

**EMERGING FROM THE QUAGMIRE: WHEN YOUR CLIENT OR HIS
LITIGATION GUARDIAN TURNS ON YOU**

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Introduction

Personal injury lawyers routinely act on behalf of clients who have sustained serious physical and psychological injuries. Often, from the first day you meet a client, it is clear that he does not have the requisite capacity to instruct you in the litigation. In other cases, a client's incapacity to instruct counsel only becomes apparent over time as the lawsuit progresses. When a client is incapable of instructing counsel ab initio or when the client is a minor, it is most often a family member who retains the lawyer on behalf of the injured plaintiff, and is later named in the action as litigation guardian on behalf of that plaintiff. If a client subsequently becomes incapable of instructing counsel, a litigation guardian can be appointed at any time in accordance with Rule 7 of the *Rules of Civil Procedure*.

The role of the litigation guardian, of course, is to instruct counsel on behalf of the incapable plaintiff. In most cases that do not proceed to trial, the litigation guardian usually heeds your good counsel, provides you with instructions to settle the case, and the Court ultimately approves the settlement achieved on behalf of the plaintiff. Things become considerably more complicated, however, when the litigation guardian chooses not to accept your advice, and instructs you to take steps that in your view, are not in the best interests of the incapable client. Similarly, during the course of the litigation, you may become aware of facts and/or information about the litigation guardian that lead you to believe that he/ she is not acting in the best interests of the injured plaintiff. The problem will also manifest itself when your injured plaintiff does not have a litigation guardian, gives you instructions that are not in his best interests, and refuses to listen to your advice. Consider the following scenarios that frequently emerge in a personal injury practice:

Scenario 1 In 2002, 9 year old Liza was a passenger in a vehicle that was involved in a serious motor vehicle accident. Liza sustained a moderate brain injury and is now cognitively impaired. This will impact on her future employability. Her mother, Judy, is her litigation guardian. The case has settled in 2006 subject to Court approval for a substantial sum. Despite your advice to place the bulk of the settlement funds in a structured settlement, Judy refuses to give you instructions to structure any portion of the funds.

Scenario 2 Ricky is 26 years old and was catastrophically injured as a result of a car accident when he was 24. His father, Ozzie, was also injured in the accident and sustained a broken arm. Ricky had no power of attorney at the time of the accident, and since his release from hospital, he resides with his father, Ozzie, who is currently unemployed. Ozzie retained you to act on his own behalf and on behalf of Ricky for both the tort and accident benefit cases. Ozzie is acting as Ricky's litigation guardian. Ozzie provides attendant care to Ricky and receives money from the accident benefit insurer for performing these services. Ricky also receives income replacement benefits from the accident benefit insurer. You learn from Ozzie's ex-wife Harriet, that Ozzie is using Ricky's money to pay off his own creditors. Harriet lives in Calgary. Ozzie has also recently purchased a new sports car. You confront Ozzie about your concerns, and he denies any wrongdoing.

Scenario 3 You act for Sarah who suffers from chronic pain, fibromyalgia and severe depression and anxiety. She also has a history of bipolar disorder. She is suing her long term disability carrier for non-payment of benefits. During the course of the litigation, Sarah becomes increasingly depressed and stops taking her psychiatric medication. On more than one occasion she has come to your office smelling like alcohol. After examinations for discovery, you receive a reasonable offer to settle from the insurer. You meet with Sarah in order to obtain her instructions. Sarah behaves irrationally, will not provide any instructions and says her case is worth twenty times what is being offered. She then says she will never accept any offers from the insurer as her punitive damages alone are worth ten million dollars. She says that if you can't understand her point of view, she wants another lawyer.

What should you do when your client or her litigation guardian turns on you?

In order to properly answer this question, it is important to appreciate the role of a litigation guardian in the litigation process and the legal definition of incapacity. The following is a brief overview:

Incapacity and the Litigation Guardian

The law presumes that an adult is capable of making his or her own decisions with respect to all important aspects of daily life. The law includes a presumption that an adult has capacity to instruct a lawyer. A lawyer must be certain that her client sufficiently understands:

- a) the nature of the retainer;
- b) the circumstances of the case; and
- c) the consequences and ramifications of the instructions given.

