

Guardianships

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As medical science has improved, so has the life expectancy of those who are catastrophically injured. With longer life expectancy has come increased financial need for those who experience these tragedies. Personal injury damage awards have increased commensurate with this new reality. In the result, it is no longer unusual to see damage awards of more than \$5 million.

These damages are payable to the person injured who is often without capacity to manage their financial affairs. It is therefore necessary to appoint guardian(s) of property to manage the victim's affairs.

THE ISSUES

As complexity of need has increased so have the issues that must be addressed in guardianships. Principal among these are:

(i) Who will manage the money?

- Are they financially astute enough?
- What is their life expectancy relative to the injured person?

(ii) Will the damage award be structured?

– Is an emergency fund to be

established to address unforeseen

needs or potential treatments? If not, why not?

(iii) How will any non-structured money be invested?

(iv) Will there be a need to purchase a new home or modify an existing home?

– Has an accessibility architect been consulted?

– What proportion of the funds will be expended on this?

– How will taxes, insurance and capital repairs be funded?

(v) What transport will the disabled person require?

– How will insurance, maintenance and replacement costs be handled?

(vi) Is a family member going to care for the injured person? Are they to be paid

attendant care costs? If so, how much and may this be modified over time?

(vii) Will the guardian(s) need to be bonded? Will they be required to

pass their guardianship accounts before the Court periodically?

(viii) What are the tax implications of the alternative settlement options?

– Meeting criteria for effective structured settlements?

– Non-structured monies?

– Using trusts?

THE PROCESS

For families who have often spent years in litigation before reaching a settlement or judgment the prospect of preparing for another court proceeding before the damage award can be accessed is often frustrating. However, guardianships are now routinely likely to last decades and it is imperative to have them established properly from the outset.

The process can proceed smoothly and with relative speed so long as the appropriate preparation is done.

If you have any questions about issues raised in this memo or any other capacity, trust or estate litigation concerns, please contact the members of our Trusts, Wills and Estates practice.

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Clare Burns is an experienced litigator who acts in complex and highly sensitive matters. Her practice focuses on trusts, estates and capacity litigation. In 2014, Clare received the Lexpert Zenith Award for her demonstrated excellence and thought leadership in trusts and estates.

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