

THE HONOURABLE WALTER R.E. GOODFELLOW

AN APPLICATION TO APPROVE AN INFANT SETTLEMENT
PRECEDENTS (Revised December 11, 2010)

ACKNOWLEDGMENT: This revision would not have been possible without the time, effort and assistance of the Nova Scotia Barristers Society Revision Committee. Chair: Robert M. Purdy, Q.C., Members Melanie Comstock, Sean F. Layden, Joey D. Palov, Peter C. Rumscheidt and Raymond F. Wagner.

EXPLANATORY NOTES
SPECIFIC REFERENCES

A.	GENERAL	1
B.	LITIGATION GUARDIAN STATEMENT	2
C.	PROPOSED TRUSTEE'S AFFIDAVIT	3
D.	PROPOSED TRUSTEE'S UNDERTAKING TO ACCOUNT	3
E.	LAWYER'S CERTIFICATE	3
F.	LAWYER'S AFFIDAVIT	3
G.	BOND	4
H.	ORDER	5
I.	AFFIDAVIT OF JUSTIFICATION	6
J.	CASE REFERENCES	7
K.	EXTRACT REGARDING FEES – NSBS CODE OF ETHICS	10

A. GENERAL

1. These precedents have been approved by the Nova Scotia Supreme Court and in any application where there is a departure, the specifics of such should be brought to the attention of the Justice before whom the application for approval is placed.
2. The Chambers Justice presiding will determine the requirements of the motion. The Chambers Justice will also make his/her determination with respect to costs.
3. Please note that the precedent lists two parties as plaintiffs. First, the infant by the infant's litigation guardian and, secondly, a parent or other adult. It is sufficient when you are applying for a settlement approval where no limitation period considerations exist to have the heading recite the one party, the infant, by the infant's litigation guardian. However, it can be a dangerous precedent in a normal proceeding. You run a risk that if only the infant is a plaintiff, the issue of whether or not the infant can recover for special damages incurred may arise and that problem is best and easily avoided by making certain your precedent lists two plaintiffs.
4. As in any application, the notice should recite the authorities relied upon and where the application is specifically pursuant to **CPR 36**, the relevant portions of that **Rule** should be cited.
5. A number of the precedents which I have reviewed use a notice of application or notice of motion. **CPR 36.13** states approval by making a motion. **CPR 36.15** dealing with approval of counsel's accounts speaks of "must make a motion" and where the representative seeks payment, **CPR 36.16(2)** speaks of "may make a motion" and **CPR 36.16.1(1)** and (3) speak in terms of "must make a motion" or if there is no proceeding, by starting one under **Rule 5 – Application**. The practice to follow, therefore, is a notice of motion. The form to be followed is form 23.03 commencing at page 5719 of the **Civil Procedure Rules**. Counsel are expected to file a brief reciting recent authorities dealing with a quantum of damages, et cetera, and this is normally

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6. **Infant Over the Age of 16.** CPR 36.09(2) creates a new duty, namely, for the litigation guardian to keep an Infant over the age of 16 fully informed. The consent of an Infant over the age of 16 is still required; however, CPR 36.13(4)(b) contains a new provision indicating an explanation is required if the Infant does not consent plus there is a required explanation as to why where an Infant is 16 years-of-age or older settlement does not await the Infant reaching majority.

B. LITIGATION GUARDIAN STATEMENT

1. CPR 36.02 (3) mandates this wording for the heading and has discarded the use of "infant". Nevertheless, inclusion of the word "infant" is more descriptive and recommended.

2. Consent to act as litigation guardian CPR 36.07 (5)(a).

3. The requirement of filing a copy of the Infant's birth certificate remains CPR 36.13(4)(a). This is a specific requirement of the settlement application CPR 36.13(3). While not necessary, it would be good practice to file a copy of the birth certificate at the outset with the Litigation Guardian's Statement.

4. It is a requirement that the litigation guardian appoint counsel and confirm that appointment CPR 36.04.

5. The litigation guardian statement precedent is actually Form 36.07 at page 5731 of the CPR's.

6. If the Infant is 16 years of age or more, the litigation guardian must keep the child informed of the proceedings and consult the child before making any decisions that affect the child and encourage the child to consult directly with counsel. (See CPR 36.09(2)). If the Infant is over 16 years of age, compliance with this requirement should be contained in the proposed Trustee's Affidavit.

C. PROPOSED TRUSTEE'S AFFIDAVIT

1. Where the proposed trustee has in fact been the litigation guardian, there is an absolute duty to advise each party to the action of the child's date of birth (CPR 36.09(5)) and this can be best complied with by filing a copy of the birth certificate at the outset and at that time the ethical obligation arises when filing anything with the Court, to provide a copy to all other parties.

