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Settlements when dealing with Minors and Incapable Beneficiaries

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This memorandum is intended to facilitate communications and discussions between the bench and bar concerning settlements involving persons under a disability as defined by Rule 7 of the Rules of Civil Procedure (Ontario) ("Rule 7").

Rule 7 encapsulates the principle that the judiciary forms a final protection for disabled parties where a settlement affecting their interests has been reached by others on their behalf. In practice, difficult issues arise, such as potential loss of solicitor-client confidentiality and how and when to deal with solicitors' fees, disbursements and GST.

The Children's Lawyer and the Office of the Public Guardian and Trustee are involved in approvals of such settlements given their respective roles in protecting the interests of minors and adult incapable persons respectively.

Rule 7

Rule 7 provides the framework for much of the discussion, dealing with: the requirement to have a litigation guardian to direct proceedings on behalf of parties under disability (7.01); the circumstances under which it is unnecessary for the Court to appoint the litigation guardian (7.02); the circumstances under which the Court must appoint a litigation guardian (7.03); representation of parties under disability by the Children's Lawyer (in the case of minors) and the Public Guardian and Trustee (if the party is mentally incapable) (7.04); the powers and duties of the litigation guardian (7.05); removal or substitution of litigation guardian (7.06); the noting in default or discontinuance by or against a party under disability (7.07 and 7.07.1); the approval of a settlement of a claim by or against a person under disability (7.08); and payment of money payable to a person under disability into Court (7.09).

Rule 7.08, dealing with settlements, reads as follows:

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the

claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application.

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the solicitor acting for the litigation guardian setting out the solicitor's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement.

(5) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (4) be served on the Children's Lawyer or on the Public Guardian and Trustee as the litigation guardian of the party under disability and may direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

Rule 7.08(1) suggests that there is no absolute requirement that settlements on behalf of disabled persons be approved, assuming the parties do not expect to have to enforce the settlement. However, Rule 7.08(2) states that Judgment on consent in favour of or against a party under disability cannot be obtained without the approval of a Judge, so effectively proceedings involving a disabled person cannot end without court approval of a settlement, or the court's decision if the matter does not settle. Rule 7.08(3), dealing with settlements reached before proceedings are commenced, states that approval of a judge "shall" be obtained on an application.

The effect of Rule 7, taken as a whole, is that any settlement or compromise of any proceeding for any person under disability needs court approval.

Solicitors Act

In the context of persons rendered incapable through accident or deliberate injury leading to Court proceedings and insurance benefits claims, it is generally understood that the majority of these claims proceed on the basis of a contingency agreement retainer with the lawyer who then acts for them and/or their litigation guardian.

The Solicitors Act (Ontario) and its regulations govern these arrangements. The Solicitors Act (Ontario) includes the following relevant provisions (the entire Act and its Regulations are reproduced at Tab "B"):

15. In this section and in sections 16 to 33,

"client" includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services;

"contingency fee agreement" means an agreement referred to in section 28.1; and

“services” includes fees, costs, charges and disbursements.

16. (1) Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

(2) For purposes of this section and sections 20 to 32, “agreement” includes a contingency fee agreement.

[...]

26. Where any such agreement is made by the client in the capacity of guardian or of trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the agreement, the agreement shall, before payment, be laid before an assessment officer who shall examine it and may disallow any part of it or may require the direction of the court to be made thereon.

27. If the client pays the whole or any part of such amount without the previous allowance of an assessment officer or the direction of the court, the client is liable to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged, and the solicitor who accepts such payment may be ordered by the court to refund the amount received by him or her.

[...]

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section.

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided.

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

- (a) a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding; or
- (b) a family law matter.

(4) A contingency fee agreement shall be in writing.

(5) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceeding, the amount to be paid to the solicitor shall not be more than the maximum percentage, if any, prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, however the amount or property is recovered.

(6) Despite subsection (5), a solicitor may enter into a contingency fee agreement where the amount paid to the solicitor is more than the maximum percentage prescribed by regulation of the amount or of the value of the property recovered in the action or proceeding, if, upon joint application of the solicitor and his or her client whose application is to be brought within 90 days after the agreement is executed, the agreement is approved by the Superior Court of Justice.

