SETTLEMENT OF PERSONAL INJURY CLAIMS ON BEHALF OF PERSONS UNDER A DISABILITY

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INTRODUCTION[1]

This paper reviews the past and current approach to the settlements of claims on behalf of minors and mentally incapable people. In particular, it considers the evidence required to allow the Court to determine if the proposed settlement is in the best interests of the claimant; and the reasonableness of solicitor fees for services. It will suggest best practices for applications under Rule 7 of the *Rules of Civil Procedure*. While this paper is not a direct response to cases like *Marcoccia v. Gill*[2] or *Lau v. Bloomfield*[3], by necessity, several of the problems identified in these decisions will also be reviewed and discussed here.

THE HISTORICAL CONTEXT

The requirement for Court approval of settlements made on behalf of parties under a disability is derived from the Court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the best interest of the protected person, for his or her benefit or welfare".[4]

Black's Law Dictionary describes *"parens patriae"* on the following terms:

> *"Parens patriae"*, literally "parent of the country", refers traditionally to role of state as sovereign and guardian of persons under legal disability. *State of W. Va. v. Chas. Pfizer & Co.*, C.A.N.Y., 440 F.2d 1079, 1089. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.

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1 This paper relies heavily on a paper I presented in November 2007 to The Middlesex Law Association, with appropriate updates. Much of it is, however, a word-for-word repeat of my earlier paper. I commend the detailed, recent best practices paper which is also being distributed at this conference.

2 unreported decision of The Honourable Justice Wilkins released January 2, 2007

3 unreported decision of The Honourable Justice Spies, dated August 24, 2007

4 *Re Eve*, [1986] 2 S.C.R. 388 at para.73. Also see,

Franklin (Litigation Guardian of) v. Neimstein & Associates, [2000] O.J. No. 4192 (C.A.)

Tsaoussis v. Baetz (1998), 41 O.R. (3d) 257 (C.A.)

Re Woo, 2006 CanLII 16344 Ontario C.A. at para.10

> *Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants, idiots and lunatics.[5]

The requirement for Court approval of settlements involving parties under disability has now been codified in Ontario by the creation of Rule 7.08(1) of the *Rules of Civil Procedure*:

> 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.

This rule codifies what was historically the practice in all infant settlements (now more properly described as a settlement on behalf of a party under a disability). For centuries, Judges of the Superior Court have exercised the *parens patriae* guardianship of the sovereign to ensure that the rights of infants and others legally disabled are protected.[6]

Similarly, Rule 7.09 was also a codification of the previous practice relating to the payment of money into Court. Rule 7.09 provides:

> MONEY TO BE PAID INTO COURT
>
> 7.09 (1) Any money payable to a person under disability under an order or a settlement shall be paid into Court, unless a judge orders otherwise.
>
> (2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise.

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5 *Black's Law Dictionary*, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, Henry Campbell Black, Fifth Edition, St. Paul Minnesota West Publishing Co. 1979

6 *Ruetz v. Morscher and Morscher* (1996) 20 O.R. 3rd 545, decision of Justice Salhany O.C.G.D.

Under the *Rules of Practice*, multiple rules addressed cases involving minors and mentally incapable persons, although no rule specifically dealt with the approval of settlements in personal injury claims, as is now provided by Rule 7.[7]

The rationale behind the requirement for Court approval, and the payment into Court of funds on behalf of a party under a disability, was succinctly described by Justice Quinn in *Hoad v. Giordano* as follows:

> Our courts are vigilant when it comes to the best interests of children; and this paternalism, unfortunately, is necessary. Anyone with experience in trying or hearing matrimonial cases knows that parents often act in a manner which is not in the best interests of their children. I do not think it is necessary for me to select my words with any delicacy here and so I say, quite directly, that, in my view, subrules 7.08(1) and (2) and 7.09(1) are part of the law of this province because parents cannot always be trusted to do what is best for their children. Undoubtedly this statement will be galling to the caring, thoughtful, wise and understanding parent. However, the fact is that most laws are aimed at those inclined to break them.[8]

As a plaintiff lawyer, it is my own suggestion that the *parens patriae* jurisdiction of the Court is not intended to see persons under disability treated differently from persons who are capable of instructing counsel. Rather, the purpose is to ensure that vulnerable claimants are not taken advantage of by others. Reasonable terms of settlement, whether on the matter of quantum of damages or the reasonableness of fees, should be considered objectively, based on the reasonable person standard.

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7 see the following *Rules of Practice*: Rule 18 – Minors, Rule 19 – Recovery of Goods or Land From Minor, Rule 20 – Tort or Money Claim Against Minor, Rule 21 – Mental Incompetent, Rule 22 – Litigation Guardian, Rule 92 – Litigation Guardian, Rule 93 – Appointing Litigation Guardian, Rule 94 – Appointing Litigation Guardian, Rule 95 – Mental Incompetent, Rule 96 – Mental Incompetent, Rule 97 – Mental Incompetent, Rule 98 – Mental Incompetent or Absentee, Rule 99 – Person Declared Incapable, Rule 100 – Consent of Litigation Guardian

8 *Hoad v. Giordano*, [1999] O.J. No. 456

THE CURRENT REGIME – *RULES OF CIVIL PROCEDURE*

Rule 7.08(4) sets out the material that is required to be placed before a Judge on a motion or an application for the approval of a proposed settlement on behalf of a party under a disability. It shall include:

- an Affidavit from the Litigation Guardian which sets out the material facts and the reasons that support the proposed settlement, along with the Litigation Guardian's position concerning the proposed settlement;
- an Affidavit from the solicitor that sets out the solicitor's position in respect of the proposed settlement;
- if the party is a minor between the ages of 16 and 18, that minor's consent in writing; and
- a copy of the proposed Minutes of Settlement.

There is no specific mention in Rule 7 - neither permissive language nor prohibitory language - with respect to the issue of legal fees that may be charged by plaintiff's counsel in connection with a proposed settlement. With regard to legal fees, one issue is whether lawyers acting for persons under disability ought to be compensated on some basis different from that used for clients not under disability.

The Rule has no specific directive with respect to structured settlements as they relate to parties under a disability.

There is no specific provision dealing with the intended manner of holding the settlement funds on behalf of the party under a disability.

Rule 72.02 deals with payment into Court, but it only deals with the procedure to be followed when making a payment into Court. It does not itself outline when or why money should be paid into Court.

Rule 7.09, already described above, is the provision which directs that money payable to a person under a disability shall be paid into Court, unless a Judge orders otherwise. There is no rule describing when Judges ought to exercise their discretion to order otherwise, and very little case law on the point. Despite this, Courts have readily accepted structured settlements as a preferred vehicle for managing settlement funds on behalf of persons under disability.

Although motions for approval under Rule 7 occur daily at courthouses across the province, there are surprisingly few decisions dealing with Rule 7. The decisions which exist often involve very large claims, or relate to issues of legal fees. For example, the commentary in Watson & McGowan's 2014 text on Ontario Civil Procedure only mentions two cases dealing with Rule 7.09.[9] It appears that different practices and protocols have developed in various regions of the province.[10] There should be more consistency to the practice and procedure for obtaining court approval, though the effort involved should always be proportionate to the interests at stake. There is no question that the requirements which must be satisfied to obtain approval of a settlement of a party under disability can often seem murky, if not capricious.

ISSUES

There are a number of issues worthy of mention in a discussion paper dealing with the settlement of actions on behalf of parties under a disability, which include:

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9 See *Martin v. Robins*, March 6, 2006, unreported decision of Justice Quinn

Hoad v. Giordano (1999), 30 C.P.C. (4th) 59

10 For example, Alberta has enacted legislation called "*Minors' Property Act*", in which s.4 deals with the settlement of minors' claims. In Nova Scotia, some case law refers to the solicitor's account, in connection with a minor, being sent to an Assessment Officer for taxation, even if a valid Contingency Fee Agreement is in place.

(a) **Required Evidence for Court approval** --The scope and clarity of material to be provided to the Court on a motion under Rule 7 for approval of a proposed settlement;

(b) **Legal fees** -- Appropriate compensation for legal fees for services rendered to persons under disability;

(c) **Use of the settlement funds** --The appropriateness of a practice direction specifically dealing with the circumstances in which it might be preferable for a Judge to "order otherwise" and have monies directed somewhere other than being paid into Court;

(d) **The Children's Lawyer/Public Guardian** -- The extent of the role of the Children's Lawyer and/or Office of the Public Guardian and Trustee;

(e) **Procedure** -- The preferred procedure for obtaining the Court's approval – should there be hearings in open Court, an attendance in Judges' Chambers, or basket motions?

(a) REQUIRED EVIDENCE

Affidavit material filed in support of the application must be sufficient to allow the Court to make a final determination of all the matters in issue. Consequently, the evidence presented to the Court must be comprehensive, thoroughly covering all matters which might impact on determining if the proposed settlement is in the best interests of the disabled party. As stated above, the requirements for Court approval ought to be proportionate to the interests involved. That is, for approval of small Family Law Act claims, particularly those involving deductibles under the Insurance Act, the expense involved in obtaining Court approval ought not to be

disproportionate to the damages recoverable. It certainly shouldn't be more than the value of the actual claim!

Where the person under disability is the main party and has suffered more substantial damages, more ought to be required by the Court. It is recommended that, at a minimum, the solicitor's Affidavit, when setting out the solicitor's position in respect of the proposed settlement in these cases, ought to include a narrative discussion addressing the following issues:

- liability, including the positions taken by all parties to the proceeding, backed up by documentation in support of the various positions.

- a discussion of the treating, consulting physician and experts' opinions, both plaintiff and defence, with respect to the nature of the injury/disability, the long-term prognosis, the need for future care, the possibility of a reduction in income-earning potential, and, if appropriate, life expectancy.

- where appropriate, a detailed description of the position taken by the defence on damages, including excerpts from discovery transcripts and other evidence relied on to resist the plaintiff's claim.

- where appropriate, a description of all the steps taken in the proceeding to advance the plaintiff's case (including motions, interviews with witnesses, consultations with experts, mediations, pre-trials, and other developments).

- recommendations for the distribution and use of the settlement funds, along with detailed evidence supporting and justifying the use of the settlement funds proposed.

- the intended retainer agreements, as entered into by the Litigation Guardian and the plaintiff's solicitor, should be included in the material.

