CURRENT ISSUES IN SETTLEMENTS

FOR PARTIES UNDER DISABILITY

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INTRODUCTION

The final resolution of a claim is, often, a gratifying experience for counsel and client. In most cases, once a claim settles, only a few remaining steps need to be taken by plaintiffs' counsel. Usually these are the "clean up" steps of getting releases signed, taking out an order dismissing the action on a without costs basis, and providing the client with a detailed reporting letter, copies of documentation, and the settlement funds. However, in the case of a minor plaintiff or other party under a disability, there is the additional mandatory step of obtaining Court approval of the actual settlement, pursuant to Rule 7.08 and obtaining approval of a management plan for the funds under Rule 7.09[1].

With respect to the disposition or management of the funds it seems that many counsel elect to simply pay the funds into Court pursuant to Rule 7.09 and don't really give much consideration to any alternative. This could be because a settlement of a minor plaintiff's claim (such as a s.61 *Family Law Act* settlement) may be small or because paying the funds into Court is a relatively simple procedure with which we are familiar and comfortable. **Payment into Court appears to be the customary or routine approach**.

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[1]Rule 7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1), (2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).)

Rule 7.09(1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1).been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1), (2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).) Rule 7.09(1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1).

But do most of us really know what happens to the funds once they are paid into Court? Can you assure the Litigation Guardian that the funds are completely safe? Do you know what income will be earned on the funds? Are you familiar with the fees levied by the Accountant of the Superior Court of Justice? Can you advise the Litigation Guardian of the effect the fees will have on the settlement funds? Are you, as counsel, beyond reproach if you take the default position and pay the funds into Court. This paper attempts to answer some of these questions and to review an array of other options available (other than paying the funds into Court) which may be considered by counsel and by the Litigation Guardian.

Many excellent papers have been written by OTLA members about the "mechanics" of obtaining Court approval and related challenging issues such as solicitor's fees and contingency fees, specifically.[2] This paper assumes we are, by now, sufficiently familiar with the "nuts and bolts" of the Court approval process. Instead the paper focuses on issues arising out of Rule 7.09(1) and the power of the Court to approve management plans other than simply paying the funds into Court. In addition, the paper provides some practice points with respect to advising the Litigation Guardian of the options available and obtaining their explicit instructions before seeking approval of a management plan.

LOOKING OUT FOR THE BEST INTERESTS OF THE PERSON UNDER A DISABILITY AFTER THE SETTLEMENT OF A CLAIM

Our professional responsibility to a party under a disability doesn't end when we achieve an excellent settlement or outcome at Trial. We are still obliged to ensure that the management plan for the settlement funds is one that is in the best interests of the disabled party. In addition, as counsel, we must be careful to adhere to best practices

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[2] Some of them include Heidi R. Brown, Obtaining Court Approval of a Settlement Under Rule 7.08: What You Need to Know, OTLA 2011 Spring Conference, May 26-27, 2011; Wendy Moore Jones, Court Approval of Settlements for Parties under a Disability, OTLA 2009 Spring Conference; Andrew C. Murray, Settlement of Personal Injury Claims on Behalf of Persons Under a Disability, Middlesex Law Association and Ontario Bar Association, Deal of no Deal: Assessment of Damages Conference, November 1, 2007; Clair Wilkinson, Creative Infant Settlements, OTLA 2006 Fall Conference.

when settling the claim of a party under a disability to ensure that no one second guesses the settlement or management plan down the road.

It is important to understand that a management plan cannot be changed, once Court approval has been obtained. The Ontario Court of Appeal has made it clear that a settlement of a minor's action cannot be revisited outside normal appeal routes and timeframes even if the plaintiff's circumstances drastically change after obtaining Court approval.[3] That makes it all the more important to put additional thought into what management options for the funds are available to a party under disability upon settlement of their case.

WHY DO WE NEED APPROVAL OF SETTLEMENTS FOR PERSONS UNDER A DISABILITY AND WHY DO WE PAY THE FUNDS INTO COURT? (THE REASONS BEHIND THE RULES)

We all understand that the requirement of Court approval is codified in Rules 7.08(1) and (2) of the *Rules of Civil Procedure* and that the routine practice of paying the funds into Court flows from Rule 7.09(1). The requirement to obtain the court's approval on a settlement exists even where there is a consent between the parties, partial settlement of a claim, and even when settlement is reached prior to commencement of an action. On motions for approval of settlements under Rule 7.08, the Court looks at whether the settlement is in the best interest of the injured plaintiff, as well as whether the proposed settlement contains a proper management plan for the use and protection of the funds allotted for the party under a disability[4]. The Court also considers whether the fees charged by counsel are reasonable in relation to the results obtained.

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[3] *Tsaoussis (Litigation Guardian of) v. Baetz*, [1998] O.J. No. 3516 (C.A). Rare but possible is to obtain approval of a settlement of a party under disability reserving the right to that party to bring an application to vary the judgment at a later date.3 In Steeves et al. v. Fitzsimmons et al. (1975) the court approved a settlement of an infant's case in the amount of $3,000.00, the settlement approved by the court provided that the minor could apply to vary the judgment at any time before her seventh birthday.

[4] *Bellaire v. Daya* [2007] O.J. No. 4819, 162 A.C.W.S. (3d) 371 sets out a method of obtaining court approval of a class action settlement where the class contains parties under disability. The parties should contact the Office of the Public Guardian and Trustee in the process of formulating a settlement proposal so that the Public Guardian and Trustee can help directly with the privacy concerns of the vulnerable parties.

But it is important to understand the reasoning behind these Rules, including the requirement of paying the funds into Court. The Honourable Mr. Justice Quinn in the decision *Hoad* v. *Giardano,* indicates that the paternalism implicit in the Rules is necessary to protect persons under a disability from others, including their own family members. Justice Quinn states:

> *"Our courts are vigilant when it comes to the best interests of children; and this paternalism, unfortunately, is necessary. Anyone with experience in trying or hearing matrimonial cases knows that* ***parents often act in a manner which is not in the best interest of their children****. I do not think it is necessary for me to select my words with any delicacy here and so I say, quite directly, that, in my view, subrules 7.08(1) and (2) and 7.09(1) are part of the law of this province because* ***parents cannot always be trusted to do what is best for their children****. Undoubtedly this statement will be galling to the caring, thoughtful, wise and understanding parent. However, the fact is that most laws are aimed at those inclined to break them*.[7] " [5] (emphasis added)

As Justice Quinn points out, the concern of the Court has always been to protect the person under a disability from those who might intentionally or unwittingly take advantage of the vulnerability of the disabled person. This "parens patriae" role of the Court can be traced back centuries in English common law. By requiring payment of monies into Court, the Court was able to perform an overseeing-function and to ensure that the funds were available to the plaintiff when he or she achieved the age of majority or when his or her disability came to an end.[6] A primary concern of the Court, historically, has been **the preservation of the monies held in Court** on behalf of a party under a disability and ensuring that no one, including well meaning parents, usurped the funds.

