule can be designed around the child's life. Common features include:

- A payment at 18 to help with the transition to adulthood.
- Payments during the college years, timed to tuition and living costs.
- Larger payments in the mid-20s or around 30, when a young adult may be buying a first home or starting a business.
- A final payment in the mid-30s.

In the settlements we see, payouts are most often staggered gradually between ages 18 and 35. That spread gives a young person support at each stage of early adulthood, instead of everything at once.

Structured settlements have real advantages:

- **Tax treatment.** Federal law excludes damages received on account of personal physical injuries "whether as lump sums or as periodic payments" from income. (26 U.S.C. § 104(a)(2).) Wrongful death damages have generally been treated the same way, but families should confirm the tax treatment of their own settlement with a tax professional.
- **A fixed, protected schedule.** In a standard structured settlement, the payments are "fixed and determinable as to amount and time of payment" and "cannot be accelerated, deferred, increased, or decreased by the recipient." (26 U.S.C. § 130(c).)
- **Protection from quick sales.** A transfer of structured settlement payment rights is void unless a court approves it as "fair and reasonable and in the best interest of the payee." (Ins. Code, § 10137.)

There are tradeoffs. A structure cannot be changed once it is set, so money that is scheduled for age 25 cannot be reached at 20 for an emergency. That is why many families combine approaches: some money in a blocked account for needs at 18, the rest structured over the years that follow.

Planning for a Child's Whole Life

A wrongful death settlement for a child is not only compensation for what was lost. It may be the foundation the parent would have provided: help with school, a first car, a first apartment, a first home.

The court approval process exists to protect that foundation. A settlement that is fair to the child, honest about any conflict with a surviving parent, reasonable in its fees, and thoughtful about when the child receives the money is the kind of settlement a judge approves, and the kind that still helps the child years later.

If your children have lost a parent, plan for the approval process from the beginning, and ask how the settlement can be structured around your child's future.

Authorities

- Code Civ. Proc., §§ 352, 372, 373, 377.60.
- Prob. Code, §§ 3500, 3505, 3601, 3604, 3611.
- Ins. Code, §§ 10134, 10137.
- Bus. & Prof. Code, § 6146.
- 26 U.S.C. §§ 104(a)(2), 130(c).
- Cal. Rules of Court, rules 7.950, 7.950.5, 7.952, 7.954, 7.955.
- Judicial Council forms MC-350, MC-351, MC-355.
- CACI No. 3921.
- *Cross v. Pacific Gas & Elec. Co.* (1964) 60 Cal.2d 690.
- *Boeken v. Philip Morris USA Inc.* (2013) 217 Cal.App.4th 992.
- *Allen v. Toledo* (1980) 109 Cal.App.3d 415.
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— *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167.

About the author

Richard C. Harris is the principal attorney of Rich Harris, A Law Corporation. His practice is dedicated to helping families pursue wrongful death claims against reckless drivers, careless companies and negligent government agencies in all 58 California counties.

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