- the intended fees to be charge to the disabled person and sufficient support to justify the fees.
- the reasons for settlement vs. proceeding to trial.
- the apportionment of damages to the various heads of damages.
- confirmation of the insurance policy limits applicable to the case.
- allocation of partial indemnity costs and disbursements.
- the proposed management of funds.

(b) LEGAL FEES

In Ontario, prior to the introduction of contingency fees, courts recognized the appropriateness of allowing lawyers to be awarded legal fees over and above the partial indemnity costs paid by the defendant, in cases involving persons under disability.

The principles that apply to lawyers' fees in cases involving persons under disability have been evolving in the last decade. Generally, it is my position that Rule 7 and the *parens patriae* jurisdiction of the Court was not intended to confer a benefit on the disabled by making their legal fees lower than others. Rather, the protection afforded should ensure that the disabled are not disadvantaged when compared to those capable of instructing counsel.

It has certainly been recognized by our Courts that personal injury litigation is inherently risky. Persons under disability inevitably are unable to fund their litigation and would be without adequate remedies if capable lawyers were unwilling to represent them and assume the economic risk of prosecuting their claims. Madam Justice Thorburn had the following to say about fees in personal injury matters:

> "...it is easy after the fact to underestimate the risk faced by the solicitor in accepting the retainer and the contribution made by the solicitor. There is an element of uncertainty in plaintiff's personal injury work that may entitle a plaintiff's solicitor to compensation over and above the value of the time spent calculated on the basis of docketed time.
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> Some cases are lost or settled for very small amounts. In other cases solicitors investigate and assess prospective claims and advise clients who do not pursue a claim. In some cases the circumstances change significantly during the litigation. In many cases the solicitors carry cases for lengthy periods. Some cases will be tried in which case the financial risk taken by the solicitors increase dramatically. In many of these circumstances there is a substantial risk that the plaintiff will be awarded little or nothing and that the solicitors will be paid nothing.
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> It is important that the fees must also be fair to the solicitor so as to ensure that persons under a disability have access to competent legal counsel who will be able to vigorously purs[u]e the claim on behalf of the person under a disability."[11]

These more recent comments from the bench are supported by older jurisprudence. The 1990 decision of Justice Osborne in *Stribbell v. Bhalla*[12], which dealt with a minor plaintiff who successfully claimed damages for medical malpractice, is a noteworthy starting point for any discussion dealing with claims by solicitors for legal fees in an amount that exceeds the party and party costs/partial indemnity costs provided by the defendant.

It is important to observe that Justice Osborne's decision was rendered at a time when contingency fees were not legal, *per se,* in Ontario. *Stribbell v. Bhalla* is a carefully worded decision that skirted the reality of outcome-based fees in high-risk litigation advanced on behalf of parties under a disability. Justice Osborne considered the factors identified by the Ontario Court of Appeal in *Cohen v. Kealey*[13] when determining the proper quantum of a solicitor's legal account:

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11 See endorsement of Madam Justice J.A. Thorburn in Rivera v. LeBlond, Court File No. 04-CV-281278CM2, March 6, 2007.

12 (1990), 73 O.R. (2d) 748

13 (1985), 10 O.A.C. 344

> The taxing officer properly listed the considerations normally applicable to the taxation of a solicitor's account, namely, the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay, and the client's expectation as to the amount of the fee.

Ultimately, Justice Osborne held:

> Justice requires that deserving actions be prosecuted by competent counsel, and competent counsel are entitled to be paid a reasonable fee for the value of the work done....I think that, when the entirety of the circumstances surrounding this litigation are considered, plaintiffs' counsel are entitled to a fee above party and party costs.

The Court of Appeal specifically endorsed Justice Osborne's decision in *Stribbell v. Balla*, in its own decision, *Desmoulin v. Blair*[14]

The Court of Appeal, in addition to the factors that had been mentioned in *Cohen v. Kealey*, recognized that, implicit in the phrase "degree of responsibility assumed by the solicitor", is the risk of non-payment, should the action not succeed.

The Ontario Court of Appeal considered the issue once again in *Re Christian Brothers of Ireland and Canada.*[15] The Court of Appeal considered whether or not a premium ought to be paid to the law firm that advanced the claim on behalf of the plaintiffs who "suffered unspeakable acts of sexual, physical, and emotional abuse" at the hands of the Christian brothers. The Court of Appeal said:

> But as important as their interests are, they must be balanced against the risks that the law firm undertook and the result it achieved for its clients and, therefore, for the victims. The reality is that, but for (the plaintiffs' counsel) having assumed this risk,

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14 (1994), 21 O.R. (3d) 217

15 [2003] O.J. No. 4249

> the estate would have had no money at all to compensate the victims.

The risks faced by personal injury lawyers are substantial in many cases. Without a premium earned in cases with a more certain outcome, plaintiff lawyers will have to decline those with less certain outcomes, depriving some persons under disability of access to justice. In the context of motor vehicle litigation, the lawyer faces additional risks associated with liability limiting rules. Claimants face a verbal threshold[16] in automobile accident cases. Injuries which fail to meet the threshold result in no compensation for pain and suffering. Even if the threshold is met, the award is reduced by a substantial deductible[17]. Both increase the risk for plaintiff's counsel. Tort claims arising out of automobile accidents ordinarily require the lawyer to assume carriage of the plaintiff's claim for first party (no-fault) benefits. Prior to litigation being commenced, there is no obligation for the first party insurer to pay any legal costs associated with this time consuming and expensive service provided to the claimant. Moreover, while it is frequently in the best interests of the injured party to receive a lump sum on account of future entitlement to first party benefits, insurers have no obligation to lump out these benefits. Even when insurers are persuaded to settle the no-fault file on a lump sum basis, they are not obliged to pay legal costs.

Perhaps the greatest risks faced by plaintiff's counsel is in the context of medical malpractice litigation. The financial commitment in terms of disbursements and time is enormous. The outcome, particularly at the outset, is most uncertain in the vast majority of cases. But for the few competent counsel willing to assume carriage of these highly volatile cases, few would get access to justice. Even fewer will get access to justice when counsel cannot reasonably predict what fees can be charged in the event of a successful outcome for the plaintiff.

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16 See Section 267.5 of the Insurance Act, R.S.O. 1980, C. I-8, as amended. The threshold is permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function. The threshold is defined in Ont. Reg. 381/03.

17 The deductible on non-pecuniary general damages is $30,000, unless the claim is assessed over $100,000.

Acting for persons under disability is inherently more expensive than acting for competent claimants. There is also more responsibility for the lawyer. Offers to settle, agreements on damages and other steps taken to save costs or expedite the proceedings require extra steps and the expense of Court approval. Instructions, though taken from a litigation guardian, could need approval by the Children's Lawyer or the Public Trustee and, in every case, ultimately the Courts. In seeking Court approval at any stage great care must be taken by the lawyer not to disclose information that might have a detrimental impact on the disabled person's case. Justifying a compromise of the plaintiff's claim requires a clear explanation of the difficulties leading to a compromise. Consideration must be given to taking the extra step of sealing the Court file. These are matters that do not arise when the plaintiff is competent.

The matter of legal fees will also present practical matters for lawyers who consider representing persons under disability. If there is uncertainty about legal fees, potentially legitimate claims may not be pursued. For example, lawyers will be discouraged from pursuing derivative Family Law Act claims for persons under disability. This is an access to justice issue. For all practical purposes, these claims cannot be pursued without a lawyer willing to underwrite the cost of and take the risk associated with them. Uncertainty about fee arrangements will deprive these claimants of access to justice.

Personal injury litigation for persons under a disability require lawyers to take on cases on behalf of impecunious plaintiffs with the ability to recover fees only from a favourable settlement or judgment. This applies to both fees and to disbursements. Disbursements are paid by the lawyers to third parties from the outset of litigation that can take many years to resolve or reach trial. The result for the lawyer is a delay in payment for many years and the risk of non-payment if success is not achieved, giving rise to a need to provide an incentive to plaintiff's counsel –

factors recognized by the Supreme Court of Canada in Walker v. Ritchie.[18] As well, encouraging competent counsel to act on behalf of personal injury clients (by allowing a premium to be charged) has been recognized as one rationale for contingency fees.[19]

Whether legal fees are paid pursuant to a contingency fee arrangement or solicitor client fees are paid over and above partial indemnity costs collected, the payment of these amounts are deducted from the claimants recovery. This fact ought not to have a bearing on the reasonableness of the legal fees. "The reality is that a plaintiff will never recover 100% of an award or settlement because there will always be fees to be paid."[20] As well, the matters of risk, potential divided liability, the interests of avoiding a costly trial and the potential matter of inadequate insurance limits have the same effect on the claimant. Moreover, a settlement, which is ordinarily a result of negotiation, will not be achieved without some compromise.

The reasonableness of result-based lawyers' fees for persons under a disability is reinforced by the legislative changes permitting contingency fees. By way of amendments to the *Solicitors Act*[21], in 2002, Contingency Fee Agreements were formally introduced into Ontario with a very specific framework developed for their implementation. Ontario Regulation 195/04 was later introduced to provide further regulatory direction with respect to the implementation of contingency fees ("Contingency Fee Regulation").

Section 5 of the Contingency Fee Regulation specifically addresses Contingency Fee Agreements as they pertain to persons under a disability. It states:

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

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18 Walker v. Ritchie, [2006] S.C.J. No. 45, at paragraph 39.

19 Ibid, paragraph 40

20 Madam Justice Toscano Roccamo in *Williams v. Bowler*, 2006 CanLii 19466

21 R.S.O. 1990, c.S.15, as amended

> (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.

Earlier case law remains helpful for identifying the appropriate principles that should be applied when determining the fees to be approved for a solicitor; however, those earlier cases must now be read in light of the reality that a true contingency fee regime has been brought to the province. Contingency Fee Agreements, in one sense, simplify the process, while at the same time complicate it in terms of the documentation that is required in order to satisfy the Court that a particular Contingency Fee Agreement is appropriate. Section 5 provides legislative approval of contingency fees for persons under disability, while preserving the right for judicial review and approval.

Some concern has been raised by Judges in the province of Ontario, and perhaps by officials with the Children's Lawyer's Office and the Office of the Public Guardian and Trustee, in that plaintiff's counsel are not properly documenting retainer agreements which purport to be contingency fee retainers. Greater care must be taken to properly document fee arrangements. Contingency fee arrangements should follow the guidelines as set out by the *Act* and Regulations. Other fee arrangements should be sufficiently particularized in a retainer or in correspondence to the client.

