TAB 11

"Stuff" the Office of the Children's Lawyer Thinks is more Interesting than the Recession

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12th Annual **Estates and Trusts Summit**
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"Stuff" the OCL thinks is more interesting than the recession

by

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This paper is not an in-depth or scholarly review of caselaw or statutes, but instead provides a practical approach to dealing with a number of issues that the Office of the Children's Lawyer ("OCL") addresses on a day-to-day basis. It is intended to provide guidance on some of these matters and to offer suggestions on alternative strategies to resolve conflicts amongst your clients and between your clients and the OCL.

GUARDIANSHIP OF PROPERTY FOR MINORS

Unlike many members of the public, lawyers are acutely aware that a parent has no inherent legal right to receive property or money on behalf of his/her child. The only exceptions are:

a) where the property or monies are transferred to the parent in trust for the child pursuant to a written instrument (a will, *inter vivos* trust, insurance declaration, etc.);

b) where the minor is entitled to receive money (but not if it is payable pursuant to a court judgment or order) in an amount not exceeding $10,000[1], or

c) if the parent has been appointed by the court as the child's guardian of property.

If none of these exceptions exist, the person or entity who holds property or funds on behalf of a minor must transfer the assets to the Accountant of the Superior Court of Justice for Ontario ("ASCJ")[2]. The ASCJ will then invest and manage the property until the child reaches the age of majority, or for such longer time as the will or other document dictates.

As noted, a parent or other individual can only be appointed guardian of a child's property by the court. This is commenced by application under the *Children's Law Reform Act*[3].

All applications for guardianship of a minor's property must be served on the OCL[4]. The person applying to be guardian should do so as the applicant, and should name the minor, "by his/her litigation guardian, the Children's Lawyer" as the respondent. For the purposes of all estate or trust litigation the Children's Lawyer acts as the litigation guardian of the minor unless the court orders otherwise[5].

OCL approval of the guardianship application is not a pre-requisite for the court to grant judgment, but the court expects the OCL to carefully review the application, and to provide consent to, or comments regarding, the proposed guardianship.

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[1] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 51.
[2] See the following:
Trustee Act, R.S.O. 1990, c. T26, section 36(6) for estate or trust interests.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 7.09(i) for monies payable pursuant to a court judgment or order.
Insurance Act, R.S.O. 1990, c. I8, section 193 for insurance proceeds.
[3] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 47.
[4] Ibid, note 3.
[5] *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rule 7.03.

Although the court certainly has the authority to grant judgment over any objections or concerns raised by the OCL, it is our experience that this rarely occurs. Accordingly, the purpose of this portion of the paper is to provide counsel with a better understanding of how the OCL approaches guardianship of property for minors and the information required for us to properly review and assess such applications.

The OCL receives many guardianship application records each year. These applications can essentially be divided into two groups. They originate with property or monies payable to a minor:

a) pursuant to a will, trust document, registered or pension plan, or life insurance proceeds (for ease of reference "estate guardianships"), and;

b) pursuant to the settlement of a minor's tort or FLA claim (referred to as "tort guardianships").

Although the amount of property or money to be administered by the guardian in each instance may be similar, the OCL approaches each type of guardianship a bit differently. That is because tort guardianships tend to focus on significant medical and care issues, and often involve structured settlements, while estate guardianships often constitute "extra" funds.

It is essential for those in the estates bar to be cognizant of what the OCL looks at in reviewing both types of guardianships, as it appears the civil/personal injury bar is increasingly seeking the assistance of estate practitioners in crafting such guardianship applications.

In an estate guardianship the OCL will review the plan to determine why the funds should not be paid to the ASCJ. If the child has no special needs requiring extraordinary payments, the ASCJ could manage the funds and provide monies to or for the benefit of the child through a cost-free fiat procedure available through the OCL.

The applicant or guardian must be made aware (especially if a parent) that he/she does not have the right to use the managed funds to provide for the ongoing financial support of the child unless the plan (and the Judgment which incorporates such a plan) provides the express authority to do so.

In reviewing plans where such financial support is contemplated, the OCL keeps in mind that parents have a legal (much less moral) obligation to support their minor children[6]. This obligation must be satisfied first, but will however vary based on the parents' assets, income and personal circumstances. An obvious instance would be two professional parents with a total income exceeding $1,000,000 living in a mortgage-free Forest Hill five-bedroom home, seeking to use part of their only child's $300,000 inheritance from his grandparents to fund the child's private school tuition.

[6] *Family Law Act*, R.S.O. 1990, c. F3, as amended, section 31.

In many cases, estate guardianships consist of "extra" money that the child has inherited from a person outside his/her immediate family. While it may be appropriate to fund certain expenses for the child, it is expected that the child's parents will support the child, and that the bulk of the estate funds will be available to the child when he/she attains the age of majority.

Further, as the minor will likely be capable at age 18, the horizon for investment in these plans may be limited. Of course much depends on the child's age and the amount of money under investment. If the child is 2, the investment risk tolerance may be greater than if the child is 17. The same applies if the amount being managed is $25,000 rather than $2,000,000.

Tort guardianships are usually quite different vehicles. In many of these cases, the minor is physically or mentally compromised and the funds consist of a lump sum, some smaller periodic lump sums, and monthly annuity payments made through a structured settlement.

The OCL will carefully scrutinize the nature and significance of the minor's injuries and pay particular attention to the current and future needs of the child in reviewing the tort guardianship applicant's plan. As any annuity payments are often geared to meeting specific care and accommodation needs of the child there is a very low risk tolerance to any investments.

In particular, the appropriateness and ability of the proposed guardian is examined. A corporate guardian may be more suitable, especially where the parent is providing full-time care to a special-needs child. It may also be that a parent has had to give up his/her employment to provide full-time care for the child which could affect the parents' ability to support the child. A further concern would also be the guardian's experience in managing the funds.

