TAB 13

Guardianship of the Catastrophically Injured

Jan Goddard
Jan Goddard & Associates

The Six-Minute Estates Lawyer 2009

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION

Guardianship in personal injury situations[1]

Co-authored by: Nimali Gamage, Jan Goddard and Alessandra Goulet, of Jan Goddard and Associates, Lawyers[2]

Introduction

Guardianship law, and situations where one person has to apply to court to assume decision making for and control of the property and person of another, is necessarily emotionally fraught. While there is no "good" time for a loved one to lose his or her capacity, a guardianship application in wake of incapacity rendered by personal injury is a particularly stressful time for the individuals involved. First, there is the shock of the loved one's accident, and the readjustment to a new reality, where, to name but a few examples, the person who was once the principal breadwinner of the family is now unable to work; where an injured parent may no longer be capable of caring for his or her children; where parents must re-calibrate all their hopes and dreams for a now brain injured child.

---

[1] This paper on guardianship applications in the context of personal injury situations is a collaborative effort produced by the lawyers at the firm of Jan Goddard and Associates. We wrote this paper to accompany Jan's live presentation at the Law Society of Upper Canada's "6 Minute Estates Lawyer" Program, chaired by Timothy G. Youdan, on April 6, 2009. The paper does not attempt to act as a comprehensive, step-by-step guide to the bringing of an application for guardianship of the property or the person of an individual who has been rendered incapable by reason of personal injury. Rather, we seek to set out the general framework, and highlight and underscore particular issues, pitfalls and challenges in this area of work when the purpose of the guardianship is to address the substitute decision making needs of a catastrophically injured person, adult or child. For a step-by-step analysis of a guardianship application under the *Substitute Decisions Act, 1992*, in Ontario, we refer the reader to "The Annotated Guardianship Application" CLE LSUC Program date February 20, 2007.

In the months and years after the accident, the family will have been inundated with a parade of "professionals" – the medical teams, the social workers, the case manager, the rehabilitative specialists, and, of course, the lawyers. The personal injury lawyers battle the lawyers for the insurer in respect of tort claims and statutory accident benefits entitlements. The family members, or the person acting as litigation guardian for the injured or incapable person who is most often a family member, may have been examined for discovery, and may have attended repeated mediations of the issues in the personal injury claims that may or may not have result in partial or full settlements. At the end of the day, there may have to be a trial. The insurance and tort claims can go on for years, literally, and in the context of this exhausting ordeal, the guardianship lawyer is asked to step in to organize the applicant on an application to be appointed as the guardian of property and/or person of the incapable person. Understandably, the clients are often fatigued and angry before they walk in your door.

In this paper, we share some of our experience in handling guardianship applications, and highlight some critical issues in moving guardianship applications in an efficient and compassionate manner from the first meeting to the hearing of the application in court.

Essential sections of the SDA (adults) and CLRA (minors)

When a loved one becomes personally injured and is rendered incapable of managing his or her affairs, his or her spouse is often surprised and shocked to learn that he or she simply cannot step in to manage the injured spouse's affairs. Similarly, parents are often surprised to learn that they have no legal jurisdiction to manage their children's assets, without court appointment as the child's guardian of property.

Continuing Power of Attorney for Property

If the injured, now incapable adult granted a continuing power of attorney for property before the accident, during his or her capacity, then that attorney, if validly appointed, would be able to step in immediately and manage the incapable person's financial affairs, under the terms of the power of attorney document. If the injured, now incapable adult never granted a power of attorney or if the attorney document is invalid, or has terms limiting the effective administration of all the property needing management or the attorney appointed is no longer willing, able or available to act, then the person seeking to manage the incapable person's property must turn to the *Substitute Decisions Act, 1992*[3] (the "*SDA*").

Guardianship Applications under the *Substitute Decisions* Act, 1992

(a) Statutory Guardians of Property under Sections 15 – 21

There are two principal ways for a person to be appointed as a guardian of property under the *Substitute Decisions Act, 1992*. If the Public Guardian and Trustee was appointed as the injured and incapable person's statutory guardian in the first instance under the *Mental Health Act* or under s. 15 of the *SDA*, a person seeking guardianship can apply directly to the Public Guardian and Trustee to replace it as the injured, incapable person's guardian, using the provisions set out in ss. 17 and 18 of the *Act*. If the statutory application to assume the guardianship is refused by the PGT, the applicant may bring a court application under s.17(2) of the *Act*.

[3] S.O. 1992, c. 30, as amend.

Where the PGT has been made statutory guardian of property in the first instance, we advise the client seeking to be made guardian that the client is at liberty to apply directly to the PGT for a statutory appointment, which can be a much less expensive process then applying to the court by way of guardianship application. However, we generally caution that the two key issues militating against this route are: (i) the time it takes to process a statutory application to the PGT; and , (ii) the PGT's position that it has no legal jurisdiction to dispense with the requirement that a potential guardianship applicant post a security bond[4]. Where time is of the essence, for instance, where a personal injury settlement is imminent, the applicant seeking to assume the guardianship from the PGT may not have months to wait for a statutory application under s. 17 to be processed through that office. In those circumstances we advise the client to proceed directly on a section 22 application to the court. And in terms of a security bond, only a judge can make an order dispensing with the requirement to post a bond, so if you anticipate that your client is going to be unable to qualify for a bond, or you believe a bond is unnecessary in the circumstances, you might advise your client to skip the statutory application-to-replace process, and head straight to an application to be appointed guardian under s. 22 of the *Act*.

[4] Section 25(2)(a) states that a court appointing a guardian of property may require that the guardian post security in the manner and amount that the court considers appropriate. Accordingly, if the court finds it appropriate, the court is at liberty to dispense with the imposition of a bond. At section 17(6) the *Act* states that the PGT, in considering whether to accept an statutory application of appointment by a proposed replacement guardian, "may refuse to appoint the applicant unless the applicant provides security in a manner approved by the Public Guardian and Trustee, for an amount fixed by the Public Guardian and Trustee." Under s. 17(7), if security is required under s. 17(6), it is the court can dispense with that requirement, or that security be provided in some manner or in some amount not approved by the PGT, or order that the amount of security be reduced or impose any other condition the court sees fit. The PGT interprets s. 17(6) as giving it no jurisdiction to dispense with the imposition of a bond in every circumstance and if the proposed guardian wants to be excepted from the requirement to post a bond, the applicant must seek an order from the court.

(b) Court-Appointed Guardians of Property under Sections 22 to 30

The jurisdiction of the court to find a person is incapable of managing his or her own property and to appoint a guardian of property to manage that property during the person's period of incapacity is found at s. 22 of the *SDA*. Evidence of the injured person's incapacity must be filed and must be sufficient to permit the court to find that person is incapable of managing his or her own property. The actual procedure on a guardianship application is set out in Part III of the *Act*. Part III sets out who must be served, who the parties are, and what documents need to be filed in support of the application. These aspects of the application are discussed in greater detail below.

(c) Guardianship Application by Summary Disposition (Rarely Used)

There is a third, summary procedure for appointment under the *SDA*. Section 77 of the *SDA* provides for an application for guardianship to be dealt with by the court without anyone appearing before it and without holding a hearing. In our experience, this section of the *Act* is almost never used. However, in personal injury situations, a guardianship application is often brought concurrently with the personal injury lawyer's motion for approval of a settlement. The motions for approval are generally heard in chambers under a civil court file number, while the guardianship applications under s. 22 proceed in open court (on the Estates List in Toronto). There may be some logic to trying to have guardianship applications be brought summarily under s. 77 of the *SDA*, where they are uncontested, so that they can be dealt with in chambers at the same time as the court deals with the civil motion for approval of a personal injury

settlement. However, until someone coordinates this, it appears that motions for approval will continue to be heard on the civil list in chambers, and guardianship applications will continue to be heard in open court, on the Estates List where the court has such a dedicated list, or otherwise on the civil list.