A client and a lawyer may disagree, and a lawyer may believe that a client is making unwise choices. However, if the client is sufficiently informed and capable of instructing counsel, the client's wishes must be respected. The challenge arises once you are well into the litigation process and you conclude that your client no longer has the requisite capacity to instruct you.

In the case of *Bilek v. Constitution Insurance* (1990), 49 C.P.C. (2d) 304 (Ont. Dist. Ct.), Justice Coe set out the following test to determine whether or not a person was under disability. At page 304, Justice Coe stated as follows:

The test was whether the Plaintiff properly understood the nature and effect of what he/she would be called upon to participate in, and what would be required to decide.

The above decision pre-dates the proclamation of the *Substitute Decisions Act*, 1992, S.O., c.30 which introduced new terminology to Rule 7 of the *Rules of Civil Procedure* which governs our conduct in the case of a party who is under a disability, and requires that persons under disability must be represented by a litigation guardian. A party under disability is a general term which includes minors, mentally incapable adults and absentees. As defined in Rule 1.03 of the *Rules of Civil Procedure*, a person is mentally incapable if they are incapable of managing their property or their personal care as defined by sections 6 or 45 of the SDA with respect to an issue in the proceeding.

Sections 6 and 45 of the *Substitute Decisions Act*, S.O. 1992, c. 30 (hereinafter referred to as the SDA) set out the tests of incapacity for managing property and for personal care respectively, as follows:

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

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

The role of a litigation guardian is unique to the litigation process. The litigation guardian has no interest in the person under disability's cause of action, nor can he or she reap any benefit from the proceeds of settlement or judgment. However, the litigation guardian does have full power over the ordinary proceedings and conduct of the action. Rule 7.05 of the *Rules of Civil Procedure* provides the litigation guardian with authority to do anything required or authorized to be done by a party, and goes on to require that the litigation guardian protect the interests of the person under disability. The Rule further provides that the litigation guardian has an obligation to retain a lawyer for the incapable party. Hence, the litigation guardian provides instructions to counsel with respect to the conduct of the action, and the authority of the litigation guardian is limited only to the extent that any settlement on behalf of person under disability must be approved by a judge in accordance with Rule 7.08 of the *Rules of Civil Procedure*.

Rule 2.02 (6) of the *Rules of Professional Conduct* of the Law Society of Upper Canada addresses the issue of capacity. The Rule directs a lawyer to maintain a normal relationship with a client, as far as reasonably possible, but the Commentary provides the remedy for the lawyer who is confronted with a client who no longer has capacity to instruct counsel.

Client Under a Disability

2.02 (6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs

and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, then the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has ethical obligation to ensure that the client's interests are not abandoned.

Thus, where a client lacks capacity to instruct you in a tort action, the *Rules of Professional Conduct* impose a positive obligation to ensure that the client's interests are protected and not abandoned. In my view, even if you believe that the client no longer wants you to represent him, it is tantamount to abandonment to simply terminate the retainer or move to get off the record. Instead, it is incumbent on the solicitor to take steps to find a suitable litigation guardian to instruct you on behalf of the client, and bring the necessary motion to appoint him or her under Rule 7 of the *Rules of Civil Procedure*.

The same obligation to ensure that your client's interests are protected apply to proceedings against his or her first party insurer. The procedures applicable to statutory accident benefit claims before the Financial Services Commission of Ontario with regard to persons under disability are set out in Rule 10 of the *Dispute Resolution Practice Code* (Fourth Edition). A minor must commence a proceeding through a parent, person with lawful custody, court appointed guardian of property or the Children's Lawyer. An adult

who has been declared mentally incapable within the meaning of sections 6 or 45 of the SDA must commence a proceeding by an attorney with a valid power of attorney, a guardian of the property appointed by the Court, or the Public Guardian and Trustee. If an adjudicator is of the view that a person lacks capacity to proceed in the dispute resolution process, the adjudicator can appoint someone to act on that person's behalf. Rule 10.7 provides that final settlements involving persons under disability should comply with Rule 7.08 of the *Rules of Civil Procedure*, meaning that formal approval of the court is required.