HISTORICAL BACKGROUND TO THE PRACTICE OF PAYING FUNDS INTO COURT

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[5] *Hoad* v. *Giordano* [1999] O.J. No. 456, at para 6 **[*Hoad*].**

[6] *Hoad*

In a second decision, *Martin* v. *Robins*, Justice Quinn provides some historical background on the practice, in Ontario, of paying funds into Court on behalf of persons under a disability, indicating that the procedure has been mandated by the Rules of Civil Procedure for more than 65 years. Justice Quinn states that "…as long ago as 1943 then rule 535 of the *Ontario Annual Practice* provided: "A judgment for the recovery of money on behalf of an infant…shall direct the money to be paid into Court." "[7] The provision in the Rules of Practice was mandatory not permissive. A Judge lacked any discretion to do other than order that the funds be paid into Court.

In the *Martin* decision, Justice Quinn also sets out a second critical point; that the discretion of a Judge to order alternative dispositions of a minor's money only came into existence relatively recently. Justice Quinn states, "The discretion, "unless a Court orders otherwise" in subrule 7.09(1) entered the rules in 1985".[8] Prior to 1985, the only option for both the Court and client, in Ontario, was to pay the monies into Court.

In the *Martin* v. *Robins* decision, Justice Quinn describes the reasons behind Rule 7.09, requiring payment of the funds into Court, as follows:

> *"Historically, the settlement funds of a minor were paid into Court for two principal reasons: (1) a conservative yet secure rate of return was guaranteed; and (2) upon attaining the age of majority* ***the minor was guaranteed to receive his or her money plus interest."*** [9] (emphasis added)

Justice Quinn's comments in the *Martin* case demonstrate the historical concern of the legislature and the Courts in Ontario**, to ensure that the settlement funds were preserved and protected** and that the full amount of the funds together with interest were available to the minor or the otherwise disabled party. The reasoning seems to be the common sense principle that, whatever else happens, the capital amount should never be lost.

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[7] *Martin* v. *Robins* [2006] O.J. No. 915, 146 A.C.W.S. (3rd) 244 footnote 1 **[*Martin*]**.

[8] *Martin* footnote 1.

[9] *Martin* para 17.

Following the 1985 introduction of judicial discretion in Rule 7.09(1) which allowed for alternatives to payment of the funds into Court, the popularity of structured settlements rose. Structured settlements, on behalf of minors, were virtually risk-free and ensured a conservative, yet secure, rate of return. A “structure” essentially, involves the purchase of an annuity from a life insurance company that provides a guaranteed, tax-free income stream for a specified term or for life. Structures have a significant tax advantage over other forms of investment, as the income generated is never subject to tax even after a minor plaintiff achieves his or her majority.

However, structured settlement brokers were reluctant to involve themselves in more modest settlements and so the availability of structures remained somewhat limited. Accordingly, while structures for minors were somewhat more popular after 1985, a majority of counsel continued to pay minors’ funds into Court, where the funds were managed by the Accountant of the Superior Court of Justice as had been the long-standing practice.

THE HISTORICAL ROLE OF THE ACCOUNTANT OF THE SUPERIOR COURT OF JUSTICE

Once funds are ordered to be paid into Court, they are paid to the Accountant of the Superior Court of Justice (the Accountant) who manages the funds. The Accountant is the trustee for all monies paid into Court. The Accountant operates as a division of the Office of the Public Guardian and Trustee (the OPGT).

Previous Restrictions on the Accountant

It is important to note that while the discretion of the Court, to order alternative dispositions of a minor’s money, changed dramatically in 1985, funds that continued to be paid into Court were managed by the Accountant in the way they had been traditionally**. The investment options open to the Accountant were strictly limited**. **Both prior to and after 1985, the Accountant was unable to invest trust funds in anything other than fixed income securities**.

Fixed income securities are investments that provide periodic payments that are fixed and do not fluctuate and that ensure the return of the principal at maturity. The classic example of a fixed income security is a Guaranteed Investment Certificate (GIC) but fixed income securities could include federal and provincial government bonds, municipal bonds, money market instruments and even corporate bonds. Such securities were, in most respects, secure but provided conservative rates of return on the funds paid into Court.

It is also important to recognize that while the Accountant's discretion regarding investment options was restricted, this principle was completely in keeping with the conservative conviction that it was in the best interests of the minor or disabled person, to get all their money back, plus a modest rate of return. This conservative tenet had successfully guided the Courts and the Accountant and the Office of the Public Guardian and Trustee for more than half a century. From 1985 until the new millennium those conservative principles continued to hold sway but the year 2000 brought with it a sea change in how the monies of person under a disability were managed, once paid into Court.

PARADIGM SHIFT: THE PRESENT PRACTICE OF MONEY MANAGEMENT FOR PARTIES UNDER A DISABILTY IN ONTARIO

The restrictions on the Accountant and the OPGT, with respect to the management of funds paid into Court on behalf of a person under a disability, were profoundly altered by amendments to the *Public Guardian and Trustee Act* in 1999.[10] There were two critical changes that applied to minors and other parties under a disability. They were:

(1) The restriction on the Accountant, requiring monies paid into Court to be invested in fixed income securities, was completely removed. The Accountant was now able to invest minor's funds in the equity markets (the stock market).

[10] *Public Guardian and Trustee Act* R.S.O. 1990, chapter P.51.

(2) The Accountant was allowed, for the first time, to charge fees in respect of management of the monies paid into Court.

Participation in the Equity Markets

As concerns the first significant change, the legislative amendments allowed the Accountant to invest in a wider range of securities, other than fixed income instruments. On August 1st, 2000, new trust funds were created by the OPGT that included equities, such as stocks, in addition to fixed income securities. According to the website of the Accountant, "*a prudent investment framework has been developed for the management of children's trust funds…The Accountant makes all investment decisions in the best interests of the individuals for whom it holds assets, based on information available. To assist in this role, the Office of the Public Guardian and Trustee has employed qualified professionals, including experienced financial planners*."[11]

Justice Quinn noted the Accountant's, dramatically, increased investment discretion in *Martin,* referring to a letter from the Accountant stating that the Accountant was, previously, " "…u*nable to invest trust funds in anything other than fixed income securities*" but now is allowed to invest in "*a wider range of securities*" ".[12]

Changes to the *Public Guardian and Trustee Act* and to the Regulations in respect of the Act, allow the OPGT to establish and maintain common trust accounts, in which "money belonging to various estates and trusts"…is combined for the purpose of facilitating investment"[13] **These common trust funds are akin to mutual funds, with which most of us are familiar.**

A mutual fund is an investment vehicle "made up of a pool of funds collected from many investors for the purpose of investing in securities such as stocks, bonds, money market instruments, and similar assets. Mutual funds are operated by money managers who invest the funds capital and attempt to produce capital gains and income for the funds'

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[11] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 6, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

[12] *Martin* para 12.