The OCL will also consider whether funds are available from both tort or accident benefits claims or if only one, the status of the other claim. Housing, transportation, therapies, assessments, the timing of payments to or for the benefit of the minor, professional fees, and a host of other factors will also be reviewed as they relate to the child and the plan.

It should be noted that the authority of a guardian for property of a minor ends when the minor attains the age of majority. The guardian has a positive duty to ensure the managed funds are transferred to the minor when he/she attains the age of majority[7], and to ensure that the minor is educated about financial management and investments before he/she turns 18. The OCL may request the guardian to sign an undertaking and acknowledgement that s/he has done this.

A particular consideration for tort guardianships (and some estate guardianships) is the capacity of the minor to manage his/her property upon attaining the age of majority. It is the OCL's practice whenever an application for guardianship is reviewed and there is an issue as

[7] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 56.

to the capacity of the minor, that the Judgment incorporating the plan include a provision requiring that a capacity assessment of the minor be undertaken prior to him/her attaining the age of majority. The Judgment should deal with who is to arrange the assessment, how it will be funded, and provide that if the minor is found incapable of managing property, the applicant guardian will notify the Public Guardian and Trustee and make sure that a new guardian of property under the *Substitute Decisions Act*[8] will be appointed.

While there are different issues that must be addressed in each of tort and estate guardianship applications, there are specific documents and information which must be provided to the court and to the OCL with respect to any guardianship application.

Section 49 of the *Children's Law Reform Act* requires that in reviewing any such application, the court must consider:

a) the ability of the applicant to manage the minor's property;

b) the plan of care and management submitted by the applicant, and;

c) the child's view and preferences, if they can be reasonably ascertained.

The most effective way to provide this information is to have the applicant provide an affidavit in support of the application. The affidavit should have the draft plan of care and management of the minor's assets attached as an exhibit. Within the affidavit and the plan should be the following documents/information:

1. A *curriculum vitae* from the applicant detailing his/her education and employment history.

2. The age of the minor and the applicant's relationship to the minor.

3. Where the minor resides and who lives with him/her.

4. The source of the minor's assets.

5. The nature and value of the minor's assets which will be administered by the guardian.

6. Confirmation that the applicant has not declared bankruptcy and that there are no judgments or claims against him/her related to financial improprieties or mismanagement.

7. Any experience that the applicant has in managing his/her or other's assets.

8. The applicant's age, health, financial stability and means.

9. Whether the applicant can post a bond, or if the applicant seeks to dispense with a bond.

[8] *Substitute Decisions Act*, 1992, S.O. 1992, c.30, as amended.

10. An acknowledgement that the applicant will be required to account for his/her actions with respect to the minor's property.

11. Any special needs of the child or any special information related to the child (i.e. medical needs/training for the Olympics/a child with MENSA attributes).

12. Whether the applicant anticipates the involvement of financial or legal professionals. If so, the nature and potential cost should be disclosed.

13. Whether the applicant will be seeking compensation and how such compensation is to be calculated.

14. Details of the expenses to be paid, the investment strategy, anticipated purchases and/or changes.

This information provides the backdrop for the OCL's review of the management plan and of the suitability of the guardian to manage the minor's assets. It also provides much of the material required to assess the merits of the applicant's plan for the care and management of the minor's assets. The OCL may contact the child to ascertain his/her views or preferences if there is a concern in this regard.

As every case has its own unique facts and issues, no two plans for the care and management of a minor's funds are the same. The plan should be tailored to meet the particular assets being managed, the needs and expenses of the child, the risk tolerance, and the anticipated management horizon. As noted earlier the value of the assets being managed and the age and circumstances of the child are the most important factors.

The following are a short list of "do's/don'ts" to assist counsel in preparing guardianship applications and steering them through the OCL and court process.

Do	provide a rationale for the appointment of a guardian to manage the minor's assets, rather than transferring them to the ASCJ. The ASCJ provides a secure, minimal risk system with reasonable returns and fees. Monies can be secured for the benefit of the child through the fiat process. If the proposed guardian lacks financial stability, has no investment or money management acumen, may incur significant professional advisory fees, or seeks compensation, guardianship may not be the appropriate way to go, or a corporate guardian might be more advisable.
Don't	forget that the guardian's investment options will be restricted to the *Trustee Act*[9] (if nothing at all in the plan is said about investments) or to those specifically enumerated in the plan. If the plan does not give the guardian the flexibility to modify the type or mix of investments the guardian will be forced to adhere to them, or return to the court to seek an amendment to the plan. Failure to adhere to investment or management restrictions in the plan could give rise to sanctions for the guardian on a passing of accounts.

[9] *Trustee Act*, R.S.O. 1990, c. T23, section 27.

