

RULE 7
PARTIES UNDER DISABILITY

REPRESENTATION

- 7.01**(1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of,
- (a) a minor, by a litigation guardian;
 - (b) a person declared to lack capacity under the *Adult Guardianship and Trusteeship Act*, or previous applicable legislation, by the guardian and/or trustee of that person;
 - (c) a person determined to lack capacity who has a duly appointed power of attorney, by the attorney of that person; and
 - (d) any other person who is under a disability, but has not been so declared or determined, by a litigation guardian.
- (2) For the purpose of this Rule, the phrase “litigation guardian” includes a litigation guardian, trustee, guardian or attorney, as applicable.

POWERS AND DUTIES OF LITIGATION GUARDIAN

- 7.02** (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.
- (2) A litigation guardian shall diligently attend to the interests of the person under disability, act solely in the best interests of the person under disability, and take all steps necessary for the advancement or protection of the interests of the person under disability, including the commencement, defence and conduct of a proceeding.
- (3) A litigation guardian, other than the Official Guardian, or the Public Guardian and Trustee, shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding.

LITIGATION GUARDIAN FOR PLAINTIFF, APPLICANT OR PETITIONER

Court Appointment Unnecessary

- 7.03** (1) Subject to subrule (2), any person who is not under disability may act as litigation guardian for a plaintiff, applicant or petitioner who is under disability, without being appointed by the court.

Affidavit to be Filed

- (2) No person, except the Official Guardian, or the Public Guardian and Trustee, shall act as a litigation guardian for a plaintiff, applicant or petitioner 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 the person has given written authority to a named lawyer to act in the proceeding;
 - (c) states whether the person and the person under disability are ordinarily resident in Prince Edward Island;
 - (d) sets out their relationship, if any, to the person under disability;
 - (e) states that the person has no interest in the proceedings adverse to that of the person under disability; and
 - (f) acknowledges that the person has been informed of their liability to pay personally any costs awarded against the person or against the person under disability.

LITIGATION GUARDIAN FOR DEFENDANT OR RESPONDENT

Generally Must be Appointed by Court

- 7.04** (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 or Counterpetition

- (3) A litigation guardian for a plaintiff or petitioner may defend a counterclaim or counterpetition 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, applicant or petitioner, 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, applicant or petitioner shall serve a request for appointment of litigation guardian, Form 7 A, 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 together 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, applicant or petitioner who moves to appoint the Official Guardian, or the Public Guardian and Trustee as the litigation guardian shall serve the notice of motion and the material required by subrule (10) on the Official Guardian, or the Public Guardian and Trustee, as applicable.

Evidence on Motion to Appoint a Litigation Guardian

- (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 the Public Guardian and Trustee, evidence,
 - (g) concerning the relationship, if any, between the person and the party under disability;
 - (h) whether the person ordinarily resides in Prince Edward Island;
 - (i) that the person consents to act as litigation guardian in the proceeding;

- (j) that the person is a proper person to be appointed, and the person has no interest in the proceeding adverse to the party under disability; and
- (k) that the person acknowledges having been informed that the person may incur costs that may not be recovered from another party.

APPOINTMENT OF OFFICIAL GUARDIAN, OR PUBLIC GUARDIAN AND TRUSTEE

7.05 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 Guardian and Trustee, where the person lacks capacity to manage their financial matters and/or personal matters, but has not been so declared; and
- (c) either the Official Guardian, or the Public Guardian and Trustee, where the person under disability is a minor and also lacks capacity as set out in (b) and (c), but has not been so declared.

REMOVAL OR SUBSTITUTION OF LITIGATION GUARDIAN

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 7 B) authorizing the minor to continue the proceeding without the litigation guardian;
- (b) a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian,

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

- (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, the Public Guardian and 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 of the party under disability; and
 - (b) on the Public Guardian and Trustee, unless
 - (i) the Public Guardian and Trustee is the litigation guardian of the party under disability, or
 - (ii) a judge orders otherwise.

DISCONTINUANCE BY OR AGAINST PARTY UNDER DISABILITY

- 7.08** (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

- 7.09** (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

- (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 Guardian and Trustee is the 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.

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 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.
- (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 Guardian and Trustee, as the guardian and/or trustee of the person under disability, and may direct the Official Guardian, or the Public Guardian and Trustee, as the case may be, to make an oral or written report stating any objections to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement.

Money to be Paid into Court

- 7.10** (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, or the Public Guardian and Trustee, 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.