[13] Ontario Regulation 191/95 s.1(2)(a)

investors."[14] The money managers are paid for their services and the costs of the money managers influence the rate of return achieved by the fund. In Canada, a mutual fund cannot be sold to the public without significant disclosure including a prospectus. **Mutual funds are bought and sold in units and the value of the units rise and fall in value in relation to the market value of the securities held in the fund**.

The legislative changes also allowed for the establishment of an "advisory committee" to advise the Public Guardian and Trustee, generally, on investments and other property management issues. The composition of the advisory committee can be found on the website of the OPGT.

The OPGT's New Trust Funds

Under the new regime ushered in by the amendments to the *Public Guardian and Trustee Act*, the Accountant now has the option of investing a minor's settlement funds in one of three different types of investment funds: (1) the Fixed Income Fund, (2) the Canadian Income and Dividend Fund, and (3) the Ontario Public Guardian and Trustee Diversified Fund. There are no other investment options available. For example, the Accountant cannot invest the money of a child in an RESP. **Once the settlement monies have been paid into Court, the Accountant has complete discretion over the management of those monies including which fund the monies will be deposited to.**

Fixed Income Fund

The Fixed Income Fund (also known as the "pooled fund") is comprised of high-quality fixed income securities such as bonds and money market instruments. The interest earned on the monies held in this Fund is paid monthly on the balance in the Fund and is based on an interest rate determined, in large part, by the income generated by the instruments held within the fund. The interest rate is approved by the Investment

[14] www.Investopedia.com

Advisory Committee and is fixed or set by the OPGT. The rate of return for the Fixed Income Fund is published in the Ontario Gazette, usually twice annually.

Presently the rate for the Fixed Income Fund is 3.5%[15] prior to the deduction of fees charged by the Accountant, as described later in this paper. However, in theory the rate is subject to being reset at any time depending on the return achieved by the fund. According to our conversation with the Accountant, changes in the rate generally occur infrequently, and usually coincide with the semi-annual maturity of the fund and reinvestment of the bond portions of the Fund. The fund is "laddered" over a five year period with 10% of the assets maturing every 6 months or 20% annually. This provision ensures that all the assets of the fund do not mature at the same time. Accordingly, the rate of return is reviewed every 6 months when 10% of the assets mature, and adjustments to the rate are made, if required.

The rate of return on the pooled fund, while fixed by the OPGT, is not a guaranteed rate of return. The interest paid on the fund varies with the performance of the market. The rate could go higher or could fall. Initially, all payments of funds into Court on behalf of a minor go into the pooled fund or Fixed Income Fund. Thereafter, consideration is given to purchasing units in the two unitized funds described below. A critical question, which follows concerns whether or not the capital invested in the various funds is guaranteed? A brief discussion of this issue is found below at the heading "Is There any Risk to the Capital of the Person Under a Disability?"

Canadian Income and Dividend Fund

The Canadian Income and Dividend Fund is a unitized Fund. The minor or disabled party's monies are used to purchase units of the fund at the price of the units on the

[15] Its rate of return in 2010 was 3.65%. In 2009 its rate of return was 3.88% and in 2008 its rate of return was 4.19%.

date of purchase. The Accountants' website describes this fund as being "**for those who may require higher regular income and can tolerate some capital risk over a medium to long-term investment time horizon**."[16]

The fund's rate of return changes monthly in relation to the income earned by the assets and changes in market valuations of the assets in which it invests. In brief, the fund invests in Canadian and other bonds as well as equities or stocks including Canadian, U.S. and International stocks. Full details of the types of assets this fund invests in are found in the materials from the OPGT at Schedule A attached to this paper, including a list of bonds and equities held in the fund.

The rate of this fund fluctuates directly with the market. **There is no fixed rate of return for this Fund**. The Fund requires a minimum investment time of three (3) years. Generally speaking, investments in this fund are riskier than investments held in the OPGT's Fixed Income Fund and investors have to be prepared to tolerate risk to the capital originally paid into Court.[17]

OPGT Diversified Fund

The OPGT Diversified Fund is also a unitized Fund. Like the Canadian Income and Dividend Fund, its rate of return also changes monthly in relation to the income earned by the assets and changes in market valuations of those same assets. **There is also no fixed rate of return for this Fund**. The OPGT Diversified Fund requires a minimum investment of five (5) years. The fund consists of a diversified portfolio of domestic and

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[16] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 6, question 7, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

[17] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 6, question 7, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

foreign equities as well as bonds. Generally speaking, this fund carries the greatest risk and therefore requires a longer term of investment.

Are Parents or Guardians Involved in Investment Decisions?

With respect to the Fixed Income Fund, parents or guardians are not consulted by the Accountant concerning investment or management of the funds. The Accountant makes all investment decisions in the best interests of the individuals for whom it holds assets, based on information available."[18]

Before depositing monies into either of the two unitized Funds (the Canadian Income and Dividend Fund or the OPGT Diversified Fund), the Accountant attempts to advise the minor's parent or guardian of the services offered by the Accountant's office and provides to the parents a questionnaire. The questionnaire is to confirm basic information and to obtain an assessment of the health of the minor to determine whether a need will arise for some portion of the monies to be advanced to the minor, in his or her best interest, before the minor reaches the age of majority.[19]

Although the Accountant seeks some input (in the form of the questionnaire) from the minor's parent or guardian in respect of the unitized funds, complete discretion over the management of the settlement funds, regardless of the guardian's response, remains in the hands of the Accountant.[20] It should be noted that a financial plan is only developed for minors eligible for investment in the unitized Funds. Parents or guardians are not routinely consulted with respect to the Fixed Income (or pooled) Fund and no financial plan is prepared in respect of the pooled fund. All financial plans for the unitized funds are prepared by a Certified Financial Planner.

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[18] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 6, question 6, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

[19] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 6, question 8, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

[20] As a trustee, the ASCJ must invest for the benefit of the minor and the investments must be made in accordance with the applicable provisions of the *Trustee Act*, including the prudent investor concept.

Counsel should be aware that the **Accountant does not automatically issue any periodic statements concerning the value of the assets or the earnings on the assets (gains or losses) for any of the 3 Funds**. The Accountant will provide a statement concerning the performance of the investment if a specific request is made in writing to the Accountant's office attaching a copy of the child's birth certificate. Subsequent requests do not require a further copy of the birth certificate. A custodial parent with lawful custody must sign the letter if the child is less than 16 years of age; the signature of the child is required if the child is 16 years or over.[21]

When are the Funds Paid Out to the Minor or Disabled Person?