2. The Court is to be provided with an affidavit of the litigation guardian. CPR 36.13(3). You will note it is broken down into headings. The factual situation in each case will govern. However, the Court, in determining if the settlement is in the best interests of the Infant, will normally require basic information that produces a strong comfort level that the litigation guardian fully understands what has taken place and the obligations being assumed as trustee.

3. When presenting an investment strategy counsel should be aware that the riskier the investment the more difficult it will be to obtain approval. The trustee should consider attaching as an exhibit a letter from the proposed investment advisor explaining the strategy or provide details of the planned investment in the affidavit.

D. **PROPOSED TRUSTEE'S UNDERTAKING TO ACCOUNT**

1. This is a mandatory requirement of CPR 36.14(2).

E. **LAWYER'S CERTIFICATE**

1. This is a mandatory requirement of CPR 36.14(2)(c). It specifically requires that there be a certificate signed by a lawyer.

F. **EXPLANATORY NOTES – LAWYER'S AFFIDAVIT**

1. A draft affidavit of the solicitor is attached and, again, the individual factual situation will prevail but certain aspects are common to every application, i.e., a statement that it is in the lawyer's opinion the settlement is in the best interests of the Infant.

2. Payment under a contingency fee agreement can only be if the agreement conforms with **CPR 77.14(4)** and **CPR 77.14(5)** (See **CPR 77.14(6)**).
3. If the fee arrangement is other than a contingency fee agreement, set out the basis and approval by the Trustee.
4. Lawyers are expected to produce time sheets in all applications giving complete detail of the description of the work performed, the time and hourly rate for all legal services, including that of any associates or paralegals.

G. **BOND**

1. **CPR 36.14(4)** directs that the terms of trust must require a Bond. Previously the amount of the Bond was double the funds to be administered in the trust, however, that has been reduced to "an amount one and one-quarter (1 1/4) times the amount of the Trust Fund or value of Trust property. The Bond must be by a recognized surety company or by the Trustee and one or more Sureties who justify by affidavit, showing their total net worth which must be equal or greater than the amount of the Bond.
2. There must be one or more Sureties unless the Court waives the requirement for a Bond or Sureties on the limited basis outlined in **CPR 36.14(5)**.
3. The bond is payable to the Infant. Counsel should note that when you are dealing with an incompetent person the situation is different as the statutory requirements of Section 8 of the *Incompetent Persons Act*, R.S. c. 218 apply to an incompetent person's guardian.
4. Frequently only legal fees remain to be paid from the settlement funds. If other expenses are sought to be paid, particulars should be recited. The Bond is to be based on the net amount, that is the actual amount subject to trust.

5. The proposed Trustee should exhibit some thought has been given to an investment strategy. The better practice is to recite precisely what is intended as to the placement of the Trust Funds. Some justices have insisted upon this practice if the Infant is close to majority.

6. Counsel should be aware that the Public Trustee may be willing to act as the Trustee and the Public Trustee does not have to be bonded. This usually arises where a family member does not qualify as a surety or qualified sureties are necessary but not available.

NB: The Bond in an Infant settlement has a time limit, ie. age of majority, and in almost every circumstance the personal Bond of the Trustee and a Surety is preferable than incurring the cost of utilizing a surety company. In addition to the annual fee for the Bond, the surety company will require an Order to discharge the Bond and this will require at the termination of the Trust the cost of an application to secure the discharge. In most cases it is advantageous to the Infant to avoid annual fees and additional, probable legal fees.

H. ORDER

1. If the Infant is over the age of 16 years, the Infant's consent in writing must be filed CPR 36.13(4)(a) and there should be a recital of the consent contained in the order.

2. The consent is not required to be in a separate document.

3. Occasionally we find orders without any consent or any indication that the defendant has any knowledge whatsoever of the motion or claim, or that any reasonable effort was made where an insurance company is involved to inform the insured. If the defendant is not personally consenting or there is no lawyer consenting on behalf of the defendant, then you should satisfy the Court that the Defendant knows and agrees or why the specific consent of the defendant or his lawyer should not, in the circumstances, be required and that the Court should accept the consent of, for example, the insurance representative.

4. A bond is mandatory, **CPR 36.14(4)**. It **must** be filed requiring an undertaking to enter into the mandatory bond and the order is not operative until this is complied with.

5. In exceptional circumstances counsel may want to seek Court approval for application of the trust funds to provide for education and maintenance in addition to medical needs (see paragraph 3(c) of the order).

6. The affidavit should indicate that the litigation guardian has been provided with a copy of the solicitor's statement of account and has approved or commented otherwise.

