

SUPREME COURT OF NOVA SCOTIA

P.M.6A

Practice Memorandum No. 6A

Infant Settlement Precedents

The Honourable Mr. Walter R. E. Goodfellow, in consultation with a committee of Nova Scotia Barristers' Society composed of Mr. Robert M. Purdy, Q.C., Ms. Melanie Comstock, Mr. Sean F. Layden, Q.C., Mr. Joey D. Palov, Mr. Peter C. Rumscheidt, and Mr. Raymond F. Wagner, prepared precedents for applications or motions to approve a settlement on behalf of a child, approve fees and expenses, and set up a trust for the proceeds.

These were revamped in the style now used by the court, and the results are attached to this practice memorandum.

The precedents may be consulted when a settlement is sought to be approved. The circumstances of these cases vary so much that counsel should always ask whether evidence or terms in the precedents need modification, replacement, or expansion.

Adopted by the court on May 10, 2012.

Joseph P. Kennedy
Chief Justice of the Supreme Court
of Nova Scotia

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[use when no action started]

20

No.

Supreme Court of Nova Scotia

Between: [complete heading as required by Rule 82 - Administration of Civil Proceedings]

[name] as litigation guardian for [name] Applicant

and

[name] Respondent

Notice of Application in Chambers

To: [name of respondent or respondent's counsel]

The applicant requests an order approving settlement for a person under nineteen

The applicant is applying to a judge in chambers for an order declaring that the parties made a conditional settlement agreement, approving the settlement agreement, providing the terms under which proceeds are to be paid to, or for the benefit of, [name of child] , and approving the account of the applicant's counsel.

The applicant started this application by filing this notice on the date certified by the prothonotary.

Grounds for order

The applicant is applying for the order on the following grounds:

- 1 [name of child] is _____ years old. [*He/She*] [*was injured in a motor vehicle accident on date/other basis for claim*] .
- 2 The respondent [name] was [*the driver of the motor vehicle that caused the injury/ other*] . The respondent [name] was [*the owner of the motor vehicle/other*] .
- 3 An agreement has been made for settling the claim of [name of child] against the respondent[s] .

- 4 The agreement is subject to approval by the court.
- 5 Counsel for [name of child] , under instruction of [name of litigation guardian] [*and* if child is able to instruct, name of child] , provided services on the claim and its settlement.
- 6 The applicant relies on the Rules in Rule 36 - Representative Party about settlements by representative parties, trusts for represented parties, and approval of counsel's accounts.

Evidence supporting application

The applicant offers the following affidavits in support of the application: affidavit of the litigation guardian, the affidavit of counsel, [and the affidavits of justification of _____ and _____].

A copy of each affidavit is to be delivered to you with this notice, and further affidavits may be delivered before the deadlines provided in Civil Procedure Rule 5 - Application.

You may participate

You may file with the court a notice of contest, and any affidavits upon which you rely, no more than five days before the date of the hearing. Filing the notice of contest entitles you to notice of further steps in the application, including notice of further affidavits.

Time, date, and place

The application is to be heard by the judge in chambers at _____ [a.m./p.m.] on _____, 20____ in the [Courthouse/Law Courts] _____ Street, _____, Nova Scotia. You have the right to be present and to be represented by counsel or to act on your own. If you are not present, the judge may proceed without you.

Possible order against you

The judge may grant a final order on the application without further notice to you if you fail to deliver your notice of contest on time, or if you or your counsel fail to appear in chambers at the above time, date, and place.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the prothonotary
Street, , Nova Scotia (telephone #).

When you file a document you must immediately deliver a copy of it to the applicant and each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The applicant designates the following address:

[counsel's address]

Signature

Signed , 20

Name of counsel

Prothonotary's certificate

I certify that this notice of application was filed with the court on , 20 .

Prothonotary

[use when no action started]

20

No.

Intended Proceeding in the Supreme Court of Nova Scotia

Between:

[name] as litigation guardian of [name] Applicant

and

[name] Respondent

Litigation Guardian’s Statement

I [name] consent to be the litigation guardian of [name] who is [relationship to litigation guardian] . I have appointed [counsel’s name] to act for us. I have no interest in this proceeding adverse to that of the person I represent as litigation guardian, and I acknowledge that, although costs are normally awarded for or against the party represented by a litigation guardian and not the guardian, costs may be awarded against a litigation guardian who abuses the court’s processes.