The Accountant is not permitted to hold the settlement funds for a minor beyond their 18th birthday. In practice, the Accountant redeems units of the funds the month before the child turns 18, at the latest. The Accountant reviews the holdings due for redemption 3 to 6 months prior to the date of redemption and, where appropriate, redeems the units in whole or in part. This allows the Accountant to redeem units up to 6 months before the minor's majority if the performance of the units is not strong, and if continuing to hold the units to the child's 18th birthday might result in a loss of value of the units.

In any event, the Accountant must redeem the funds by the child's 18th birthday and cannot continue to hold funds beyond that date. This last point should be of interest to counsel and litigation guardians, since the Accountant is not able to follow the investment principle of "buy and hold" to ride out downturns in the market. If the minor achieves majority during a downturn in the market the funds must be redeemed for the prevailing value of the unit.

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[21] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 8, question 13, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

Is There any Risk to the Capital of the Person Under a Disability?

The investment managers who advise the OPGT are aware that capital preservation of the minor's settlement funds is the highest priority for the Accountant. However, there is no guarantee concerning the rate of earnings on the investment and no guarantee of the principal amount initially paid into Court. All investments in unitized funds must be redeemed "**at the current market value**"[22] The capital amount increases or decreases with market changes.

The value of the unitized funds are driven by the performance of the stock markets both domestic and foreign. To a lesser extent, so are the earnings on the pooled fund. The money managers, on behalf of the Accountant, are in no different position than your own personal financial planners; to a certain extent they are all at the mercy of the market and no one can predict, with complete certainty, the rates of return or guarantee the capital.

This may come as something of a shock to those counsel who routinely pay funds into Court and even to some Judges in Ontario. Payment into Court is usually based on the assumption that the principal is guaranteed, as outlined by Justice Quinn in the *Martin* case, even if only a modest return is achieved. In Ontario, this is, not necessarily, the case. At any given point the Accountant manages approximately one billion dollars in assets. Since the year 2000, those monies have actively participated in domestic and foreign stock markets. This is not to suggest that the rates of return achieved by the

[22] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 – page 7, question 9, http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

OPGT's funds are not respectable but, rather, to highlight the dramatic change from the previous policy in Ontario.[23]

It should be clearly understood, that there is no criticism of the Accountant intended or suggested by this paper. The staff of the Accountant have been extremely helpful in proving information concerning the OPGT trust funds. The Accountant, Mr. Steve Adams, has been exceptionally generous of his time and knowledge in answering questions and in providing detailed documents and materials related to the management of funds paid into Court. It is not often that one can speak, directly, with the C.E.O. of a large government organization but in our experience, Mr. Adams has been accessible, open and helpful in assisting counsel to understand the workings of the OPGT trust funds.

It is the position of the Accountant that, although earnings could be negatively affected by market downturns, the principal held in the pooled fund is very safe. The Accountant feels that only a "financial Armageddon" would impact the assets held in the pooled fund, since most of those assets, such as bonds are backed by guarantees from governments and municipalities. However, the pooled fund does hold corporate bonds, and the guarantees are only as good as the health of the company. Prior to 2009, it was difficult to imagine that corporations such as General Motors or Chrysler would seek protection in bankruptcy. The Accountant and the OPGT strive to protect the capital by investing in healthy, profitable companies evidenced by the details of the composition of the various funds shown at Schedule A.

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[23] Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

As far as the unitized funds are concerned those investments are more risky since the value of the units is directly tied to the market value of the assets held in the fund at the date of redemption. The Accountant's website makes it clear that the value of units in the fund either increase or decrease depending on market conditions. When the units are redeemed the amount paid out of Court will depend, in part, upon the value of the unit. A person under a disability can achieve a capital gain upon disposition of the units; however, the possibility also exists of a capital loss. The office of the Accountant is very open about the implicit risks to earnings and capital and the website makes that fact clear to parents and guardians. However, it is not clear that all counsel, presently, appreciate the element of risk, however remote, attached to paying funds into Court. Whether all Judges in Ontario are fully familiar with the present treatment of funds paid into Court, is similarly not known.

One interesting problem which the Accountant faces with respect to valuation of the units is that, in the event of a loss of capital, it is impossible for the plaintiff to "top up" the investment. This is similar to the restraints on investing in an RRSP. If you lose money in your RRSP you cannot top it up if market conditions become more favourable. You are restricted by the annual limits on RRSP contributions. The Accountant's position is similar but even more restricted. No additional amount can be contributed to the monies held in Court by the Accountant. As such, if losses occur following a "market correction", the Accountant must work with the remaining capital until the final date of redemption.

What Brought About the Changes to the *Public Guardian and Trustee Act?*

It would appear that the motivation behind the changes to the *Public Guardian and Trustee Act* which allows for investment in domestic and foreign stock markets was well intentioned. It was to permit funds held by minors and other persons under a disability, to participate in the earnings available from investment in equity markets. Parents and

guardians wanted access to the market for their children's assets held in Court. The perception was that minor's funds held in fixed income instruments were penalized in respect of earnings. In the year 2000, returns in the market were significantly better than fixed income returns and, from an historical perspective, investors in the early years of the 21st century had not yet experienced the "tech bubble" nor the global financial crisis which dramatically affected the markets during the Fall of 2008.

There are a multiplicity of unpredictable variables that affect national and international stock markets. Individual stocks can be influenced by company earnings, new technologies, analyst recommendations, interest rates, currency values and even by the health of the company C.E.O., as in the case of Steven Jobs and Apple. Markets can be affected by oil prices, the performance of industries, demographics, geopolitical events, social unrest, war and even natural disasters. There are a myriad of complex and uncontrollable factors which cause equity markets to advance and retreat. Making accurate predictions about the effects of those complicated variables on markets is extremely difficult and, often, impossible.

In the end, **the legislation that permits the Accountant to invest the funds of a person under a disability in equity markets has introduced a new, if modest, element of risk to the minor's money that did not exist under the old conservative regime that pre-dated the year 2000**. Whether one views these legislative changes as positive, negative or neutral depends on one's experience in the market and one's view of mutual funds as investment vehicles. In any event, counsel must be cognizant of the risk, however remote. Paying funds into Court is, potentially, not the conservative practice it once was. Counsel have an obligation to help their clients access information about the benefits and risks of payment of funds into Court, and the alternatives thereto so that the client or guardian can make an informed decision.

The Fees Charged by the Accountant

A person's perspective on the new regime of money management for persons under a disability might also be influenced by the costs associated with mutual funds, equity investments and active money management.

In the *Martin* case, Justice Quinn considered the Accountant's newly acquired ability to charge fees and reviewed the schedule of fees levied by the Accountant. Martin was decided in March of 2006 and the schedule of fees, today, remains the same as it was at the time of the *Martin* decision. The Accountant's fees are as follows:

Fees are charged both on capital and on transactions.

Fees are charged monthly.

