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BY THE HON. MADAM
JUSTICE SYLVIA CORTHORN

Court Approval of S E T T L E M E N T S

Slightly more than a year ago, I was asked to submit an article on the subject of pre-trial conferences. I agreed to do so. As time passed, however, I was struck by the frequency with which motions and applications for settlement

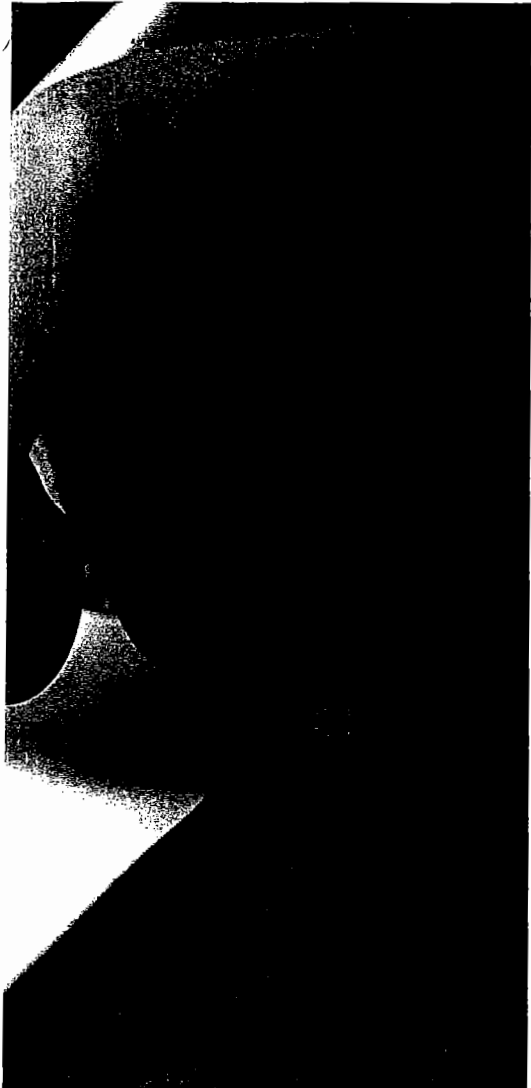
approval are unsuccessful at first instance, if not entirely. That lack of success is a phenomenon that need not exist.

I requested and received permission to change the subject of my article. What follows are guidelines intended to assist counsel in achieving success on motions and applications for court approval of settlements reached in personal injury litigation.

Background

The requirement for court approval of settlements reached on behalf of a person under a disability stems from the court's *parens patriae* jurisdiction.¹ That role is reflected in many of the *Rules of Civil Procedure*.² Settlements on behalf of persons under a disability are addressed in rules 7.08 and 7.09.

Settlement approval is obtained by way of a motion or an application, the



the case on behalf of the person under a disability.

2. Management of the settlement funds

- The level of detail to be included is akin to that required on an application for the appointment of a guardian of property or for the approval of a management plan.

3. Approval of the solicitor-client account

- The evidentiary requirements are similar to those on an assessment of an account as between solicitor and client.

Affidavit evidence is required from both counsel and the litigation guardian.⁴ It is not sufficient to include a blanket statement from either individual that the settlement reached is both reasonable and in the best interests of the person under a disability. The supporting material must be sufficient for the court to conclude that the assertion, if made, is correct.

Evidentiary Requirements

For ease of reference and concision, I have used check-lists to describe the nature of the evidence required in the supporting affidavit materials.

a) Affidavit of Counsel

In most cases, counsel's affidavit sets out the bulk of the evidence. In keeping with the three general topics listed above, counsel's affidavit should address the following matters:

1. Reasonableness of settlement

- Liability
 - The basis for the discount, if any, from full recovery because of liability issues
 - A discussion of the parties' respective positions

- Reference to and copies of the supporting documents, if relevant (police report, experts' reports, etc.)

- Limits on potential recovery

- The liability limits of available insurance and limits of other sources from which compensation may be paid
- The ability or inability of the settling defendant(s) to personally pay the amount, if any, recovered by way of judgment in excess of the insurance limits available to the settling defendant(s)

- Assessment of damages

- Up-to-date medical information
- The outcome of defence medical examinations
- The basis for the discount, if any, from full recovery because of causation issues
- The opposing parties' respective positions on damages
- Reference to and copies of the supporting documents, if relevant (key experts' reports)

- The basis for the apportionment of compensation as between the party under a disability and other plaintiffs, including *Family Law Act*⁵ claimants

- The amount paid by the settling defendants(s) for costs (fees, disbursements, and HST)

- The existence of any concurrent legal proceedings—and the potential for additional recovery in other matter(s) and status of those proceedings

- Collateral benefits including, in motor vehicle cases, accidents benefits

- The availability of collateral benefits

- The status of claims for collateral benefits

latter in the event a settlement is reached before litigation is commenced.³ The relief requested will only be granted if there is sufficient evidence to support the request. Court approval of a settlement is an evidence-based process.