I. **AFFIDAVIT OF JUSTIFICATION**

1. The precedent envisions two Sureties, the Infant's mother, Jocelyn Smith and the additional Surety, Mary Elizabeth Johnson.

2. The particulars contained in the proposed Trustee's Affidavit, ie. Joint Tenancy ownership, et cetera, would probably eliminate the need for a separate Affidavit of Justification by the Infant's mother, Jocelyn Smith.

3. The use of a schedule is a convenient way of highlighting the assets/liabilities: however, alternate methods including spelling it out in the body of the affidavit are quite acceptable.

4. Note requirement of **CPR 36.14(4)**.

5. When a surety or sureties are required, something more than a blank statement of net worth should be provided. The affidavit is one of justification and a draft form is attached.

J. CASE REFERENCES

Legere v. Hamilton, [1992] N.S.J. No. 71, 111 N.S.R. (2d) 411 (N.S.T.D.). The infant plaintiff, by his guardian *ad litem*, sought approval under rule 6.08, of an infant settlement for injuries suffered in a car accident. *Held*, dismissing the application, that:

1. the application, having been made *ex parte*, did not comply with rule 6.08
- **2. the draft order did not contain a clause dispensing with a bond on the appointment of the trustee-guardian of the infant's estate**
3. the background of the proposed trustee-guardian was insufficiently documented
4. the consent of the proposed trustee-guardian was not filed
5. the medical report was out of date
6. the draft order contained only a global sum for legal fees and disbursements. The court discussed the differences between the guardian *ad litem* and a trustee-guardian.

**** Legere v. Hamilton** was decided in 1992 well before the adoption by the Supreme Court of infant settlement precedents 11 December 1997. The precedents require a bond by the proposed trustee/guardian. The discretion in the Court is to determine whether a surety(s) is required and, if so, the requirements. CPR 36.14 deals with a settlement that produces a fund and requires the appointment of a trustee. Terms of the trust must provide a bond in the amount of one and one-quarter times the amount of the trust fund. It may be provided by a recognized surety company or by the trustee with one or more sureties. Before pursuing a bond by a recognized surety company, carefully assess the cost of such bond and bear in mind that the surety company will continue the bond with its annual fee until such time as there is an Order discharging the bond. This usually means an application will be necessary for such discharge and this adds additional legal fees and disbursements which are

generally avoided where the trustee provides a personal bond with one or more sureties.

CPR 36.14(5) provides guidance when the judge may waive the requirement for a bond or surety(s).

Pitchuck v. Tricon Global Restaurants (Canada) Ltd., [2004] N.S.J. No. 422, 227 N.S.R. (2d) 340, 2004 NSSC 224. Pitchuck was seriously injured when he fell through a roof. His guardian applied for approval of the settlement. *Held*, settlement and fees approved. The contingency fee percentage was on the net recovery, which should not include disbursements or party-and-party costs.

CPR 36.15 spells out with clarity the requirements and necessity of a motion to approve counsel's legal fees and disbursements if they are to be paid out of the trust funds. Similarly, a representative (trustee) who wishes to be paid for services from the trust funds must make a motion for permission. **CRP 36.16**.

Harnish v. Perry Rand Ltd. (1994), 134 N.S.R. (2d) 145. This case deals with the contingency fee agreement and the position of party-and-party costs.

Bodhaine v. Smith, [2006] N.S.J. No. 82, 241 N.S.R. (2d) 327, 2006 NSSC 70. The litigation guardian for a 15-year-old applied for approval of a settlement of \$8,000 plus costs of \$1,500. *Held*, application adjourned until deficiencies addressed. An up-to-date medical report was required, as the doctor had last seen the child in June 2003. The lawyer's account did not set out times or hourly rates. The lawyer could not claim the percentage under the contingency fee agreement plus the costs. the contingency fee was calculated as 25 per cent on the total recovery of \$9,500, or \$2,375. The fees for orthodontic treatments unrelated to the accident were prima facie a parental obligation, without further information. Once these deficiencies were addressed, the mother could be a guardian without surety, as the child was almost sixteen and the balance of the fund could be placed in a three- year non-redeemable term GIC.

N.B.: Subsequently the infant was unable to continue certain extracurricular activities, i.e., cheerleading, due to the injuries suffered. The Court ordered an updated medical and, on receipt, settlement was increased from \$9,500.00 to \$19,500.00.

McLellan v. Crowell, [2000] N.S.J. No. 20, 181 N.S.R. (2d) 350 (S.C.). The eight-year-old defendant was struck by a motor vehicle driven by the plaintiff. The plaintiff sued for a declaration on liability. The child's mother and father were not prepared to act as litigation guardians. A first application to appoint the child's mother as litigation guardian was adjourned. After the plaintiff advised the mother that no action would be pursued against her, a second application was brought to appoint her. *Held*, application dismissed. The parents' responsibility may still be an issue at trial, either by the child adding the parents as third parties or by the court acting on its own motion. A person that is not closely connected to the case should be sought, or the plaintiff could underwrite the Public Trustee's costs in acting as litigation guardian.