- No fee is charged upon payment of money into Court for a minor
- A fee of 3.0% is charged on investment income credited to the minors account each month (referred to as receipts)
- A fee of 3% is charged on all payments out of Court, including interim payments and final distribution to the minor at age 18 or date of entitlement (referred to as disbursements)
- A care and management fee of 3/5 of 1% (or 0.6% annually) is charged monthly calculated as 1/12th of 0.6% on the monthly balance in the minor's account
- HST applies on all fees

Justice Quinn observed in *Martin* that the "monthly fees and GST are only deducted from income and not from capital and that should the fees and GST exceed the income earned in a month, the unpaid balance of the fees and GST will be carried forward to future months".[24]

In practice, then, if the minor's investment fairs poorly during a given month the fee is not forgiven but, rather, carried forward and added to the ongoing fees to be deducted from income in the next profitable month. **However, there is a "cap" on fees such that**

[24] *Martin* para 10

the fees can never reduce the capital paid into Court, even if the fees exceed all the interest earned on the investment.

The former Accountant, Mr. Paul A. Kott, explains the cap saying "the Accountant will not encroach upon the capital in the minor's account to pay the fees and GST therein. Any fees which remain owing after the final payment out of Court will be waived."[25] In other words, as far as the fees go, the minor cannot receive less than was paid into Court, but the fees could, potentially, reduce or (in the worst case scenario) eliminate any earnings on the invested funds. Mr. Kott provides an example of how the cap on fees operates. He states:

> "…*assuming that the balance in the minor's account is $100,000.00, income earned is 5% per annum and final payment is made on the last day of the month:*
>
> | | | |
> |---|---|---|
> | *Balance is* | | *$100,000* |
> | *Income is* | *$100,000 @5% times 31 days over 365 days* | *425* |
> | *Fee on income receipt is* | *$425 @3% plus 7% GST thereon* | *(14)* |
> | *Care and Management fee* | *$100,000 @0.6% over 12 months plus 7% GST thereon* | *(54)* |
> | *Balance that can be paid out before disbursement fee is deducted* | | *$100,357* |
> | *Disbursement fee* | *The lesser of:*
• *3% of payout plus 7% GST thereon, equals $3,121;*
• *income for the month of $425.00 less fees charged in the month of $14 and $54 (as above), equals (including GST)* | *(357)* |
> | *Payment out* | | *$100,000* |

[25] Letter from the Ministry of the Attorney General, former Accountant of the Ontario Superior Court of Justice, to Mr. William F. Elkin, dated November 30th, 2000.

In the above example, the Accountant would normally charge a fee of 3% on the interest generated for that month, as well as the care and management fee of 1/12 of 0.6% of the balance in the account. Finally, the Accountant would charge the disbursement fee of 3% of the total balance in the account on the date of redemption. In the above example the disbursement fee exceeds $3,000.00, plus tax. This example illustrates the cap on fees showing that the Accountant has to waive most of the 3% disbursement fee since the fees can never erode the capital.

Nevertheless, if the money paid into Court has been invested in the unitized funds, the units must be redeemed at the current market value. If that value is below the value of the units when purchased, then the minor will receive the reduced amount when the funds are paid out. Put differently, while the Accountant's fees can't encroach on the minor's capital, the value of the assets in the market, on the date of redemption, will determine the final amount paid out. A poor market could, possibly, mean that some investors will not get back what they paid in.

In the *Martin* decision, Justice Quinn made a very candid statement with regard to the fees levied on funds paid into Court. Justice Quinn said:

> "*In my little corner of the judicial world it was unknown to me that the accountant charged fees in relation to money paid into court for minors and I admit to being surprised by the knowledge. I understand that the charging of fees started in May 2000,* ***but I expect that the practice is not widely known by members of the judiciary****.*"[26] (emphasis added)

Although it is five years since the *Martin* decision, it is still not clear that all counsel and Judges are aware of the fees and the effect of the fees on the earnings of funds paid into Court. It would also be helpful to know if all counsel and Judges are fully familiar with the present practice of investment of minor funds in the equity markets upon payment into Court. The landscape in 2011 is far different than the conservative principles of modest returns and preservation of capital that previously governed all payments into Court on behalf of disabled parties.

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[26] *Martin* footnote 1.

Are There Any Other Fees Payable by the Party Under a Disability?

Usually there are, usually other fees associated with investments in the equity markets including brokerage fees and commissions, trailing commissions and the fees of financial planners and money managers. The information provided on the Accountants' website indicates that "the services of the financial planner are included in the regular fees of the Accountant of the Superior Court of Justice".

Still, it is not clear whether brokerage fees and money manager fees are deducted from earnings on the OPGT funds **before** computing the final rate of return and whether any additional fees are, indirectly, borne by the investor. The Canadian mutual fund industry has often been criticized for high management expense ratios, including the expense of trailing commissions and for lack of transparency in respect of the cost of financial advice.

It is not clear whether all of the money management and other fees are paid directly by the Accountant or whether additional fees impact on the return of the person under a disability. For example, are commissions paid out of the funds' earnings prior to computing the investors' rate of return? Do the financial planners and money managers employed by the OPGT charge trailing commissions? Is a fee charged to the funds based on a management expense ratio? If so, are commissions charged on income earned or on the balance in the fund?

Additionally, there are important questions we should ask concerning the costs and benefits of active money management as employed by the OPGT as compared with systems that employ passive management techniques through the use of index funds and exchange trade funds. In most situations, the costs of passively managed funds are considerably lower than actively managed funds. As well, questions could be explored about the rates of return on investment achieved by the OPGT's money managers and advisors as compared to the rates achieved by independent financial managers. These

questions and others require further clarification from the Office of the Accountant, and further investigation, but are beyond the scope of the present paper.

Should lawyers be concerned about the changes to the *Public Guardian and Trustee Act* that permit the monies of persons under a disability to be invested in equity markets? The answer, for the most part, depends on how well those monies perform in the market and on factors largely beyond the control of the lawyer. If equity markets are strong and an infant benefits then, of course, all is well.

However, if markets "correct" dramatically or plunge catastrophically or if geopolitical events beyond our borders (such as potential default on debt by a member of the European Economic Community) provoke market instability and even, crisis, then settlements paid into Court, (and forgotten about) could come back to haunt counsel. After working hard to achieve an excellent outcome for a minor, no lawyer would want to face a minor or their parents to explain why little or no interest was earned on the investment or, worse, why the minor no longer has the capital received upon settlement.

It is for this reason that it is part of our professional responsibility to advise minors and their litigation guardian of all the possible investment options open to the person under a disability. While we must be careful not to offer financial advice or to recommend a particular option, we can put forward information for the review of the litigation guardian and we can recommend that they obtain independent financial advice. We need to bring to the attention of the litigation guardian safe investment vehicles, outside of payment of the funds into Court. If the litigation guardian elects to pay the funds into court, or chooses a different option, we need to document that choice in our correspondence.