Do	bring the application in the right court. The Ontario Court of Justice does not have the authority to approve a plan which provides for payments out of the assets, other than reasonable management fees and expenses. Only the Superior Court of Justice ("SCJ") can approve a plan which provides for payments to or for the education, support or benefit of a minor[10]. Note as well that with the recent Toronto Practice Direction any SCJ application must be brought on the Estates List.
Don't	forget that all guardians appointed are jointly and severally liable for all aspects of their management of the minor's property[11]. This includes adhering to the terms of the plan, the obligations imposed on the guardian as a fiduciary, and the duty to account.
Do	teach your client/proposed guardian about the duty and complexities of accounting. Guardians are required to account in the same way as trustees[12]. The OCL sees many situations where guardians cannot account for their actions as they were not properly instructed by their counsel to keep accurate records and receipts. The OCL sees many instances where the guardian was unaware of the obligation and is unable to account. This often leads to their removal as guardians and great expense. Many are well-meaning individuals who were simply ignorant of their duties.
Don't	bring a guardianship application prematurely. In cases of disputed custody the appointment of a guardian of property should only be made after custody issues are resolved. In tort guardianships there must be a Judgment in the tort action before the guardianship application can be considered. It is inappropriate to ask the OCL or the court to assess the merits of the plan, much less the application, until the quantum and allocation of the settlement funds are resolved.
Do	address the need for a bond. Section 55 of the *Children's Law Reform Act* requires the guardian to post a bond in an amount that the court considers appropriate. The court has the authority to dispense with the bond if the proposed guardian is a parent of the minor[13], but the applicant must put forward an evidentiary basis for this request.
Don't	forget to take into account risk tolerance and the investment horizon when preparing the guardian's plan of care and management. Investing $50,000 for a 16-year-old who inherited the money and is entitled to receive it at 18 is quite different from investing a $500,000 inheritance for a 2-year-old. It is also important to note that it would be inappropriate to put the 16-year-old's $50,000 in a 5-year GIC that cannot be redeemed prior to maturity.
Do	deal with the professional fees of an investment advisor and compensation. These are relevant. If the proposed guardian intends to have both flowing from the minor's funds, it may be inappropriate. Again, the size and nature of the assets is relevant. Managing an estate portfolio of $20 million may require sound investment advice. It should be noted that unlike the *Substitute Decisions Act*, the *Children's Law Reform Act* does not have prescribed compensation. Accordingly, compensation for a guardian of property for a minor would usually be based on the "guidelines" used for estate administration by trustees.

[10] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 59(1) and (2).
[11] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 48(4).
[12] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 52.
[13] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 55(2).

Finally, DON'T hesitate to run your guardianship plan by the OCL before commencing your application. If the type/allocation and quantum of property to be managed by the guardian has been settled, we are certainly prepared to review the draft plan and other information and provide our comments. We hope this will result in more cohesive, thorough plans, a better understanding of the guardian's obligations, and a more efficient and less costly process.

DON'T SELL THAT HOUSE (WITHOUT US – SOMETIMES!)

The OCL is usually involved in the transfer, leasing or mortgaging of real property where a minor has an interest in the land, vested or not. There are different statutes which mandate the OCL's involvement and the extent of its authority to approve or consent to the transaction.

Vested Interests

When an interest in land has vested in a minor, the OCL does not have the authority to approve its sale. The *Children's Law Reform Act* mandates that only the SCJ may approve the transaction[14]. Such approval is sought by application to the court on notice to the OCL. The application may request that all or part of the minor's interest in the land be transferred, encumbered or leased. The court may make the order only if it determines that the transaction is necessary or proper for the "...support or education of the child or will substantially benefit the child."[15] In these cases, the court will want to know if the OCL supports the transaction, and if not, why.

Trustee Acquisitions

There are also situations where the child's interest in the real property is owned by an estate or trust and the trustee wishes to acquire the property. An application again must be made to the court to approve such a sale, on notice to the OCL. The application should be brought under Rule 14.05(3) of the *Rules of Civil Procedure* [presumably under 14.05(3)(a), (b), (e), (f) or (h)] and section 60(1) of the *Trustee Act*.[16] The OCL will act as the litigation guardian for the minor in the proceeding.

The applicant trustee must set out within her/his affidavit why s/he wants to acquire the property and why there is no other individual or entity who will buy it at a reasonable price. Needless to say it will be imperative to show that the amount to be paid by the applicant/trustee is equal to or more favourable than the amount that would be paid if the property were offered for sale on the open market.

Obviously, the role of the OCL is to determine whether there will be a benefit to the minor if the property is sold to the trustee. At least two professional, independent appraisals must be provided to substantiate the condition of the premises, special

[14] *Children's Law Reform Act*, R.S.O. 1990, c. C12, section 59(1).
[15] Ibid, section 59(2).
[16] *Trustee Act*, R.S.O. 1990, c. T23.

circumstances related to the property (i.e. more than one owner, environmental concerns, zoning restrictions, etc.), and the method(s) of valuation used.

On occasion, after having been served with an Application to Pass Accounts where a minor/unborn/unascertained has an interest in the estate or trust, the OCL discovers in reviewing the accounts that a trustee has, without court approval, acquired real property from the trust/estate. Any such transfer to a trustee, even if done in good faith, is caught by section 60(1) and may be voidable. These are sometimes serious breaches of trust which, with the appropriateness of the transaction confirmed, can be corrected by obtaining a court order, *nunc pro tunc*.

Unvested interests

Where real property has not vested in a minor, but there is a need or request for it to be sold, mortgaged or leased, resort must be had to the *Estates Administration Act*[17]. It provides the OCL with the statutory authority to deal with such matters for minors.

There are of course many situations regarding a minor's unvested interest where the approval of the OCL is not necessary. They are:

1) The trustee has authority within the trust instrument (will, codicil) to sell, lease or mortgage the property. This trustee takes his/her authority from the powers given by the testator. Note that the existence of a will does not necessarily confer this power on the trustee – s/he must be given such powers in the document itself.

2) The trustee must dispose of, or mortgage, the property to satisfy legitimate debts of the deceased.

   It is crucial to remember that these must be debts of the deceased in existence at death, not those incurred by the estate (like funeral expenses) after death. Before any real property is sold or encumbered to pay debts, the trustee must look to the personal property of the deceased to satisfy these obligations.

3) There was, at the time of the deceased's death already a mortgage on the real property, and as a liability of the estate, it is necessary to sell the property to discharge the debt.

4) A judge (by necessity a judge of the Superior Court) has made an order directing the sale or transfer of real property in which a minor has an interest. We often see this as part of judgments approving Minutes of Settlement in which a minor is involved. If the OCL is not already part of the proceedings as the minor's litigation guardian, the OCL must be served with the application materials seeking such relief[18].

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[17] *Estates Administration Act*, R.S.O. 1990, c. E22.
[18] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 67.