There are three critical subjects to be covered in the supporting affidavit materials:

1. Reasonableness of the settlement

- The substantive contents are similar to those of a pre-trial conference memorandum. They are written in evidentiary rather than narrative form. They include a forthright discussion of the strengths and weaknesses of

- A summary of the status of the personal injury litigation at the time of settlement
 - Steps taken in the action to date
 - Steps to be taken to complete the action in the event the settlement is not approved.

As noted above, including key documents and experts' reports as exhibits is important. Even more important is summarizing, in the body of counsel's affidavit, the critical portions of the documents and reports. All too frequently, counsel simply identify the document and refer the judge to the exhibit. The exhibits are meant to be a secondary source of the relevant information; they are available for the reviewing judge for the sake of completeness.

2. Management of the settlement funds

Rule 7.09 provides that monies payable to a person under a disability shall be paid to the accountant of the Superior Court of Justice, "unless a judge orders otherwise". The discretion to order otherwise has existed since 1985—for over 30 years. Many counsel fail to appreciate that the exercise of this discretion is not automatic. Evidence is required in support of a request for the judge to exercise this discretion.

Counsel should make certain that they and the litigation guardian understand how the settlement funds would be managed if they were paid to the accountant. Check the information available from the website for the Ministry of the Attorney General.⁶

If something other than payment to the accountant is proposed, contrast the proposed alternative with payment

to the accountant. Explain why the alternative is in the best interest of the party under a disability. (See the discussion below with respect to rule 7.09.)

3. The solicitor-client account

The net recovery to the party under a disability or minor must be addressed. Approval of the proposed solicitor-client account is part of the settlement approval process.

Regardless of whether the retainer agreement executed by the litigation guardian is on a fee-for-service or a contingency fee basis, address the risk assumed by counsel in taking the matter on. In addition, include the following:

- A chronology of the events in the action (discoveries, motions, mediation, etc.)
- A chart-form summary of work done that
 - Categorizes the work done by the steps in the proceeding
 - Identifies each time keeper (experience level and hourly rate)
 - Itemizes the hours docketed for each time keeper by work category and step in the proceeding
- A computer generated pre-bill (as an exhibit)
- A list of the experts retained and the issues addressed by each expert
 - Copies of their respective invoices may be required if the fees charged by the experts exceed what might be considered the norm
- Retainers
 - A copy of the retainer agreement executed by the litigation guardian
 - An explanation as to how and why the retainer differs, if at all, from the "usual" retainer for a client not under a disability.

Even more important is summarizing, in the body of counsel's affidavit, the critical portions of the documents and reports.

If the proposed solicitor-client account is based on a contingency fee retainer agreement, the evidence required in support of the proposed account is extensive. This aspect of the approval process requires an article of its own to do justice to the subject.⁷

b) Affidavit of the Litigation Guardian

The litigation guardian's affidavit is typically less extensive than counsel's affidavit; it should not, however, be given short shrift. The following subject matters, among others, should be considered when preparing the affidavit of the litigation guardian:

- Is the litigation guardian in a position to re-state that they have no interest adverse to the party under a disability or the minor?⁸
 - If so, include the re-statement in the affidavit; and
 - If not, consider bringing a motion to have the litigation guardian replaced before proceeding with the motion for approval of the settlement.⁹
- If the person under a disability is an adult, is the litigation guardian

in a position to address the issue of capacity?

- Is an up-to-date capacity assessment required, before proceeding with the motion for approval, so as to have evidence substantiating the continuing disability?

It may also be necessary for the litigation guardian to address some of the subjects addressed in counsel's affidavit, although from the perspective of the litigation guardian.

Where a request is made pursuant to rule 7.09 for the settlement funds to be managed other than by payment to the accountant, the litigation guardian will, in many instances, be the individual with first-hand knowledge of the proposed, alternative management plan.

The litigation guardian's affidavit is typically less extensive than counsel's affidavit; it should not, however, be given short shrift.

I therefore turn to the type of evidence required in support of such a request.

Rule 7.09 – Management of Settlement Funds

Mandatory reading for counsel preparing materials in support of a

request pursuant to rule 7.09 is the decision in *Hoad v. Giordano*.¹⁰ That decision identifies at least 15 questions to be addressed in the supporting materials.

