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ACCIDENT BENEFITS:
RECENT CHANGES AND DEVELOPMENTS

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REPRESENTING PERSONS UNDER DISABILITY

Acting for persons under disability in the context of accident benefits litigation is a challenge for both counsel and for the insurer. Without clearly defined rules, similar to those found in the *Rules of Civil Procedure*, acting on behalf of a mentally incapable person is at times akin to travelling in an unfamiliar and unchartered area with only a rudimentary map to assist you.

The purpose of this paper is to review the framework for acting for persons under disability and to assist counsel and the insurer in understanding the myriad of rules and procedures which inform and govern this aspect of the law.

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Approval of Accident Benefit Claims for Parties Under Disability: The Important First Steps and Ensuring an Expedited Conclusion

I. INTRODUCTION

Personal injury lawyers routinely represent clients as against their accident benefits insurer, who do not have the requisite capacity to instruct counsel, whether due to serious and permanent physical or psychological injuries they have sustained or due to the fact that they are a minor, and cannot represent themselves. The implications to an accident benefits case are far reaching, however, it is apparent that their impact at both the onset and conclusion of a case is of utmost importance.

While an individual can be appointed to represent an applicant during the dispute resolution process by an adjudicator at the Financial Services Commission of Ontario (hereinafter referred to as "FSCO"), without the appointment of a litigation guardian or an established Power of Attorney at the outset of a case, this often results in delays in the provision of required and urgently needed accident benefits. Similarly, at the end of the case, when settlement is reached, an established litigation guardian or Power of Attorney is highly effective in the resolution of a file, as court approval is necessary for the party under disability, and the lack of an established litigation guardian or Power of Attorney often results in unnecessary delays.

II. THE LAW

A. *Mental Incapacity Defined*

In law, there exists a presumption that an adult is capable of making his or her own decisions with respect to all important aspects of daily life. This includes a presumption that the adult has the capacity to instruct a lawyer. When representing a client, the lawyer must be certain that the client understands the nature of the retainer, the circumstances of the case and the consequences and ramifications of any instructions given. A client and his/her counsel may disagree; however, as long as counsel believes that the client is sufficiently informed and mentally capable of giving instructions, the client's wishes must be respected.

The enactment of the *Substitute Decisions Act*, 1992, S.O., c.30 ("the *SDA"*) and the subsequent amendments to Rule 7 of the *Rules of Civil Procedure* ("the *Rules*"), now govern our conduct in the case of a party who is under disability. Specifically, the *Rules* require that persons under disability be represented by a litigation guardian.

A party under disability is a general term that includes both minors and mentally incapable adults. Rule 1.03 defines a mentally incapable individual as one who is incapable of managing his/her property or personal care, as defined by sections 6 and 45 of the *SDA*. Similarly, Rule 10 of the *Dispute Resolution Practice Code* ("*DRPC*") also defines a person as mentally incapable as defined by sections 6 and 45 of the *SDA*, which read 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 a 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 a decision.

B. ***Rule 10 of the Dispute Resolution Practice Code***

The procedures applicable to accident benefit claims before the Financial Services Commission of Ontario ("FSCO") with regard to persons under disability are set out in Rule 10 of the *DRPC*, which states that a minor must commence a proceeding through a parent, a person with lawful custody, a 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 property appointed by the Court, or the Public Guardian and Trustee. If an adjudicator is of the view that a person lacks capacity to participate in the dispute resolution process, the adjudicator can appoint someone to act on that person's behalf.

Under Rule 10.1 of the *DRPC*, a party to a mediation, settlement discussion, neutral evaluation or proceeding is presumed to have the mental capacity to manage his or her property, appoint and instruct a representative and conduct his or her own case. However, in the event that claimant is not mentally capable, Rule 10.2 of the *DRPC* applies.

This Rule provides that a person who has been declared mentally incapable must commence a mediation or other proceeding through either:

(a) The Public Guardian and Trustee or a court-appointed guardian of property under the provisions of the *SDA*; or

(b) An attorney under a valid continuing power of attorney that gives the attorney authority over all the property of the party.[1]

Rule 10.3 of the *DRPC* provides that where an adult party has not been declared mentally incapable with the meaning of section 6 or 45 of the *SDA* but exhibits signs of mental difficulty during the course of a mediation, settlement discussion, neutral evaluation or proceeding, either party may request a hearing on a preliminary issue, or the adjudicator or the Registrar may direct a hearing on a preliminary issue to determine the following:

(a) Whether the party has the mental capacity to proceed in the dispute resolution process;

(b) Whether there is an attorney with a valid continuing power of attorney over the party's property; or

(c) Whether there is a person such as a spouse, same sex partner, near relative, close friend or a professional such as a doctor, lawyer or business entity, such as trust company, who has made or intends to make arrangements for the appointment of a guardian over the party's property under the provisions of the *SDA*.[2]

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[1] The *Dispute Resolution Practice DRPC*, (Fourth Edition, May 31, 2001).