Attached to this discussion paper at **Tab 1** is the entire *Solicitors Act*, with Section 28.1 being the relevant section as it relates to Contingency Fee Agreements. Also attached at **Tab 2** is the Contingency Fee Regulation in its entirety. All lawyers doing personal injury work for plaintiffs should be familiar with the *Act*, Regs, and related case law, and doubly so as it relates to parties under a disability.

As a matter of policy there is no reason to treat parties under a disability any differently from competent plaintiffs in terms of the appropriateness of compensation for counsel, without whose efforts the party under a disability would surely be unable to advance a case. A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation. The *parens patriae* jurisdiction should not expand that entitlement. The *parens patriae* jurisdiction does not enable the Court to create a different compensation regime for minor plaintiffs. The Court must protect the minors' best interests, but it must do so within the established structure for the compensation of personal injury claims.[22]

It may be an attractive concept to preserve money that might be needed for future care costs, by restricting the quantum of legal fees to be paid to the solicitor, but there is not a sound reason to do so when one considers the following:

- Often there can be a problem with insurance policy limits, such that the only money available to respond to the claim is inadequate because the tortfeasor was underinsured.

- Problems with witnesses, risk adverse plaintiffs, and a myriad of other problems often result in settlement proposals that are less than 100% of the plaintiff's damages.

- Very often, the injured plaintiff shares blame for the accident, to a greater or lesser degree, such that, as a result in the split in liability, there will not be adequate funds to ensure the continued care of the plaintiff.

- The rationale behind Rule 7 is to ensure that minors and mentally incapable people are not taken advantage of because they are not in a position to look out for their own interests. Rule 7 was not, however, designed to give persons under a disability a better deal on legal fees than other claimants. Whether a plaintiff is 17 years old or 19 years

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22 *Tsaoussis v. Baetz*, supra, at para. 29

old should not be determinative of the legal fees to be paid at the successful conclusion of the case to the plaintiff's lawyer.

- The Office of the Public Guardian and Trustee itself charges fees for its involvement. See the attached approved fee schedules at **Tab 3**.

- In motor vehicle matters, a sizable portion of a settlement can be funded by an accident benefit insurer, which often has no obligation to make any contribution towards legal fees (and often requires a discount to achieve a lump sum settlement of past and future entitlement).

If solicitors wish to assert a claim for fees based on a contingency fee retainer, careful attention and care should be paid to the provisions of the *Solicitors Act* and Contingency Fee Regulation to ensure that the parties have indeed entered into a valid Contingency Fee Agreement. Consideration should be given to an application to a Judge for approval of the agreement before the agreement is finalized, rather than waiting until the conclusion of the case to have the agreement approved as part of the Rule 7.08 approval process. Where a contingency fee is not used, if a retainer arrangement for a minor is consistent with retainers entered into by adults, these retainers should be approved.

There ought to be certainty and predictability of compensation for legal fees. Contingency fee arrangements or reasonable retainer agreements provide for predictability. As well, the process ought not to be so cumbersome as to discourage representation of persons under a disability or unduly increase the cost associated with acting for these claimants.

In July 2012, the Ontario Court of Appeal clarified that a two-step process must be followed when enforcement of a Contingency Fee Agreement is sought in the context of a Rule 7 approval motion. Firstly, the fairness of the agreement must be assessed as of the date that it was entered into (and not with hindsight as to what actually happened during the life of the file),

and, secondly, the reasonableness of the agreement must be assessed as of the date of the hearing.[23] The court also provided the following guidance:

> If a judge faced with a contingency fee agreement calls into question the fairness or reasonableness of the agreement, the judge should normally raise the issues with the solicitors and seek their submissions.[24]

(c) RECENT JUDICIAL COMMENT ON CONTINGENCY FEES IN THE RULE 7 CONTEXT

1. *Cogan v. M.F.*, 2007 CanLii 50281 ONSC

In which Justice R. Smith creates an excellent template of factors to be considered for any settlement of a claim on behalf of a party under disability in which a contingency fee agreement is asserted. In this instance, the purported contingency fee agreement equalled 33-1/3% of the total amount recovered for damages and costs. The parties settled the legal action on the eve of trial for $12.543 million in damages. The lawyer sought court approval of the contingency fee agreement and approval of his fees in the amount of $4.174 million, which was approved and found to be fair and reasonable in all of the circumstances. This decision, in full, should be on the reading list of every plaintiff personal injury lawyer, even if the likelihood of ever achieving a $12 million settlement is remote. The underlying principles still offer excellent guidance.

2. *Giusti v. Scarborough Hospital*, 2008 CanLii 22555 ONSC

Where Justice Spies dealt with all the issues involved in court approval of a settlement on behalf of a minor, where the amount received for the claims totalled $5.734 million. The solicitors requested that solicitor and client fees be paid in the amount of $1.13 million for fees and nearly $90,000.00 for disbursements, over and above the $700,000.00 for partial indemnity fees and disbursements received from the defendants. It was proposed that this be funded by 20% of the monies allocated to the plaintiffs (including OHIP), pursuant to a contingency fee retainer agreement. The court reduced the amount claimed, approving further fees in the amount of $780,000.00 plus GST and endorsed using 15% as a factor from the recovery as more reasonably

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23 *Henricks-Hunter (Litigation Guardian of) v. 81488 Ontario Inc.* 2012 ONCA 496

24 *Henricks-Hunter (Litigation Guardian of) v. 81488 Ontario Inc.* 2012 ONCA 496, para. 24

reflecting the appropriate amount, given that the action was settled a year or more in advance of trial. The court noted that, although early settlements are to be encouraged, they substantially reduce the financial risk to the firm.

3. ***Adlen (Litigation Guardian of) v. State Farm*** **(2009), 79 C.P.C. (6th) 140**

Where it was held that the premium on an accident benefit settlement should be smaller than the premium in a tort settlement.

4. ***Aywas v. Kirwan*****, 2010 ONSC 2278 (CanLii)**

Where Justice Hackland felt a 35% contingency fee for a global tort and AB settlement was excessive and approved of the list of factors outlined in *Lau v. Bloomfield* (cited above).

5. ***McAndrew v. Roberts*****, 2012 ONSC 472**

Where Justice Wilkins, in a brief endorsement relating to a 14-year-old girl who suffered a fracture of the femur and a non-displaced facial bone, held that the plaintiff's solicitor failed to file adequate material with respect to the issues that needed to be addressed on an application to enforce a purported contingency fee agreement. The matter was referred to the Office of the Children's Lawyer to review and report on all issues, not just the contingency fee agreement, but also the post settlement itself.

6. ***Melvin v. Ontario (Correctional Services)*****, 2013 ONSC 5432 (CanLii)**

Where Justice Shaw rejected the position of the PG&T on legal fees (which was to suggest a reduction) and approved the solicitor's requested fee, largely because of the detailed dockets that were available and the excellent result.

7. ***Henricks-Hunter v. 81488 Ontario Inc.*****, 2013 ONSC 5245 (CanLii)**

In which Justice Darla Wilson was required to determine whether the contingency fee retainer agreement between the law firm and the litigation guardian (which was the Public Guardian and Trustee) was fair and reasonable in accordance with s.24 of the

Solicitor's Act. Relying on *Raphael Partners v. Lam*[25], the court considered the following factors:

- the legal complexity
- the result achieved
- the risk assumed by lawyer
- the time expended by the lawyer

(d) USE OF SETTLEMENT FUNDS

In *Martin v. Robins*[26], Justice Quinn analyzed the routine practice of paying money into Court for minors. He remarked in a footnote to his judgment:

> In my little corner of the judicial world, it was unknown to me that the accountant charged fees in relation to money paid into court for minors, and I admit to being surprised by the knowledge. I understand that the charging of fees started in May 2000, but I expect that the practice is not widely known by members of the judiciary. A settlement for a minor usually is in respect of a tragedy, a misfortune or some other loss suffered by the minor. Historically, payment into court of such settlements has been treated as virtually compelled by the Rules of Civil Procedure. At least as long ago as 1943, then Rule 5.35 of the Ontario Annual Practice provided, "a judgment for the recovery of money on behalf of an infant...shall direct the money to be paid into court". The discretion, "unless the court orders otherwise", in subrule 7.09(1), entered the Rules in 1985.

Having regard for the careful judgment rendered by Justice Quinn, one must ask under what circumstances it would be appropriate to have funds paid into Court as opposed to being held outside of the Court in some other safe investment vehicle. A party who does not suffer from a disability within the meaning of Rule 7 would be reluctant to have his or her money paid to the Accountant and would wish to explore alternatives. There may be alternative arrangements, depending on the circumstances of the case, that make sense when dealing with a minor.

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25 *Raphael Partners v. Lam* 2002 CanLii 45078 (ONCA)

26 *Martin v. Robins* , supra

I have successfully obtained approval of this on several occasions. Attached at **Tab 4** is the endorsement of Justice Granger in *Foster v. Foster*, an unreported decision dated August 23, 2007 where Court approval was granted for an RESP. That said, some commentators suggest this is an appropriate use of funds as it converts a minor's claim into an asset owned by the parent, and should then require oversight by way of a formal management plan (not ordered in the cases I have seen).

In *Hoad v. Giordano*, Justice Quinn was asked by a parent to have the entire settlement proceeds of $14,750.00 paid to the child's father. The only reason advanced as to why the settlement funds should not have been paid into Court was the father's belief that he could get a higher rate of return. He did make mention to the Registered Education Savings Plan, but did not appear to provide enough evidence to convince Justice Quinn that the father's proposal was a good one. Notwithstanding this decision, it would seem appropriate to develop a Practice Direction, or, alternatively, a sanctioned pronouncement from the Children's Lawyer, dealing with the circumstances and appropriateness (if any) of having a portion of settlement monies on behalf of a minor paid into a Registered Education Savings Plan.

Justice Quinn, in disposing of the application, also provided a very helpful list of questions to be answered by the Litigation Guardian whenever it is proposed that monies be paid somewhere rather than into Court. His list is as follows:

(a) Why is the litigation guardian opposed to payment of the funds into court?

(b) Is there evidence that the litigation guardian has the ability to manage the funds?

(c) What are the financial circumstances of the litigation guardian including his or her income and expenses, and the number of dependents for whom he or she is responsible?

(d) What is the plan advanced by the litigation guardian for the management of the funds?

(e) What are the merits and demerits of the plan?

(f) What criteria will be employed for periodic encroachments, if any?

(g) What is the likelihood that the funds (or the remaining balance, if there have been encroachments), plus accrued interest, will be secure until the minor attains his or her majority?