What Do you Do When Your Litigation Guardian Turns On You?

Rule 7.04 of the *Rules of Civil Procedure* states that the Court shall appoint as litigation guardian the Children's Lawyer for minors and the Public Guardian and Trustee for incapable adults when there is no other person willing or able to so act.

Rule 7.06 (2) of the *Rules of Civil Procedure* further provides as follows:

Where it appears to the court that a litigation guardian is not acting in the best interest of the party under disability, the court may substitute the Children's Lawyer, the Public Guardian and Trustee or any other person as litigation guardian.

Let us now consider further the dilemmas facing a solicitor in the three scenarios set out on page 1:

Scenario 1 In 2002, 9 year old Liza was a passenger in a vehicle that was involved in a serious motor vehicle accident. Liza sustained a moderate brain injury and is now cognitively impaired. This will impact on her future employability. Her mother, Judy, is her litigation guardian. The case has settled in 2006 subject to Court approval for a substantial sum. Despite your advice to place the bulk of the settlement funds in a structured settlement, Judy refuses to give you instructions to structure any portion of the funds.

In Scenario #1, you are convinced that Judy is not acting in Liza's best interests. Your experience tells you that a structured settlement is vital to ensuring that Liza has a guaranteed income stream for life in the event that she cannot compete in the workforce some day. Moreover, a structure will ensure that Liza's future care needs are met. You

have discussed structures will Judy in great detail. You have also explained to Judy that the Court must approve any settlement for a minor, and it is unlikely that a judge will approve anything but a structured settlement or a payment of the funds to the Ontario Superior Court of Justice. Judy insists that she wants the funds paid to her in a lump sum, and she wants you to bring an application to have her appointed as Liza's guardian of property under the *Children's Law Reform Act*. She feels that she is able to decide how to invest her child's money as she has worked for a bank in the past.

You are at an impasse, because you cannot obtain court approval of the settlement under Rule 7.08 of the *Rules of Civil Procedure* in the absence of an affidavit sworn by the litigation guardian setting out her agreement to all the terms of the settlement. You conclude that it is a mistake for Liza's settlement not to be structured, and you feel that having Judy appointed as guardian of her daughter's property may not be in Liza's best interests. Accordingly, you decide that you must bring a motion to appoint the Children's Lawyer to substitute Judy as litigation guardian for Liza. The Children's Lawyer can then provide you with instructions vis-a-vis Liza's settlement and swear the requisite affidavit so that the Court can determine the issue of whether or not the settlement funds should be structured.

Scenario 2 Ricky is 26 years old and was catastrophically injured as a result of a car accident when he was 24. His father, Ozzie, was also injured in the accident and sustained a broken arm. Ricky had no power of attorney at the time of the accident, and since his release from hospital, he resides with his father, Ozzie, who is currently unemployed. Ozzie retained you to act on his own behalf and on behalf of Ricky for both the tort and accident benefit cases. Ozzie is acting as Ricky's litigation guardian. Ozzie provides attendant care to Ricky and receives money from the accident benefit insurer for performing these services. Ricky also receives income replacement benefits from the accident benefit insurer. You learn from Ozzie's ex-wife Harriet, that Ozzie is using Ricky's money to pay off his own creditors. Harriet lives in Calgary. Ozzie has also recently purchased a new sports car. You confront Ozzie about your concerns, and he denies any wrongdoing.

You have grave concerns about Ozzie's spending habits in Scenario #2. Although you are aware that Ozzie and Harriet's relationship is acrimonious and that they went through a bitter divorce, you are inclined to put some stalk in Harriet's allegations of Ozzie's fiscal

impropriety. Ricky is living with Ozzie only because Harriet works full-time and cannot care for her son during the day. When you met Ricky, Ozzie and Harriet in the hospital shortly after the accident, you discussed with them that someone would have to act as litigation guardian to instruct you on behalf of Ricky, and that ultimately, if Ricky remained incapable of managing his property once the lawsuit was concluded, he would require that a guardian of property be appointed in accordance with the Substitute Decisions Act. It was agreed that Ozzie would act on his son's behalf since he was an Ontario resident.

