

RULE 7
PARTIES UNDER DISABILITY

REPRESENTATION

- 7.01** A proceeding shall be commenced, continued or defended on behalf of,
- (a) a minor, by a litigation guardian;
 - (b) a person who has been declared mentally incompetent or incapable of managing his or her affairs, by the committee of the person's estate and person; and
 - (c) a person who is mentally incompetent or incapable of managing his or her affairs, not so declared,
 - (i) where the Public Trustee is committee of the person's estate and person, by the Public Trustee;
 - (ii) in any other case, by a litigation guardian, unless the court orders or a statute provides otherwise.

LITIGATION GUARDIAN FOR PLAINTIFF OR APPLICANT

Court Appointment Unnecessary

- 7.02** (1) Any person who is not under disability may act, without being appointed by the Court, as litigation guardian for a plaintiff or applicant who is under disability, subject to subrule (2).

Mentally Incapable Person

- (2) Unless the court orders otherwise, where a plaintiff or applicant,
- (a) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as litigation guardian;
 - (b) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian;

- (c) is a person in respect of whom an order was made under subsection 40(4) of the *Mental Health Act*, the guardian shall act as litigation guardian.

Affidavit to be Filed

- (3) No person except the Official Guardian or Public Trustee shall act as a litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit with the prothonotary in which the person,
 - (a) consents to act as litigation guardian in the proceeding;
 - (b) confirms that he or she has given written authority to a named solicitor to act in the proceeding;
 - (c) states whether he or she and the person under disability are ordinarily resident in Prince Edward Island;
 - (d) sets out his or her relationship, if any, to the person under disability;
 - (e) states that he or she has no interest in the proceedings adverse to that of the person under disability; and
 - (f) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

LITIGATION GUARDIAN FOR DEFENDANT OR RESPONDENT

Generally Must be Appointed by Court

- 7.03** (1) No person shall act as a litigation guardian for a defendant or respondent who is under disability until appointed by the Court, except as provided in subrule (2) or (3).

Where Minor Interested in Estate or Trust

- (2) Where a proceeding is against a minor in respect of the minor's interest in an estate or trust, the Official Guardian shall act as the litigation guardian of the minor defendant or respondent, unless the Court orders otherwise.

Defending Counterclaim

- (3) A litigation guardian for a plaintiff may defend a counterclaim without being appointed by the Court.

Motion by Person Seeking to be a Litigation Guardian

- (4) A person who seeks to be the litigation guardian of a defendant or respondent under disability shall move to be appointed by the Court before acting as litigation guardian.

Application by Plaintiff or Applicant to Appoint Litigation Guardian

- (5) Where a defendant or respondent under disability has been served with an originating process and no motion has been made under subrule (4) for the appointment of a litigation guardian, a plaintiff or applicant, before taking any further step in the proceeding, shall move for an order appointing a litigation guardian for the party under disability.
- (6) At least ten days before moving for the appointment of a litigation guardian, a plaintiff or applicant shall serve a request for appointment of litigation guardian, Form 7A, on the party under disability personally or by an alternative to personal service under Rule 16.03.
- (7) The request may be served on the party under disability with the originating process.
- (8) A motion for the appointment of a litigation guardian may be made without notice to the party under disability.
- (9) A plaintiff or applicant who moves to appoint the Official Guardian or the Public Trustee as the litigation guardian shall serve the notice of motion and the material required by subrule (10) on the Official Guardian or Public Trustee.

Evidence on Motion to Appoint

- (10) A person who moves for the appointment of a litigation guardian shall provide evidence on the motion concerning,
 - (a) the nature of the proceeding;
 - (b) the date on which the cause of action arose and the date on which the proceeding was commenced;
 - (c) service on the party under disability of the originating process and the request for appointment of litigation guardian;
 - (d) the nature and extent of the disability;
 - (e) in the case of a minor, the minor's birth date;
 - (f) whether the person under disability ordinarily resides in Prince Edward Island;

and except where the proposed litigation guardian is the Official Guardian or Public Trustee, evidence,

- (g) concerning the relationship, if any, of the proposed litigation guardian to the party under disability;
- (h) whether the proposed litigation guardian ordinarily resides in Prince Edward Island; and
- (i) that the proposed litigation guardian,
 - (i) consents to act as litigation guardian in the proceeding;
 - (ii) is a proper person to be appointed;
 - (iii) has no interest in the proceeding adverse to that of the party under disability; and
 - (iv) acknowledges having been informed that he or she may incur costs that may not be recovered from another party.