(h) Does the plan permit a transfer to the minor of the balance of the funds immediately upon the attainment of his or her majority?

(i) What is the amount to be managed?

(j) What is the duration of the plan?

(k) Should the litigation guardian be required, at some point, to pass accounts in respect of his or her management of the funds?

(l) Should the litigation guardian be required to post a bond as security for the performance of his or her duties in the management of the funds?

(m) What are the views of the child (to the extent that he or she is of an age where such views can reasonably be ascertained)?

(n) If there is a request for part of the funds to be transferred to the litigation guardian now (with the balance to be paid into court), are the requested funds to be used for the direct and reasonable benefit of the child and in circumstances where the parents of the child are unable to meet the expense involved?

(o) In all of the circumstances, has the litigation guardian established, on a balance of probabilities, that it is in the best interests of the minor that payment be made to the litigation guardian rather than into court?

(i) Structured Settlements

Section 116 of the *Courts of Justice Act*[27] already deals with periodic payment and a review of damages. If the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, the Court shall order the defendant to pay all or part of the award periodically.[28] This also serves to override the 1992 decision of *Kendall (Litigation Guardian of) v. Kindl Estate*[29] which held that the Court's *parens patriae* jurisdiction did not provide jurisdiction to order an unwilling defendant to enter into a structured settlement on behalf of a minor plaintiff.

Mr. Justice Wilkins expressed some concern in *Marcoccia v. Gill* about the process for arranging structured settlements and the extent of the details disclosed to the Court concerning the choice of annuity. If lawyers and litigation guardians provide the Court with sufficient detail about the structure options available to the person under disability and a reasonable rationale for choosing the particular annuity, there ought to be little second-guessing by the Court.

Many of the cases that come before the Court arise within the context of a motor vehicle accident. Ontario Regulation 461/96 deals with Court proceedings for automobile accidents that occur on or after November 1, 1996. Section 6 has been drafted to specifically deal with structured settlements and provides:

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27 R.S.O. 1990, c.C.43
28 s.116(1)(b)
29 10 C.P.C. (3d) 24

> 6.(1) The court shall order that an award for damages for pecuniary loss be paid periodically under section 267.10 of the Act if two or more of the following circumstances exist:
>
> 1. The award, including prejudgment interest but excluding costs, is for $100,000 or more.
>
> 2. On the date of the order, the plaintiff is less than 18 years of age.
>
> 3. The court is satisfied that the plaintiff has no other means to fund his or her future care.
>
> 4. The court is satisfied that the plaintiff is not likely to manage the award in a prudent manner.
>
> (2) Subsection (1) does not apply if the court is satisfied that,
>
> (a) sufficient funds to pay the award periodically are not available under a motor vehicle liability policy; or
>
> (b) an order to pay the award periodically would have the effect of preventing the plaintiff or another person from obtaining full recovery of a claim arising out of the incident.

Section 116.1 of the *Courts of Justice Act* now also specifically provides for a mandatory structured settlement regime for medical malpractice cases where an award for future care costs of the plaintiff exceeds $250,000.00.

(e) THE CHILDREN'S LAWYER

The Ministry of the Attorney General website indicates that the origin of the Office of the Children's Lawyer in Ontario can be traced back to as early as 1826, when the Lord Chancellor of Upper Canada appointed a leading member of the legal bar to be guardian *ad litem* of minors when they were being sued, and to represent their interests in Courts.

In civil cases, the Office of the Children's Lawyer reviews proposed settlements referred by the Courts in cases involving minors. The Children's Lawyer assesses whether the proposed settlement is in the best interests of the child and reports to the Court.

The Children's Lawyer also has responsibilities and property rights cases, estate/trust cases, personal rights cases, child protection cases, and child custody and access cases.

Rule 7.08(5) of the *Rules of Civil Procedure* provides, that notice to the Children's Lawyer or the Public Guardian and Trustee, as the case may be, is not an automatic requirement for the approval process. Rather, the Judge reviewing the matter may direct that the material be served on the Children's Lawyer or the Public Guardian and Trustee, and may direct either office to make an oral or written report stating any objections to the proposed settlement.

Anecdotally, it is clear that neither office has adequate resources to become involved with each and every approval that comes before the Court. Indeed, often times the delay that results from the involvement of either the Children's Lawyer or the Office of the Public Guardian and Trustee can be considerable. Further, some of the people called upon to assess the reasonableness of the settlement may be insufficiently experienced.

It would certainly be preferable to involve the Children's Lawyer or Public Guardian and Trustee on an infrequent basis, perhaps with novel matters or other unusual circumstances that truly necessitate their involvement.

(f) PUBLIC GUARDIAN AND TRUSTEE

The Office of the Public Guardian and Trustee is part of the Ministry of the Attorney General. It is responsible for protecting mentally incapable people, protecting the public's interest in charities, searching for errors, investing perpetual care funds, and dealing with dissolved corporations. The website further describes a tradition, for more than 500 years, of English common law, giving governments a special responsibility to protect the interests of mentally incapable adults, children, and charities, which tradition has continued in Canada.

The Office of the Public Guardian and Trustee also operates the Accountant of the Superior Court of Justice. A schedule of fees charged by the Accountant has been established pursuant to the *Public Guardian and Trustee Act*.[30]

Attached at **Tab 5** is a paper and checklist prepared by Laurie Redden of the Public Guardian and Trustee which addresses the Public Guardian and Trustee's role in Rule 7 approval motions.[31]

PRACTICE POINTS

In no particular order, I offer these practice points to you for your consideration:

1. It is not my practice to serve defence counsel with motion material that I have prepared in connection with a Rule 7 motion for approval. The exception to this is that I do share any Minutes of Settlement that need to be jointly executed. This is particularly important with structured settlements, as there is very precise language that must be employed in order to ensure the Canada Revenue Agency tax-free status of the structure. Nonetheless, as a general rule, I do not provide my supporting Affidavit material to defence counsel. The justification for this decision is that service on the defence counsel may hamper full and frank disclosure by plaintiff's counsel of issues that impact on the settlement. Keep in mind that, until the Court approves the settlement, the case is not actually settled. If the Court does not approve of the settlement, and the case needs to proceed, I do not want to risk disclosing privileged information or information that could prejudice the disabled plaintiff in ongoing litigation, in the event that the settlement is not approved by the Court. I take the position that the role of the Court in the approval process is not as an arbiter between the parties. Rather, the Court's

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30 R.S.O. 1990, c.P.51, as amended, s.8(2)

31 I am grateful to Laurie Redden for giving me permission to include her material in this paper.

function is to ensure that the proposed settlement is in the disabled party's best interests. Consequently, avoiding service of the approval material on the defence does not prejudice the defence.

2. If you propose to enter into a contingency fee on behalf of a party under a disability, and seek to have that retainer agreement approved at the outset of the case, as the *Solicitor's Act* permits, I strongly encourage that you also seek to have the motion material sealed by Court order. While, in general, there is an inclination not to seal Court files, and there are important public reasons to support that practice, I would argue that more latitude should be granted for requests to seal Affidavits in the context of the pre-approval retainer agreement situation. Similarly, there may well be good reason to have motion material that has been filed in support of an intended settlement also sealed.

3. With the proposed legal fees, be sure that your motion material thoroughly canvasses the relevant information that the Court will require in order to be satisfied that the proposed fee is appropriate. The kind of information that should be contained in the solicitor's Affidavit includes:

- detailed information concerning the work that has been performed in order to achieve the result;
- the experience of the solicitor;
- a description of the persons involved in the file;
- an explanation of the risk assumed;

- the position of the defence. In this regard, it might be helpful to append the defendant's Mediation Memo or Pre-Trial Memo, if the case has reached that stage;

- a review of the experts retained, or other significant disbursements that were incurred in order to carry the file;

- a copy of the retainer agreement entered into by the Litigation Guardian and counsel; and

- a description of counsel's usual retainer arrangements in a similar case involving a party that is not under a disability.

Generally, try to ensure that your Affidavit covers off the factors that are described in the Ontario Court of Appeal decision *Cohen v. Keeley*, as these are the considerations that the Court needs to make when considering the appropriateness of a fee.

4. If it is proposed that a portion of the settlement monies be structured by way of a structured settlement, it is important to explain the rationale behind the structure proposal, the considerations that went into the selection of the specific structure scenario that is being proposed for Court approval, and how the structured settlement assists the disabled plaintiff in meeting his or her future expenses.

5. Don't hide details of the total settlement, which only serves to raise a red flag. The judge will feel more comfortable with the approval if he or she knows the global numbers.

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for an excellent discussion on the rationale for costs orders

Ontario

ServiceOntario
e-Laws

Français

Solicitors Act

R.S.O. 1990, CHAPTER S.15

Consolidation Period: From December 15, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 2, s. 70.

UNAUTHORIZED PRACTICE

Penalty on persons practising without being admitted as solicitors

1. If a person, unless a party to the proceeding, commences, prosecutes or defends in his or her own name, or that of any other person, any action or proceeding without having been admitted and enrolled as a solicitor, he or she is incapable of recovering any fee, reward or disbursements on account thereof, and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly. R.S.O. 1990, c. S.15, s. 1.

SOLICITOR'S COSTS

Solicitors to deliver their bill one month before bringing action for costs

2. (1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of the solicitor, his or her executor, administrator or assignee or, in the case of a partnership, by one of the partners, either with his or her own name, or with the name of the partnership, has been delivered to the person to be charged therewith, or sent by post to, or left for the person at the person's office or place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill. R.S.O. 1990, c. S.15, s. 2 (1).

Not necessary in first instance to prove contents of bill delivered

(2) In proving compliance with this Act it is not necessary in the first instance to prove the contents of the bill delivered, sent or left, but it is sufficient to prove that a bill of fees, charges or disbursements subscribed as required by subsection (1), or enclosed in or accompanied by such letter, was so delivered, sent or left, but the other party may show that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act. R.S.O. 1990, c. S.15, s. 2 (2).

Charges in lump sum

(3) A solicitor's bill of fees, charges or disbursements is sufficient in form if it contains a reasonable statement or description of the services rendered with a lump sum charge therefor

together with a detailed statement of disbursements, and in any action upon or assessment of such a bill if it is deemed proper further details of the services rendered may be ordered. R.S.O. 1990, c. S.15, s. 2 (3).