Clearly, Harriet cannot act as litigation guardian, as Rule 7.02 of the *Rules of Civil Procedure* requires that the litigation guardian must reside in Ontario. You now feel conflicted between your obligation to Ozzie, who is also your client, and your obligation to ensure that you are acting in Ricky's best interests. Furthermore, given your concerns about Ozzie's spending, you query whether you have a duty to the accident benefit insurer, who is paying money to Ricky for income replacement benefits in the absence of a guardianship of property Order for Ricky under the SDA.

You conclude that your only recourse is to bring a motion to appoint the Public Guardian and Trustee to substitute Ozzie as litigation guardian for Ricky. You notify Ozzie that the insurer cannot continue paying income replacement benefits to Ricky because Ricky is incapable and has no guardian of property. You notify the insurer that Ricky's benefits are to be paid to the Accountant of the Superior Court of Justice until a guardian of property is appointed under the SDA.

Scenario 3 You act for Sarah who suffers from chronic pain, fibromyalgia and severe depression and anxiety. She also has a history of bipolar disorder. She is suing her long term disability carrier for non-payment of benefits. During the course of the litigation, Sarah becomes increasingly depressed and stops taking her psychiatric medication. On more than one occasion she has come to your office smelling like alcohol. After examinations for discovery, you receive a reasonable offer to settle from the insurer. You meet with Sarah in order to obtain her instructions. Sarah behaves irrationally, will not provide any instructions and says her case is worth twenty times what is being offered. She then says she will never accept any offers from the insurer as her punitive damages alone are worth ten million dollars. She says that if you can't understand her point of view, she wants

another lawyer.

With regard to Scenario #3, you are aware that Sarah has no family in Ontario and is a single woman with no children. You have attempted on several occasions to explain to Sarah that she has an unrealistic view of the case and what it is worth. You have provided her with copies of all the leading cases on punitive damage awards and have tried to make her understand the type of conduct required by an insurance company that will attract a large punitive damage award. Sarah refuses to accept your advice that no Court will award the sum of damages she expects to obtain.

You want instructions to make a counter-offer in response to the offer you have received from defence counsel. You are satisfied that there is no person who is willing or able to act as litigation guardian for Sarah, and you are of the view that you must bring a motion to appoint the Public Guardian and Trustee to act as litigation guardian on her behalf in order to advance the action.

But How Do You Bring Your Motion Without Breaching Solicitor-Client Privilege?

It is, of course, trite law that the solicitor-client communication privilege is one that belongs to the client and not to the lawyer, and exists for the benefit of the client. In the context of a personal injury lawsuit, it is not the incapable client that instructs counsel; it is the litigation guardian. Nevertheless, there is little doubt that the relationship between litigation guardian and the counsel appointed to represent a person under disability is characterized as solicitor and client in nature. In the absence of the privilege, the litigation guardian cannot engage in the frank and full disclosure that is essential to giving and receiving advice on behalf of the person under disability.

The grounds in support of your motion to appoint the Children's Lawyer or Public Guardian and Trustee must be set out in affidavit material to be brought before the Court. But how do you swear an affidavit in Scenario #1 without breaching Judy's confidential instructions not to structure Liza's settlement proceeds? How do you ensure that the defence does not become privy to your suspicions about Ozzie vis-a-vis Ricky's money in Scenario #2?

How do you go to court to appoint a litigation guardian for Sarah in Scenario # 3 when the bulk of the evidence as to her lack of capacity to instruct counsel is based almost entirely on your own observations?