Property of Minors

A parent does not have an automatic legal right to manage and control a child's property, even where the child resides with the parent or parents in their care, custody and control. Where parents are divorced or separated, a custodial parent's order for custody does not also confer on that parent the right to control the child's property.

An adult seeking the right to manage the property of a person under the age of 18 years proceeds by way of an application brought under section 47 of the *Children's Law Reform Act.*[5]
In the context of personal injury matters, a minor child may become entitled to funds stemming from a situation where the child herself has been injured and becomes entitled to settlement funds or damages in respect of the minor's claim for accident benefits or in tort. A second typical situation where a minor may become entitled to funds arising from a personal injury matter occurs when a minor is awarded funds as a result of a successful dependant's claim for damages under Part V of the *Family Law Act.*[6]

Section 51(1) of the *CLRA* holds that payment of up to $10,000.00 may be made for the benefit of a child, even where there is no guardian in place, by payment to the parent with whom the

[5] R.S.O. 1990, c. C.12
[6] "Loss of guidance, care and companionship" and pecuniary loss claims under sections 61(1) and (2) of the *Family Law Act*, R.S.O. 1990, c. F.3

child resides or the person who has lawful custody of the child. However, s. 51(2) cautions that section 51(1) does not apply in respect of money payable under a judgment or order of a court.

A minor's monies payable under the child's own claim for loss sustained by reason of the child's own injuries or in respect of the child's dependant's claim under the *FLA* in respect of the injuries or loss of another, can be handled in one of two ways, in most circumstances: by payment of money into court and interim payment out of court by fiat application to the Office of the Children's Lawyer, or, by way of an order for guardianship over the child's property under section 47 of the *CLRA.*

(a) Minor's Funds Held in Court - Payment Out of Court by Fiat

Firstly, under Rule 7 of the Ontario *Rules of Civil Procedure*, a person under the age of 18 is considered a person under a disability. Therefore, any litigation of a minor's issues must be handled by a litigation guardian, who may be any appropriate person who applies for that appointment by filing the requisite affidavit evidence, or, where there is no such appropriate person, by the appointment of the Children's Lawyer.[7] Any settlement of a claim made by or against a person under a disability, whether or not a proceeding has been commenced in respect of the claim, is not binding on that person without the approval of a judge.[8] The child's litigation guardian and their solicitor, as well as the Children's Lawyer upon request, will assist the court to review the sufficiency of any settlement or award made in respect of a minor, and then, once

[7] Rules 7.01, 7.02 and 7.04(1) and (2).
[8] Rule 7.08(1)

approved, the *Rules* provide that any money payable in respect of a minor shall be paid into court, unless a judge orders otherwise.[9]

Once those monies are paid into the Office of the Accountant of the Superior Court of Justice in Ontario, to the credit of the minor child, the monies may stay there until child attains the age of 18, and as an adult can apply to the Office for release of his or her funds.

Where the funds held in court are required by the child's parent or the child, for the child's support, or to pay for therapies or special expenses the child may have during his or her minority, the child's parent or guardian may apply to the Children's Lawyer by process of fiat, to request a discrete amount of funds for a specific purpose. We refer the reader to the Ministry of the Attorney General, Office of the Children's Lawyer website, "Guardianship of Property of Minor Children" page, which refers to the OCL's "informal" procedure by which parents or legal guardians (in the custodial sense of the word) may apply in writing to the OCL for payments out of court for the direct benefit of the child.[10] The process of applying for a fiat authorizing the paying out of a portion of the minor's money for the child's direct benefit may be brought by the child's parent or guardian repeatedly during the entire period of the child's minority. In addition, we are advised by counsel for the OCL that it may be possible, in appropriate circumstances, for the parent to obtain one fiat for the repeated, monthly paying out of an agreed upon amount for the direct benefit of the child for up to a year at a time. This kind of fiat would eliminate the need of the parent to apply on a monthly basis for money from the child's funds.

---

[9] Rule 7.09(1) and (2). Rule 7.09(2) stipulates that any money paid to the Children's Lawyer on behalf of a [minor] shall be paid into court, unless a judge orders otherwise.

[10] http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/propguard.asp

This manner of handling a minor's personal injury funds is most appropriate for smaller amounts of money, or where the parent or guardian may not have great or complicated need for the funds held in court. In circumstances where the child will be receiving a larger settlement, or a stream of money from a lump sum placed in a structured annuity, and where the parent or guardian will need to frequently resort to the money for the child's on-going needs, a guardianship of the child's property will usually be preferable.

(b) Guardianship Application over Minor's Property under Section 47 of the *CLRA*

Application for guardianship over a minor's property is brought under section 47 of the *CLRA*. The statutory provisions of the *CLRA* in respect of these types of applications are not as detailed as the provisions for guardianships of the property of adults under the *SDA*.

For instance, the format of the financial management plan that must be prepared under a *SDA* application is set out by regulation to that *Act*. There is no corresponding regulation setting out the format of a financial management plan to be prepared by a prospective guardian of a minor's property. The Office of the Children's Lawyer will provide counsel with a draft management plan and a draft guardianship of a minor's property judgment, on request.

The other challenge in respect of guardianship applications under the *CLRA* is the question of which court in which to bring your application – family, civil, or estates, of the Superior Court of Justice.

According to the Ontario *Family Law Rules*, at Rule 1(2), "These family law rules apply to all family law cases ... in the Superior Court of Justice... (a) under, ... (iii) the *Children's Law Reform Act*, except sections 59 and 60." Since guardianship applications under ss. 47 to 58 are not specifically excepted by Rule 1(2)(a)(iii), arguably, one must bring one's application for guardianship under the *CLRA* under the Family Law Rules, in the family court of the Superior Court of Justice, unless the court has a specific practice direction specifying some other procedure. Certainly in the Family Law Rule's Form 8 (Application General) there is a specific "check box" for guardianship applications under the *CLRA.*

In Toronto, there has long been a practice direction specifying that guardianship applications brought pursuant to s. 47 of the *CLRA* shall be brought in the Superior Court of Justice on the Estates List.[11] The new practice direction for the Estates List, effective April 1, 2009, reconfirms this instruction to the profession. In other jurisdictions, where there is no operative practice direction guiding this issue, there seems to be some uncertainty as to whether the application should be brought under the Family Law Rules or the *Rules of Civil Procedure* on the civil list. We have done both.

A Procedural Overview

In most personal injury situations, an application for guardianship will be brought under s. 22 of the *Act*. The person bringing the application, i.e. the person seeking the appointment as the guardian of property, is the applicant. In most situations that come through our door, the applicant is the injured person's spouse, or parent or other close family member. The respondent

[11] Notice to the Profession – Toronto Region Estates List – The Honourable Susan E. Lang, February 11, 1999; and, now, The New Toronto Region Estates List Practice Direction, Mr. Justice D. M. Brown, in effect April 1, 2009.

is the allegedly incapable person. The *SDA* also requires that the Public Guardian and Trustee be served with the application. The Public Guardian and Trustee, therefore, will also named as a respondent in the style of cause. Where an applicant is seeking to appoint an institutional trustee, such as a trust company or trust arm of chartered bank, or where the applicant is seeking a joint appointment of him- or herself jointly with the trust company, the institutional trustee shall also be named as a respondent in the style of cause. The applicant should file the trust company's consent to appointment.[12]

Under Part III, section 69(6) of the *Act*, family members of the incapable person need to be served, by ordinary mail at that person's last know address. As discussed further down, in some circumstances, it is possible to obtain a court order dispensing with the requirement to serve family members. Family members entitled to be served under s. 69(6) are not "parties" to the application *per se*, therefore are not named in the style of cause. However, we list them all in the notice of application, and file our affidavits of mail or courier service of family members, so the court can be assured that they have been served.