Order for assessment on requisition

3. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,

(a) by the client, for the delivery and assessment of the solicitor's bill;

(b) by the client, for the assessment of a bill already delivered, within one month from its delivery;

(c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made. R.S.O. 1990, c. S.15, s. 3; 2006, c. 19, Sched. C, s. 1 (1).

No reference on application of party chargeable after verdict or after 12 months from delivery

4. (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for the reference is made. R.S.O. 1990, c. S.15, s. 4 (1).

Directions as to costs

(2) Where the reference is made under subsection (1), the court or judge, in making it, may give any special directions relative to its costs. R.S.O. 1990, c. S.15, s. 4 (2).

When officer may assess bill without notice

5. In case either party to a reference, having due notice, refuses or neglects to attend the assessment, the officer to whom the reference is made may assess the bill without further notice. R.S.O. 1990, c. S.15, s. 5.

Delivery of bill and reference to assessment

6. (1) When a client or other person obtains an order for the delivery and assessment of a solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill shall be delivered within fourteen days from the service of the order. R.S.O. 1990, c. S.15, s. 6 (1).

Credits, debits, etc., on reference

(2) The bill delivered shall stand referred to an assessment officer for assessment, and on the reference the solicitor shall give credit for, and an account shall be taken of, all sums of money by him or her received from or on account of the client, and the solicitor shall refund what, if anything, he or she may on such assessment appear to have been overpaid. R.S.O. 1990, c. S.15, s. 6 (2).

Costs on reference

(3) The costs of the reference are, unless otherwise directed, in the discretion of the officer, subject to appeal, and shall be assessed by him or her when and as allowed. R.S.O. 1990, c. S.15, s. 6 (3).

No action

(4) The solicitor shall not commence or prosecute any action in respect of the matters referred pending the reference without leave of the court or a judge. R.S.O. 1990, c. S.15, s. 6 (4).

When payment due

(5) The amount certified to be due shall be paid by the party liable to pay the amount, forthwith after confirmation of the certificate in the same manner as confirmation of a referee's report under the Rules of Civil Procedure. R.S.O. 1990, c. S.15, s. 6 (5).

Client's papers

(6) Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, shall deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power belonging to the client. R.S.O. 1990, c. S.15, s. 6 (6).

Contents of order

(7) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variation therefrom and any other directions that the court or judge sees fit to make. R.S.O. 1990, c. S.15, s. 6 (7).

What order presumed to contain

(8) An order for reference of a solicitor's bill for assessment shall be presumed to contain subsections (2) to (6) whether obtained on requisition or otherwise, and by the solicitor, client or other person liable to pay the bill. R.S.O. 1990, c. S.15, s. 6 (8).

Motion to oppose confirmation

(9) A motion to oppose confirmation of the certificate shall be made to a judge of the Superior Court of Justice. R.S.O. 1990, c. S.15, s. 6 (9); 2006, c. 19, Sched. C, s. 1 (1).

Costs of unnecessary steps in proceedings

7. (1) Upon assessment between a solicitor and his or her client, the assessment officer may allow the costs of steps taken in proceedings that were in fact unnecessary where he or she is of the opinion that the steps were taken by the solicitor because, in his or her judgment, reasonably exercised, they were conducive to the interests of his or her client, and may allow the costs of steps that were not calculated to advance the interests of the client where the steps were taken by the desire of the client after being informed by the solicitor that they were unnecessary and not calculated to advance the client's interests. R.S.O. 1990, c. S.15, s. 7 (1).

Application

(2) Subsection (1) does not apply to solicitor and client costs payable out of a fund not wholly belonging to the client, or by a third party. R.S.O. 1990, c. S.15, s. 7 (2).

When actions for costs within the month may be allowed

8. A judge of the Superior Court of Justice, on proof to his or her satisfaction that there is probable cause for believing that the party chargeable is about to depart from Ontario, may authorize a solicitor to commence an action for the recovery of his or her fees, charges or disbursements against the party chargeable therewith, although one month has not expired since the delivery of the bill. R.S.O. 1990, c. S.15, s. 8; 1993, c. 27, Sched.; 2006, c. 19, Sched. C, s. 1 (1).

Assessment where a party not being the principal, pays a bill of costs

9. (1) Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill either to the solicitor, his or her assignee, or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, the person's assignee or personal representative, may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable. R.S.O. 1990, c. S.15, s. 9 (1).

What special circumstances may be considered in such case

(2) If such application is made where, under the provisions hereinbefore contained, a reference is not authorized to be made except under special circumstances, the court may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill if he, she or it was the party making the application. R.S.O. 1990, c. S.15, s. 9 (2).

Order for delivery of a copy of the bill

(3) For the purpose of such reference, the court may order the solicitor, his or her assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy. R.S.O. 1990, c. S.15, s. 9 (3).

Assessment at instance of third person

(4) When a person, other than the client, applies for assessment of a bill delivered or for the delivery of a copy thereof for the purpose of assessment and it appears that by reason of the conduct of the client the applicant is precluded from assessing the bill, but is nevertheless entitled to an account from the client, it is not necessary for the applicant to bring an action for an account, but the court may, in a summary manner, refer a bill already delivered or order delivery of a copy of the bill, and refer it for assessment, as between the applicant and the client, and may add such parties not already notified as may be necessary. R.S.O. 1990, c. S.15, s. 9 (4).

Application of s. 6

(5) The provisions of section 6, so far as they are applicable, apply to such assessment. R.S.O. 1990, c. S.15, s. 9 (5).

When a bill may be reassessed

10. No bill previously assessed shall be again referred unless under the special circumstances of the case the court thinks fit to direct a reassessment thereof. R.S.O. 1990, c. S.15, s. 10.

Payment not to preclude assessment

11. The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment. R.S.O. 1990, c. S.15, s. 11; 2002, c. 24, Sched. B, s. 46 (1).

Assessment officer may request assistance of another assessment officer

12. Where a bill is referred for assessment, the officer to whom the reference is made may request another assessment officer to assist him or her in assessing any part of the bill, and the officer so requested shall thereupon assess it, and has the same powers and may receive the same fees in respect thereof as upon a reference to him or her by a court, and he or she shall return the bill, with his or her opinion thereon, to the officer who so requests him or her to assess it. R.S.O. 1990, c. S.15, s. 12.

How applications against solicitors to be entitled

13. Every application to refer a bill for assessment, or for the delivery of a bill, or for the delivering up of deeds, documents and papers, shall be made *In the matter of (the solicitor)*, and upon the assessment of the bill the report of the officer by whom the bill is assessed, unless set aside or varied, is final and conclusive as to the amount thereof, and payment of the amount found to be due and directed to be paid may be enforced according to the practice of the court in which the reference was made. R.S.O. 1990, c. S.15, s. 13.

What to be considered in assessment of costs

14. In assessing a bill for preparing and executing any instrument, an assessment officer shall consider not the length of the instrument but the skill, labour and responsibility involved therein. R.S.O. 1990, c. S.15, s. 14.

AGREEMENTS BETWEEN SOLICITORS AND CLIENTS

Definitions

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; ("client")

"contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

"services" includes fees, costs, charges and disbursements. ("service") R.S.O. 1990, c. S.15, s. 15; 2002, c. 24, Sched. A, s. 1.

Agreements between solicitors and clients as to compensation

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. R.S.O. 1990, c. S.15, s. 16 (1).

Definition

(2) For purposes of this section and sections 20 to 32,

"agreement" includes a contingency fee agreement. 2002, c. 24, Sched. A, s. 2.

Approval of agreement by assessment officer

17. Where the agreement is made in respect of business done or to be done in any court, except the Small Claims Court, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by an assessment officer. R.S.O. 1990, c. S.15, s. 17.

Opinion of court on agreement

18. Where it appears to the assessment officer that the agreement is not fair and reasonable, he or she may require the opinion of a court to be taken thereon. R.S.O. 1990, c. S.15, s. 18.

Rejection of agreement by court

19. The court may either reduce the amount payable under the agreement or order it to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be

assessed in the same manner as if the agreement had not been made. R.S.O. 1990, c. S.15, s. 19.

Agreement not to affect costs as between party and party

20. (1) Such an agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by the person to or from the client to be assessed in the ordinary manner, unless such person has otherwise agreed. R.S.O. 1990, c. S.15, s. 20 (1).

Idem

(2) However, the client who has entered into the agreement is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client's own solicitor under the agreement. R.S.O. 1990, c. S.15, s. 20 (2).

Awards of costs in contingency fee agreements

20.1 (1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement. 2002, c. 24, Sched. A, s. 3.

Same

(2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor. 2002, c. 24, Sched. A, s. 3.

Same

(3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise. 2002, c. 24, Sched. A, s. 3.

Claims for additional remuneration excluded

21. Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement. R.S.O. 1990, c. S.15, s. 21.

Agreements relieving solicitor from liability for negligence void

22. (1) A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.

Exception, indemnification by solicitor's employer

(2) Subsection (1) does not prohibit a solicitor who is employed in a master-servant relationship from being indemnified by the employer for liabilities incurred by professional negligence in the course of the employment. 1999, c. 12, Sched. B, s. 14.

Determination of disputes under the agreement

23. No action shall be brought upon any such agreement, but every question respecting

the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice. R.S.O. 1990, c. S.15, s. 23; 2006, c. 19, Sched. C, s. 1 (1).

Enforcement of agreement

24. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner. R.S.O. 1990, c.S.15, s.24.

Reopening of agreement

25. Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just. R.S.O. 1990, c. S.15, s. 25; 2002, c. 24, Sched. B, s. 46 (2); 2006, c. 19, Sched. C, s. 1 (1).

Agreements made by client in fiduciary capacity

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. R.S.O. 1990, c. S.15, s. 26; 1992, c. 32, s. 26.

Client paying without approval to be liable to estate

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. R.S.O. 1990, c. S.15, s. 27.

Purchase of interest prohibited

28. A solicitor shall not enter into an agreement by which the solicitor purchases all or part of a client's interest in the action or other contentious proceeding that the solicitor is to bring or maintain on the client's behalf. 2002, c. 24, Sched. A, s. 4.

Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

Remuneration dependent on success

(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. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(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. 2002, c. 24, Sched. A, s. 4.

Written agreement

(4) A contingency fee agreement shall be in writing. 2002, c. 24, Sched. A, s. 4.

Maximum amount of contingency fee

(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, how ever the amount or property is recovered. 2002, c. 24, Sched. A, s. 4.

Greater maximum amount where approved

(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. 2002, c. 24, Sched. A, s. 4.

Factors to be considered in application

(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. 2002, c. 24, Sched. A, s. 4.