It is expected that most counsel will continue to pay settlement funds into Court notwithstanding the effect of fees on the minor's investment or the risk associated with turbulent international and domestic equity markets, since there are only a few realistic alternative options.[27] In addition, electing an alternative to payment into Court, requires

[27] Clair Wilkinson, Creative Infant Settlements, OTLA 2006 Fall Conference.

counsel to make extra efforts to convince a Judge that the alternative proposed is sound.

THE ALTERNATIVES TO PAYMENT INTO COURT

To assist in providing the client and litigation guardian with information to choose the plan that best suits their needs and interests, I have briefly outlined, below, the following alternative options:

1. Structured Settlements
2. GIC's held in trust for the disabled party
3. RESP investments
4. RDSP investments
5. Management of funds by an expert relative of the disabled party

THE ALTERNATIVE OPTIONS: STRUCTURED SETTLEMENTS

The alternative option of a structured settlement may be attractive to a party under a disability. This option addresses many of the traditional concerns that the Court had in relation to the protection of a party under a disability. The structured settlement obtained from a registered life-insurer will guarantee periodic payments for a specified period, or for life. Each payment received is a combination of capital (some of the invested money) and interest (some of the life insurer's money). The terms of the structure and the amount of the periodic payment can be custom tailored to the client's needs, but once the structure is in place it cannot be changed.

There are a few circumstances under the present legislation in which the court is instructed to order a structured settlement. In *Sandhu (Litigation guardian of)* v. *Wellington Place Apartments*[28] the Ontario Court of Appeal confirmed that rather than focusing on Rule 7.09(1), the focus of the trial judge's analysis should have been on s.

[28] *Sandhu (Litigation guardian of)* v. *Wellington Place Apartments* [2008] O.J. No. 1148, 2008 ONCA 215

116 of the *Courts of Justice Act*[29]. S.116 gives the Court the power to order periodic or structured payments in respect of personal injury or *Family Law Act* claims. The triggering event under s. 116(1)(b) is the request for a gross-up on the settlement, either "express or implied", to offset any liability for income tax on income or interest earned on the settlement funds. Section 116(1)(b) makes a structured award mandatory unless it is demonstrated that such an award would not be in the plaintiff's best interests.

Structured settlements are not without their limitations. Often a structure is unavailable if the capital amount is too low. In my experience, structured settlement brokers are reluctant to structure a capital sum less than $50,000.00. However, if your firm enjoys a good relationship with one of the major structured settlement companies you may find that the broker will structure smaller sums; particularly, if you regularly give that company your firm's business. It may be possible for a Court to order a structured settlement even if the amount is modest but the case law is not entirely clear whether a Court can force a structure on an unwilling defendant.[30]

The downside to a structured settlement is that in the event of unforeseen grave financial changes or adversities in the minor's life (and if structure does not have an emergency fund built in) then there is no way of pulling additional funds out of the structure to respond to a financial crisis. With other options including payment into court it is possible, at any time, on motion pursuant to Rule 72.03 to ask a Judge for permission to encroach on the funds.

In addition, the structured settlement may be for a period that runs significantly longer than the minor plaintiff had in mind. The minor plaintiff may have different views from his

[29] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[30] *Kendall (Litigation Guardian of)* v. *Kindle Estate* (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.) but see Section 116(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended.

or her litigation guardian concerning what is in his or her best interest. If the funds are "locked" in a structured settlement then the minor plaintiff, upon reaching the age of majority, will not have access to the entire amount of the settlement. Some parents and guardians want to ensure that the minor doesn't get all his or her monies at age 18. In contrast, a minor plaintiff can easily take funds out of court upon reaching the age of majority. In *Sanders v. Gouthro* [31] . Quinn J. confirmed that a minor doesn't have to obtain an order to take money out of court upon reaching the age of majority, even if the order approving the settlement doesn't contain any provisions regarding the process of taking money out of court.

THE ALTERNATIVE OPTIONS: GICS

An alternative option for investment of the settlement funds is to purchase a Guaranteed Investment Certificate (GIC) to be held by a trustee. In the *Martin* case, Justice Quinn allowed our law firm to be the trustee on behalf of the minor. The prevailing interest rates for a GIC were considerably higher than the rate of return available through the Accountant even without considering the effect of the Accountant's fees. Our client will receive considerably more interest over the term of the investment by the use of a GIC. However, this may not always be the case since interest rates have fallen, dramatically, since the financial crisis of 2008.

The current interest rates on GICs do not exceed the rate of return paid by the Accountant on funds paid into Court as they did at the time of the *Martin* decision. However, at the date of this paper Achieva Financial (a division of Cambrian Credit Union) offers a rate of 3.5% for a five year GIC with no fees. The rate on the OPGT Fixed Income Fund is 3.5% before deduction of the Accountant's fees. Ally Bank Canada offers a rate of 2.75% on a GIC. Most of the big commercial banks will match or come close to the Ally and Achieva rates if you insist upon their best rate. This is,

[31] *Sanders* v. *Gouthro* [2006] O.J. No. 774, [2006] O.T.C. 203

particularly so if your firm does all its business with that bank. GIC's usually carry a federal or provincial guarantee in the form of deposit insurance. Mutual funds are not eligible for deposit insurance.

On obtaining court approval for this investment option the litigant has to demonstrate clearly why this is a preferred option over payment into court. The benefits of this option over payment into court are a guarantee of the capital, a fixed rate of return on the investment which may be competitive with the interest paid by the Accountant and no fees whatsoever, payable during the life of the investment on interest earned or upon final distribution of the funds.

The downside to a GIC in the event of a financial emergency or a drastic change to the circumstances of a minor is that early withdrawal of the funds out of a GIC affects interest earned and may under some GICs be subject to a penalty. Nevertheless, it is possible to encroach upon the funds with permission from a Judge obtained on motion.

As GICs are typically only available for a maximum term of 5 years, Counsel will have to have a proper mechanism in place for the renewal of the GICs and may have to be the trustee of the GIC. It is also possible to have the bank act as trustee, but it would be important to determine what, if any fees, the bank would charge to act as trustee.

Since the *Martin* case, this firm has acted as trustee for numerous persons under a disability. The demands on the trustee are not onerous or time consuming and the firm does not charge a fee to the minor for acting as trustee.[32]

[32] *Martin*

THE ALTERNATIVE OPTIONS: RESPS

There is very little reported case law pertaining to the appropriateness of investments into an RESP. That being said, it seems clear that with appropriate affidavit evidence, the Court may allow payment of some of the settlement funds directly to the Litigation Guardian to be used for the benefit of the infant plaintiff. For instance in *Hoad v. Giordano*[33], Justice Quinn was not satisfied with the affidavit evidence from the Litigation Guardian regarding plans to invest the settlement money into an RESP and to purchase a computer for the minor to assist him with his education. However, Justice Quinn did not reject, outright, the option of payment of the funds into an RESP nor did he reject the option of the parent acting as trustee of the child's money.