Whether in the litigation guardian's affidavit or in counsel's affidavit, address the following matters:

- The investigation carried out and investment/management options considered by the litigation guardian
- An explanation as to why the option chosen is in the best interest of the person under a disability
- Evidence from the financial institution or advisor with whom the funds are to be placed may be required—in particular if a non-structured investment of funds is proposed for all or a portion of the settlement funds
- An explanation of how the proposed management of the settlement funds ties into the other property, assets, income, and expenses of the person under a disability
- For the structured portion, if any, of the settlement
 - What is the rationale, generally, for a structure?
 - What alternative structures were considered?
 - How does a structure assist the person under a disability to meet their future expenses?
 - What is the basis for the particular payment schedule proposed?
 - Is the payment schedule proposed in keeping with future expenses?
 - If a guarantee is proposed for the benefit of someone other than the person under a disability,
 - ♦ What is the cost of the guarantee?
 - ♦ Who is responsible to pay the cost of the guarantee—the

person under a disability or the beneficiary of the guarantee?

- ♦ How are (monthly and/or yearly) payments affected by the cost of the guarantee? (i.e. What is the specific amount by which the payments are decreased?)
- ♦ Why is the guarantee in the best interests of the person under a disability? (i.e. What evidence is there of the benefit, to the person under a disability, by reason of the guarantee?)
- Financial management
 - Is the assistance of a financial advisor, a money manager, or an accountant required?
 - Is there a guardian of property?
 - Is the posting of a bond required?
 - What are the terms of the reporting or accounting obligations of the guardian of property?
 - What is the draft amended management plan for which the guardian of property intends to seek court approval in the related guardianship proceeding (assuming the settlement reached is approved)?
- For an adult person under a disability residing outside Ontario, satisfy the court that there is in place, pursuant to the applicable statutes and/or regulations, sufficient protection of the assets of the person under a disability. An affidavit may be required, from a lawyer practising in the province, state, etc. where the person under a disability resides, as to the laws applicable to the management of property of persons under a disability.

Other Matters

Other miscellaneous matters that

routinely arise in the context of the court approval process warrant mention:

- Lump sum payments proposed to anyone other than the person under a disability must be explained. For example, if the litigation guardian proposes that they or someone else be compensated for services provided then details are required of the services and the basis upon which the proposed compensation is calculated.
- If there is a request for the record to be sealed, set out the grounds in support of the request. A brief factum with supporting case law may also be required.

Summary

It is in the best interests of a person under a disability, for whom a settlement has been reached, that court approval not contribute to delay in the conclusion of litigation that may well have already taken a number of years. I am confident that counsel who follow these guidelines will efficiently secure orders approving settlements reached on behalf of clients who fall within the category of a person under a disability.

The Hon. Madam Justice Sylvia Corthorn is a Justice for the East Region of the Ontario Superior Court

NOTES

- ¹ The definition of a "person under a disability" includes a minor. See rule 1.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- ² R.R.O. 1990, Reg. 194. See, for example, rules 15.01 (lawyer required) and 31.03 (5) (examination for discovery).
- ³ The vast majority of requests for settlement approval are made by way of a motion. For ease of reference, in this article I refer only to "motions".
- ⁴ Rule 7.08(4).
- ⁵ R.S.O. 1990, c. F.8.
- ⁶ See Elkin, William F., "Current Issues in Settlements for Parties Under Disability", Ontario Trial Lawyers Association 2011 Fall Conference, for a detailed discussion of the historical and more recent options available to the Accountant of the Superior Court of Justice for investment of funds paid into court.
- ⁷ See *Henricks-Hunter (Litigation Guardian of) v. 814888 Ontario Inc.* (2012), 2012 ONCA 496, 294 O.A.C. 333 for discussion of the two-part process to be applied by the court in determining whether to enforce a contingency fee agreement.
- ⁸ I say, "re-state", because rule 7.02 requires the litigation guardian on behalf of a plaintiff to file an affidavit attesting to a number of matters including that "he or she has no interest in the proceeding adverse to that of the person under a disability".
- ⁹ See, for example, the decision in *Motz v. Howard*, 2015 ONSC 6464, 259 A.C.W.S. (3d) 257 (Ont. S.C.). The litigation guardian had a conflict because of costs exposure and, on the order of the court, was replaced by the Public Guardian and Trustee.
- ¹⁰ (1999), 30 C.P.C. (4th) 59, 89 O.T.C. 298 (Ont. Gen. Div.).



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