In addition to the specific procedural rules set out in the *SDA* itself, an application for guardianship follows the procedural rules as set out generally in Rule 38 of the *Ontario Rules of Civil Procedure*. This means, strictly speaking, under the Rules, an application may be brought on ten days' notice. Practically speaking however, given that the Public Guardian and Trustee will require time to review the application and you will need time to respond to any questions or concerns raised by the PGT, it is prudent to leave yourself much more time. In addition, where you are serving family members who reside outside the jurisdiction of Ontario, they shall be

[12] Section 70(1)(a) of the *SDA*.

entitled to the minimum notice period provided under Rule 38.06(3), or, twenty days. We generally serve our applications on 30 days' notice, where possible and appropriate.

The Public Guardian and Trustee will review the application and provide a letter setting out its comments and identifying points of concern, if any. If the questions and concerns raised by the lawyer for the PGT reviewing the file cannot be addressed to the PGT's satisfaction before the first return date, we would generally arrange to adjourn the first return date on consent to give ourselves more time to work with the client to amend their management plan, or otherwise address the PGT's concerns. When the PGT has no further concerns or objections, it will not provide its "consent" to the application, but rather shall file a further letter identifying what its concerns had been and the extent to which those concerns have now been addressed to its satisfaction. If there are outstanding issues upon which the applicant and the PGT simply do not agree, you can proceed with the application and highlight the difference of the opinion to the judge, for adjudication on that point, whether the PGT is in attendance or not. For instance, even where the PGT has no substantive objection to a proposed guardianship, the PGT will never indicate its support for an applicant's request for a dispensation of the requirement to post a bond. In practically every circumstance that we have represented an individual (as opposed to a corporate or institutional) applicant seeking to be excused from the imposition of a bond, the PGT has indicated that such a decision is in the court's jurisdiction and the PGT shall abide by the court's decision in that regard.

If family members who have been served are inclined to consent to the application, we will send them a letter providing them with a consent to the application for their signature and recommend

that they obtain independent legal advice before they sign the consent and return it to us. We then file the family members' consent(s) with the court in advance of the application or on the date of the hearing. While the consent of the family members is not strictly necessary or required to permit the court to make the guardianship order, we have noticed that the judges appear far more comfortable when they have something in writing from family members, who most often do not appear at the return date.

Where you have managed to address all of the PGT's concerns, if any, and have answered all the family members' questions and/or filed family members' consents to the application, the hearing will generally proceed on the first return date as an uncontested or consent hearing in open court. In most cases, due to the sheer volume of applications they review, the PGT will not appear and the court will rely on the letter filed by the PGT in the court.[13] The applicant may or may not attend – we have done many applications where the client does not come to court – their responsibilities caring for the incapable person may prevent them from attending court with you, or they may be so fatigued from court processes that they are loathe to attend. Generally, however, we like having our client attend with counsel to observe the application process. While the application proceeds by way of affidavit, often the judge appreciates seeing the applicant in person, and may sometimes engage the applicant in some light, supportive questioning or to offer the judge's own personal words of encouragement and commendation for the often Herculean task undertaken by the applicant in their care and management of an injured incapable person.

[13] The PGT counsel generally asks the applicant's counsel to provide an undertaking that if the PGT letter is not in the court file, that the applicant's counsel will ensure a copy of the letter is passed up to the judge at the hearing.

Now, with the implementation of the new Estates List Practice Direction, effective April 1, 2009, our approach to the timing of the hearing of the application will change. Section V:D of the new Estates List Practice Direction stipulates that guardianship applications brought under both the *SDA* and the *CLRA* should be commenced by booking a 10-minute Scheduling Appointment and an initial return date. If the matter will be opposed, an order for directions can issue that day and a time table for future steps in the application can be set out. If the application will not be opposed, the new Practice Direction suggests that it may be possible for the unopposed application to be heard that same day, as part of the Hearing Matters scheduled for after the Scheduling Appointments.

Who should be the guardian?

Persons closest to the injured, incapable person generally step forward or are considered at first blush to be the most obvious choices for guardian. There seems to be a societal expectation that the spouse will naturally step up to apply for guardianship of the other spouse. It seems to be "assumed" that the parent will "naturally" be the best choice as property guardian of the child. However, in our experience, the spouse or parent may not truly be in the best position to perform the role of guardian; we try to sit down with the proposed guardian and set out in a candid and realistic fashion what the responsibility of guardianship entails coupled with comprehensive review of what the incapable person or minor will need in terms of financial and property management going forward, and what will be in their best interests.

In cases where the personal injury settlement or trial award is substantial (in the million dollar or millions of dollars mark), it may be unrealistic to expect the husband or wife of the injured incapable person to step in and manage that amount of money, and to maintain books and records to permit them to pass their accounts at court-ordered intervals. Even where those millions are placed in a guaranteed structure (annuity) under a schedule of payments over a period of decades, or until the injured person passes away, the sheer volume of monthly payments and expenditures to be made for an injured person may be confusing and intimidating. In selecting the guardian, one must be realistic about the sophistication and capacity of the proposed guardian to be able to manage such sums appropriately, and to maintain proper record keeping and compliance with the management plan developed for the incapable person's property.

In our experience, family members who wish to be made guardians of their spouse's or child's property tend to resist the suggestion that an institutional trustee be considered, as the guardian of property or as a co-guardian of property along with the individual spouse or parent. The family members don't want to see precious settlement funds or damages awards eaten up by trust companies in fees and compensation. The spouse or parent may also feel that the imposition of a trust company would be an invasion of the family's long term privacy, because all expenditures and financial decision making about the spouse or child will have to go through the institution's trust officer.

It is true that institutional guardians do charge fees for their services, and generally charge a percentage on all money coming in and all money going out (disbursed) in the course of the

guardianship on behalf of the incapable person. The institutional guardians also negotiate to receive an on-going "care and management fee" of funds they hold under the guardianship, and they may charge for additional services they may provide such as investment advice and the preparation of tax returns, where such services are prepared "in house". The percentage rates the trust companies charge are calculated and set with reference to the market value of the incapable person's estate, and the volume of work that may be required in managing that property, and the length of time the guardianship will be in place and other factors the trust company may consider salient to its determination of a fair price for its services.

In our view, the cost of an institutional guardian should not be necessarily the deciding factor when considering who is the best person to be the guardian. Any savings in fees to a guardian who insists on being appointed personally may be wiped out by the legal costs of subsequent passings of accounts if the guardian has mismanaged the funds, lost money because of bad or inappropriate investments, failed to comply with the management plan, or failed to maintain proper books and records of all transactions undertaken for the incapable person. We have had guardians arrive, two years into their management of their loved one's property, with, literally, plastic bags of receipts and nothing more to indicate how they managed the incapable person's funds. Any proposed guardian should be made aware of the consequences for failure to properly fulfill their fiduciary and legal role as guardian of property, including the spectre that the Public Guardian and Trustee, Office of the Children's Lawyer or any other appropriate person may bring an application to force them to account and possibly have them removed as guardian. In addition, they may be personally liable for damages to the incapable person for their failure to properly administer the guardianship property. In our practice, we believe we see an increasing

trend on the part of the judiciary to lean towards and favour the appointment of institutional trustees, at the very least as co-guardians with a family member. We believe it gives some comfort to the court to know that a professional money managing institution has been put in place where the financial future of a very vulnerable person is at issue, particularly in these turbulent financial times.