Regrettably, in my experience, and in the experience of the very good lawyers who work at the Offices of the Public Guardian and Trustee and Children's Lawyer, many lawyers avoid bringing motions to appoint litigation guardians for their clients because they feel constrained by solicitor and client privilege. They feel that they are bound by confidentiality and as such, cannot comply with their obligation to maintain a normal lawyer and client relationship as required by Rule 2.02(6) of the *Rules of Professional Conduct*. As stated above, many move to get off the record leaving their clients unrepresented. In the worst case scenarios, many bury their head in the sand and take instructions that they know to be unreliable.

The remedy to the solicitor and client privilege dilemma was confronted by Master Kelly in the case of *Poirier v. Carmelite Order of Nuns* in Court File No. 94-CQ-055262CM released May 18, 2004. Master Kelly was being asked to appoint the Public Guardian and Trustee as litigation guardian for the Plaintiff. At paragraph 6 of his decision, Master Kelly stated as follows:

“ [6] The purpose of the motion is to protect the interest of the client. That is also one purpose of Rule 7.01. Rule 7.01 seeks to protect the integrity of the judicial process for all participants in the litigation, including the Court. In implementing Rule 7.01, the Court is invariably required to examine evidence that would otherwise be privileged. Capacity of a party is fundamental to civil justice. If during the conduct of litigation communications between solicitor and client impact the issue of the client's capacity, counsel is duty-bound to seek appointment of a litigation guardian. On a motion for that relief, one can expect that the requisite disclosure to the Court could involve privileged information. The client's confidentiality can be preserved by the sealing process.”

The concept of sealing the record was endorsed by Justice Jennings in oral reasons released February 14, 2006 delivered by Mr. Justice Jennings in the case of *Marizel Sorian et al. v. Gregory Laberakis* in Court File 134/03.

Authority for restricting public access to the courts and its records begins with the decision of Mr. Justice Dickson in *MacIntyre v. Nova Scotia (Attorney General)* [1982] 1 S.C.R. 175 in which it is stated at page 186 as follows:

“The authorities have held that subject to a few well-recognized exceptions, **as in the case of infants, mentally disordered persons** or secret processes, all judicial proceedings must be held in public” (emphasis mine).

Sealing a file is a radical departure from the norm. In fact, sections 135 and 137 of the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43 state as follows:

135(1) Subject to subsection (2), and rules of court, all court hearings shall be open to the public.

137(1) On payment of the prescribed fee, a person is entitled to see any documents filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

In civil matters, however, Ontario judges have statutorily granted authorities to restrict public access to the court and the information divulged therein. Sections 135 (2) and 137 (2) provide for case-by-case exceptions to the foregoing:

135(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

137(2) A court may order that any documents filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

A sealed file cannot be viewed by any but a stated group of individuals. Often the sealing

order is accompanied by an injunction requiring silence on the matter from all those involved.

Let us now re-examine the three scenarios:

Scenario #1: You bring a motion to appoint the Children's Lawyer to substitute Judy as litigation guardian for Liza under Rule 7.06 (2) of the *Rules of Civil Procedure*. Your prayer for relief in your Notice of Motion should contain a request for an Order sealing the solicitor's affidavit in support of the motion.

Your affidavit should state that the nature of the motion is to remove Judy as litigation guardian for Liza and to substitute the Children's Lawyer in her stead. Given that the case is ready to be settled, the affidavit should contain the following:

- a) background information regarding the motor vehicle accident;
- b) a summary of Liza's medical care and treatment;
- c) copies of all relevant medical reports should be produced as exhibits to the affidavit;
- d) copies of future care cost reports and future economic loss reports should also be produced as exhibits;
- e) the facts that led to the proposed settlement on behalf of the minor plaintiff;
- f) the offer to settle, subject to Court approval, in its entirety;
- g) information about the fee you intend to render to the client subject to Court approval;
- h) your rationale as to why a structured settlement is in Liza's best interests;
- i) the rationale for your belief that the instructions you have received from Judy, the current litigation guardian of Liza, are not in Liza's best interests.