The *Estates Administration Act*[19] provides an estate trustee without a will (and trustees when the will does not provide for such powers) with the statutory authority to encumber, transfer or lease real property.

It would be unusual for the OCL to agree to allow real property in which a minor has an unvested interest, to be encumbered by an estate trustee without a will. It is expected that such a trustee will complete the administration of the estate as soon as reasonable, and after providing his/her accounts, pay the minor's share of the estate to the ASCJ.

Where a trustee wants to sell any non-vested real property, s/he needs first to secure the approval of a majority of the adult beneficiaries who represent at least one-half of the total interest in the property. However, if a minor has an un-vested interest OCL approval is still necessary, even if the trustee has the consent of the required adult beneficiaries[20]. The only exception is where the trustee has obtained a court order approving the sale.

Whether seeking OCL approval to a sale pursuant to the *Estates Administration Act* or seeking court approval to a sale pursuant to *The Children's Law Reform Act* the following documentation is required:

1. **Appraisals for the Property** (necessary to establish the market value of the property):

Commercial	Two professional, independent, detailed appraisals must be produced. Opinion letters and "statements of value" are not acceptable. Any such appraisals must have been done within the six preceding months and must detail the condition of the property.
Residential	Although it may require two professional, independent detailed appraisals, the OCL will in some circumstances accept one appraisal and a letter of opinion provided they have been completed in the preceding six months and detail the condition of the property.

2. **The Certificate of Appointment of Estate Trustee with or without a will.** If the property has already vested in a minor this is not necessary but the applicant will be required to explain how the minor acquired his/her interest in the property.

3. **The written consent to the transaction from all minors who are sixteen or over.** Where the minor has a vested interest in the property, the consent must be accompanied by a solicitor's affidavit confirming the solicitor read and fully explained the consent to the minor, and the minor understood, and voluntarily agreed to, the transaction.

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[19] *Estates Administration Act*, R.S.O. 1990, c. E22, sections 15, 17 and 22.
[20] *Estates Administration Act*, R.S.O. 1990, c. E22, section 15.

4. **The Agreement of Purchase and Sale**. If only OCL approval is necessary, the transaction must contain a provision stating it is subject to that approval. If a court order is necessary under the *Children's Law Reform Act*, it must contain a provision stating it is subject to the approval of the Ontario Superior Court of Justice.

5. **The Statement of Adjustments**.

6. **A Statement of Distribution indicating how the minor's share has been calculated from the net proceeds of sale**. This will include details of any deductions for encumbrances, real estate commission, solicitor's fees and disbursements, costs of the appraisals, and the costs of the OCL. Any other expenses or debts which are relevant (and which reduce the minor's share) must be provided.

7. **A copy of the solicitor's legal account dealing with the costs of the sale, and, if necessary, the anticipated costs of any application for court approval.**

8. **If the lands are encumbered, an up-to-date mortgage statement.** If there are other encumbrances or outstanding municipal taxes, documents confirming any such outstanding debt must be provided.

9. **The written personal undertaking of the solicitor handling the real estate transaction to pay the minor's share of the net proceeds to the ASCJ within 10 days of the closing of the transaction.**

10. **An affidavit signed by the trustee or the applicant** (if court approval is necessary) setting out:
    a) The names, birth dates and marital status of all minors having an interest in the property, and the names and addresses of the persons with whom they reside. If there is a guardian of property for the minor, particulars of the guardian, and a copy of the order appointing the guardian must be provided;
    b) The type and value of the property, details of any encumbrances, and if relevant, whether the property has generated any income;
    c) The legal and municipal descriptions of the property;
    d) That creditors have been advertised for, together with a list of outstanding debts of the deceased and the estate (assuming the property is not vested in the minor);
    e) Details of the methods used and efforts to sell the property;
    f) A statement that the trustee/applicant considers the sale price to be reasonable and why the sale is in the best interests of the minor.

Unique to sales under the *Estates Administration Act*, the affidavit must also contain the following:

a) The written consent of a majority of the adult beneficiaries having at least 50% of the total interest in the property;

b) A copy of any caution or renewal of caution registered pursuant to sections 9 and 11 of the *Estates Administration Act*;
c) An Acknowledgement and Direction signed by the Transferor/Estate Trustee. It should contain as a schedule a statement that "The Children's Lawyer hereby consents to and approves the sale of the property herein on behalf of ____________________________, a minor, born January 1, 2011, pursuant to the *Estates Administration Act*, R.S.O. 1990, c. E22, section 17(2)." Obviously, The Children's Lawyer will sign the Acknowledgement and Direction for the minor;
d) A draft Transfer to be signed by the trustee;
e) A detailed list of the assets of the estate;
f) The complete names and addresses of all adults having an interest in the property and their relationship to the deceased.

Required for any applications for court approval under the *Children's Law Reform Act* on the following:

a) The Notice of Application;
b) A draft Judgment for approval by the OCL. It should state that The Children's Lawyer is to sign all sale documents on behalf of the minor and should provide for payment of the minor's interest to the ASCJ;
c) Details of the minor's interest in the property and how such interest was acquired;
d) Details of any personal property which the minors are entitled to and its value and the necessity of resorting to the sale of the real property;
e) Any other additional facts or rationale for the sale which brings the transaction within section 59 of the *Children's Law Reform Act*.

Once the sale is complete (assuming approval by the OCL or a court order approving the transaction), counsel for the trustee/applicant must deliver the following to the OCL:

Under the *Estates Administration Act*

1) A copy of the registered Transfer;
2) That the minor's share of the proceeds have been deposited with the ASCJ (within 10 days of the closing);
3) An affidavit pursuant to section 36(6) to effect the deposit, with the final Statement of Distribution of the net proceeds attached as an exhibit;

Under the *Children's Law Reform Act*

1) A copy of the issued and entered Judgment;
2) A copy of the final legal account(s) and Statement of Distribution;

3) The Acknowledgement and Direction signed by all adult Transferors. The Children's Lawyer will sign the document stating that pursuant to the Judgment she has the authority to act on behalf of the minor who does not have the capacity to act on his/her own behalf;

4) The executed Transfer;

5) After the Transfer is registered, a copy of it;

6) Confirmation that the minor's share has been deposited with the ASCJ within 10 days of the closing.