[2] *Ibid.*

In the event that a dispute resolution proceeding through FSCO is commenced without compliance with Rule 10.3, Rule 10.5 of the *DRPC* provides a (temporary) remedy. The Rule states that where an adjudicator is not satisfied that a party has the mental capacity to proceed in the dispute resolution process and there is no attorney or person as described above, the adjudicator may appoint a spouse, same-sex partner or near relative of the party to act on the party's behalf, provided that the adjudicator believes that the individual is suitable, willing and able to proceed in the dispute resolution process and to receive and administer accident benefits on behalf of the person exhibiting mental difficulty[3].

The Rule also provides that the adjudicator may place such conditions or restrictions on appointments pursuant to this section as the adjudicator considers reasonable and necessary to protect the interests of the person exhibiting mental difficulty, the other parties to the proceeding and the dispute resolution process[4].

The finding of mentally incapacity by an adjudicator pursuant to the *DRPC* is much less onerous than an application for the appointment of a litigation guardian under the *Rules*. This principle was established in *Sukree Jagdeo and Royal & Sunalliance Insurance Company of Canada*[5].

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[3] *Ibid.*

[4] *Ibid.*

[5] (FSCO A01-001182, August 26, 2002) (hereinafter referred to as "*Jagdeo"*).

In *Jagdeo*, the Applicant's father had brought an application to the Ontario Superior Court of Justice for a declaration that his father was mentally incapable of managing his property and to appoint the Applicant as guardian of his father's property. The application was rejected. When the matter came before FSCO, Arbitrator Miller held that she had jurisdiction to deal with the issue as to whether Mr. Jagdeo's father had the mental capacity to proceed in the dispute resolution process and to appoint Mr. Jagdeo to represent him in this process if she determined that he did not have capacity.

In making this determination, Arbitrator Miller stated that an application to the Ontario Superior Court of Justice under the *SDA* is significantly different than the application under Rule 10 of the *DRPC*. Arbitrator Miller held that a finding of mental capacity pursuant to Rule 10.3(a) of the *DRPC* relates only to the narrow issue of whether or not a party has the mental capacity to participate in the dispute resolution process; by contrast, an application under the *SDA* deals with the broader issue of declaring that a person lacks the mental capacity to manage his/her property and to appoint a guardian to manage same[6].

Arbitrator Miller further stated that the powers granted to a person appointed to act for a mentally incapable individual under the *DRPC* are different to those granted to a guardian appointed pursuant to the *SDA*.. Arbitrator Miller held that the powers of a person appointed under the *DRPC* are narrower, limited to allowing the appointed person to receive and administer accident benefits and to participate in the dispute resolution process.

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[6] *Ibid.*

C. *Limits to Rule 10 of the Dispute Resolution Practice Code*

Although the enactment of Rule 10 was undoubtedly to provide applicants and their counsel with a less onerous and more expeditious method of proceeding through the dispute resolution process, ultimately, the Rule provides only a temporary solution to the issue of dealing with a mentally incompetent claimant. Although the Rule allows for the appointment of a representative authorized to instruct counsel during the dispute resolution process and with respect to settlement, the representative's authority ends there. In order to finalize settlement and deal with the disposition of settlement funds, a court-appointed guardian of property is required. Rule 10.7 deals explicitly with this, providing that any final settlements involving persons under disability must comply with Rule 7.08 of the *Rules of Civil Procedure*, which requires formal approval of the Court[7].

This reality was confirmed by Arbitrator Miller in the *Jagdeo* decision referred to above. Arbitrator Miller stated that (notwithstanding the existence of a representative appointed under Rule 10.5), Rule 10.7 of the *DRPC* requires that any settlement made by the representative of a party who has been found to lack mental capacity be approved by the Court in accordance with Rule 7.08 of the *Rules*, as only a person appointed pursuant to the *SDA* can be given complete control over all of a disabled person's property[8].

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[7] *Ibid.*

[8] *Ibid.*

The *Jagdeo* decision was upheld in *M. v. Pembridge Insurance Co.*[9] In this decision, Arbitrator Killoran reviewed three FSCO cases: *Jagdeo, Mr. Y and Allstate Insurance Company of Canada*[10] and *Kabala and TD Home and Auto Insurance Company*[11]. Arbitrator Killoran concluded that from a procedural perspective, it is clear that paramount consideration is to be given to fairness between the parties with a predominant concern, particularly with a self-represented party, that the insured person has the capacity to understand the dispute resolution process. Arbitrator Killoran ultimately concluded that the applicant did not have capacity as he did not understand the content of the submissions, nor did he grasp what had just taken place. As there was no one available to represent the applicant, the Public Guardian and Trustee would have to be notified and appropriate steps would have to be taken under the provisions of the *SDA*[12].

