

Protecting catastrophically injured person after the settlement

Car accident victims suffering from a catastrophic injury often cannot conduct their own affairs. If there is no power of attorney, courts must approve of the person being appointed as



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guardian and the management plans. Any settlement agreement with the insurance company must also be approved by the court. To that point the system in Ontario effectively protects the best interests of the incapable person. The question is what about afterwards?

A recent Ontario case, *Timbers Estate v. Bank of Nova Scotia*, illustrates the vulnerability of those who are victims of a catastrophic injury.

Jeffrey Timbers was in a car accident in 1993 and remained in a coma until his death in 2005. Gordon Wood, his brother-in-law, was appointed his guardian of property and managed the money received from the insurance company. When Timbers died, his daughter became the trustee of his estate. After reviewing the documents, she came to the conclusion that her uncle, Gordon Wood, stole settlement money from the structured settlement payments. In her capacity as estate trustee she sued for breach of trust in the amount of \$900,000.

While the case itself is interesting, for this article, I want to address what steps might have been taken to protect Timbers after the court's approval of the settlement agreement.

While the public guardian and trustee may make spot checks, there is no one really watching the guardian of property on a regular basis to ensure that the money is used for the benefit of the injured party. Remember that in personal injury cases there is quite often a lot of money involved. In cases of truly catastrophic impairment, this can mean a payout of millions of dollars.

A structured settlement is a type of insurance product called an annuity that guarantees the injured person a fixed stream of tax-free payments, usually for life. What can or should family members do to protect the person under disability and ensure that the guardian of property does not take advantage of the situation? In my experience the answer lies with the guardian of property having to pass his accounts.

Making the guardian pass his or her accounts means that the guardian will have to show all the records of what transpired with the property of the incapable person while the guardian of property was in charge. It will allow those who brought the motion to compel a passing of accounts to verify if the guardian of property has properly managed the incapable person's money. If the objections are not answered, the matter goes to trial. The three points in time where one might ask a court to order that a

guardian of property pass his or her accounts are as follows: (a) Application to appoint guardian of property. When there is a catastrophic personal injury resulting in the accident victim becoming incapable, a motion to appoint a guardian of property will take place. At that point, family members can ask for the order to provide that the guardian of property pass his or her accounts at regular intervals; (b) Motion for Approval of Settlement. Any settlement negotiated on behalf of an incapable person has to be approved by the court. At that point, family members can also ask the court to include a provision in the judgment that the guardian of property pass his or her accounts at regular intervals; (c) Motion seeking leave to compel an accounting. The guardian of property is a fiduciary whose powers and duties must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. That duty includes an obligation to keep accounts of all transactions involving the property. Arguably, the fiduciary's duty to consult with supportive family members and friends includes an obligation to let them know about the management of property. Failure to share what's going on with the money should be a red flag of concern and, arguably, gives reasonable cause for a concerned family member or friend to consider bringing an application for leave to compel the guardian of property to pass his or her accounts.

This short review of the law should not be

taken as legal advice. Cases often turn on their specific facts. If the reader believes this topic to be relevant to a legal matter in which they are involved, nothing replaces retaining a competent lawyer who will do a thorough analysis of the law and the fact situation to provide proper advice.

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MONTREAL

Kelp Caviar new kosher substitute from Canada

A Canadian caviar substitute made from seaweed has received kosher certification from the Orthodox Union (OU). Kelp Caviar, based in Montreal, offers nine flavours of its zero-calorie vegetarian caviar substitute: sturgeon, salmon, lumpfish orange, lumpfish yellow, truffle, wasabi, balsamic and chili. The products are available for private label and under house brand. "By becoming certified kosher by the OU, we have opened many new opportunities for our export markets, including, but not limited to, the United States, Israel, France and South Africa," said Naor Cohen, general manager of Kelp Caviar, adding that "kelp is the only caviar product on the market that can be used as an ingredient in your favourite dishes; it will not break down and will resist temperatures up to 300°C (500°F)."

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