ANNUITIES

We are all familiar with annuities – especially those over 70 who have invested their RRSPs in annuitized RRIFs. An annuity is the investment of a lump sum of money which entitles the investor to a series of equal regular payments. These payments may be for a specific period of time (term certain), or for life with a guarantee period chosen by the investor (i.e. 10-15-20 years). If the annuitant chooses a lifetime annuity with a 20-year guarantee period but dies before the expiry of the guarantee period, the designated beneficiary of the annuity will continue to receive the payments until the end of the 20 years, or can usually elect to receive a discounted lump sum from the issuing company.

Estate planners are quite familiar with annuities as the favourable tax treatment they enjoy generally results in a better return (revenue) than GICs, but they are just as safe and conservative. The planner will want to be cognizant of the potential value on the death of the annuitant and that there is a designated beneficiary.

However, it is also important that estate litigators consider annuities as a creative "outside the box" solution to their clients' issues. Annuities can be a cost-saving, effective tool.

Most practitioners will be familiar with annuitizing RRSPs for minors or purchasing an annuity for a spendthrift beneficiary. However, there are a host of other situations in which annuities can be used in the estate litigation context. The following scenarios outline cases where annuities have been used, but as one of my colleagues always says: "the names and some particulars have been changed to protect the guilty – or to avoid liability if the case gets screwed up."

Consider the following:

Joe died suddenly at age 65. He left behind his 38-year-old wife of 5 years and 2 children from his first marriage aged 17 and 20. Joe also left behind his ex-wife (aged 66 with some health concerns) who was receiving monthly support from Joe. Joe's ex had never worked outside the home and her support was to be reviewed in 5 years.

Joe's widow had not worked since she and Joe married. Joe left an insurance policy of $500,000 which designated his children as equal beneficiaries. He also left a will directing that the balance of his relatively modest estate pass to his second wife, neglecting to provide a fund for ongoing support for his ex. Joe named his second wife as his estate trustee.

It was unlikely that the ex would want to claim against the insurance proceeds which would provide funds for her children's education and future. However, she is clearly one of Joe's dependents and required ongoing support given her age and health.

Certainly support could be paid on an ongoing basis to the ex from the estate (modified to take into account that the payments will now be tax neutral for the payor and payee). However, the acrimony between the second and first wives was palpable and neither relished the prospect of an ongoing relationship, much less discussions about increases in cost of living or whether the support should end.

The solution agreed upon was to have the estate purchase a lifetime annuity for the ex. The amount would have to be tax neutral and reflect her needs. Consideration was given to a lengthy guarantee period, and designating the children as the irrevocable beneficiaries. The children were even prepared to contribute a portion of the insurance proceeds to fund the annuity purchase to make the resolution more palatable for the second wife. The ex would have secure funds for her future, the kids most of their money and the potential for additional funds in the future from the annuity, and the ex and widow could go their separate ways.

In another case issues arose over the administration of the estate. The ex-wife was entitled to all of the income of the estate and capital encroachments, in the discretion of the estate trustees. She and two of the deceased's children were the estate trustees. Private companies formed part of the estate assets and the widow claimed the other trustees were refusing to declare corporate dividends (thus artificially reducing her income entitlement) and refusing her reasonable requests for capital encroachments. The litigation escalated and the three were all removed as trustees.

The deceased's grandchildren (all minors) were beneficiaries of part of the residue of the estate. The widow (who thankfully had a wonderful relationship with the deceased's grandchildren) had a term to one-hundred life insurance policy and was prepared to designate the grandchildren, equally, as the beneficiaries. However, the annual premium payments on the policy were about $50,000 and she could not afford them. She wanted the estate to make the premium payments for what could have been 26 years (the widow was 74). The balance of the estate after all the widow's issues had been settled was about $950,000. It was clear that even if the rate of return on the $950,000 was good, taxes, trustee's compensation, bank charges, legal fees and the cost of filing the trust returns would further diminish the funds. There might not be enough to ensure the policy premiums would be paid and thus ensure the grandchildren received the benefit of the insurance policy.

Consideration was given to purchasing an annuity to fund the premium payments. This proved to be a very effective way of resolving the matter. The lump sum required to purchase the lifetime annuity was between $650,000 and $700,000 depending on the guarantee period chosen. The after-tax portion of the annuity (a very large portion given the annuitant's age) would be used to pay the annual insurance premium.

As can be seen, the annuity literally put an additional $250,000 to $300,000 back into the children's hands. The widow had her settlement and the grandchildren would receive a significant benefit (in excess of $2.5 million) from the insurance on their grandmother's death. A win-win situation for all.

There are many other situations where annuities may be useful: to fund the payment of insurance premiums; to deal with excessive encroachments; to provide funding for variation applications.

The possibility for using an annuity will of course be driven by the particular facts and by the amount of money in dispute. However, it is important to understand vehicles such as annuities as they can provide yet another opportunity to formulate an effective solution to costly mediation.

KIDS' TRUST PROPERTY

Oh, to be able to see into the future! So many great plans and expectations – dashed by financial setbacks, personal or family issues, professional changes or societal shifts.

Many individuals create elaborate estate schemes or settle *inter vivos* trusts (primarily for family or tax purposes) in the expectation that their lives will proceed exactly as they planned. Regrettably, unanticipated events force the individual to re-think their future and seek to terminate or vary the trust instrument that was so carefully crafted.