(7) In determining whether to grant an application under subsection (6), the court shall consider the nature and complexity of the action or proceeding and the expense or risk involved in it and may consider such other factors as the court considers relevant.

(8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,

(a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

(9) A contingency fee agreement that is subject to approval under subsection (6) or (8) is not enforceable unless it is so approved.

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements.

(11) For purposes of assessment, if a contingency fee agreement,

(a) is not one to which subsection (6) or (8) applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment; or

(b) is one to which subsection (6) or (8) applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within the time prescribed by regulation made under this section.

The Regulations to the Solicitors Act (Ontario) include the following:

5. (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

(a) apply to a judge for approval of the agreement before the agreement is finalized; or

(b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.

(2) In this section,

“person under disability” means a person under disability for the purposes of the Rules of Civil Procedure.

Severe injuries causing incapacity tend to result in considerable damage awards and attendant care insurance benefits. When solicitors acting in such cases are doing so on a contingency basis, the implicit result is a considerable payment to solicitors, provided the Court approves the settlement. One aspect impacting on the benefit of any settlement to a disabled person is approval of the solicitor’s fees.

Marcoccia (Litigation Guardian of) v. Gill (Marcoccia)

The recent decision in *Marcoccia (Litigation Guardian of) v. Gill (Marcoccia)*, 2007 CarswellOnt15 demonstrates some of the difficulties inherent in this dynamic.

Pertinent excerpts are set out below:

25. Rule 7.08 and the provisions of the applicable statutes require that there be a serious consideration by a judge of all the various steps necessary to complete the settlement in total. Justice, fairness and the protection of the person under a disability require that the provisions of

rule 7.08 be followed. Failure to have the entirety of the completed settlement process placed before the same judge at the same time could, in some circumstances, work to the disadvantage of a plaintiff under a disability and create a circumstance involving an inappropriate result. [...] By further comment, I would note that there now has developed a process of taking the money and paying it into a structured annuity prior to the court approval, or setting monies aside prior to the court approval, in other words, embarking upon steps related to disposition of funds prior to approval of the settlement itself, let alone approval of how those funds should be distributed

[...]

37. I am of the view that there should be a formal motion or application for approval in order that there be a property finality to all of the questions related to the disposition of settlement funds, the future management of the monies and property of the person under a disability, the amount of the settlement funds to be paid to the solicitor by way of fees and disbursements, the amount of money to be paid into an annuity, the terms and provision of that annuity, the amounts of money to be paid for purposes other than the purchase of an annuity, and in the appropriate case, whether or not there should be the assistance of a money manager or an accountant. The formal motion or application should also place before the judge the terms of reporting by the guardian as to property or any money management consultant or accountant assisting that person. In the circumstance where an annuity for periodic payments is to be purchases (sic), there should, in my view, be material to satisfy the Court that the terms and provisions of that annuity are the best available to satisfy the specific needs of the plaintiff under disability and that those are the provisions of the annuity which are in that persons best interests.

38. As far as the solicitor's fees are concerned, there should be proper material before the judge to justify any amount being charged to the person under a disability that exceeds the amount of the partial indemnity costs and disbursements obtained from the settlement.

39. It may well be that the litigation guardian and even, possibly, the guardian of property might be prepared to make agreements with respect to contingency fees or other payments of fees to the solicitor, but, in my view, the scope or (sic) rule 7.08 is such that none of those agreements has any force and effect in the absence of approval by a judge and there is no obligation on the judge to award the solicitor fees and disbursements in accordance with any such agreement, unless that judge might be satisfied, having regard to the total circumstance of the settlement, that such additional fees and disbursements are correct and justified.

[...]

61. Although a solicitor is entitled to fees for work performed, those fees must be reasonable in terms of the work performed by the solicitor. Those fees must be proportionate to the recovery by the plaintiff under a disability and reflective of the value of the work performed as it has advanced and benefited the interests of the plaintiff under a disability.

62. The solicitor argues that to deny her fees would be to set a precedent which would discourage solicitors from litigating on behalf of persons under a disability. It is her position that any reduction in her fees would discourage solicitors from carrying a litigation file and incurring certain risks with respect to payment of fees. The argument she presents is the argument that was presented on numerous earlier cases with respect to requests for a premium in fees.