Signature

Signed _____, 20

Name

[use when action not started or defence not filed]

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name]

[title in proceeding]

and

[name]

[title in proceeding]

Designation of Address for Delivery

[name of respondent] designates the following address for delivery of documents:

Documents delivered to this address are taken to be received when delivered.

Additional contact information has been given to the prothonotary.

[If the address of the respondent's lawyer is designated include *I am counsel for the respondent[s] in this proceeding.*]

Signature

Signed _____, 20

Name

[use when action was started]

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] Plaintiff

and

[name] Defendant

Notice of Motion

To: defendant at designated address or defendant's counsel

Motion

The litigation guardian in this proceeding moves for an order declaring that the parties made a conditional settlement agreement, approving the settlement agreement, providing the terms under which proceeds are to be paid to, or for the benefit of, [name of child] , and approving the account of plaintiff's counsel.

Time and place

The motion is to be heard by a judge on _____, 20 at _____ [a.m./p.m.] in the [Courthouse/Law Courts] , _____ Street, _____, Nova Scotia. The moving party has set the motion for hearing in a half-hour or less in chambers. The moving party says that the motion will not require more time.

References

The moving party relies on the following legislation, Rules, or points of law: The Rules in Rule 36 - Representative Party about settlements by representative parties, trusts for represented parties, and approval of counsel's accounts.

Evidence

The evidence in support of the motion is as follows: the affidavit of the litigation guardian [./and] the affidavit of counsel [./and] [the affidavits of justification of _____ and _____] .

Possible order against you

You may file an affidavit and a brief, attend the hearing of the motion, and state your position on whether the proposed order should be made. If you do not attend, the judge may grant an order without further notice to you.

Signature

Signed _____, 20____

Name of counsel

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Affidavit of [name of litigation guardian or other proposed trustee]

I [make oath/affirm] and give evidence as follows:

- 1 I am the litigation guardian for [name] /other. [Note: The precedents assume that the litigation guardian proposes to be the trustee of the settlement fund. If not, an affidavit from the proposed trustee is also necessary.]
- 2 I have personal knowledge of the evidence [sworn to /affirmed] in this affidavit except where otherwise stated to be based on information and belief.
- 3 I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

Child's background

- 4 [name] is [] years old and was born on [], as shown by the birth certificate attached to this affidavit and marked Exhibit "A".
- 5 [name] resides at [] in [], Nova Scotia with [name] other residents and state their relationship to the child] .
- 6 etc. [Provide relevant, personal information such as parents' employment, parents' marital status and address or addresses, child's schooling, child's relationship with each other person in the residence.]

For example:

- Joan Ann Smith resides at 4321 Main Street ... with her mother, my wife Jocelyn Smith, her brother and sister, Randall, four, and Beatrice, two, and me.
- I am a postal worker employed with Canada Post for eleven years since I graduated from high school in June, 1990.
- My wife is a registered nurse, but she presently works at home taking care of the children full-time.

Collision

[Describe how the collision occurred and the mechanics that led to the injuries. Include sources for hearsay.]

For example:

- Joan Ann was injured in a two vehicle car crash on June 23, 2006 when the car in which she was a passenger was travelling south on Ridge Street near the intersection with Main.
- My knowledge of the car crash is based on the information of Reginald Smith, my brother-in-law and the driver of the car in which Joan Ann was a passenger; I believe what Mr. Smith told me to be true.
- Mr. Smith's car collided with a car owned and driven by the defendant.
- The defendant's car crossed the centre line and hit the front driver's side corner of Mr. Smith's car.
- Joan Ann was seated in a booster seat restrained by a seat belt.
- She suffered injuries as a result of the force of the collision and the effectiveness of the seat belt restraint.

Injuries

[Describe injuries, their physical effects, the consequences for the child's comfort and functioning, the history of recovery, and remaining effects. Include sources for hearsay.]