Both Judy and the Children's Lawyer are served with the motion. In order to ensure that defence counsel does not become privy to the confidential information that may be contained in the affidavit in support of the motion to appoint a litigation guardian, my

practice is not to serve counsel for the defendants with the motion. Rule 7 does not specify whether defence counsel must be served, and I take the view that they are not entitled to the information. Of course, defence counsel is entitled to be apprised of the outcome of the motion and will accordingly be served with a copy of the Order appointing the Children's Lawyer as litigation guardian.

Upon being served with the motion, The Children's Lawyer usually contacts Judy to discuss the matter, and will explore the possibility of working out some form of compromise. If no compromise is possible, the Court will afford Judy an opportunity to articulate her point of view about the settlement proceeds, however, in most instances, the Court will appoint the Children's Lawyer to substitute Judy as litigation guardian. A subsequent motion will then be required to obtain court approval of the settlement under Rule 7.08.

Scenario #2: You bring a motion to appoint the Public Guardian and Trustee to substitute Ozzie as litigation guardian for Ricky under Rule 7.06 (2) of the *Rules of Civil Procedure*. Again, it is good practice to request an Order sealing the solicitor's affidavit in support of the motion.

As in Scenario #1, your affidavit should set out the same background information about the accident and the medical reports you have to date with respect to Ricky's care and treatment. You should further set out the quantum of benefits that Ricky receives from all sources, together with a brief summary of the facts and information upon which you are relying in support of your belief that Ozzie is not acting in Ricky's best interests.

The situation is complex, in that Ozzie was also injured in the accident, and you act for him as well in his own capacity as a plaintiff. Upon being confronted with a motion to have him removed as his son's litigation guardian, Ozzie will probably be inclined to seek other counsel. Furthermore, once the Public Guardian and Trustee becomes appointed as litigation guardian for Ricky, it is most probable that an investigation will be conducted into Ozzie's financial affairs, and proceedings may ultimately have to be taken against Ozzie

for repayment of any of Ricky's funds that he improvidently spent. It seems quite clear that you will be unable to continue acting as Ozzie's lawyer given that he is adverse in interest to Ricky. The Public Guardian and Trustee will most likely retain you as their counsel to continue acting on Ricky's behalf, as you have demonstrated by bringing the motion that you have acted in the best interests of the incapable client. The Public Guardian and Trustee will then instruct you during the course of the litigation.

Scenario #3: In Sarah's case, you have in your possession certain medical reports which you have acquired for the purpose of the lawsuit, which set out Sarah's physical, emotional and psychiatric problems. None of your reports state definitively that Sarah lacks capacity to instruct counsel if she does not take her medication. Sarah is not currently under the care of a psychologist. You have asked Sarah to undergo a capacity assessment. Sarah tells you that she refuses to be assessed by any more doctors.

If you have had Sarah assessed by an expert psychologist or psychiatrist for the purpose of the litigation, you may approach that same expert and request her opinion as to Sarah's capacity to instruct counsel if she were to stop taking her medication. If the expert will provide you with a supportive opinion, you can produce same in support of your motion to appoint a litigation guardian for Sarah. However, you should be aware that you may ultimately be required to produce this report to defence counsel in the course of the litigation. Given that the report is being obtained solely for the purpose of determining the issue of capacity, and given that it may contain confidential information, you may choose not to produce it to defence counsel at this time. As such, it is good practice to request an Order that the expert report be sealed. Alternatively, I would state in my affidavit that the medical evidence upon which I am relying is not being produced in my motion material in order to protect solicitor and client privilege. I further state that the report will be available for inspection by the Court at the return of the motion to have a litigation guardian appointed.

In Sarah's case, your affidavit should contain a narrative of Sarah's deteriorating

behaviour and the difficulties you have encountered in obtaining instructions. The affidavit should be carefully and sensitively drafted so as not to insult Sarah. Further elaboration on the basic facts can be made in your oral submissions to the Court at the return of the motion.

Once the Public Guardian and Trustee is appointed as litigation guardian for Sarah, that office will endeavour to ensure that Sarah is involved in the case to the fullest extent that she is able. Perhaps she will one day start taking her medication and become capable again to instruct counsel. If this is not to be, Sarah will have a litigation guardian to provide realistic and reasonable instructions to you as her counsel.