In terms of a lack of family privacy, it is true that the trust officer will be involved in all the financial decisions and transactions in respect of the incapable person's property. However, by the time of the settlement of a personal injury matter, the family has probably become habituated to a parade of professionals in their lives – the case managers, physicians, speech and language pathologists, physiotherapists, attendant care providers. From what we observe, the relationship between most families and the trust officer is categorized by warmth, mutual respect and professionalism.

When advising the prospective guardian-family member, they should be advised that generally, persons who have been bankrupt will not be considered appropriate candidates to be guardians of property.

Where a prospective guardian is unable to be approved for a security bond, this may not prevent him or her from being appointed as guardian. The effect of your client's inability to be bonded on the court's estimation of your client's candidacy will turn on the facts. If your client is a generally trustworthy person, with a longstanding record of steady employment, family ties and ties to the community, he may be appointed even where a bond has been refused for reason of his

lack of assets. If a bond has been denied for reason of past criminal or fraudulent behaviour, obviously you should be advising your client to rethink his candidacy.

Timing and coordination of guardianship application and motion for approval of settlement

Rule 7.08 of the Rules of Civil procedure provide that 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. As noted by Justice Wilkins in the case of *Marcoccia (Litigation Guardian of) v. Gill*[14], in Toronto, a practice had developed wherein counsel seeking approval of settlements on behalf of parties under disability were bringing these motions before a judge of their choosing in chambers on an ad hoc basis. Within the context of these ad hoc motions for approval of settlements, the judgment approving the settlement would sometimes include an order appointing the guardian of property for the party under disability and perhaps requiring other terms such as directing that the judgment be served on the Public Guardian and Trustee and directing that draft accounts be sent to the Public Guardian and Trustee every two years after the date of the judgment. This practice of tacking on guardianship orders to judgments approving settlement persisted despite the fact that the *Substitute Decisions Act, 1992*, which has been in force for almost 13 years, has specific requirements regarding the manner in which guardianship applications should be brought, the evidence that must be provided, and the parties who must be served.

[14] 2007 CarswellOnt 15 (Ont. S.C.J.)

These types of orders were problematic for several reasons. First, service of the judgment on the Public Guardian and Trustee after the fact serves no purpose as the Public Guardian and Trustee has no authority to take any action in respect of the judgment. Second, a judgment approving a settlement that simply appoints a person as a guardian of property without a proper guardianship application being served and filed fails to comply with the mandatory requirements of the *Substitute Decisions Act, 1992*, and likely could be overturned on appeal. Third, an order requiring the person to deliver draft accounts to the Public Guardian and Trustee is not an adequate protection of the disabled party's property as the Public Guardian and Trustee does not, as a matter of practice, review draft accounts; rather, the Public Guardian and Trustee would review accounts on a formal application to pass accounts on behalf of the incapable person. Fourth, since motions for court approval of settlements are not required to be served on all of the disabled party's family members, the disabled person's family members will not have an opportunity to oppose the appointment of a certain person as the guardian as they would have if the application for a guardian was properly brought pursuant to the *Substitute Decisions Act, 1992*.

The *Marcoccia* decision held that a formal motion or application for court approval of a settlement should be brought before the court and should deal with the following:

- Description regarding the disposition of settlement funds;
- Future management of the funds and other property of the person under disability;
- The amount of the settlement funds to be paid to solicitors for fees and disbursements;

- The amount of money to be paid into an annuity or structure, the terms and provisions of that annuity, and how the funds available from the structure will satisfy the specific needs of the plaintiff;
- The amount of money to be paid for purposes other than the purchase of an annuity;
- Whether or not there should be the assistance of a financial adviser, money manager or accountant;
- Information regarding whether a bond should be posted; and
- What the terms of any reporting or accounting obligations by the guardian of property will be.

Justice Wilkins envisioned that a motion for court approval of a settlement, the appointment of a guardian of property, and an approval of a scheme of management and accounting for the ultimate disposition of the settlement funds could all be dealt with at the same time by the same judge, having strict regard for the provisions of Rule 7.08 of the Rules of Civil Procedure and the provisions of the *Substitute Decisions Act, 1992* (or the *Children's Law Reform Act* in the case of guardianships of minors).

In theory, Justice Wilkins has identified three crucial aspects that ideally should be dealt with at the same time by the same judge based on the premise that the plans regarding the management and disposition of the funds could reflect on the adequacy of the actual settlement. In this regard, Justice Wilkins held that "management of the settlement funds of a person under disability over their life expectancy is very important and is something which ought to be closely reviewed by the approvals judge. To break up the judicial functions into

a number of different steps performed by different judges strikes me as inconsistent with the purpose of intent of Rule 7.08 and the duties and responsibilities imposed on a judge by the doctrine of *parens patriae*."[15]

In practice, however, the circumstances of each individual case are not always such that the motion for approval of the settlement can be brought at the same time as the application for guardianship. In some cases an application for a guardian of property is required long before the personal injury litigation has settled, for example in cases where an injured person has income from statutory accident benefits that need to be managed on their behalf by a person who is authorized to do so. In these cases, the guardianship application should be brought pursuant to the *Substitute Decisions Act, 1992* and the affidavit in support of the guardianship application and the management plan should both indicate that legal proceedings are under way with respect to the tort and accident benefits claims and should describe the status of those proceedings. Upon review of these types of guardianship applications, the Public Guardian and Trustee will usually require the guardian to submit an amended management plan to the Public Guardian and Trustee or to the court for approval within a certain timeframe after settlements have been approved by the court. In actual fact, the amendment of the management plan may occur and arguably should occur in conjunction with the personal injury lawyer's preparation of the motion for court approval of the settlement. In other words, an amended management plan should be prepared, which plan takes into account the proposed settlement proceeds and the guardian's plan with respect to the management of those proceeds. If a portion of the funds are going to be placed in a structure,

---

[15] *Marcoccia (litigation guardian of) v. Gill*, 2007 CarswellOnt 15

the proposed structured settlement schedule should be attached to the management plan and a description as to how the monthly payments from the structure will be managed should be described in the plan. This amended management plan, in draft form, as it will not have yet been approved by the Public Guardian and Trustee or the court, should be included in the personal injury lawyer's motion for approval of the settlement.

Another example of a situation where a guardian may need to be appointed before a motion for approval of a settlement is brought, occurs when one of the tort or accident benefits claims is settled and the other is still outstanding. Where one claim has settled, and a motion for approval of that settlement is being brought, a guardianship application should be brought at that time, pursuant to the *Substitute Decisions Act, 1992*, and dealt with in conjunction with the motion for court approval being brought pursuant to Rule 7.08. Subsequently, if and when the other claim is settled, an amended management plan will have to be prepared and approved by the Public Guardian and Trustee or the court.

In cases where a guardian has not been required in advance of the settlement of the personal injury claims, counsel will then find themselves in the ideal situation that Justice Wilkins envisioned where a guardianship application brought pursuant to the *Substitute Decisions Act, 1992* or the *Children's Law Reform Act* can be brought in conjunction with the Rule 7.08 motion for court approval of a settlement. Although the motion for court approval of the settlement and the guardianship application are two separate proceedings, the guardianship lawyer and the personal injury lawyer will need to coordinate their efforts on several levels. The guardianship lawyer will need to know all the details of the settlement, including the

amount of the settlement proceeds, both in tort and accident benefits, and how much of the proceeds are to be placed in a structure versus paid out in a lump sum, how the structured portion of the settlement will be set up and a schedule of the structured payments, and the nature of the care costs of the incapable person so that these can be factored into the expenses listed in the management plan.