Agreement not to include costs except with leave

(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. 2002, c. 24, Sched. A, s. 4.

Enforceability of greater maximum amount of contingency fee

(9) A contingency fee agreement that is subject to approval under subsection (6) or (8) is

not enforceable unless it is so approved. 2002, c. 24, Sched. A, s. 4.

Non-application

(10) Sections 17, 18 and 19 do not apply to contingency fee agreements. 2002, c. 24, Sched. A, s. 4.

Assessment of contingency fee

(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. 2002, c. 24, Sched. A, s. 4.

Regulations

(12) The Lieutenant Governor in Council may make regulations governing contingency fee agreements, including regulations,

(a) governing the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee, including but not limited to,

(i) setting a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the solicitor, and

(ii) differentiating the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;

(b) governing the maximum amount of remuneration that may be paid to a solicitor pursuant to a contingency fee agreement;

(c) in respect of treatment of costs awarded or obtained where there is a contingency fee agreement;

(d) prescribing standards and requirements for contingency fee agreements, including the form of the agreements and terms that must be included in contingency fee agreements and prohibiting terms from being included in contingency fee agreements;

(e) imposing duties on solicitors who enter into contingency fee agreements;

(f) prescribing the time in which a solicitor or client may apply for an assessment under clause (11) (b);

(g) exempting persons, actions or proceedings or classes of persons, actions or proceedings from this section, a regulation made under this section or any provision in a regulation. 2002, c. 24, Sched. A, s. 4.

Where solicitor dies or becomes incapable of acting after agreement

29. Where a solicitor who has made such an agreement and who has done anything under it dies or becomes incapable of acting before the agreement has been completely performed by him or her, an application may be made to any court that would have jurisdiction to examine and

enforce the agreement by any person who is a party thereto, and the court may thereupon enforce or set aside the agreement so far as it may have been acted upon as if the death or incapacity had not happened, and, if it deems the agreement to be in all respects fair and reasonable, may order the amount in respect of the past performance of it to be ascertained by assessment, and the assessment officer, in ascertaining such amount, shall have regard, so far as may be, to the terms of the agreement, and payment of the amount found to be due may be ordered in the same manner as if the agreement had been completely performed by the solicitor. R.S.O. 1990, c. S.15, s. 29.

Changing solicitor after making agreement

30. If, after any such agreement has been made, the client changes solicitor before the conclusion of the business to which the agreement relates, which the client is at liberty to do despite the agreement, the solicitor, party to the agreement, shall be deemed to have become incapable to act under it within the meaning of section 29, and upon any order being made for assessment of the amount due him or her in respect of the past performance of the agreement the court shall direct the assessment officer to have regard to the circumstances under which the change of solicitor took place, and upon the assessment the solicitor shall be deemed not to be entitled to the full amount of the remuneration agreed to be paid to him or her, unless it appears that there has been no default, negligence, improper delay or other conduct on his or her part affording reasonable ground to the client for the change of solicitor. R.S.O. 1990, c. S.15, s. 30.

Bills under agreement not to be liable to assessment

31. Except as otherwise provided in sections 16 to 30 and sections 32 and 33, a bill of a solicitor for the amount due under any such agreement is not subject to any assessment or to any provision of law respecting the signing and delivery of a bill of a solicitor. R.S.O. 1990, c. S.15, s. 31.

Security may be given to solicitor for costs

32. A solicitor may accept from his or her client, and a client may give to the client's solicitor, security for the amount to become due to the solicitor for business to be transacted by him or her and for interest thereon, but so that the interest is not to commence until the amount due is ascertained by agreement or by assessment. R.S.O. 1990, c. S.15, s. 32.

Interest on unpaid accounts

33. (1) A solicitor may charge interest on unpaid fees, charges or disbursements, calculated from a date that is one month after the bill is delivered under section 2. R.S.O. 1990, c. S.15, s. 33 (1).

Interest on overpayment of accounts

(2) Where, on an assessment of a solicitor's bill of fees, charges and disbursements, it appears that the client has overpaid the solicitor, the client is entitled to interest on the overpayment calculated from the date when the overpayment was made. R.S.O. 1990, c. S.15, s. 33 (2).

Rate to be shown

(3) The rate of interest applicable to a bill shall be shown on the bill delivered. 2009, c. 33, Sched. 2, s. 70.

Disallowance, variation on assessment

(4) On the assessment of a solicitor's bill, if the assessment officer considers it just in the circumstances, the assessment officer may, in respect of the whole or any part of the amount

allowed on the assessment,

(a) disallow interest; or

(b) vary the applicable rate of interest. 2009, c. 33, Sched. 2, s. 70.

Regulations

(5) The Lieutenant Governor in Council may make regulations establishing a maximum rate of interest that may be charged under subsection (1) or (2) or that may be fixed under clause (4) (b). 2009, c. 33, Sched. 2, s. 70.

SOLICITORS' CHARGING ORDERS

Charge on property for costs

34. (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding. R.S.O. 1990, c. S.15, s. 34 (1); 2006, c. 19, Sched. C, s. 1 (1).

Conveyance to defeat is void

(2) A conveyance made to defeat or which may operate to defeat a charge under subsection (1) is, unless made to a person who purchased the property for value in good faith and without notice of the charge, void as against the charge. R.S.O. 1990, c. S.15, s. 34 (2).

Assessment and recovery

(3) The court may order that the solicitor's bill for services be assessed in accordance with this Act and that payment shall be made out of the charged property. R.S.O. 1990, c. S.15, s. 34 (3).

SOLICITORS AS MORTGAGEES, ETC.

Interpretation

35. (1) In this section,

"mortgage" includes any charge on any property for securing money or money's worth. R.S.O. 1990, c. S.15, s. 35 (1).

Charges, etc., where mortgage is made with solicitor

(2) A solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which the solicitor is a member, is entitled to receive for all business transacted and acts done by the solicitor or firm in negotiating the loan, deducing and investigating the title to the property and preparing and completing the mortgage, all the usual professional charges and remuneration that he or she or they would have been entitled to receive if the mortgage had been made to a person not a solicitor and the person had retained and employed the solicitor or firm to transact such business and do such acts, and such charges and remuneration are accordingly recoverable from the mortgagor. R.S.O. 1990, c. S.15, s. 35 (2).

Right of solicitor with whom mortgage is made to recover costs, etc.

(3) A solicitor to or in whom, either alone or jointly with any other person, a mortgage is made or is vested by transfer or transmission, or the firm of which the solicitor is a member, is entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by the solicitor or firm subsequent

and in relation to the mortgage or to the security thereby created or the property therein comprised all such usual professional charges and remuneration as he or she or they would have been entitled to receive if the mortgage had been made to and had remained vested in a person not a solicitor and the person had retained and employed the solicitor or firm to transact such business and do such acts, and accordingly the mortgage shall not be redeemed except upon payment of such charges and remuneration. R.S.O. 1990, c. S.15, s. 35 (3).

Solicitor-director, right to charge for services to trust estate

(4) A solicitor who is a director of a trust corporation or of any other company, or the firm of which the solicitor is a member is entitled to receive for all business transacted or acts done by the solicitor or firm for the corporation or company in relation to or in connection with any matter in which the corporation or company acts as trustee, guardian, personal representative or agent, all the usual professional fees and remuneration that he or she or they would be entitled to receive if the solicitor had not been a director of the corporation or company, and the corporation or company had retained and employed the solicitor or firm to transact such business and do such acts, and such charges and remuneration are accordingly recoverable from the corporation or company and may be charged by them as a disbursement in the matter of such trusteeship, guardianship, administration or agency. R.S.O. 1990, c. S.15, s. 35 (4).

SALARIED SOLICITORS

Costs, salaried counsel

36. Costs awarded to a party in a proceeding shall not be disallowed or reduced on assessment merely because they relate to a solicitor or counsel who is a salaried employee of the party. R.S.O. 1990, c. S.15, s. 36.

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Solicitors Act

ONTARIO REGULATION 195/04

CONTINGENCY FEE AGREEMENTS

Consolidation Period: From October 1, 2004 to the e-Laws currency date.

No amendments.

This is the English version of a bilingual regulation.

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Signing and dating contingency fee agreement

1. (1) For the purposes of section 28.1 of the Act, in addition to being in writing, a contingency fee agreement,

(a) shall be entitled "Contingency Fee Retainer Agreement";

(b) shall be dated; and

(c) shall be signed by the client and the solicitor with each of their signatures being verified by a witness. O. Reg. 195/04, s. 1 (1).

(2) The solicitor shall provide an executed copy of the contingency fee agreement to the client and shall retain a copy of the agreement. O. Reg. 195/04, s. 1 (2).

Contents of contingency fee agreements, general

2. A solicitor who is a party to a contingency fee agreement shall ensure that the agreement includes the following:

1. The name, address and telephone number of the solicitor and of the client.

2. A statement of the basic type and nature of the matter in respect of which the solicitor is providing services to the client.
3. A statement that indicates,
    i. that the client and the solicitor have discussed options for retaining the solicitor other than by way of a contingency fee agreement, including retaining the solicitor by way of an hourly-rate retainer,
    ii. that the client has been advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates,
    iii. that the client has chosen to retain the solicitor by way of a contingency fee agreement, and
    iv. that the client understands that all usual protections and controls on retainers between a solicitor and client, as defined by the Law Society of Upper Canada and the common law, apply to the contingency fee agreement.
4. A statement that explains the contingency upon which the fee is to be paid to the solicitor.
5. A statement that sets out the method by which the fee is to be determined and, if the method of determination is as a percentage of the amount recovered, a statement that explains that for the purpose of calculating the fee the amount of recovery excludes any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.
6. A simple example that shows how the contingency fee is calculated.
7. A statement that outlines how the contingency fee is calculated, if recovery is by way of a structured settlement.
8. A statement that informs the client of their right to ask the Superior Court of Justice to review and approve of the solicitor's bill and that includes the applicable timelines for asking for the review.
9. A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated.
10. A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter. O. Reg. 195/04, s. 2.

Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:

1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.
2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and

ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.

3. A statement that explains costs and the awarding of costs and that indicates,

i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

ii. that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.

4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.

5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed 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,

ii. a statement that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment under rule 7.08 of the Rules of Civil Procedure, and

iii. a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure. O. Reg. 195/04, s. 3.

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

"Rules of Professional Conduct" means the Rules of Professional Conduct of the Law Society of Upper Canada. O. Reg. 195/04, s. 4 (2).