Issues and Analysis

Some of the key issues engaged by review of Rule 7, the relevant provisions of the Solicitors Act, the Marcoccia decision and general knowledge of the practical day-to-day management of these matters are discussed below.

1. Access to Justice

Disabled clients are often unable to work, and can almost never earn an income allowing them to pay solicitors in the traditional, pay-as-you-go based on hourly rates fashion. Inability to pay under Ontario's system of justice means inability to retain counsel at all, let alone counsel of choice. In many personal injury cases, the client will not be able to pay until a settlement or judgment is obtained. Absent some mechanism for eventual payment, solicitors will not act for disabled clients in these circumstances. The odd case where a solicitor acts pro bono should not be taken as an indication that this is or will become anything of a pattern, or even that it should be. Cases involving clients with severe disabilities, particularly where both tort and insurance issues arise from injuries which caused the disabilities, are extremely complex, risky and difficult.

Pro bono is obviously a credit to the profession and laudable in the cases where it is effective. However, it also has inherent practical risks. For many solicitors, no matter how well-intentioned, there is an inclination to do less work or work of a lower quality when not getting paid. In short, in many cases, the solicitor will put better efforts into paying cases, especially in cases as complex, risky and difficult as the ones this memorandum deals with. It is suggested that, in the vast majority of cases, pro bono is no more an answer to the fee issue than monthly bills to clients who cannot pay them.

2. Competent Counsel

Absent economic incentive to specialize in these cases, solicitors will not undertake the years of training needed to become an effective advocate for the disabled. This is a complex, highly specialized area involving difficult cases, vulnerable clients living sometimes destroyed lives, and a range of knowledge that can only be acquired over years. More often than not, the opposition is an insurance company retaining well-trained, well-funded counsel who must either be convinced that an expensive settlement is warranted, or defeated at trial. Such cases require specialists if disabled clients are to obtain results.

Counsel can only become specialists by focussing for years, meaning they forego the opportunity to practice other areas. Solicitors will not make that decision unless they believe their remuneration will be competitive, if not generous.

3. Disbursements and Risk

Solicitors in these cases often finance the litigation via disbursements, to be reimbursed on settlement or judgment. Disbursements will often be in the hundreds of thousands of dollars, plus interest. In theory, even if the client receives nothing, the solicitor can bill those disbursements. In practice, absent settlement or success in the proceeding there is no one to pay that bill. There are cases where a solicitor will invest considerable assets in disbursements which will not be reimbursed. The losses on those cases must be made up with profits on others.

There is a natural tendency to focus on contingency fees retroactively, after a successful result, because that is when the Court generally first learns of the agreement. Considering the fees prospectively, that is when the solicitor faces a difficult battle, considerable disbursements and risk of no payment whatever or even reimbursement of hundreds of thousands of dollars worth of disbursements, may give a more balanced perspective. Without the chance of generous remuneration at the end of the day, fewer solicitors will want to act in these cases. Fewer solicitors means less competition means, eventually, less competent counsel.

4. Insurance and Tort

The Marcoccia case suggesting that all aspects of a settlement be dealt with simultaneously will be problematic in cases where there is both a private injury tort claim and accident benefits claim. These two claims will often involve different parties who settle at different times. If one claim settles but the other continues, the disabled person will be ill-served if approval of the settlement of one aspect of the proceeding is held up pending resolution of the second. The fact that Court cannot know the result of that second proceeding when approving or disapproving of the first is problematic, but it is submitted that this problem is less troubling than the inability to settle one claim separately from the other.

The principle of putting the Court in a position to understand all aspects of the case which will impact on the disabled person may not be practically helpful in many cases, even though it is clearly the best case scenario and should be attempted if possible.

5. Interim Settlements

Often, the accident benefits aspect of a claim will involve an initial, without prejudice interim settlement intended to provide for immediate and recovery needs while the remainder of the litigation proceeds. This makes sense to both sides: for the plaintiff, it means immediate care and a reduction in the tremendous economic and emotional pressures on plaintiffs and their families; for the defendants, it avoids considerable interim motions and allows for litigation to proceed at a more manageable pace, and it also allows for maximum medical recovery from injuries by the plaintiff due to early comprehensive treatment. This is obviously best from a policy perspective, but it also may benefit the defendant by reducing liability for income loss and other damages. In short, it may be best for all parties. While this practice makes excellent sense on a practical basis and should clearly be encouraged, it nonetheless runs afoul of Rule 7 because virtually nobody asks for Court approval.