For example:

- Both my wife and I have read the medical reports obtained by our lawyer, Donald Brown, and I have been in regular communication with our family doctor, Dr. Ralph Withers; I believe the information in the reports and the information from Dr. Withers to be true.
- Joan Ann's left arm was broken in two places and her most serious injury was a fracture of her pelvis.
- Her injuries required hospitalization for ten days followed by treatment and a program of physiotherapy.
- A cast on her arm was removed four weeks after the accident, and she remained immobile as a result of the pelvic fracture for a period of three and one half months.
- Initially our daughter suffered a great deal of pain and had concerns with traveling in a motor vehicle, plus considerable difficulty with mobility due to her pelvic fracture.
- The cuts and bruises have all healed and have left no permanent disfigurement, and from my own observations, she suffers no adverse effects from the injury to her left arm; she is left-handed and has no difficulty with writing.
- Her level of achievement at school has returned to that attained by her prior to the accident.
- While the injury to her pelvis has taken some considerable time to heal and she occasionally finds herself tired after strenuous exercise, she is able to participate in all activities that she previously engaged in prior to the accident, including bicycling, hiking, girl guides camp, and music.

Consent and Undertaking

10± I have read the draft order to be filed in support of my motion for approval of the settlement and am willing to act as trustee.

11 I have signed an undertaking to be filed in support of the motion.

12 [Name of counsel] , explained to me the duties that will be imposed upon me if the draft order is granted and the duties that follow from the undertaking.

Settlement and expenses

- 13± I accept counsel's opinion that payment of \$ _____ in exchange for dismissal and release is a fair and reasonable settlement in the circumstances and one that is in the best interests of [name of child] .
- 14 I seek no trustee's fees.
- 15 I seek reimbursement out of the settlement of expenses incurred by me for [name of child] : [List each expense or rewrite the paragraph to incorporate a statement of the expenses as an exhibit.]

Counsel's services and account

- 16 On behalf of [name of child] I entered into a fee agreement with counsel, under which [describe terms] .
- 17 I have been provided with a detailed statement of the time and services performed by counsel and the account dated _____, 20 ____ .
- 18 Counsel advised me that I have a right to seek independent legal advice about the settlement, counsel's account, and the proposed disbursement of funds.
- 19 I approve of the account and I support counsel's request for court approval.

Trustee's background

- 20 I am _____ years of age.
- 21 My education consists in _____ .
- 22 I am a [occupation] , I work at _____ , and I have been employed in the field for _____ years.

Financial Responsibility

- 23 I propose to guarantee my personal liability as trustee [*with a bond issued by name of surety company./with a bond executed by me and by _____ and _____ as sureties, who will swear or affirm affidavits of justification.*]

[Provide evidence of the trustee's net worth. If a bond from a surety company is not offered, also provide evidence of the ability of each surety to respond to a claim.]

For example:

- My wife and I own our home in joint tenancy and the most recent municipal assessment for our property is in the amount of \$140,500; it is worth at least that.
- As of our last mortgage statement, which was dated _____, the balance outstanding on our mortgage was \$61,500, giving us an equity of about \$79,000 in the home.
- In addition, we have RRSPs, savings, and similar assets, with a value of about \$85,000. Our outstanding liabilities on credit cards and our credit line with a bank total about \$11,000; we have no other liabilities.
- Our net worth is \$153,000, and I am prepared to execute a bond in such amount as may be directed by the court; I understand that it may be 1.25 times the amount of the trust funds (\$39,675 x 1.25 = \$49,593.75).
- My wife, Jocelyn Smith, is prepared to be a surety and she will provide an affidavit of justification.
- My sister-in-law, Mary Elizabeth Johnson, has also agreed to act as surety and to provide an affidavit of justification.

Plan for investment

[Describe how the proposed trustee plans to invest the trust money.]

For example:

- I propose, if appointed trustee, to invest the net proceeds one half in a guaranteed investment certificate with an institution covered by Canada Deposit Insurance Corporation and one half in a mutual fund with one of the major investment companies in Canada.

Sworn to/Affirmed before me)
 on _____, 20)
 at _____,)
)
)
)
 _____)

 Name of litigation guardian

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Affidavit of Counsel

I [make oath/affirm] and give evidence as follows:

- 1 I am [name] , counsel for the plaintiffs.
- 2 I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information and belief.
- 3 I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
- 4 The plaintiffs seek approval of a proposed settlement for [name of child] in the amount of \$.

Medical evidence

- 5 I obtained an accident report and medical reports from [names of physicians] .
- 6 The most pertinent reports are attached to this my affidavit as Exhibits ["A", "B",] .
- 7 As revealed in the accident and medical reports:
 - (a) [name of child] suffered [summarize injuries] on [date of accident] ;
 - (b) [summarize progress after injury] ;
 - (c) [summarize child's present condition] .