The personal injury lawyer will need to know, from the guardianship lawyer, who the proposed guardian of property and/or personal care will be and what their management plan provides. If the settlement provides that a portion of the settlement proceeds is going to be paid out in a lump sum rather than the proceeds wholly being placed in a structure, the personal injury lawyer will need to know what the proposed guardian's plans are with respect to managing the lump sum proceeds and a detailed investment plan should be provided. Ideally, the guardianship lawyer will be able to provide a draft copy of the management plan, attaching any investment plans, to the personal injury lawyer for inclusion in his or her motion for court approval.

The personal injury lawyer and guardianship lawyer, in cases where a guardianship application was not required in advance of the settlement, should also coordinate the timing of the actual serving and filing of the motion for court approval and the guardianship application. Pursuant to the practice direction concerning the Estates List of the Superior Court of Justice in Toronto, effective April 1, 2009, where the settlement of a civil proceeding that is not a proceeding on the Estates List will require the appointment of a guardian of property for a person under disability, the application for the appointment of a

guardian should be brought on the Estates List. However, where the settlement occurs during the trial or pretrial conference of a civil matter, the trial or pretrial judge may deal with the application to appoint a guardian of property where the circumstances make it more practical to do so.

The practice direction further provides that, where the settlement involves an adult under disability, in most circumstances the application to appoint a guardian of property should be brought on the Estates List prior to the filing of a motion for approval of the settlement [my emphasis] so that an authorized person exists to receive any settlement funds on behalf of the party under disability prior to the approval of the settlement. In these cases, the guardianship lawyer should coordinate with the personal injury lawyer so that all of the information regarding the settlement is included in the guardianship application and specifically dealt with in the management plan so that the guardian of property does not need to file an amended management plan after the settlement is approved by the court. What this may involve is preparing a management plan that includes two columns of income and expenses, one being the income and expenses at the time the guardianship application is being brought (which would not include any settlement proceeds) and a second column that includes the plans for the management of the income from the settlement proceeds and the expenses that will be made on the incapable person's behalf having regarding to the income from the settlement proceeds.

A different set of considerations apply in the case of guardianships under the *Children's Law Reform Act* where a guardian of property is required for a minor. Where the personal injury

settlement involves a minor under disability, the Office of the Children's Lawyer prefers that the application for guardianship be brought after the settlement has been approved. Alternatively, the practice direction provides that the application to appoint a guardian of property for a minor under the *Children's Law Reform Act* should be made returnable at a scheduling appointment on the Estates List so that the court can coordinate the hearing of the application to appoint a guardian with the motion to approve the settlement. It remains to be seen how, in practice, this will actually play out. The likely outcome of such a scheduling appointment is that the judge on a scheduling appointment will probably refer the *CLRA* guardianship application to the judge hearing the motion for approval of the settlement.

In some cases, the guardianship application will not be brought until after the settlement has already been approved by the court, such as in cases of *Children's Law Reform Act* guardianships or in cases where an applicant for guardianship of the property of an adult disabled person was not referred to a guardianship lawyer or advised to bring a guardianship application until after the settlement was approved by the court. In these cases, it is important for the guardianship lawyer to consult with the personal injury lawyer directly, in addition to consulting with the applicant for guardianship, to obtain information regarding the details of the settlement, the judgment approving the settlement, whether any funds have been paid into court pending the appointment of a guardian and what the amount of those funds are, whether any funds are being held by the personal injury lawyer in trust, and how the incapable person's expenses are being met until such time as a guardian can be appointed who is authorized to receive the settlement proceeds and pay the expenses. In many of these cases, once a settlement is reached, the accident benefits insurer will cease paying the

statutory accident benefits and the incapable person will not have access to any funds to pay for their care costs. It will be important to then bring the guardianship application as expeditiously as possible.

It is also important to remember to include in these guardianship applications a request for an order that any settlement funds being held by the court be paid out to the guardian of property to be managed on the incapable person's behalf otherwise, a separate motion for such a court order will need to be brought after the guardianship application, causing further delay to the guardian's access to the incapable person's funds.

As stated above, both the guardianship application and the motion for court approval of the settlement will need to provide a scheme of management of the settlement funds that adequately meets the needs of the incapable person over the duration of their life expectancy. In the context of the guardianship application, the Public Guardian and Trustee's office of the office of the Children's Lawyer will review the application, including the management plan, and provide the applicant and the court with its comments and position, if any, regarding the application. At the same time, Rule 7.08(5) of the Rules of Civil Procedure provide that on a motion for the approval of a settlement, the judge may direct that the motion or application for approval be served on the Children's Lawyer or on the Public Guardian and Trustee as the litigation guardian of the party under disability and may direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement. Keep in mind that, although it is the

same body, either the Children's Lawyer or the Public Guardian and Trustee, who is reviewing the guardianship application and providing an oral or written report regarding the motion for approval of a settlement, the review of the guardianship application and the report regarding the approvals motion are done separately and take different factors into consideration. However, in practice, a guardianship lawyer may find him or herself in a position of having to delay proceeding with the next steps in a guardianship application until such time as the report is delivered by the Children's Lawyer or the Public Guardian and Trustee in the approvals motion.

The judge hearing the motion for court approval of the settlement may request the following information which will require the personal injury lawyer to consult with the guardianship lawyer. As discussed in the case *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*[16], in considering the sufficiency of the settlement, the court may consider what the future costs of the guardianship may be to determine whether settlement proceeds are sufficient to cover such potential costs. In considering the costs of guardianship, the court in *Sandhu* considered the following factors. First, the court looked at the specific medical evidence regarding the impact of the injury on the guardianship costs. Second, the court considered what the corporate guardian's fees would likely be and in considering this factor, the court looked at who should be the guardian and concluded that it preferred a trust company over a private accountant, and the reasonableness of the anticipated fees based on fee quotes from two different trust companies. Third, the court considered the non-corporate guardian's fees, factoring in the time the non-corporate guardian would spend making both property and personal care decisions and indicated that this consideration should not be

[16] 2006 CarswellOnt 3668

approached in a static way; rather, one needs to look at the possible challenges that the guardians may face throughout the life of the incapable person as they age and go through different phases of life. Fourth, the court considered the legal fees of the guardianship and in considering this, the court factored in the costs of the initial application for guardianship, regular passings of accounts, an application for guardianship of property and the person when a minor turns 18, motions to court for advice and directions, amendments to the management plan and the appointment of new guardians.

As held in the case of *Rivera v. LeBlond*[17], on a motion for court approval of the settlement, the court will need evidence regarding the means of ensuring that the settlement funds will be secure and that monies that are paid for the disabled person's care will in fact be spent on the disabled person. In this sense, the guardianship lawyer will need to coordinate with the personal injury lawyer to ensure that the management plan and the motion for court approval address the issue of security of the funds, whether this is by way of a majority of the funds being placed in a structured settlement, regular passings of accounts being ordered, or a bond being obtained by the guardians.

Capacity Assessments under the *Substitute Decisions Act*

Capacity, or lack of it, is the linchpin for guardianship under the *SDA*. A capable person makes decisions for himself or herself. An incapable person needs an attorney or guardian to act as a substitute decision maker, assuming, as is the case for most people, the decisions need to be

[17] 2007 CarswellOnt 1482

made. This will certainly be the case for an adult who is catastrophically injured. Therefore the court will be asked to consider the question of whether a person is capable or incapable.

Since the *SDA* came into force, applicants have relied primarily upon capacity assessors, as so designated by the *SDA*, to perform the required capacity assessments. These are members of certain regulated health professions who have undergone training by the Ministry of the Attorney General and who have maintained their qualifications through continuing education and the conduct of assessments.[18]

It is worth noting that, with the exception of assessments leading to statutory guardianship (Section 16) and assessments in support of guardianship applications brought by way of summary disposition (Sections 72 and 73 - both rarely used), the *SDA* is silent on what evidence is required to prove incapacity. While the court will look to the applicant to provide expert evidence of incapacity from a person qualified to give the evidence, theoretically that evidence does not have to be from a capacity assessor.