In light of the foregoing, and for the reasons set out below, in cases where incapacity is clear, counsel would be well-advised to undertake the appointment of a guardian of property in the early stages of a claim.

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[9] (FSCO A05-001356, July 12, 2007) (hereinafter referred to as "*Pembridge"*).

[10] (FSCO A05-000670, May 26, 2006).

[11] (FSCO A04-002743, May 4, 2006).

[12] *Ibid, supra*, note 9.

III. THE ROLE OF THE GUARDIAN

As stated above, the early appointment of a guardian of property is often necessary and certainly advisable when dealing with an individual who does not have capacity and is not expected to regain capacity in the near future. A guardian of personal care is authorized to deal with matters such as housing, treatment and other necessary medical decisions. By contrast, a guardian of property is authorized to manage the incapable person's finances and, by extension, to make decisions regarding settlement (subject, of course, to court approval) and to instruct counsel with respect to same.

In the context of an accident benefits claim, a guardian of property and personal care may be required for a variety of reasons, including the following:

a. To sign Treatment Plans approving treatment on behalf of the insured person;

b. To deal with treatment providers and to direct or authorize actions taken during the course of treatment;

c. To manage the payment and disposition of weekly benefits (income replacement benefits, caregiver benefits or non-earner benefits);

d. To instruct counsel in relation to the management of the accident benefits claim; and

e. Ultimately, to make decisions regarding interim or final settlements, and to manage the monies received.

In the course of my practice, I recently encountered a situation where an insurer threatened to terminate payment of all statutory accident benefits unless a guardian of property was appointed. In this case, the appointment of a guardian was mandated by the insurer (under duress of non-

payment of benefits); however, the appointment of a guardian at an early stage is important in any event.

IV. APPOINTING A GUARDIAN

A. *Determining when a Guardian is Required*

The first step for counsel when dealing with a mentally incompetent adult is to determine whether a court-appointed guardian of property is required. At the time of the retainer, when counsel usually meets with the claimant's closest family members, counsel should inquire as to whether there exists a valid Power of Attorney granted by the claimant **prior to the onset of his/her incapacity**. Perhaps it goes without saying that a mental incompetent is not capable of granting a valid Power of Attorney after the onset of his/her disability; however, it is a question frequently posed by family members of an injured person.

If a valid Power of Attorney exists, this is sufficient to satisfy both the requirements of FSCO and the court in dealing with both the day-to-day management of an accident benefits claim and instructing counsel with respect to final or interim settlement. Unfortunately, in my experience, most people do not have either the foresight or the knowledge that a Power of Attorney would be of assistance in the event of incapacity resulting from an accident. Therefore, the vast majority of claimants have no valid Power of Attorney. The remainder of this section therefore deals with situations where no valid Power of Attorney exists.

B. ***Capacity Assessment***

Prior to seeking the appointment of a guardian of property and/or personal care, counsel must arrange for a formal determination of incapacity. This determination must be made by a capacity assessor certified to perform capacity assessments pursuant to the *Substitute Decisions Act*. The Capacity Assessment Office, part of the Office of the Public Guardian and Trustee, can provide a list of certified capacity assessors. The assessor must meet with the claimant and then complete the requisite forms detailing his/her opinion as to whether the claimant is capable of managing his/her own property and/or personal care. In the event that the capacity assessor finds that the claimant is incapable, a court-appointed guardian will be required.

C. ***Appointment of a Guardian of Property and/or Personal Care***

The next step to be taken in the event that the capacity assessor makes a determination of incapacity, a court-appointed guardian of property will be required. This is usually a close relative or friend or, in the event that the claimant does not have someone who may be able to act as a court-appointed guardian, the Public Guardian and Trustee. The appointment process is extremely onerous and beyond the scope of this paper; therefore, counsel should ensure that the process is managed by a lawyer with expertise in guardianship matters.

D. ***Costs Associated with Guardianship***

Given the complexity of guardianship applications, the costs associated with same (including the cost of conducting a capacity assessment and the cost of the guardianship application itself) can be significant.

The issue of who is responsible for payment of guardianship costs was dealt with by the Ontario Superior Court of Justice in *Stukic (Litigation guardian of)* v. *Personal Insurance Co. of Canada*[13]. In this case, Court held that the cost of obtaining a guardianship order for a catastrophically impaired plaintiff who was unable to deal with his property was compensable under s. 15(2) of the *Statutory Accident Benefits Schedule*. The court found that obtaining the guardianship order was a measure undertaken to reduce or eliminate the effects of the disability resulting from the impairment and therefore, the insurer was required to reimburse the claimant for the associated costs.