Settlement

8 The parties were able to reach an agreement for settlement subject to approval by the court, which agreement is evidenced by the documents attached as Exhibit "X".

9 The terms of settlement are summarized as follows:

Opinion on value of claim

[Provide counsel's opinion on quantification of each head of loss. See Rule 36.13(5)(c).]

Opinion on liability

[Provide counsel's assessment of the case for the child including liability generally, causation, heads of loss, and the intangible expenses of going to trial. Each risk should be appraised, such as "high, medium, or low". See Rule 36.13(5)(d).]

Opinion on settlement

12+ I have reviewed the medical reports and have carefully considered case law for guidance, and I have concluded that, in all the circumstances, the proposed settlement is in the best interests of [name of child] .

Approval of Account

13 I agreed to provide services to the plaintiffs [*on the basis that my firm would be paid at standard rates per hour/on the contingency agreement attached and marked Exhibit " " /other*] .

14 Attached and marked Exhibit "Y" are records of the time devoted to the case by me and other members of my firm, which show work done, standard rates, and the extensions.

15 Attached and marked as Exhibit "Z" is a statement of the disbursements paid by my firm for the plaintiff.

16 Attached and marked Exhibit "XX" is a copy of the final account, the original of which has been delivered to [name of litigation guardian] [*;this account includes an adjustment to cover future work required for completion of the services/discloses costs covered by the defendant, such as the expense of the motion for approval/other*] .

[Provide further evidence on each of the subjects in Rule 77.13(2) that are important in this case:

- "counsel's efforts to secure speed and avoid expense for the client"

- "the nature, importance, and urgency of the case"
- "the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid"
- "the general conduct and expense of the proceeding"
- "the skill, labour, and responsibility involved".]

Sworn to/Affirmed before me)
 on , 20)
 at ,)
)
)
)

Name of counsel

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Consent of Young Person

I, [name of young plaintiff] , am [] teen years old. [Name of counsel] advised me about the settlement sought to be approved and the proposed terms of the trust. I agree that the settlement ought to be made on my behalf, and I agree with the terms of the proposed trust. I have a copy of the undertaking to account signed by [name] .

Signed [] , 20 []

Name of young plaintiff

Witness

Note: Rule 36.13(4)(b) requires a consent from a child who is over sixteen. The consent may be advisable for younger children who are capable of instructing counsel.

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Undertaking to Account

I undertake to account to the court and to [name of child] for my administration of a trust resulting from a settlement of this proceeding by filing with the court and delivering to [name of child] a statement of receipts and disbursements at each of the following times:

- whenever a judge directs
- when the trust terminates
- no more than six months after the nineteenth birthday of [name of child] .

I also undertake to abide by any terms the court includes in an order appointing me to be trustee.

Signature

Signed _____, 20

Name of trustee

Witness
Print name:

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Counsel's Certificate

I explained to [name of trustee] the duties [he/she] would have if the draft order appointing [him/her] trustee for [name of child] is granted, and I explained the duties [he/she] will have under the undertaking to account.

Signature

Signed _____, 20

Name of counsel

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Affidavit of Justification

I [make oath/affirm] and give evidence as follows:

- 1 I am [name and relationship to the child and the trustee] .
- 2 I have personal knowledge of the evidence [sworn to/affirmed] in this affidavit except where otherwise stated to be based on information and belief.
- 3 I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
- 4 I reside at , postal code .
- 5 Attached as Exhibit "A" is my net worth statement.
- 6 The net worth statement is accurate at today's date, and it is based on information I know personally except the following persons, whom I believe, have provided me with information on the following subjects: [The information and belief could be of a bank official on balance of loans, an investment adviser on value of savings, an appraiser on value of property, and so on.]

Sworn to/Affirmed before me)
 on , 20)
 at ,)
)
)
)

Name of surety

Net Worth Statement

[Name]

[Date]

Assets Note: Do not include property jointly owned or controlled, such as a home in joint tenancy, a joint bank account, or a joint investment account, unless both or all joint parties are to be liable as trustee or surety.

Value of home at Nova Scotia	Street,	\$
RRSPs		\$
Other investments, namely		\$
Car		\$
Personal property		\$
other [specify]		\$

Liabilities

Mortgage on home		\$
Credit cards		\$
Over draft		\$
Line of credit		\$
Car loan		\$
Other term loan		\$
Other liabilities [specify]		\$

Net Worth \$

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Bond for Trustee's Obligations

Purpose of bond

This bond is signed, sealed, and delivered to the court in support of the motion of [name of litigation guardian] for approval of a settlement on behalf of [name of child] and for the appointment of [name of trustee] as trustee.