The advantage of using a capacity assessor, when it comes to assessments specifically of capacity to manage property and capacity for personal care is that the capacity assessor will have been specifically trained to conduct such an assessment in accordance with the *SDA*. The *SDA* contains legal definitions of incapacity to manage property[19] and incapacity respecting personal

[18] See O.Reg 460/05

[19] Section 6 of the SDA states: "A person is incapable of managing property if the person is not able to understand the information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

care[20]. The capacity assessor will also be trained to use the forms[21] prescribed under the *SDA* for the reporting of capacity assessments. These forms direct the writer's and the reader's minds to the legal definitions of incapacity, the observations that need to be made and the criteria for assessment that need to be addressed.

The alternative to using a capacity assessor is usually to seek an opinion from a physician who is treating the person. Capacity/incapacity under the *SDA* is a legal construct, and most physicians do not have training with respect to the law and how their clinical observations apply to legal definitions. Therefore it is important, if you are seeking an opinion as to capacity from a treating physician, to ensure that you provide the physician with some guidance as to the legal test, how it is to be applied and what needs to be included in the written opinion.

A person who has sustained a serious personal injury will have been examined and assessed many times. An additional assessment with respect to capacity can seem like an unwarranted additional burden. Is there not enough evidence of incapacity in the existing medical records? In our experience, there is not. Medical assessments are focused on medical issues such as diagnosis and possibilities for treatment. They seldom adequately address capacity to manage property, which is a legal issue. A lot of needless time (and expense) can be spent trying to mine medical reports for evidence of incapacity. Unfortunately for the injured person, such efforts are usually fruitless and it is better from the outset to arrange for a capacity assessment.

---

[20] Section 45 of the SDA states: "A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

[21] See O.Reg 460/05, Section 7

The following direction of Conway J. and Brown J. was recently published respecting evidence to support making a finding of incapacity:

> **Guardianship Applications – Judicial Comments about Evidence to Support Making a Finding of Incapacity**
>
> Judges on the Estates List are hearing an increasing number of applications for the appointment of a guardian of property and/or person under the *Substitute Decisions Act, 1992* ("SDA"). To grant such an appointment a judge must make a finding of incapacity: SDA s.25(1), s.58(1). The definition of incapacity is contained in SDA, s.6 (for property) and 45 (for personal care).
>
> Judges hearing applications for guardianships carefully and critically review the evidence of incapacity submitted by the applicant. A finding of incapacity is a serious one, with significant legal and financial consequences. An evidentiary foundation for this finding musts exist before any order can be made, even if the parties proceed on a consent or unopposed basis. In order to make a determination of incapacity a judge must assess the adequacy of the evidence of capacity, consider the availability of less restrictive alternatives to the appointment of a guardian, and take into account the interests of the person alleged to lack capacity.
>
> The most cogent evidence regarding capacity, of course, consists of up-to-date medical evidence from qualified medical professionals or capacity assessments from qualified assessors. If the evidence from medical practitioners will not take the form of an affidavit, their reports must meet the requirements of section 52(2) of the *Evidence Act*.
>
> Evidence of relatives, neighbours and others who have observed the person may also be adduced, but a court will assess whether such evidence provides a partial or fulsome picture of the respondent as at the time of the hearing. As well, the *SDA* contains enhanced evidentiary requirements for summary applications which are conducted without a hearing.
>
> All types of evidence must be satisfactory in substance, not just in form. It is critical that a medical or assessment report contains details about the background of the practitioner/assessor, the relationship of that person to the patent, the types of tests or examinations conducted, the number of times the patient was seen and most importantly, the basis for the conclusion of incapacity. All evidence should be current.
>
> In order to avoid repeated attendances on a guardianship application, and the associated expenses and delays, when preparing application materials counsel

should consider carefully the evidence that will be required to demonstrate the lack of availability of less restrictive alternatives to the appointment of a guardian and to establish a lack of capacity on the part of the respondent.[22]

Who needs to be served?

SDA

Section 69 of the *SDA* provides for who is to receive notice of a guardianship application. Applications to appoint a guardian of property or a guardian of the person, as well as applications to terminate guardianships, must be served on the person alleged to be incapable or already under guardianship, the Public Guardian and Trustee and any existing guardian or attorney, regardless of type, i.e., if the application concerns guardianship of property, any attorney for personal care or guardianship of the person must also be served.

Service on the person alleged to be incapable and any other of the parties described above who do not have representation should be personal, in accordance with the Rules of Civil Procedure and the requirements for personal service of an originating process. Service on individuals residing in institutions should be planned with some care. The person must receive the document and it should remain in his or her possession. However, given the personal nature of its contents and the possibility that the recipient, due to diminished capacity, may not guard its privacy, steps may need to be taken to ensure the document is stored in a secure place. It is also sometimes necessary to educate staff of the institution about the requirement of personal service and of the necessity that the document remain accessible to the person. It is not unheard of for application

[22] Deadbeat, Vol. 27, #3, February 2009 at 3

records to be confiscated by staff and placed on a chart or in a file, although the incidence of this appears to be decreasing.

In addition, the SDA requires that the following family members be served by mail with the application record: the spouse or partner of the person alleged to be incapable or already under guardianship (in the case of a proposed termination); "adult" children (in the case of property, age 18; in the case of personal care, age 16); the person's parents; and the person's "adult" siblings (property - 18; personal care - 16). All of these family members are entitled to be added as parties at any stage in the proceeding.[23]

In *Donohue v. Crozier*[24] the Court of Appeal set aside a guardianship order that had been made without notice to the alleged incapable person.

This notice on family members can be contentious, because a catastrophic injury can have the effect of causing division and fractured relationships within families. Nevertheless, it is a requirement. It is our view that in most cases it is best to be transparent regarding the bringing of a guardianship application and to allow whatever issues exist to be raised and addressed by the court at first instance.

There is no case adjudicated as yet addressing the repercussions for an applicant who fails to serve notice on family members, as required pursuant to subsection 69(6). The court has

[23] Subsections 69(6) and (9)
[24] [2003] O.J. No. 3298 (Ont.C.A.)

adjudicated on when service on family members is not required. In both *Boyd v. Thomson*[25] and *Marcoccia v. Marcoccia and the Public Guardian and Trustee*[26], the Public Guardian and Trustee sought an order of the court compelling the applicants for guardianship to serve family members with these applications, where the family members themselves were consenting not to be served. In both cases, the Public Guardian and Trustee advanced the argument that service on the family members is mandatory, regardless of their own consent to dispense with such service. In both cases, the court held that service could be dispensed with, if this relief was requested, by the applicant and if, the request being considered on its own merits, it was reasonable in the circumstances.

In *Boyd v. Thomson*, the Public Guardian and Trustee asserted that service on the family members is a "right" of the alleged incapable person. The court rejected this contention, finding that the right or entitlement to service is that of the family members who can, in proper circumstances, waive that right.

By implication, if service on the family members is a right or entitlement, and dispensing with service on family members must be the subject of an order for such relief, then arguably an applicant is at great risk if he or she fails to serve family members.

In practice, service on family members has been required even in situations where the family members reside in other countries and are not conversant in English. Some judges have been quite stringent in their application of this requirement to service on overseas family members,

[25] (2006), 28 E.T.R. (3d) 312 (Ont.S.C.J.)
[26] (2006), (Ont.S.C.J.), unreported

and the lawyer for the applicant should give serious thought to how to effectively bring the fact of the application to the attention of overseas, non-English speaking family members.