Contingency fee agreement, person under disability

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. O. Reg. 195/04, s. 5 (1).

(2) In this section,

"person under disability" means a person under disability for the purposes of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (2).

Contingency fee excludes costs and disbursements

6. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements. O. Reg. 195/04, s. 6.

Contingency fee not to exceed damages

7. Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement. O. Reg. 195/04, s. 7.

Settlement or judgment money to be held in trust

8. A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money. O. Reg. 195/04, s. 8.

Disbursements and taxes

9. (1) If the client is responsible for the payment of disbursements or taxes under a contingency fee agreement, a solicitor who has paid disbursements or taxes during the course of the matter in respect of which services were provided shall be reimbursed for the disbursements or taxes on any funds received as a result of a judgment or settlement of the matter. O. Reg. 195/04, s. 9 (1).

(2) Except as provided under section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), the amount to be reimbursed to the solicitor under subsection (1) is a first charge on the funds received as a result of the judgment or settlement. O. Reg. 195/04, s. 9 (2).

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

11. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 195/04, s. 11.

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F. Litigation Services

9. Passings of Accounts:

   Where no attendance is required at a hearing for the passing of accounts, costs in accordance with Tariff C of the Rules of Civil Procedure, payable by the estate, trust or incapable person;

   Where the passing of accounts is contested, or where the costs exceed the amount allowed under Tariff C, solicitor- client costs at the hourly rate of legal counsel and staff providing the service, payable by the estate, trust or incapable person.

0. For all other litigious matters, including but not limited to applications under the Substitute Decisions Act, family law, estate litigation or other civil litigation:

   At the hourly rate of legal counsel and staff providing the service, payable by the opposing party, where possible, or, in the alternative, by the client or estate.

1. For litigation services rendered to clients for whom the Public Guardian and Trustee acts as litigation guardian or legal representative under any rule of Court or by court Order:

   At the hourly rate of legal counsel or staff providing the service, payable by the opposing party, where possible, or, in the alternative, by the client or estate.

G. Other Legal Services

2. For any legal service provided by the Public Guardian and Trustee not specifically listed in this Schedule:

   At the hourly rate of legal counsel and staff providing the service.

3. The hourly rates of legal counsel and legal staff are as follows:

Job Description	No. of Years of Experience	Rate Per Hour
Counsel	0 to 2 years	$150
	3 to 5 years	$175
	6 to 8 years	$200
	9 to 10 years	$225
	Over 10 years	$250
Articling Students		$100
Law Clerks and Paralegals		$80

The Public Guardian and Trustee may designate counsel in the Office of the Public Guardian and Trustee who may charge up to an additional $50.00 per hour for specialized legal services. **[No counsel have been so designated as of September 1, 2004.]**

H. Accountant of the Superior Court of Justice

4. Compensation on trusts held for minors, incapable adults under a mental disability payable monthly by the minor, incapable person and absentees:

   3.0% on capital and income receipts; and 3.0% on capital and income disbursements, or trust.

5. Care and Management Fee on Trusts managed for minors, Incapable adults under a mental Disability and absentees:

   3/5 of 1% per annum on the average annual value of the trust under management, payable monthly by the minor, incapable person, trust or absentee.

6. Care and Management Fee on money paid into Court by or on behalf of a party to litigation (who are not minors or mentally incapable adults), whether on Consent or pursuant to a Court Order:

   3/5 of 1% per annum on the average annual value of the funds under management payable monthly out of the funds held in Court.

7. Fee for the taking of an Affidavit: or Declaration by a Commissioner for taking Oaths

   $10., payable by the affiant.

8. Any other fee of the Accountant of the Superior Court of Justice, as provided by a statute, regulation or any Rule of Court:

   As provided by the statute, regulation or rule.

COURT FILE NO.: 52782/06
DATE: 2007-07-23

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: **GLORIA FOSTER**

Applicant

- and -

DUSTY LACE FOSTER, MISTY DIANE FOSTER AND TAYLOR RUBY FOSTER

Respondents

BEFORE: Justice B.T.Granger

COUNSEL: Gordon Good, for the Applicant

Marian Jacko, for the Office of the Children's Lawyer

ENDORSEMENT

[1] Gloria Foster is the mother of the three minor respondents, Dusty Lace Foster born June 23, 1994, Misty Dianne Foster born May 28, 1996 and Taylor Ruby Foster born May 28, 1996.

[2] On June 30, 2006, I approved the Minutes of Settlement in Court File Number #33515/00 and in Court File Number #42910, which resulted in Judgment in favour of each minor in the sum of twenty thousand six hundred and thirty dollars ($20,630.00), inclusive of interest. The judgment in favour of each of the minor children arose from injuries suffered by their father Clarence Foster in an automobile accident. The claims of the infants were derivative claims pursuant to the provision of the *Family Law Act*, R.S.O.1990.

[3] Pursuant to paragraph six of my Judgment dated June 30, 2006, I ordered that the minors funds be held in trust by Gordon Good, a Barrister and Solicitor, pending my further order as to the manner in which the minor plaintiffs' funds were to be invested pending each minor child attaining the age of 18 years.

[4] Ms. Foster wishes to manage the settlement funds belonging to the minors and requests an order appointing her as guardian of the property of each minor. As part of her plan of management, Ms. Foster proposes to pay $4,000.00 annually, which is the maximum contribution allowable at the present time into a Registered Education Savings Plan, ("R.E.S.P."), for each child, to fund each of their post secondary educational pursuits.

[5] The evidence indicates that each of the children based on their scholastic records to-date, are likely to be accepted as a student at a university or college in the future. Ms. Foster and her husband are concerned that as a result of the automobile accident, they will be unable to contribute financially to the post secondary school expenses of the children.

[6] If the settlement fund of each child is contributed to an R.E.S.P. at the rate of $4000.00 per annum, Human Resources and Skill Development Canada will make a contribution equal to 20% of the contribution made by the subscriber. These figures may increase as a result of changes to the Federal Budget.

[7] If a child goes to a post secondary school, all of the funds in her R.E.S.P. will be available to fund, in part, her education. If any of the children do not attend a post secondary education institution, the contributions made by Human Resources and Skill Development Canada must be returned to Human Resources and Skill Development Canada and the remaining funds in the R.E.S.P. will belong to the beneficiary of the plan.

[8] In my view, the investment of each of the minor's settlement funds in an R.E.S.P. would be in the best interest of each minor so long as the funds can be maintained as the separate funds of such minor, and the investments are conservative and the risk of loss or reduction in value is kept to a minimum. I am satisfied these objectives can be achieved by investing the settlement funds of each child in their own R.E.S.P.

[9] In order to create an R.E.S.P., there must be a subscriber and a beneficiary. In this case, I am satisfied that Gloria Foster, as guardian of the property of each of the minor children, can apply with court authority as Trustee on behalf of each child as a subscriber for an non-family R.E.S.P., and direct that the minor child subscriber shall be the irrevocable beneficiary of the R.E.S.P.

[10] In rejecting this type of investment in the past, courts have been concerned that creditors of the guardian of property would attempt to seize the funds to satisfy debts of the guardian. In this case, the minors' settlement funds are presently being held in trust by Gordon Good. Gloria Foster, as the guardian of property of each of the minors, can direct Gordon Good to transfer the funds into a trust account in favor of each minor with MacKenzie Funds who would, on an annual basis, make the maximum contribution into the minors' R.E.S.P. I am satisfied that if this procedure is followed, the guardian would have no beneficial interest in the funds of each minor, whether the funds are in the MacKenzie Funds or the R.E.S.P., and as such a creditor of the guardian of property would have no claim against the property.

[11] It is imperative that once the funds have been deposited in the trust fund and/or the R.E.S.P., such funds only be paid out to the minor upon her attaining her majority or to an educational institution or pursuant to an order of this court.

[12] The Management Plan of the settlement funds of the minors provides for the investment of such funds in the trust funds and/or R.E.S.P. to be in mutual funds. Although the suggested mutual funds for investment of the settlement funds are conservative and minimize the risks of

investment loss while providing a potential for growth of the capital, the use of mutual funds for the investment of the only asset of the minors, subjects such assets to a reduction in value if there is a downward trend in the value of the stocks in the mutual funds. This risk exists notwithstanding the positive average return on the mutual funds over the last 10 years.

[13] In my view, the settlement funds must be invested while in trust and/or in an R.E.S.P. in guaranteed investment certificates to ensure the funds are available for the minors personally or for their post secondary education. MacKenzie Funds must agree, in writing, to abide by the terms of the Management Plan.

[14] Mr. Good shall amend the Management Plan to reflect these changes and shall submit same to Ms. Jacko for approval on behalf of the Office of the Children's Lawyer. If counsel are unable to agree on the terms of the amendment plan, I may be spoken to.

[15] Counsel may make written submissions on costs subsequent to the Management Plan being approved, and the order appointing Gloria Foster as guardian of the childrens' property being issued.

"Mr. Justice B. T. Granger"
Mr. Justice B. T. Granger

DATE: August 23, 2007.

CHECKLIST FOR APPLICATIONS TO APPOINT A GUARDIAN

1. Notice of Application under the *Substitute Decisions Act*, section 22 or 55 or both, to declare an individual incapable of managing property; or incapable of managing personal care; or both. In the case of an application for guardianship of personal care, order must specify whether it is for full or partial guardianship and, if the latter, specify the areas in which the individual is incapable and the guardian has authority (see section 45 for list of areas). In Toronto, by Practice Direction, the Notice of Application must be issued at the Estates Office and receive a separate court file number from any other civil litigation in which the incapable person is a party. Outside of Toronto, the Notice of Application must be issued with a new Court file number in the Superior Court of Justice.

2. Affidavit of proposed Guardian indicating the guardian's consent to act, the relationship with the incapable person, qualifications, other suitability, consultation with relatives and friends, consultation with experts as required for the duties.

3. Detailed Management Plan (for property) s. 70(1)(b); and/or Guardianship Plan (for personal care) s. 70(2)(b). These are prescribed forms under the Act. The plans should include the current state of assets or personal care, in addition to the plans for the future. If there are funds held by the Court for the incapable person, this must be noted in the plan as well as the guardian's intention to withdraw and manage the funds. If the Accountant of the Court is to pay the funds out of Court, this must be so ordered in the guardianship order.