V. COURT APPROVAL OF A SETTLEMENT

A. *The Appointment of a Litigation Guardian*

As stated above, the appointment of a guardian of property and/or personal care does not provide the guardian (or counsel taking instructions from the guardian) with the ability to settle an incapable claimant's accident benefits case without the approval of the court. Even if a guardian of property and/or personal care has been appointed prior to settlement of an accident benefits claim, the court must still approve the settlement as being in the claimant's best interests. Rules 7.08(1), (2) and (3) of the *Rules* provide that a settlement of a claim made by or against a person under disability is not binding on the person without the approval of a judge, whether or not a proceeding has been commenced.

[13] [2005] O.J. No. 3325.

Generally, settlement of an accident benefits claim occurs in the context of an arbitration proceeding (or alternatively, in the during FSCO mediation, but in any event, outside the litigation context). The first step in the court approval process therefore involves the issuance of a Notice of Application, where the sole relief sought is approval of the accident benefits settlement. Prior to issuing a Notice of Application, counsel must have a litigation guardian appointed. This process is governed by Rule 7.08, which requires that the proposed litigation guardian file an affidavit confirming his/her relationship to the claimant and confirming that (s)he consents to act as Litigation Guardian and has no interests adverse to those of the claimant. Generally, the claimant's guardian of property and/or personal care should be appointed as litigation guardian.

The role of the litigation guardian is to instruct counsel on behalf of the incapable plaintiff. A litigation guardian must have no interest in the person under disability's cause of action, nor can (s)he reap any benefit from the proceeds of settlement or judgment. A litigation guardian has full power over the ordinary proceedings and conduct of the action, limited only to the extent that any settlement on behalf of a person under disability must be approved by a judge in accordance with Rule 7.08.

B. ***Material required for Court Approval***

In recent months, the Toronto court has introduced a complex and rigorous process for obtaining court approval of settlements. Rule 7.08(4) outlines, in very general terms, the material required on a motion or application for the approval of a judge. The material required includes an affidavit from the claimant's litigation guardian, an affidavit from the solicitor, a copy of the proposed minutes of

settlement and, where the person under disability is a minor over the age of 16, his/her consent in writing.

Rule 7.08(5) provides that the judge may refer the court approval documents to the Children's Lawyer or Public Guardian and Trustee for a report outlining any objections to or concerns regarding the proposed settlement, along with any recommendations, with reasons for same. In Toronto, the recent practice of the roster of judges appointed to review applications for approval of settlements has been to refer the matter for the opinion of the Children's Lawyer or Public Guardian and Trustee in all cases.

Through experience, I have determined that the inclusion of specific material to be provided to the Court on a motion for approval of settlement has assisted in expediting the court approval process and increasing the chance of court approval. While the provision of thorough material does not guarantee approval of a settlement, providing the court with complete information and a detailed overview of the case and the reasons for settlement will assist in expediting the approval process. At a minimum, the following material should be included in a motion for court approval of settlement for a party under disability:

a. Retainer agreement;

b. Mediation summaries (if any);

c. Relevant medical reports;

d. The guardian's written instructions regarding settlement;

e. Actuarial or accounting reports detailing the present value of the various benefits to which the claimant is entitled;

f. A letter from the insurer with a breakdown of benefits paid to date;

g. Guardianship Orders;

h. Details regarding the proposed structured settlement (if any); and

I. Information regarding the proposed disposition of the settlement funds, including a management plan.

The court approval process may take time; however, counsel should rest assured that the insurer will likely be considered to be bound to the settlement pending court approval, even if the claimant's circumstances change. In the Ontario Court of Appeal's decision in *Wu Estate v. Zurich Insurance Co.*[14], the court held that an insurer cannot repudiate a minor settlement pending court approval, even when the law relating to the insurer's liability had subsequently changed. This case involved the status of a settlement agreement based on the death of the applicant prior to the approval of the Court. The Court held that prior to the applicant's death, the accident benefits settlement had become a contractual right to the agreed amount contingent upon obtaining the court's approval, which was a chose in action, which, by operation of law, became operational once court approval had been given . The court further held that the applicant's estate could enforce the obligation to pay once court approval was obtained[15].

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[14] [2006] O.J. No. 1939.

[15] *Ibid.*

VI. CONCLUSION

While a FSCO adjudicator has jurisdiction to appoint a representative for the applicant when it has been determined they lack mental capacity throughout the dispute resolution process, it is clear that the appointment of a guardian of property (in the absence of a valid pre-existing Power of Attorney) at the outset of the case is paramount as ultimately, a court-appointed guardian will be required for the approval of settlement by the Court. In addition, the appointment of a guardian in the first steps of litigation will help to streamline all aspects of the management and settlement of an accident benefits claim, as the provisions of the *DRPC* are insufficient to effect settlement of a claim. By having a guardian appointed early in the process and adhering to the principles outlined above, accident benefits claims can be managed in the most efficient manner possible and settlement can be achieved with a minimum of delay.