In *Hoad*, Justice Quinn raised a number of questions to be considered to ensure no conflict of interest between the minor and the litigation guardian. For instance, what are the financial circumstances of the litigation guardian including his or her income and expenses, and the number of dependents for whom he or she is responsible? What criteria will be employed for periodic encroachments, if any? Should the litigation guardian be required, at some point, to pass accounts in respect of his or her management of the funds? Should the litigation guardian be required to post a bond as security for the performance of his or her duties in the management of the funds? What are the views of the child (to the extent that he or she is of an age where such views can reasonably be ascertained)? Is there is a request for part of the funds to be transferred to the litigation guardian now (with the balance to be paid into court)? Are the requested funds to be used for the direct and reasonable benefit of the child and in circumstances where the parents of the child are unable to meet the expense involved? [34]

[33] *Hoad*

[34] *Hoad*

It may not be that contentious to obtain court approval for education-related expenses for the benefit of the minor. It is, potentially, more challenging where money from the settlement is proposed to be used for an improvement to an asset (such as a family home) that benefits not just the minor but the entire family. Given that Plaintiff counsel takes his or her instructions, normally, from a parent as the litigation guardian, there is a possible risk of a conflict of interest between the guardian and the person under a disability. The litigation guardian may not understand that the concern of the Court and of counsel is to always act in the best interests of the person under a disability.

In *Foster v. Foster* (2007)[35] the court was aware of the potential for conflict between the Litigation Guardian and the minor plaintiffs. The court approved investment of the settlement funds of the minors into RESPs because the funds were to be held by counsel in trust until they could be paid into the RESPs. As such, the Guardian would have no access to or interest in the funds of each minor.

Information concerning the mechanics of investing in an RESP, along with answers to frequently asked questions, is attached to this paper at Schedule B.

THE ALTERNATIVE OPTIONS: RDSP

A new alternative option involves placing settlement funds into a Registered Disability Savings Plan (RDSP). Any funds contributed to an RDSP and any interest earned on contributions while held in the RDSP are not subject to any tax. This new savings plan is available to any person who is eligible for the Federal Disability Tax Credit.

[35] Unreported decision by Justice Granger, Court File No. 52782/06

The RDSP offers deferral of tax and allows eligible individuals to receive matching Canada Disability Savings Grants (CDSGs) up to a lifetime amount of $70,000.00. In addition, the plan may be eligible for Canada Disability Savings Bonds (CDSBs) up to a lifetime amount of $20,000.00 offering the potential for even greater earnings.

A person is eligible for the disability amount only if a qualified practitioner certifies on Form T2201, Disability Tax Credit Certificate, that the individual has a severe and prolonged impairment of a physical or mental function. The form must also be approved by the Canada Revenue Agency (CRA) and a determination made that the plaintiff is eligible for the disability amount.

If the beneficiary has reached the age of majority and is legally able to enter into a contract, then a disability savings plan can be established for such a beneficiary by the beneficiary **and/or** the legal parent.

If the beneficiary is a minor, another person can open an RDSP for the minor and become a holder if that person is:

- a legal parent of the beneficiary;
- a guardian, tutor, or curator of the beneficiary, or an individual who is legally authorized to act for the beneficiary; or
- a public department, agency, or institution that is legally authorized to act for the beneficiary.

If the person is no longer considered to suffer from the severe or prolonged impairment in physical or mental functions that initially qualified them for the disability amount then the RDSP must close **and** all amounts must be paid out of the plan by December 31 **following** the first calendar year of any change in disability status. Any funds remaining

in the RDSP after any required repayments of government grants and bonds will then be paid to the beneficiary.

A Canada disability savings grant (grant) is an amount that the government of Canada contributes to an RDSP. The government will pay matching grants of 300, 200, or 100 percent, depending on the beneficiary's family income and the amount contributed. An RDSP can receive a maximum of $3,500 in matching grants in one year, and up to $70,000 over the beneficiary's lifetime.

The RDSP is exempt from most provincial disability and income assistance benefits. It does not get clawed back and it does not reduce disability benefits payments[36].

There are circumstances under which the government grants and contributions have to be repaid. This is a very new investment option for which there is no reported case law. For detailed information and specifics please look up the RSDP plan at www.cra-arc.gc.

THE ALTERNATIVE OPTIONS: PAYING THE FUNDS TO AN INDEPENDENT FINANCIAL PLANNER

A final alternative to consider is the possibility of paying the funds to a well-qualified independent financial advisor to invest in the best interests of the person under a disability. This option should not sound far-fetched if the Court recognizes that paying the funds into Court, ultimately, will result in the funds being managed by a professional money manager on behalf of the OPGT.

[36] Section 28(1) 26.1 of Regulation 222/98 to the Ontario Disability Support Program Act, 1997.

The financial advisor could, potentially, be a parent or relative of the disabled party. Justice Quinn did not rule out this possibility in the *Hoad* decision where the father requested that the funds be paid to him to manage on behalf of his child. Rather, Justice Quinn declined to have the funds paid to the father because the management plan was "overly vague" and "there was too much uncertainty and too few safeguards with the plan put forward by Mr. Hoad".[37] Justice Quinn set out the important questions to be considered when it is proposed to have the funds managed by the litigation guardian, as reviewed above and also indicated the test to be applied:

> "*In all the circumstances, has the litigation guardian established, on a balance of probabilities, that it is in the best interests of the minor that payment be made to the litigation guardian rather than into court?"*[38]

In a relatively recent decision, OTLA Director, Laura Hillyer was successful in having funds paid to the father of two minor plaintiffs. The father was a professional in the investment industry with a "Professional Financial Planner Designation" and 24 years of experience with a large brokerage firm. The father successfully managed large sums of private capital and acknowledged his fiduciary duty to his clients.

The father's management plan was to utilize the benefits available through the RESP program offered by the federal government. The father selected an option that would allow for modest growth and manageable risk. On achieving 18 the minors would have the option of receiving the funds directly or leaving them in the RESP, at their discretion, so the funds would be available for their post-secondary education. In this particular case, the father elected to charge no fees for his management services.

While most parents are not fully-qualified financial planners, many parents will have access to their own investment advisors or financial planners who may be able to prepare a management plan that is equal to or superior to the plan and rates of return available when funds are paid into Court.

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[37] *Hoad* para 10

[38] *Hoad* para 8

PRACTICE POINTS

Initially, it is critical for all counsel to recognize that blindly paying funds into Court is not, necessarily, the conservative practice that it once was. Paying the funds into Court is an implicit endorsement of a money management plan that should be critically reviewed and assessed with the client. In addition, alternative options should be considered. This means that the litigation guardian and the client must be made familiar with all of the options including payment of the funds into Court.