In theory then, a motion for approval of an interim settlement would need to have affidavits of the litigation guardian and his/her solicitor in support of the settlement. For these affidavits to have any meaning they would need to explain the litigation as a whole. This practice, it is submitted, could compromise the litigation as a whole if defendant's counsel finds out information they otherwise would not. Also, the delay inherent in a motion for approval could mean that precious months of treatment are lost.

6. Confidentiality

According to Rule 7.08, the litigation guardian and solicitor for the incapable must both swear affidavits attesting to why the settlement is in the incapable person's benefit. The defendant is entitled to know about the motion because it is waiting to make payments, can then find out all the reasons it ought not to have agreed to pay so much. This is

unlikely to affect the current case unless the Court refuses to approve the settlement, but it can certainly affect cases with similar facts in the future.

Eventually, this could reduce settlements over time. In effect, the affidavits in such motions will often include motherhood statements about the settlement being prudent because it avoids the risk, expense and delay of a trial. These motherhood statements will all no doubt be true, but they are something of a given and do not really assist the Court in assessing the monetary gain to the disabled party. They are therefore likely not what was intended by Rule 7.08. Judges know as much or more about the risks, delays and expense of litigation and an affidavit confirming that knowledge is unlikely to give them new information. Lengthy affidavits talking about the merits and demerits of a disabled party's claim from the perspective of his/her solicitor will be much more illuminating to the Court, but also to the opposing party. This is true not only of the merits of the case, but also the solicitor's payment arrangements.

It is extremely problematic for one side to know the other side's lawyer's compensation arrangements. Again, it may not affect the case being settled, but over time it could very easily affect future cases. Of course, insurance companies are sophisticated enough to have a general idea of how the opposing side's solicitors are getting paid, but to tell them exactly, in cases where the Court might not agree to the settlement, is dangerous and fundamentally wrong in principle.

7. Piecemeal Settlements

Putting the entire settlement, including solicitor's fees, before the Court at one time is risky: if the Court does not like one aspect of the settlement the whole agreement may be lost. Also, the solicitor on the motion for approval of settlement must fulfil two countervailing functions. First, he/she must advocate for the disabled in terms of the settlement being in his/her best interest. Second, the solicitor must defend his/her fees. Doing both at the same time means that the solicitor is simultaneously advocating for the client as to the merits of the settlement and advocating for him or herself against the client as to fees.

For the Court to allow the settlement but not the solicitor's fees creates unfairness, it is submitted, because the practical reality is that the settlement was entered into by the litigation guardian in full knowledge of the net after-fees benefit to the disabled person. To some extent, this dynamic is inherent in contingency fees, so a full solution is likely impossible, but it is submitted that the problem can be mitigated.

Guardianship Applications

Although outside the direct scope of this paper, applications for guardianship of the property of persons under disability go hand in hand with settlements of claims which result in funds or assets being paid to them or on their behalf. Justice Wilkins refers to this in the Marcoccia decision, suggesting that these applications should take place at the same time as the approval of settlement, since all the issues are inextricably linked. That the issues are linked is clear. However, this approach may not be readily applicable to many cases. Approval of settlement involves plaintiff, defendant, Court and The Children's Lawyer/Public Guardian and Trustee. Part of that settlement involves solicitor's fees, but that ought not to involve the defendant. Nor does a guardianship application have anything to do with the defendant. It is suggested that in many (if not most) cases the defendant should have nothing to do with the Court's approval or otherwise of the disabled party's legal fees, disbursements and GST.