Bond

We [name of trustee] , [name of surety] , and [name of surety if there is another] jointly and severally bind ourselves to pay to [name of child] the sum of \$ [1.25 times the amount of the trust fund] , or such lesser amount as the court may permit, payable if the trustee fails to abide by the order appointing [him/her] , fails to abide by another order made in connection with the trust, fails to manage the trust in accordance with law, fails to distribute trust property in accordance with law, or fails to account to the court and to [name of child] .

Termination of Bond

This bond is void only when the trust terminates and only if the trustee abides by the order appointing [him/her] and any other order made in connection with the trust, manages the trust funds in accordance with law, distributes it in accordance with law, and accounts to the court and to [name of child] .

Signed, sealed, and turned
over for delivery to the
court [see note] , 20

_____(Seal)
Name of proposed trustee

Subscribing Witness
Print name:

_____(Seal)
Name of surety

_____(Seal)
Name of surety

[If signed by recognized surety company, remove signature of trustee and second surety. If signed by trustee and sureties, file affidavits of justification.]

[The date is to be filled in when the subscribing witness signs. It is the day when all parties have signed and sealed, and counsel is ready to make delivery to the court.]

20

No.

Supreme Court of Nova Scotia

Between:

[name] as litigation guardian for [name] [title in proceeding]

and

[name] [title in proceeding]

Order Approving Settlement and Establishing Trust

Before the Honourable Justice [name or blank] in chambers

The court is satisfied that a settlement between the parties to this action by which \$ is paid for the benefit of [name of child] , who is years of age, is in [his/her] best interests.

The court is also satisfied that [name of proposed trustee] is a fit person to act as trustee of the settlement funds for [name of child] .

On the motion of as counsel for , the following is ordered:

- 1 It is declared that the parties made a settlement agreement, by which the defendant pays the sum of \$ for the benefit of [name of child] in exchange for a general release of the defendant from all claims made by the child [if an action, *and an order dismissing this proceeding*] .
- 2 The settlement is approved.
- 3 [name] is appointed trustee of the settlement fund for the benefit of [name of child] .
- 4 Delivery of a bond signed by [name of surety company or names of trustee and sureties] is now accepted by the court.

OR

- 4 This order is effective only when [name of surety company] delivers a bond to the court in the form attached to this order.
- 5 The litigation guardian is authorized to bind the plaintiff to a release by signing it and delivering it to the defendant.
- 6 Counsel's fees and disbursements are approved in the amount of \$ _____, and counsel may deduct that amount from the settlement fund. [If fees are based on a contingency agreement this paragraph should include the calculation and recognize the treatment of costs paid by the defendant and any discount allowed by counsel.]
- 7 The litigation guardian's expenses are approved in the amount of \$ _____, and counsel may reimburse that amount from the settlement fund.
- 8 Counsel must pay the balance of \$ _____ to the trustee, who is directed to deal with it as follows:
- (a) safely invest, and keep invested, the money in investments permitted by law for the investment of trust funds;
 - (b) use such of the income, and, if the income is insufficient, such of the principal as the trustee finds advisable for the following expenses:
 - (i) to reimburse expenses that the trustee incurs in administering the trust and that are approved by the court,
 - (ii) to pay for uninsured medical treatment and care arising from the injuries for which the settlement fund was paid,
 - (iii) [other purposes may be included if they are justified by evidence and are beyond those that would normally be provided had there been no injury] ;
 - (c) manage the trust funds according to law;
 - (d) pay the balance to [name] when [he/she] reaches the age of majority or, if [he/she] should die or become unable to manage [his/her] affairs, to such person as a judge directs;
 - (e) account as the trustee has undertaken to do.
- 9 An interested person may make a motion to change the terms of this order or for directions.

10 *[This action is dismissed when the settlement funds are delivered to counsel for the plaintiff./The claims of name of child are dismissed when the settlement funds are delivered to counsel for the plaintiff and the claims of other parties remain to be determined.]* Note: Do not include if the order is sought by notice of application rather than by motion in an action.

Signed _____, 20

Prothonotary

CONSENTED TO:

as counsel for the
[applicant/plaintiff]

as counsel for the
[respondent/defendant]