Generally, if all of the potential beneficiaries are *sui juris* they can enter into an agreement to vary the trust. However, if a minor has a vested or contingent interest in a trust or estate, a court must approve any change to the trust terms under the *Variation of Trusts Act*[21]. The court also approves on behalf of all other incapacitated beneficiaries.

Rule 7.03(2)[22] provides that The Children's Lawyer acts as litigation guardian for the minor respondent, and as such must be served with the application to vary. It is however only the court that can approve a variation of the trust instrument on behalf of the incapacitated individual, "if it thinks fit."[23]

The sole restriction on the court's discretion is that it cannot approve a variation "unless the carrying out thereof appears to be for the benefit of that [incapacitated] person."[24]

How do you define benefit? It is the obligation of the applicant to satisfy the court that not only will there be a benefit for the incapacitated beneficiary, but that the benefit is

[21] *Variation of Trusts Act*, R.S.O. 1990, c. V1.
[22] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, section 7.03(2).
[23] Variation of Trusts Act, R.S.O. 1990, c. V1, section 1(1).
[24] Ibid, section 1(2).

adequate.[25] There should not simply be a replacement of what the incapacitated beneficiary would have received under the original trust instrument; there must be something more. If the interest was contingent, some concrete benefit must be secured with the variation.

There are situations where the proposed benefit is not financial. Increasingly, applicants are seeking to vary trusts to advance more subjective benefits – educational or societal benefits, or to promote family stability and harmony.[26] The OCL views these with great scepticism.

There have been instances where a court has approved a variation to eliminate a trustee's discretion to benefit one or more beneficiaries to the exclusion of others, to include a previously excluded member of the extended family[27], or to increase the age at which a beneficiary was to receive a significant amount of capital from the age of majority, to the age of 25[28]. The above arrangements and others have been approved by the court over the opposition of the litigation guardian of the children involved.

While the court (and/or the OCL) is prepared to consider variations which interpret "benefit" liberally, there must be a significant benefit to the minor/unborn/unascertained) interest involved.

But what is a sufficient benefit? Is it acceptable that the minor suffers some financial loss if the resulting variation will benefit the family as a whole, or will vitiate a parent's personal or financial concerns? Does a temporary issue justify a permanent loss for the minor? The market will eventually rebound and the parent will likely get a new job.

We are all aware that the recession has resulted in many people losing their jobs, much of their pensions, their investments and even their homes. Consider then the parent who settles a major part of his/her assets in an *inter vivos* family trust. Remember that such trusts are usually tax-driven and non-revocable. The parent names his/her spouse and children as the income beneficiaries. At the date of distribution (which is often twenty-one years after the creation of the trust or sooner if the trustee(s) decides it is appropriate) the issue of the settler are the only named capital beneficiaries.

If the settlor was the sole income earner and has lost his/her employment should the trust be varied to allow the settlor access to the income and/or capital, or is it enough that the spouse is entitled to receive income? What if the income generated is not enough? Under the terms of the above trust only the issue of the settlor are entitled to capital, even if the trustee decides to advance the date of distribution. The funds are for the issue and presumably cannot be paid to the parents. The above scenario might cause some to apply to vary the trust as the family (and thus the minor children) might otherwise suffer severe hardship.

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[25] *Finnell v. Schumacher Estate* (1990), 37 E.T.R. 170 (Ont. C.A.).

[26] *Re Weston's Settlements* [1968] 3 All E.R. 338; *Re Spencer* 1 N.S.R. (2d) 282, (1969).

[27] *Weir Trust (Trustees of), v. Weir,* 60 E.T.R. (2d) 314 (2003).

[28] *Re S .(N.) Trustees*, 36 E.T.R. (3d) 43 (2007).

However, add another few twists to the scenario and "family harmony" can take on quite a different meaning, and can provide insight into why the OCL queries whether there is a "real" benefit for the minor.

What if the trust property comprised most of the couple's assets, including their home and cottage, and they had recently separated?

These properties generally do not produce income as they are or have been occupied by the family. However, the spouse who does not earn income now requires support, as do the children. Regrettably, the settlor no longer has the employment income to provide such support. Should the properties be sold and the trust varied to allow the capital proceeds to be paid to the settlor and his/her spouse to provide the parties with financial stability? Does this variation and the attendant loss of capital for the minor children (issue) constitute a reasonable future financial loss if it will provide the funds required for the parents (and thus the children's) immediate needs?

Further, what if the settlor owes the spouse a large equalization payment as well, and wants to "take back" the trust property to facilitate the payment on the basis that the property is really his/hers, and was only put in the trust for tax planning purposes?

The OCL is sensitive to these issues and will look closely at each variation application. It must be acknowledged that trusts cannot be varied when they become inconvenient or when the settlor personally wishes to again have access to the trust property, or where it will simply provide extra income or capital to resolve marital issues but maintain the parents' pre-separation lifestyle. When minors are named as the sole capital beneficiaries of a trust, they have a vested interest in the trust property. Unless the facts overwhelmingly support a distinct or sufficient benefit for the minor, the OCL will not be able to support the variation.

SEPARATION AGREEMENTS AND INSURANCE

Insurance designations can be tricky even for the most seasoned estate practitioner. Is it the will in question or the insurer's designation form that takes precedence? What if the declaration is done on a computer with an electronic signature? Has the insured properly revoked a previous designation? Is the beneficiary designation irrevocable? What if there is another document such as a separation or shareholder's agreement which appears to designate a beneficiary and contradicts the will or the insurer's form?

These issues have come to the forefront with the release of the Ontario Court of Appeal's decision in *Turner v. DiDonato*[29].

Turner was the deceased's second wife and the trustee of his will. The deceased and his first wife, DD, entered into a separation agreement in 1995. The agreement required the

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[29] (2009), 46 E.T.R. (3d) 1; also (2009) Carswell Ont. 1389
– heard December 5, 2008, judgment released March 18, 2009.

deceased to pay spousal support to DD until she reached the age of 65, and also required the deceased to designate DD as the beneficiary of $100,000 of a life insurance policy he had in the total amount of $220,000, until such time as he was no longer obligated to contribute to DDs support.