Possible Solutions

Many of the issues raised may not be capable of a single, one-size-fits-all solution. The variety of the fact situations and the circumstances of the parties affected ranges across all facets of situations and persons. However, disabled parties need the Court's protection and some mechanism is needed to inform the Judge as to settlements affecting them. This is impossible without impacting on solicitor-client confidentiality and giving rise to some of the other problems raised above. Nevertheless, the problems inherent in the need to protect the disabled can be identified and mitigated. Some possible solutions to some of the issues are:

1. Seal Court approval of settlement proceedings from all except the disabled client(s), the(ir) solicitor and The Children's Lawyer and/or Public Guardian and Trustee.
2. Solicitors representing clients under a disability may wish to have contingency agreements (or other fee agreements) reviewed and approved at the outset. If the Court does not like the proposed arrangement, the solicitor at least will be able to choose whether to act. The danger here is that the agreement may be fair at the outset, but be rendered unfair by events. Whether the Court ought to fetter its discretion by a prospective approval is questionable. Judicial consideration of this point would be illuminating for solicitors given the different perspective involved.
3. A change in Rule 7 might allow for interim, without prejudice settlements to be made pending finalization of the entire litigation. This would obviate the problems caused by a practice which benefits all parties but runs afoul of Rule 7. It would also allow for the Children's Lawyer and/or Public Guardian and Trustee to challenge interim settlements after the fact without interfering in or delaying the provision of quick care to injured persons. If deemed appropriate, the range of items covered by a rule change could be limited, but certainly interim settlements providing for the care, assistance, recovery, rehabilitation and quality of life of a disabled party ought to be encouraged by the system and the Rules.

A possible starting point for such a change to Rule 7 might be section 40 of the Substitute Decisions Act, 1992 S.O. 1992, c.30, as amended. That section allows guardians for property to pre-take compensation in accordance with the prescribed fee scale, subject to a Court's overriding jurisdiction on a passing of accounts to reduce it. It also allows for the Public Guardian and Trustee to consent in writing to compensation greater than the prescribed fee scale, again subject to the Court's overriding jurisdiction on a passing to re-open the issue. Using Rule 40 as a starting point then, a litigation guardian could consent to an interim settlement knowing the Court might re-open it at the end of the litigation. Whether The Children's Lawyer and/or Public Guardian and Trustee ought to be involved is open to question.

Practically speaking, counsel in the area are familiar with all issues and the practice of interim settlements has a solid foundation. The benefit of disinterested involvement of an outside party interested only in the party under disability may be outweighed by the possibility for delay and confusion as more parties become involved. It is submitted that The Children's Lawyer and Public Guardian and Trustee should be consulted about whether it is feasible for them to give essentially immediate answers to interim settlement issues.

4. Case management judges could be assigned to cases involving disabled parties at the outset. Those case management judges could be responsible for court approval of the settlements which result. In personal injury cases in particular, this would allow for decisions from the bench based on in depth knowledge of the matters, reducing the time, expense and effort for all involved needed to formalize settlements. Any refusal to approve a settlement would be based on a solid background in the facts of a matter and knowledge of the steps taken by each side and the arguments brought to bear in the proceedings. In the Marcoccia decision, Justice Wilkins refers with some disapproval to an informal process in the past whereby solicitors would access something of this sort. It may be that the benefits of this informal process, namely quick and cost-effective court responses to settlements, could be achieved without the drawbacks of informality, namely actual or apparent non-compliance with the Rules and lack of detailed, open and concentrated attention to the issues prior to decision.
5. Approval of settlements, whether all issues are addressed in the same hearing or not, could be conceptually or even procedurally split into component parts. The first part would be the benefits of the settlement taken as a whole to the disabled person, assuming the legal fees, disbursements and GST claimed are all to be paid to the solicitor, without reduction. The second part would be approval or otherwise of solicitors' fees. Any amount not approved would revert to the disabled person, and in essence be in addition to his/her benefits under the first part. Finally, once all the benefits to the disabled person are determined, the guardianship aspect could be broached. The obvious danger here is that the Court will use the second part to increase the benefits to the disabled person at

the lawyer's expense, leading to great uncertainty for solicitors and some of the attendant risks described in 1, 2 and 3 in the "Issues and Analysis" section above.

Conclusion

The bench and bar share the objective of ensuring effective counsel and Court oversight for vulnerable litigants as well as fairness for counsel in terms of remuneration. The most practical manner of improving upon the current system, it is suggested, may be a tweaking of Rule 7 of the Rules of Civil Procedure to allow for an improvement of this vital function of not only the Court, but also counsel, The Children's Lawyer and the Public Guardian and Trustee.

Awareness of the issues, continued and intensified dialogue between the various participants and a resulting addition to Rule 7 may be the best way forward.