CLRA

The *CLRA* is silent on the issue of who is to be served with an application for guardianship of a minor's property, other than the Children's Lawyer.[27] In cases of divorced or separated parents, and assuming that one of the parents (usually the custodial parent) is a proposed guardian, we consider it the best practice to serve the other parent with the application. Subsection 48(1) of the *Act* states that as between themselves and subject to any court order or any agreement between them, the parents of a child are equally entitled to be appointed as guardians of the property of the child. The right of the non-custodial parent to be served can be reasonably implied. In our view, it is also better to address any issues between the child's parents concerning guardianship of the child's property in a transparent fashion and in particular to address any disagreements at the first opportunity.

Drafting the management plan

Both an *SDA* and a *CLRA* guardianship application requires a management plan to be filed with the court. Under the *SDA*, the management plan is in a prescribed form. The *CLRA* does not prescribe a form, but there is a format that has been in the past recommended by the Office of the Children's Lawyer and it is what we use in our *CLRA* applications.

[27] CLRA, s.47(1).

The following are some of the more thorny issues that arise in the management of an incapable person's or child's property, and our comments on these issues.

Purchase of real estate

A person who has been severely injured will often have special housing needs and it is often contemplated that a portion of the proceeds of settlement of a personal injury claim will be used to provide for these needs. This may involve renovation of an existing home or the purchase or building of a suitable, accessible home.

If the incapable adult's or child's property is used to purchase the home, either fully or in some part, the plan must call for the registration of the ownership of the home to reflect the contribution that the incapable person or child has made. Contrary to the belief of some, it is possible for a child to be an owner of real estate. In cases where a child and parent both contribute toward the purchase of a home, it is not appropriate for title to be taken in joint names, as this creates a survivorship interest for the other joint owner subverting either the child's testamentary freedom when he or she becomes an adult or, if the child will remain capable, potentially subverting the rights of the child's intestate beneficiaries.

If a proposed co-owner will need a mortgage in order to purchase his or her share of the property, this mortgage cannot affect the incapable adult's or minor's interest. It is possible for a tenant-in-common to mortgage his or her interest only.

The management plan has to address how the carrying costs of the home will be met. There needs to be a plan respecting payment of property taxes, insurance, utilities, maintenance and repairs. If other members of the incapable adult's or minor's family will be residing in the home with him or her, the contribution these family members will make or will have made on their behalf needs to be addressed in the plan. For example, if a house purchased by a minor with a minor's funds will be a home to not only the minor's parents, but also the minor's siblings, the plan has to address how the minor will be compensated for providing shelter to these family members. Often family members are providing care to the minor, and this forms a part of their contribution to the cost of shelter. Family situations differ and are dynamic. For example, when a sibling of a minor or a child of an incapable adult becomes an adult and enters the working world, but remains living in the home, it may be reasonable to adjust the contribution that sibling or child makes to the ongoing costs of the home, in exchange for the shelter being provided by the incapable adult or minor.

What if it is some day no longer possible for the incapable adult or minor to remain living in the home? The equity interest in the home is an asset that is no longer of use to the incapable adult or minor and the home should be sold and the proceeds used to provide for the incapable adult's or minor's needs elsewhere. The guardian needs to understand that family members who reside with the incapable adult or minor do not necessarily have any security of tenure in the home.

Reconciling the management plan with a family budget

The incapable adult is usually and a minor is always part of a family unit. If the injuries have arisen from a motor vehicle accident, the incapable adult or minor has usually been receiving statutory accident benefits. These will have included payment of medical and rehabilitation expenses and, if needed, the payment of up to $6,000.00 per month for attendant care. Frequently, this payment for attendant care is made in whole or in large part to a family member, often a spouse of an incapable adult or a parent of a child. With almost the same frequency, the $6,000.00 per month is supporting the family unit, since the spouse or parent who is providing attendant care is fully occupied in doing so and has no other ability to earn an income.

A settlement reached on behalf of the incapable adult or minor may be a settlement respecting a tort claim, a settlement of the person's accident benefits claim, or both. If the settlement includes settlement of the accident benefits payable to the person, then upon the settlement coming into effect the medical and rehabilitation benefits and the attendant care will no longer be paid. Regardless of whether the settlement is a lump sum, structured settlement or a combination of the two, there is often a decrease in funds available to pay for the expenses of the injured person, post-settlement. The funds that are available have to be used to cover all expenses, including shelter, medical and rehabilitation expenses, assistive devices, special needs supplies and attendant care. Frequently, the proposed guardian is also the primary caregiver. This creates a delicate situation of conflict for the proposed guardian, who must put forward a plan that addresses all the needs of the incapable adult or minor, but who also needs to be compensated fairly for continuing to provide attendant care.

The situation becomes even more complicated if there are other family members who have needs that must be addressed. For example, an injured adult may have been supporting dependents prior to the accident, who are still in need of support. An incapable adult may have jointly owned assets with a spouse prior to the injury and now their respective responsibilities and rights with respect to those assets needs to be addressed in the management plan.

Under the *SDA*, the proposed guardian must create a budget that works with the funds available and addresses the requirement under the *Act* that the needs of the incapable person be the first priority, the support for dependents be the second priority and the incapable person's other legal obligations be the third priority in terms of spending.

In terms of what kinds of "other legal obligations" an incapable adult may have, most frequently the incapable adult will have debts. These may have been incurred prior to the personal injury, or later as a result of a dire financial situation caused by the personal injury. The management plan will have to address the repayment of these debts while at the same time ensuring that the incapable adult's needs are met.

Most family units use credit cards, which can be a convenient and sometimes always necessary means of making purchases. However, the Public Guardian and Trustee will not support a management plan that includes the "pledging of credit" on behalf of an incapable person. Therefore the ongoing use of credit cards as a means of paying for the incapable adult's and his or her dependents' expenses is not an appropriate part of a management plan. It may be that the

need for a credit card as part of a family's purchasing means can be addressed by another family member having the credit card and being reimbursed by the incapable person where appropriate.

The proposed guardian needs to strike a fine balance in producing a management plan that meets the fiduciary responsibility of a guardian and the needs of the family unit. We see the development of an acceptable management plan as an iterative process. A management plan prepared by our firm, with input from the client, usually undergoes several drafts. It is not at all unusual for the plan to be further amended once we have received input from the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer. It is important that a client understand that the management plan needs ultimately to be approved of by the court and that it is not finalized until the judgment is given.

Parents' obligation to support their child

A management plan for a minor needs to take into consideration that it remains the obligation of the child's parent to provide him or her with support. The child's funds are to be used to meet extraordinary needs, beyond the usual need a child has for support from a parent. A management plan for a minor needs to take into account that a parent will need to contribute towards the child's support.

Preparing the guardian for their on-going responsibilities

Once the guardianship judgment is obtained, and any monies which have been paid into court pursuant to any approval of a personal injury settlement have been requisitioned and transferred from the Accountant of the Superior Court of Justice to the guardian of property, ostensibly the work of the guardianship lawyer is "done."

Each individual counsel needs to assess, however, whether the retainer with the guardian/client ends at the date of their appointment, or whether there shall be an on-going retainer with the client. Most guardians are court-ordered in the guardian judgment to return to court within six months of the two-year anniversary of their appointment date, to pass their accounts in court-passing format, if not earlier. In our final meeting with the guardian/client, we clearly set out verbally and in a follow up reporting letter what their two-year anniversary date is and by which date the guardian must bring an application to pass his or her accounts. However, we indicate that we consider our retainer with the client to be at an end after the completion of the guardianship appointment and final reporting meeting and clarify that the obligation to diarize and comply with court deadlines shall be on the guardian him or herself. This is a liability issue: we do not want to undertake to remind the guardian of his or her court-ordered obligations in 24 to 30 months time when we cannot be assured we will even be able to find them at that time. Similarly, we face dilemmas in terms of the extent to which we are able to offer on-going or future assistance in respect of their handling of their books and records, record keeping and compliance with the management plan. You may have worked in an intimate and detailed fashion with the guardian/client to develop the management plan, conducted repeated meetings in which you explain the manner in which they must administer the incapable person's property

under that plan, and hammered home the necessity that they maintain their books and records. Yet, two years later, when they arrive back to retain you on the passing of accounts, you find that their books are a mess or are non existent, the record keeping is that fore-mentioned plastic bag of receipts and they have exercised some "creativity" in interpreting the dictates of the management plan.