4. Evidence of incapacity: differs if the Application is for guardianship of property or personal care and whether there will be a hearing or it will be heard by "summary disposition" (no hearing, which includes guardianship applications over the counter contemporaneously with a Rule 7.08 settlement);

(a) For appointment of a property guardian, with a hearing, evidence required is that which is sufficient to satisfy the Court of the incapacity of the respondent, based on the test in section 6 of the Substitute Decisions Act. The report of the medical practitioner or capacity assessor should describe in some details the specific functions the individual is unable to perform. Mere statements that the individual is "incapable of managing property" are not sufficient.

(b) For appointment of a property guardian on summary disposition, the evidence of incapacity must include one statement by a capacity assessor

and another by a person who has been in contact with the incapable person in the preceding 12 months (section 72).

(c) For appointment of a guardian for personal care with a hearing, the evidence required is that which is sufficient to satisfy the Court of the incapacity of the respondent, based on the test in section 45 of the Substitute Decisions Act. The report of the medical practitioner or capacity assessor should describe in some detail the specific functions of personal care that the individual is unable to perform. Mere statements that the individual is "incapable of his or her personal care" are not sufficient. Where the evidence substantiates or the order sought is for personal care guardianship of specific functions only, the Order should state the functions over which the guardian has authority, or if all, state that it is an order for full guardianship for personal care. A statement by a person who has been in contact with the incapable individual in the preceding 12 months should also be included [section 71(1)].

(d) For appointment of a guardian for personal care by summary disposition (without a hearing), two statements by capacity assessors are required pursuant to section 74 of the Act.

The Court's powers on applications for summary disposition are listed in section 77.

5. **Service:**

(a) **Service on the incapable person** is mandatory under the Act [section 69(1)(1) for property and section 69(3)(1) for personal care] and the Court of Appeal has held that failure to do so is fatal to the order appointing the guardian. The consent of the incapable person is sometimes offered but should be questioned – if the person is incapable, did he or she have the capacity to make informed consent to the appointment of a guardian? Note the rights advice and the statement mandated by sections 70(1)(c) and 70(2)(c) of the Act.

(b) **Service on family members**: parents, siblings and children pursuant to section 69(6). The Superior Court has held that although this section is mandatory, relatives may consent in writing to the appointment of the guardian and waive their right to service under the Act, to eliminate the need for service.

(c) **Service on the Public Guardian and Trustee,** who is a party respondent, is also mandatory. The Court should expect to receive a letter or report from OPGT to counsel and the Court, or a personal appearance, commenting on the application. We appreciate being served within the ten days prescribed by the Rules of Civil Procedure.

6. Has the incapable person responded to the application or indicated a desire to respond? Does he or she require legal counsel? If so, the Court may direct the Public Guardian and Trustee to arrange legal representation to be provided for a person whose capacity is in issue in a proceeding under the *Substitute Decisions Act* [section 3(2)].

7. Does the Order contain a time period within which the guardian of property should pass accounts? Many judges find this advisable after one or two years, to ensure the guardian is performing his or her duties and keeping records in accordance with the Act. It may also be requested as an alternative to the ability to post security. The obligation to keep records and detailed requirements for both types of guardians are set out in O. Reg. 100/96.

8. **Security**: Is the guardian of property required to post security? If so, in what amount? The following clause should be inserted in the Order:

   "THIS COURT ORDERS that (name of applicant) be and is appointed as the Guardian of Property upon posting a bond with the Registrar of this Court in the amount of $ .00 and that this Order shall not be issued until such a bond is posted."

   The Public Guardian and Trustee is entitled to charge a fee for reviewing guardianship applications, currently in the amount of $265. [$250. plus $15. G.S.T.]. These fees are usually fixed in the guardianship Order.

10. Guardianship Orders must provide for a copy to be served on the Public Guardian and Trustee, to be included in the public Register of Guardians under O.Reg.99/96.

11. The appointment of a guardian of property should predate any approval of a monetary settlement for the incapable person under Rule 7.08. It is suggested that applications under the Substitute Decisions Act be made immediately in situations where funds are payable upon the commencement of the disability of the incapable person, such as attendant care benefits, no fault benefits and payments for medical and rehabilitative services.

This checklist is for the assistance of counsel only and should not be construed as legal advice or the policy or position of the Public Guardian and Trustee.

October 9, 2007

APPENDIX "A"

CHECKLIST FOR MOTIONS FOR APPROVAL OF SETTLEMENTS FOR PARTIES UNDER DISABILITY UNDER RULE 7.08

1. **Documents required by Rule 7.08(4):**

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

   (b) **Affidavit of solicitor for the litigation guardian** setting out the solicitor's position in respect of the proposed settlement;

   (c) The **written consent of a minor over the age of 16 years,** unless a Judge orders otherwise; and

   (d) A copy of the proposed **Minutes of Settlement**.

2. **Evidence:**

   (a) copy of Statement of Claim;

   (b) theory of plaintiff's case and defence, including facts and liability;

   (c) extent of damages/injuries (include selected important medical reports including reports which address the stability of the condition of the party under disability, particularly in cases involving acquired brain injuries);

   (d) reasons for settlement v. trial;

   (e) rationale for and details of quantum of damages;

   (f) apportionment of damages;

   (g) allocation of funds among all plaintiffs, including:

      a. partial indemnity costs awarded;

      b. assessable disbursements paid by defendants;

(h) management of funds for party under disability

For Adult Parties Under Disability

a. Is there a legally authorized person to manage the funds?

   i. Attorney under a continuing power of attorney for property; or

   ii. Guardian of property appointed by Court or PGT (must include a formal Management Plan).
   Copy of authority should be included.

b. Are there restrictions or conditions on guardian's authority (i.e. amendment to Management Plan or posting of security required following settlement of a claim);

c. Will the attorney or guardian be retaining professional assistance to manage the funds? (This is advisable if there is a significant capital fund to be managed);

d. What is the proposed management plan for the funds?

e. Should there be a passing of accounts scheduled in the future?

f. If applicable, the impact of settlement on other income of the adult under disability (i.e. Ontario Disability Support (ODSP), welfare payments, OAS or CPP). There are methods to structure personal injury awards to maximize and continue the receipt of ODSP benefits which must be arranged prior to judgment).

For Minors

An application to appoint a guardian of property is made contemporaneously with the approval of the proposed settlement In the guardianship application consideration is give to the following:

a. The qualifications of the proposed guardian;

b. The proposed management plan;
Does the plan reflect the future care needs of the minor? Is there a satisfactory investment plan? Is the minor's interest in the assets adequately protected? Does the plan provide for reasonable disbursements for the benefit of the minor that are related to the injury suffered?

c. Is there a requirement for the guardian to account?

d. Is the guardian of property claiming compensation? If so, how will it be calculated?

e. Does the Judgment require a capacity assessment prior to the minor's 18th birthday?

As the Judgment in the guardianship proceeding and the management plan define the authority of the guardian of property appointed under *The Children's Law Reform Act*, it is necessary that the management plan set out with some particularity the investment plan and the authorized disbursements.

For All Parties Under Disability

(i) Has a structured settlement been considered or proposed? Why or why not?

i. Options for various structures considered and rationale;

ii. Rationale for terms of particular structure being recommended (commencement date, term, payments, guarantee period, balloon payments for post-secondary education, vehicles, medical assistance devices or other future needs etc.);

iii. Rationale of structure v. private investment – rate of return, future care.

(j) Plans for investment or disposition of any lump sum which is not included in a structure;

(k) Income tax impact of settlement on party under disability;

(l) Will any or all of the funds be paid into Court pursuant to Rule 7.09?
(This is required under Rule 7.09 if there is no legally authorized person to manage the funds).

3. Costs to solicitor for litigation guardian

(a) Copy of retainer – contingency or hourly;

(b) Total claim for legal fees and disbursements for all plaintiffs;

(c) Amount recovered from defendant(s) for fees and disbursements;

(d) Balance of fees and disbursements over and above partial indemnity costs claimed from party under disability;

(e) If there are FLA claimants or other plaintiffs, the proportion of legal fees and disbursements contributed from their settlement, whether or not parties under disability.

4. Terms of Order/Judgment

(a) approving the terms of the settlement on behalf of the party under disability;

(b) ordering payment of legal fees, disbursements and G.S.T. to solicitor for the litigation guardian;

(c) ordering disposition of all funds:

i. into Court to the credit of the party under disability – (if a minor, specify that funds are to be paid out at 18, subject to any further order that the Court may in the meantime make);
ii. to a guardian of property for the minor to be appointed under *The Children's Law Reform Act* contemporaneously with the approval of the proposed settlement; or a guardian of property who has already been appointed for the adult under disability under the *Substitute Decisions Act* or an attorney under a continuing power of attorney given by the adult under disability;
iii. to a structured settlement, with payments to a guardian of property or, for an adult, alternatively to an attorney for property; or
iv. a combination; and
v. funds to be paid to other plaintiffs, such as *Family Law Act* claimants, including contribution to legal costs;

(d) Unless a guardian of property is appointed at the time of the motion for approval of the settlement (for minors) or in advance of the settlement (for adults), the funds of the party under disability shall be paid into Court (Rule 7.09) unless the Court orders otherwise. (It is not acceptable to permit disposition of funds to a "trustee" for an adult party under disability, or a minor, unless the minor permanently resides outside Ontario).

(e) A guardian of property cannot be "appointed" in the same order approving a settlement for a party under disability. A separate application must be made to the Court under *The Children's Law Reform Act* for a minor, or the *Substitute Decisions Act* for an adult, for the appointment of a guardian of property. For an adult, the appointment of a guardian of property should pre-date the motion for approval of a settlement, since other funds such as SABs are usually paid well in advance of any settlement. By Practice Direction in Toronto, applications under the *Substitute Decisions Act* must be scheduled on the Estates List in Toronto. If the guardianship is not in place by the time of the settlement motion, a separate guardianship application must be <u>issued</u> at the Estates Office with a separate Court file number but <u>heard</u> by the same Justice considering the Motion for approval. The guardianship application must follow the requirements of the *Substitute Decisions Act.* If the application is to be read concurrently with a tort settlement, the SDA application must also comply with the requirements for summary disposition as the matter will be decided without a hearing. The Public Guardian and Trustee is a party respondent and must be served with the application, on a minimum of 10 days' notice. Applications under *The Children's Law Reform Act* are issued at the Estates Office but may be heard by the same

Judge hearing the motion for approval of the settlement, contemporaneously with the motion for approval.

(f) The Order or Judgment approving the settlement should require service on the Children's Lawyer (if a minor). Please do not dispense with this service because it provides a check that money is paid into Court, as ordered.