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# Litigation Guardians and Parties Under a Disability

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Where a party to litigation is under a disability, the proceeding shall be commenced, continued or defended by a litigation guardian. Rule 7 of *the Rules of Civil Procedure* sets out the requirement of having a litigation guardian, and the procedure for becoming a litigation guardian.

## What is a "Party Under a Disability"?

The definition of "disability" under Rule 1.03 provides that a person is said to have a "disability" where the person is (a) a minor; (b) mentally incapable within the meaning of section 6 (incapacity to manage property) or section 45 (incapacity for personal care) of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, or (c) an absentee within the meaning of the *Absentees Act.*

A recent decision of the Superior Court of Justice, *Susan Eng v. Elizabeth Eng*,[i] clarifies the level of incapacity that is required for a litigation guardian to be appointed. There, a mother commenced an action through a litigation guardian against her daughter. The mother was assessed by a capacity assessor, and was found to be capable of managing her property and personal care. However, the assessor found that she was incapable of instructing counsel. The defendant then moved to have the action brought by the litigation guardian dismissed or stayed. The defendant argued that there was no finding of incapacity under either s. 6 or 45 of the *Substitute Decisions Act, 1992,* and therefore the action by the litigation guardian was inappropriate.

The court disagreed. The court noted that there may be different levels of incapacity. The court further noted the definition of "disability" in the Rules and emphasized the importance of the phrase "in respect of an issue in the proceeding". The action was allowed to continue by way of a litigation guardian.

## What Evidence is Required to be Appointed Litigation Guardian?

The *Eng* decision also highlights the information that the court requires in order to allow an action to be brought by a litigation guardian. The proposed litigation guardian must file with the court an affidavit in which the litigation guardian:

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to a named lawyer to act in the proceeding;

(c) provides evidence concerning the nature and extent of the disability;

(d) in the case of a minor, states the minor's birth date;

(e) states whether he or she and the person under disability are ordinarily resident in Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

With respect to the nature of the evidence concerning the nature and extent of the disability, the court in *Eng* stated that the report should be by a qualified assessor. However, the assessor need not be a health practitioner. Amongst other factors, the report should confirm that the assessor is familiar with the purpose of the examination and the report, and the applicable test; should confirm that the assessor is sufficiently familiar with the nature and scope of the litigation; should summarize the materials reviewed; should describe the information sought and provided; should describe the examination conducted and the observations made; and should set out the assessor's opinion, with

specific reference to the test and an explanation as to the grounds for the conclusions reached.

## Litigation Guardian Must Have No Adverse Interest

As to the requirement that the litigation guardian have no interest in the proceeding that is adverse to the person under disability, the court in *Eng* observed that this does not mean that the litigation guardian must have NO interest in the proceeding: just that the interest, if any, not be adverse. The court rejected the argument that the litigation guardian should be disqualified from acting as litigation guardian simply because she was a beneficiary of the mother's estate, and possibly stood to gain financially if the litigation was successful.

Procedurally, the litigation guardian for a plaintiff or applicant files the required affidavit when the proceeding is commenced. If the action or application is brought against a person under disability, a person who wants to act as litigation guardian would bring a motion before acting. If no motion is brought, then the plaintiff or applicant must bring a motion to appoint a litigation guardian before taking any further step in the litigation. Before bringing such a motion, the plaintiff or applicant must serve a "request for appointment of litigation guardian" on the party under disability.

## Litigation Guardian Not Always Required

The Rule regarding litigation guardians does not apply to an application under the *Substitute Decisions Act*. However, in such an application, the court may appoint counsel for the person whose capacity is in issue under s. 3, and the person shall be deemed to have capacity to retain and instruct counsel.

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[i] 2021 ONSC 464 (CanLII)