When the deceased died (prematurely at the age of 58) he had the insurance policy in place but he had designated DD as the beneficiary of only $43,507.15 of the proceeds. DD was, at the time of the deceased's death only 56. The separation agreement stated that if the deceased died without the insurance designation in effect as set out in the agreement, his obligation to contribute to DDs support would be a first charge against his estate.

Although DD received the $43,507.15, she made a claim against the estate for $56,492.85, being the difference between $100,000 and what she had received. She argued that she was entitled to the full $100,000 as an independent obligation under the agreement and that she was not limited to receiving the present day value of the remaining support payments. The second wife argued that the purpose of the insurance designation was only to provide security for the balance of the time-limited support payments. If the estate was required to pay DD the $56,492.85, she would get a bonus as DD had already received support to the date of the deceased's death and $43,507.15, the balance of the deceased's support obligation to DD until she reached 65.

The trial judge observed that by failing to maintain the $100,000 designated amount for DD, the deceased was in breach of the agreement between the parties. If the deceased had complied with his obligation under the agreement, DD would have received $100,000 irrespective of how much the deceased had paid DD for spousal support before he died. The judge also noted there was ample caselaw to support the proposition that an estate can be found liable for damages for a deceased's failure to maintain an insurance policy. The court held as a principle of law, where a party to a contract has breached an agreement, the injured party is entitled to be put in the same position as if the contract had been performed. Accordingly, DD was entitled to the full $100,000 from the estate, subject to the $43,507.15 payment she had already received from the insurance company.

The appeal by Turner centred on the interpretation of the agreement, and in particular the provision which stated that if the deceased died "without this insurance in effect contrary to the Agreement, his obligation to contribute to the support of the wife…"[30] Turner stated that the purpose of the clause was to have insurance available as security only for any support required to be paid to DD from the date of the deceased's death to the time that DD turned 65.

The Court of Appeal disagreed. It noted that the deceased <u>did</u> have insurance on his death, and that the position taken by Turner would only have been relevant if the deceased had <u>no</u> insurance on his death. Obviously that was not the case.

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[30] Ibid, paragraph 8.

The Court went further and noted there was no language in the agreement which linked the obligation to maintain the $100,000 in insurance to the support payments. To make a finding that the insurance was intended only as security for future support would require a clear expression of that intention within the agreement. Conversely, it made no sense that DD was to get less than the $100,000 if the deceased breached his obligations under the agreement.

The decisions of the trial judge and Court of Appeal appear a bit draconian. The deceased's untimely death seems to have had a punitive effect on his estate (loss of future income and a doubling up of a part of his support obligations) while DD acquired more support than she would have been entitled to had the deceased lived another 9 years.

The Court of Appeal released another interesting decision this year related to separation agreements and insurance designations. In *Richardson (Estate Trustee of), v. Mew*[31] in 1992, the deceased divorced his wife ("SM") of 26 years, and immediately married Ferguson, who was 24 years younger than the deceased. There were children from both relationships although by the time the deceased died in 2007, the children from his first marriage were adults and living on their own. The oldest child of his second marriage was just reaching his teens.

The deceased and SM entered into a separation agreement in early 1994. One of the terms of the agreement was that the deceased was required to designate SM as the beneficiary of an insurance policy he had in the amount of $100,000 up until February 28, 1995. The deceased complied with the provision and so designated SM. The amount, if any, of life insurance which the deceased was required to maintain for SM after that time was to be determined thereafter when they dealt with variations to the amount of spousal support the deceased was to pay to SM. There were further written agreements amending the quantum of spousal support, but neither dealt with the insurance issue at all.

At trial, it was determined that February 28, 1995 was the date the parties believed the insurance policy expired (presumably term insurance). However, this was an error. The policy continued to exist after February and the deceased continued to pay the policy premiums.

In 1999, the deceased was diagnosed with Alzheimer's. As his Power of Attorney for Property, Ferguson continued to pay the premiums out of their joint bank account. Ferguson claimed at trial that she made the payments (from her own funds as well in the year of the deceased's death as she said the deceased's assets were exhausted), as she believed she was the beneficiary of the policy.

It was only on the deceased's death that Ferguson learned the designation had never been changed and that SM was to benefit. Ferguson claimed she was entitled to the policy proceeds and asked that a constructive trust be imposed on the insurance proceeds. Ferguson said that had she known SM was still the beneficiary, she would have either

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[31] (2009), 97 O.R. (3d) 65 (Ont. C.A.)

changed the beneficiary designation using her Power of Attorney, or would never have continued making the premium payments.

The trial judge refused to find in Ferguson's favour. Although there was a general release in the separation agreement, it was not particular enough to oust the designation. It was also clear that any further obligation regarding the insurance for SM was to be dealt with during the variation proceedings. As neither party had applied to vary the insurance, and as the deceased had continued to pay the premiums while he was competent and did not remove SM as the designated beneficiary, there was no "unjust" enrichment to SM. Her actual designation as beneficiary under the policy constituted a juristic reason for the enrichment. Finally, the trial judge commented on Ferguson's position. He stated that changing the designation in a life insurance policy was akin to a testamentary disposition and that Ferguson had no authority to alter the deceased's designation under the Power of Attorney. Further, as the deceased had made the premium payments for 4 years after the 1995 "expiry" date, Ferguson was bound, as the deceased's Attorney, to continue to make the payments from his assets. As a fiduciary, Ferguson was obliged to act with honesty, integrity and only in the deceased's best interests; not her own.