Some personal injury lawyers who refer clients to us to do the management piece have asked us if we would agree to "continue on" with the client to help him or her get up and running in the guardianship, and we are happy to set up such a retainer, if the guardian agrees to do it. Similarly, we have often thought that if we could get the guardian to agree to return to our firm for a "six months check up" to review with us how they got started and to fix or improve on their administration before any errors go too far, this would assist the guardian when it comes time to pass their accounts. However, we can't force the guardians to retain us for on-going guidance, and generally the first time we see how the guardians have fared in that first two-year period of guardianship is the date they come in with their records to prepare to pass their accounts. Some guardians are fabulously organized; others emerge as woefully not so.

Some guardians fail to return to court to pass their accounts, despite being court ordered to do so in the guardianship judgment. In those circumstances, we do not see ourselves as responsible for the client and their failure to pass their accounts. However, there is a tension between our strict view of the limits of our retainer and our concern about the incapable person, the guardian of property and the family and wanting to assist the family comply with the court order. On occasion, the Public Guardian and Trustee may flag a file and write to us to inquire as to the

status of the bringing of the passing. While we take the position we are not retained at that time, we will make best efforts to locate the guardian and provide him or her with the PGT letter and urge the guardian to get on with the passing of his or her accounts in compliance with the guardianship judgment.

The cost of future passings can also be an issue. When the guardian/client returns to you to pass his or her accounts, and if the personal injury matter has settled and the guardian now manages all the incapable person's funds, the application to pass accounts may be the first time the guardian of property has to write a cheque from the incapable person's funds to pay a legal retainer. They are often perturbed by the requirement to pay a retainer up front, for in their experience in the personal injury matter, the personal injury lawyers generally take no fees up front, but are paid from the eventual settlement, on approval by the court. Paying for the passing outright, from the funds of the incapable person can be a shock to the guardian of property. It is prudent to canvas that issue with the guardian of property back at the time you are assisting him or her with the development of the management plan under the guardianship application. It helps to provide a realistic estimate of the likely future legal costs, including the cost of an average passing. One other level of tension can be the cost of the passing of accounts where the guardian of property has come to you with a messy set of books or where he or she may have failed to comply with the management plan in the preceding two years. If the Public Guardian and Trustee has many objections to the accounts on the passing, or if family members raise concerns about the manner in which the incapable person's property has been managed, the costs of the passing go up. In those circumstances it may not be fair that the legal costs of the passing of accounts application be borne entirely by the incapable person; the guardian may be required to pay

personally for a portion of the legal fees, where the Public Guardian and Trustee refuses to approve the guardian's costs.

Where the personal injury matters are still ongoing at the two year anniversary of the guardianship appointment, we take the position that the costs associated with the passing of accounts is an expense of the insured and that the insurer should pay the legal fees. In order to achieve this, we consult with the personal injury lawyer as to the status of the personal injury matters and provide a written explanation of the estimated fees and costs to bring the passing of accounts. The personal injury lawyer then submits the explanation of our costs to the insurer and the insurer generally approves some or all of the costs as quoted. Where there will be a shortfall between what the insurer is prepared to pay and our costs, we request that the guardian agree to pay that shortfall.

In terms of the guardianship of the property of minors, the same concerns exist. The guardian is clearly informed of his or her ongoing responsibilities – to comply with the management plan, maintain books and records and return to court to pass his or her accounts of his or her management of the minor's property at the court-stipulated time. Further, presumably the guardian of the minor's property will want to continue to manage the minor's property when the minor becomes an adult in the appropriate circumstances.

The guardian of property of a minor has been appointed under the *CLRA*. As discussed above in this paper, a guardianship of a minor's property is required because a person under 18 is considered at law to be a person under a disability simply because of the fact of his or her age.

However, there may be an added layer of "disability" in respect of a person who is under 18, in that the losses he sustained in the accident or incident in which he was hurt may have caused cognitive impairment or other conditions that would impede or prevent him from being capable of managing his own property once he attains the age of majority.

In circumstances where a guardian of property has been appointed for a person under the age of 18, simply because of the fact of his status as a minor, and where there are no circumstances giving rise to a belief that the young person will be unable to manage his own affairs upon turning 18, the *CLRA* guardianship will terminate by operation of law on the child's 18th birthday, and any property owned by the young person will come under his own control.[28]

Where the young person is under a "double" or multiple disability – because his status as a minor, but also because of cognitive or other impairments giving rise to a concern that the young person will not be capable of managing his affairs as an adult, it is incumbent on the guardian of property to have considered this in the guardianship application in the first instance.

There is no provision in the guardianship provisions of the *CLRA* to grant authority to the guardian of property to have the minor assessed for his capacity to manage property prior to his eighteenth birthday. The *Substitute Decisions Act, 1992*, does provide jurisdiction to order an assessment for capacity, however the *SDA* applies only to persons who have attained the age of majority and cannot be used to order an assessment of a minor. So, here we have a potential gap – a minor who may not be capable may be fast approaching his eighteenth birthday, at which

[28] Many parents may feel that their child, at age 18, would still not capable of managing his or her own property, however that is a personal view, not a viable legal position.

time the payments from the structured settlement will cease, at law, to be payable to the *CLRA* guardian. The child may turn 18, and may be in receipt of funds paid directly to him, or he may have access to lump sums or investments made by the guardian during the young person's minority, and it may take months to get the 18-year-old in for an assessment, if he consents to undergo one under the *SDA*, and get back into court on a guardianship application under the *SDA*. The lack of coordination between the *CLRA* and the *SDA* on this point has potential to let vulnerable young adults fall through a crack. The legislation needs review and we have heard from the bench that it would appreciate the development of a coordinated policy approach to this gap issue on the part of the PGT and the OCL.

In the meantime, two unreported cases show how judges are circumventing the gap. In *Re Sadowski*[29], an unreported case of Himel J. dated October 13, 2004, the judge found she could rely on section 105(2) of the *Courts of Justice Act*, and the court's inherent *parens patriae* jurisdiction to order a medical assessment of the minor prior to his eighteenth birthday. That case was recently followed by Mr. Justice Stinson, in the unreported case of *Re Kamstra*[30], on March 13, 2009 in Superior Court of Justice at Toronto.

Conclusion

Although the *SDA* and *CLRA* have been the governing laws with respect to guardianship of the property of an incapable adult or a minor for many years now, these laws were not always rigidly adhered to in the past when there was need for the management of settlement funds or damages paid as a result of personal injury. The times are rapidly changing, and post-*Marcoccia* there is

[29] *Re Sadowski*, Unreported Superior Court of Justice court file no. 03-0079/96, dated October 13, 2004.

[30] *Re Kamstra*, Unreported Superior Court of Justice court file no. CL-001/09, dated March 13, 2009.

an expectation that guardianships will be formally established in these circumstances, in compliance with the laws that are directly applicable to them. Estates lawyers who are experienced in guardianship litigation can expect an increasing demand for their assistance in these cases. Our goal in writing this paper has been to assist our colleagues by sharing our experience derived from the many *SDA* and *CLRA* guardianship applications brought by our firm in the personal injury context in the past nine years, as these have some unique features.