A second practice point is that counsel must recognize that he or she is not a qualified or certified financial planner or advisor. **It is not the job of counsel to endorse a particular option from a financial perspective.** Instead, counsel should attempt to provide as much information and documentation to the litigation guardian as possible to ensure that he or she can make an informed, prudent decision that is in the best interest of the party under a disability.

To this end, near the conclusion of a case involving a disabled party, counsel should outline, in a letter, the various options for disposition of the settlement funds. This letter should include the option of payment of the funds into Court but should also advise of the types of investments the Accountant has open to him and should also advise of the fees charged by the Account.

Other alternative options (such as payment into an RESP or an RDSP, the purchase of a GIC, structured settlements, or the appointment of a well-qualified independent financial advisor) should also be brought to the attention of the litigation guardian and minor client, in writing, well in advance of final resolution of the claim.

The litigation guardian should be encouraged to investigate and research all options available and should be directed to websites or other sources of information on a particular option. The litigation guardian should also be encouraged to directly contact professionals who may assist in providing information to make an informed decision.

Structured settlement brokers will always meet with clients and will even come to their home to provide advice and materials.

A litigation guardian can contact the office of the Accountant of the Superior Court of Justice, directly, to obtain more information on the OPGT's funds. The Accountant's staff is exceptionally helpful, in our experience, and will attempt to answer all questions concerning the management of funds paid into Court. The Accountant, Mr. Steve Adams, is prepared to assist both client and counsel in understanding the OPGT's management plan. A telephone call to the Accountant, invariably brings a prompt and helpful response from the Accountant himself. In our experience, the Accountant is completely transparent in presenting information critical to making choices concerning a management plan.

Litigation guardians should be encouraged to consult an independent financial expert, preferably an accountant, in the case of settlements involving larger sums of money. If the litigation guardian does not want to incur the expense of obtaining an opinion from an account he or she should be encouraged to consult his or her financial advisor or planner, particularly if the advisor is a fees for services advisor and not one paid on commission.

If the litigation guardian does not have a financial advisor, they should be encouraged to consult their bank manager or a trusted friend or family member who is more knowledgeable about financial matters. **The ultimate goal is to assist the litigation guardian in becoming educated about the various options available and the risks and benefits of each option so that he or she can make an informed decision on behalf of the person under a disability.**

Once the litigation guardian has, thoroughly, researched the options available, instructions in writing, including a signed direction, should be obtained from the litigation guardian setting out the clients instructions concerning investment of the settlement funds. Finally, the closing letter to the client should recite the options outlined by

counsel to the litigation guardian and client, should confirm that the litigation guardian was advised to seek independent financial advice, should confirm that counsel is not qualified to offer financial advice and should confirm the details of the option chosen by the litigation guardian.

Motion materials in support of Court approval of the settlement and management plan could reflect the lawyers' advice to the client concerning the options available, and briefly outline the litigation guardian's research into management plans and criteria used for selecting the chosen investment option.

If all these steps are followed (and if, the investment decision made by the litigation guardian unfortunately comes to grief because of unanticipated turbulence in financial markets beyond the control of the litigation guardian) then counsel will have done his or her job well and will not, likely, be subject to criticism. Placing the client and the litigation guardian in a position to make an informed decision on management plans that is in the best interest of the person under a disability, will protect against the risk of unhappy clients down the road.

IN CONCLUSION:

In his excellent paper, OTLA Director, Andrew Murray raises an important consideration. He suggests that a party not suffering from a disability would be reluctant to have their own settlement funds, mandatorily, paid into Court to be invested at the discretion of the Accountant.[39]

Nevertheless, hundreds if not thousands of minor settlements are approved in Ontario every year without much consideration by counsel of alternatives to the customary or routine practice of paying funds into Court. There is no specific wording in Rule 7.09 to

[39] Andrew C. Murray, Settlement of Personal Injury Claims on Behalf of Persons Under a Disability, Middlesex Law Association and Ontario Bar Association, Deal of no Deal: Assessment of Damages Conference, November 1, 2007.

guide counsel concerning how the funds of the disabled party should be managed, merely the provision that all funds are to be paid into Court, "unless a judge ordered otherwise".[40] It is hoped that this paper sheds some light on the routine practice of paying funds into Court and on alternatives to be considered by the litigation guardian in attempting to identify alternative safe management plans consistent with the best interests of persons under a disability.

[40] *Martin*

LIST OF TOPIC RELATED MATERIALS

1. Heidi R. Brown, Obtaining Court Approval of a Settlement Under Rule 7.08: What You Need to Know, OTLA 2011 Spring Conference, May 26-27, 2011;

2. Wendy Moore Jones, Court Approval of Settlements for Parties under a Disability, OTLA 2009 Spring Conference;

3. Andrew C. Murray, Settlement of Personal Injury Claims on Behalf of Persons Under a Disability, Middlesex Law Association and Ontario Bar Association, Deal of no Deal: Assessment of Damages Conference, November 1, 2007;

4. Clair Wilkinson, Creative Infant Settlements, OTLA 2006 Fall Conference.

5. *Tsaoussis (Litigation Guardian of)* v. *Baetz,* [1998] O.J. No. 3516 (C.A)

6. *Bellaire* v. *Daya* [2007] O.J. No. 4819, 162 A.C.W.S. (3d) 371

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

8. *Martin* v. *Robins* [2006] O.J. No. 915, 146 A.C.W.S. (3rd) 244

9. *Public Guardian and Trustee Act* R.S.O. 1990, chapter P.51.

10. Office of the Public Guardian and Trustee, The Accountant of the Superior Court of Justice, Answers to Frequently Asked Questions about Assets Held in Court for Children, Queen's Printer for Ontario, 2007, Reprinted in 2011 http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

11. Ontario Regulation 191/95 s.1(2)(a)

12. www.investopedia.com

13. *Sandhu (Litigation guardian of)* v. *Wellington Place Apartments* [2008] O.J. No. 1148, 2008 ONCA 215

14. *Courts of Justice Act*, R.S.O. 1990, c. C.43.

15. Section 116(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended

16. *Kendall (Litigation Guardian of)* v. *Kindle Estate* (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.)

17. *Sanders* v. *Gouthro* [2006] O.J. No. 774, [2006] O.T.C. 203

18. Section 28(1) 26.1 of Regulation 222/98 to the *Ontario Disability Support Program Act,* 1997

19. http://www.canlearn.ca/eng/saving/resp/faq.shtml

20. http://www.canlearn.ca/eng/saving/resp/fact.shtml

21. http://www.canlearn.ca/eng/saving/resp/brochure/resp-eng.shtml

22. http://www.hrsdc.gc.ca/eng/learning/education_savings/public/resp.shtml