What Happens When the Case is Finished?

Once Court approval of the settlement on behalf of the incapable person is obtained, or a successful Judgment is obtained at trial, Rule 7.09 of the *Rules of Civil Procedure* dictates that the settlement proceeds must be paid to the Accountant of the Superior Court of Justice unless a judge orders otherwise.

As such, what will happen in our above 3 scenarios?

Scenario #1: In Liza's case, the Children's Lawyer agrees with your advice that Liza's funds should be placed in a structured settlement, and Court approval is thereby obtained. The monthly structure payments are to take effect when Liza turns 16. In addition, a lump sum of money was placed in Court for Liza to be used for her benefit should any funds be required prior to the commencement of the structure payments, and prior to her 18th birthday, when she will attain the age of majority.

You have advised Judy, Liza's mother, that she is not the automatic guardian of Liza's property. Whereas Liza is entitled to monies that exceed \$10,000.00 before she attains the age of 18 years, a guardianship of property order will likely be required under the

Children's Law Reform Act, R.S.O 1990, c. C. 12. The Office of the Children's Lawyer is served with these applications and will scrutinize them carefully to ensure that the proposed management plan which must be filed on behalf of the minor, is in the best interests of the minor.

Although Judy did not want to structure Liza's funds, she may now appreciate the benefits of the structured settlement. As Liza's parent, she may be the most appropriate person to apply for guardianship, which will remain in place only until Liza's 18th birthday. As guardian of Liza's property, she will have the authority at law to receive the structure payments and spend them in accordance with the management plan she must file with the application for guardianship.

Conversely, given the history of this matter, you may wish to decline to bring the guardianship of property application and refer Judy to other counsel. It should be noted, however, that as Liza's parent, Judy does not need a guardianship order to make a fiat application to the Children's Lawyer for payment of money out of court from time to time if funds are required for Liza's direct benefit. The Children's Lawyer accepts these applications and reviews same. Every few weeks, a Judge reviews and rules on these applications on a case by case basis.

Scenario #2: _____ In Ricky's case, a guardian of property will have to be appointed fairly soon, given that the accident benefit insurer is paying Ricky's income replacement benefits into court pending the appointment of a guardian of property. Someone must be accorded the legal authority to receive monies on Ricky's behalf throughout the course of the litigation. The concerns about Ozzie's ability to manage funds remain. Ricky undergoes a capacity assessment and is determined to be incapable of managing property in accordance with section 6 of the SDA. Harriet, Ricky's mother, has recently moved to Ontario and has requested that you bring an application to appoint her as guardian of Ricky's property under the SDA.

An application for guardianship of the property may be brought before the court at the same time as approval of the settlement is sought, or at an earlier or later stage. As guardian of the property, Harriet must keep Ricky's assets, financial accounts and transactions separate from her own, and must manage the property in accordance with a management plan that is either approved by the Court or the Public Trustee, depending on the circumstances.

If you are satisfied that both Ricky and the Public Guardian and Trustee consent to the appointment of Harriet as Ricky's guardian of property, and if Ozzie is no longer your client, in my view, there is no reason why you should not be able to bring the guardianship application, despite Ozzie's objections. Once the Order is obtained, Harriet has the legal authority to receive the funds being held by the Accountant of the Superior Court. At the conclusion of the lawsuit, the Court may order that the settlement funds be paid to Harriet as guardian of Ricky's property upon submission to the Court of a copy of the guardianship Order and an approved amended management plan that sets out Harriet's plans vis-a-vis the settlement proceeds.

Scenario #3: In Sarah's case, by the time the matter is concluded, Sarah starts taking her medication and stops drinking. As such, you will adduce evidence to the Court to support the fact that Sarah is now capable and as such, the settlement proceeds may be paid to her and need not be paid into Court.

If, however, Sarah is determined to be incapable of managing her property, a guardian of property will likely have to be appointed for her. If no one else comes forward, the Public Guardian and Trustee will most likely be called upon to fulfill that role.