These are important decisions for both the estate and family law bars. The insurance clause found in the DiDonato agreement is similar to that found in many separation agreements drafted over the last 20 years. As these agreements are unlikely to be amended (not by the "ex" certainly if s/he has good legal advice), estate practitioners acting for the "ex" in situations like *Turner v DiDonato* should carefully examine the wording of the agreement against the reasoning set out in the trial and appeal decisions.

The decision in *Richardson Estate* highlights that while the courts have authority to impose a constructive trust on a policy in certain situations, unless those situations clearly warrant such equitable relief, "...a beneficiary designation in a life insurance policy is normally unassailable", and cannot be over-ridden.

These decisions are impacting the family law bar, and making it keenly aware of the need to carefully craft insurance clauses. Estate and trust practitioners can certainly assist their family law cousins in creating clear, enforceable insurance clauses using the recent Court of Appeal decisions, and their own expertise.

"Stuff" the OCL thinks is more interesting than the recession

Debra L. Stephens
The Office of the Children's Lawyer

12th Annual Estates and Trusts Summit
November 13, 2009

Alternatives

- Formal Trust Document
- Accountant, Superior Court of Justice
- *CLRA*, s.51 – Funds not exceeding $10,000
- Court Appointed Guardian of Property (s. 48)
  - Parents' Joint Entitlement
  - Parents' Preferential Treatment

2

Process

- Application – SCJ (Toronto – Estates List)
- Affidavit
- Plan of Care and Management
- Court's Obligations
  - Guardian's ability
  - Plan
  - Child's Views – s.49

Service on OCL s. 47 *CLRA*

3

Broad Categories

- "Estate Guardianships"
- "Tort Guardianships"

4

Duration

- Age of Majority
- Removal
- SDA Guardianship
- Minor's Obligation to Support s.56

5

Requirements

- **Details re minor:**
  age; relationship to guardian; residence; occupants; special needs
- **Assets:** source; nature; value
- **Guardian:**
  C.V.; management experience; health; age; stability; means; potential concerns (bankruptcy, claims, etc.)
- **Bonding issues**
- **Investment Strategy**
- **Guardian's Understanding of Obligations:**
  fiduciary; accounting; transfer to minor
- **Professional costs and Compensation**

6

Significant Areas of Concern

- Investment restrictions
  - Trustee Act
  - Plan itself
- Joint and Several Liability
- Risk Tolerance
- Accounting Issues
- Termination of Guardianship
- "Pre-approval"

7

Sale of Real Property

- Minor's <u>Vested</u> Interest
  - *CLRA* s. 59
  - Court Application – Notice to OCL
  - Application – Affidavit – Draft Judgment
- Minor's <u>Unvested</u> Interest
  - EAA – s. 15, 17, 22
  - <u>No</u> Court Application
  - OCL has statutory authority to deal with property

Exceptions

1) authority given in will, codicil
2) transaction necessary to pay debts of deceased
   – not post death
3) need to discharge mortgage already on title
4) a court has ordered the sale

8

Documents Required

- 2 appraisals
- Certificate of Appointment (may not need if vested)
- Minor's Consent (16+)
- Agreement of Purchase + Sale - must be conditional
- Statement of Adjustments
- Statement of Distribution – minor's and other's shares
- Legal Account
- Up-to-date statements re property debts, mortgage, taxes, etc.
- Solicitor's undertaking re payment to ASCJ – 10 days
- Affidavit
  - Details re minors
  - Particulars regarding the property
  - Creditors and debts
  - Efforts undertaken to sell property
  - Rationale for sale and the price

9

Turner v. DiDonato

AD	– dies in 2004; age 58
CT	– widow of AD; trustee and sole beneficiary of AD's estate
DD	– AD's 1st wife; separated after 26 years; age 56 in 2004; entered into separation agreement with AD in 1995
Separation Agreement	– AD to pay spousal support to DD until DD 65 (9 more years); – AD to designate DD as beneficiary of $100,000 of AD's life insurance until no longer obligated to contribute to DD's support – if AD dies without insurance – 1st charge on estate

10

Turner v. DiDonato

At AD's death	– AD still supporting DD
	– AD designated DD as beneficiary of only $43,507.15 of insurance equalling balance of support payments until DD is 65
Issue	– what was DD's entitlement:
	a) balance of support payments to 65 ($43,507.15)
	b) full $100,000 of insurance (less $43,507.15 already paid to DD)
Ratio	– AD breached agreement
	– did not die without insurance
	– restitution-specific performance
	– linkage of support obligation and insurance (Ont.C.A.)

11

Richardson v. Mew

MR	– died 2007, age 67
AF	– MR'swidow; trustee and sole beneficiary of MR's estate; age 43
	– also MR's attorney for property and personal care as of 1998
SM	– MR's 1st wife; separated after 26 years in 1992; signed separation agreement with MR in 1994
Separation Agreement	– MR to pay SM spousal support for 1 year; either party could apply after 1 year for variation of amount and duration
	– MR to maintain SM as irrevocable beneficiary of $100,000 life insurance policy until Feb 28/95
	– amount of insurance (if any) after Feb 28/95 to be determined at variation proceedings

12

Richardson v. Mew

Further facts

- spousal support varied in 2 subsequent amending agreements
- no mention of insurance in either agreement
- spousal support ended effectively late 1996
- MR diagnosed with Alzheimer's 1999 – moved to care facility 2003
- AF using Power of Attorney paid all insurance premiums to MR's death and in last year used own money
- SM claims as designated beneficiary of policy on MR's death
- AF thought she was beneficiary of policy – that MR had changed it after 1995

13

Richardson v. Mew

Issue

- Was SM or AF entitled to insurance?
- SM was actual designated beneficiary
- AF claimed constructive trust be imposed on proceeds for her benefit

Ratio

- Release in Agreement did not oust SM's entitlement
- MR had never re-designated – paid premiums while able
- AF had no authority under Power of Attorney to change designation or payments
- SM's designation equals juristic reason for SM's "enrichment"

14