APPOINTMENT OF PUBLIC TRUSTEE OR OFFICIAL GUARDIAN

7.04 Unless there is some other person willing and able to act as litigation guardian, the Court shall appoint,

- (a) the Official Guardian, where the person under disability is a minor;
- (b) the Public Trustee where the person under disability is mentally incompetent or is incapable of managing his or her affairs, not so declared, and there is no committee of the person's estate;
- (c) either the Official Guardian or Public Trustee, where the person under disability is a minor and is also mentally incompetent or incapable of managing his or her affairs, not so declared, and there is no committee of the person's estate.

POWERS AND DUTIES OF LITIGATION GUARDIAN OR COMMITTEE

- 7.05** (1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian or committee.
- (2) A litigation guardian or committee shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the

commencement and conduct of a counterclaim, crossclaim or third party claim.

- (3) A litigation guardian or committee other than the Official Guardian or Public Trustee shall be represented by a solicitor and shall instruct the solicitor in the conduct of the proceeding.

REMOVAL OR SUBSTITUTION OF LITIGATION GUARDIAN OR COMMITTEE

7.06 (1) Where, in the course of a proceeding,

- (a) a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may, on filing an affidavit stating that the minor has reached the age of majority, obtain from the prothonotary an order (Form 7B) authorizing the minor to continue the proceeding without the litigation guardian;
- (b) a party under any other disability for whom a litigation guardian or committee has been acting ceases to be under disability, the party or the litigation guardian or committee may move without notice for an order to continue the proceeding without the litigation guardian or committee,

and the order shall be served forthwith on every other party and on the litigation guardian or committee.

- (2) Where it appears to the Court that a litigation guardian is not acting in the best interests of the party under disability, the Court may substitute the Official Guardian or the Public Trustee or any other person as litigation guardian.

DEFAULT OF PARTY UNDER DISABILITY

7.07 (1) A party under disability may not be noted in default under Rule 19.01 without leave of a judge.

- (2) Notice of a motion for leave under subrule (1) shall be served,
 - (a) on the litigation guardian or committee of the estate of the party under disability; and
 - (b) on the Public Guardian, unless
 - (i) the Public Trustee is the committee or litigation guardian, or
 - (ii) a judge orders otherwise.

DISCONTINUANCE BY OR AGAINST PARTY UNDER DISABILITY

- 7.07.1** (1) If a party to an action is under a disability, the action may be discontinued by or against the party under Rule 23.01 only with leave of a judge.
- (2) Notice of a motion for leave under subrule (1) shall be served,
- (a) on the litigation guardian of the party under disability; and
 - (b) such other persons as a judge may otherwise order.

APPROVAL OF SETTLEMENT

Settlement Requires Judge's Approval

- 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.
- (2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

Where No Proceeding Commenced

- (3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application to the court.

Notice to Public Trustee

- (4) Notice of a motion or application for the approval of a judge under this rule shall be served,
- (a) on the Official Guardian, unless
 - (i) the Public Trustee is the committee of the estate or litigation guardian of the party under disability, or
 - (ii) a judge orders otherwise; and
 - (b) where the party under disability is a defendant or respondent, on the litigation guardian or committee.

Material Required for Approval

- (5) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,
- (a) an affidavit of the litigation guardian or committee setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian or committee in respect of the settlement;

- (b) an affidavit of the solicitor acting for the litigation guardian or committee setting out the solicitor'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.
- (6) On a motion or application for the approval of a judge under this rule, the judge may direct that the material referred to in subrule (5) be served on the Official Guardian or on the Public Trustee as the Committee of the estate or litigation guardian of the party under disability and may direct the Official Guardian or the Public Trustee, as the case may be, to make an oral or written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

Money to be Paid into Court

- 7.09** (1) Any money payable under an order or a settlement to a person under disability shall be paid into Court, unless a judge orders otherwise.
- (2) Any money paid to the Official Guardian on behalf of a person under disability shall be paid into Court, unless a judge orders otherwise.

MacKinnon v. Ross, 2015 PESC 38

The Court found that Rule 7 had no application to the case because the person under disability was not a party to the proceeding and therefore outside the scope of Rule 7.

Wood (Litigation Guardian of) v. Wood 2013 PESC 11

On a motion under Rule 7, the *parens patriae* jurisdiction of the court is invoked. It is the duty of the court to protect the person under a disability and to ensure the settlement is in the best interests of the party.

An application under Rule 7.08 to approve a settlement also constitutes a judicial determination as to whether a legal account is fair and reasonable. The factors set out in Rule 57 and 58 are applicable.

Dunphy v. Registrar of Motor Vehicles, 2001 PESCTD 28

The applicant, a minor, made an application for judicial review without the assistance of a litigation guardian. The trial judge applied Rule 2.03 and

dispensed with the requirement of Rule 7.01 that a proceeding by a minor shall be commenced by a litigation guardian.