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Obtaining Court Approval for

INFANT Settlements

In the majority of cases, after having settled a file, the most difficult part of your job is over. However, if your client is a minor, there is one important step that needs to be completed before the matter can be finalized. If you have never done a motion under Rule 7.08, do not underestimate the time commitment and complexity of these motions.

The need for court approval stems from the court's *parens patriae* jurisdiction. The court ensures that a settlement is in the best interests of the minor plaintiff. They do so by doing a thorough review of the matter, including a liability and damages assessment as well as an assessment of solicitor's fees. Do not treat these motions as "rubber stamp" motions because

PROVIDE THE COURT WITH all the information it needs to assess the reasonableness of the settlement.

judges will undertake an extensive review of your motion materials. The onus remains on the counsel bringing the motion to satisfy the court that any proposed resolution is fair and reasonable in the circumstances, and is in the best interest of the minor plaintiff.

Rule 7.08(1) of the Rules of Civil Procedure states as follows: “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.”

If a lawsuit has not been initiated for a claim, court approval is obtained by way of an application to the court. In Toronto, these matters are done in writing, whether by motion or application.

In approaching these motions, you must ensure that you provide the court with full and frank disclosure of your case. A glossed over summary or boilerplate materials will not suffice and will likely result in either a request for further information or your settlement not being approved. In either of these situations, you face significant delay in finalizing the settlement, not to mention significantly more work.

Key components of a motion for court approval includes the following:

- (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the

litigation guardian in respect of the settlement;

- (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer’s position in respect of the proposed settlement;

- (c) where the person under disability is a minor who is over the age of sixteen years, the minor’s consent in writing, unless the judge orders otherwise; and

- (d) a copy of the proposed minutes of settlement.

The Affidavit of the Litigation Guardian should include confirmation that the litigation guardian does not have an interest adverse to that of the minor plaintiff. Given that litigation guardians are typically the minor’s parents or guardians, it would be helpful for this affidavit to contain some information about the nature of the minor’s injury and how it affects his or her daily functioning. It should also state why the litigation guardian believes that the settlement would be beneficial to the minor. Keep in mind that typically, settlement amounts for minors are paid into court until the minor reaches 18 years of age, at which point the court will provide the plaintiff with documents to fill out and instructions on next steps to claim the funds.

In your affidavit, you will want to go over your assessment of liability,

and address any liability risk that should factor into the calculation of a reasonable settlement. You may wish to include actual liability documents such as a motor vehicle accident report or expert engineering reports, and also provide the court with the liability positions and arguments advanced on both sides.

When it comes to damages, you should include pertinent medical records as exhibits. Reports from treating doctors are often useful, and you want to ensure you have a relatively recent medical record that discusses a client’s prognosis and future care required. Expert opinions are also useful to include as exhibits. The motion record should answer any questions a judge may have about the injury and current status of the minor. A discussion of damages in a motor vehicle accident case should also include a discussion on threshold and the applicability of the statutory deductible, as obviously these would factor into whether or not the settlement is reasonable in the circumstances, and certainly the prospects of success if the matter were to go to trial.

One issue plaintiff counsel can face is whether or not to serve the materials on opposing counsel, given that there could be discussions that may raise issues with solicitor-client privilege. In those instances, you may wish to get opposing counsel’s formal consent to the motion for infant settlement itself, including consent to the form and content of the draft judgment (which you could attach as a schedule to the consent), as well as the proposed minutes of settlement. Given the sensitive nature of these motions, you may also wish to include in your notice of motion a request for an order sealing the motion record.

When it comes to approval of solicitor’s fees, it is important to remember that the court will also have to approve the amount of fees as part of the motion. Most personal injury lawyers are paid based on a contingency fee retainer. In Rule 7.08 motions, the court will look into whether or not this retainer is in the best interests of the minor plaintiff. This includes whether or not your fees are reasonable, taking into account the outcome, legal complexity, stage of litigation, time expended, as well as the risks assumed by the lawyer. If there are significant complexities or risks involved in the case, you should outline these in your affidavit.

Your goal when preparing the motion record should be to provide the court with all the information it needs to assess the reasonableness of the settlement. Although it is not an

adversarial motion, you should plan to put in significant time into drafting the materials. Certainly, this is not a motion you should assign to someone who has not worked on the file, as it will be hard to provide full and frank disclosure into the intricacies of the matter, which usually justifies why the matter settled for a particular amount.



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