Burris v. Burris, [1981] N.S.J. No. 113, 45 N.S.R. (2d) 625 (S.C.T.D.). An *ex parte* application to appoint the father of the infant defendant as his guardian *ad litem* was refused since the purpose of the application was to permit the father's insurer to take an action by subrogation in the name of its insured (the father) against the son. The father in such a situation might not carry out his duties properly and might have a conflict of interest with his son.

Conflict of Interest

Schwartz v. Schwartz Estate, [2000] N.S.J. No. 194, 185 N.S.R. (3d) 122, 2000 N.S.C.A. 82.

K. LEGAL ETHICS AND PROFESSIONAL CONDUCT – NSBS

CONTINGENT FEES

- 12.11 It is not improper for a lawyer to enter into an arrangement with the client for a contingency fee, provided such fee is fair and reasonable and the lawyer adheres to the rules of court and the regulations and rulings of the Society relating to such an arrangement.
- 12.12 It is implicit in the rationale for the acceptance and approval of the concept of contingency fee agreements that they govern litigation for which there are very real contingencies or doubts as to the outcome. The lawyer may only enter into a contingency fee agreement in respect of litigation when there is real or reasonable doubt that the outcome will not favour the lawyer's client. Mere impecuniosity of a client or potential client is not sufficient justification for a contingency fee agreement. The lawyer has a duty, when considering a contingency fee agreement, to observe Commentary 12.2 in cases of hardship or impecuniosity.

Ormrod v. Goodall, [2002] N.S.J. No. 487, 209 N.S.R. (2d) 330, 2002 N.S.S.C. 243. Where the Court referred to the factors found in the Barristers' Society Code of Ethics to determine the fairness and reasonableness of the fees.

Factors to be considered whether a fee is fair and reasonable are set out in the Code of Ethics and Professional Conduct at page 51.

The former **CPR** 63.19 required a filing with the Prothonotary of a copy of the contingency fee agreement within 10 days of it being signed. The new Rule, **CPR** 77.14(5) no longer has this requirement; however, on a motion for approval of an infant settlement where the fees are sought in accordance with a contingency fee agreement it is imperative that a copy of the signed agreement be provided with the application.

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

NOTICE OF MOTION

To:

MOTION

Joan Anne Smith, the plaintiff in this proceeding by way of her litigation guardian Ralph George Smith, moves for an order to approve the final infant settlement in this matter pursuant to Civil Procedure Rule 36.13 and to approve the account of counsel pursuant to Civil Procedure Rule 36.15.

TIME AND PLACE

The motion is to be heard by a judge on _____, 20____, at [a.m./p.m.] in the Law Courts, 1815 Upper Water Street, Halifax, 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. I have been advised by*, Solicitor for the Defendants, that his clients will not oppose this motion.

REFERENCES

The moving party relies on the following legislation, Rules, or points of law:

- Civil Procedure Rule 36

EVIDENCE

The evidence in support of the motion is as follows: Affidavit of Ralph George Smith, litigation guardian, sworn on _____, 20____, and affidavit of Donald Brown, sworn on _____, 20____, filed with this Notice.

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____

Signature

Print name: Donald Brown

[Supreme Court of Nova Scotia/Intended proceeding in the
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Between:

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of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

LITIGATION GUARDIAN'S STATEMENT

I, Ralph George Smith, consent to be the litigation guardian of Joan Ann Smith who is my daughter. I have appointed Donald Brown 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 [____]

Signature

Print Name: [_____]

[Supreme Court of Nova Scotia/Intended proceeding in the
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- and -

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Defendants

PROPOSED TRUSTEE'S AFFIDAVIT

I, Ralph George Smith, of Halifax, in the Regional Municipality of Halifax, Province of Nova Scotia, hereby make oath and say as follows:

1. I am the litigation guardian of my daughter, Joan Ann Smith.
2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information or 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.

PERSONAL BACKGROUND

4. Joan Ann Smith was born November 10, 2002 and attached hereto is a true copy of her birth certificate marked as Exhibit "A". She is currently * years of age.

5. My wife, Jocelyn Smith, and I reside at 4321 Main Street, Halifax, Nova Scotia, with our daughter, Joan Ann Smith, and two other children, our son, Randall, now four years of age and our daughter, Beatrice, now two years of age. I am a postal worker by profession, and I have been so employed with Canada Post for eleven years since I graduated grade twelve academic from Queen Elizabeth High School in June 1990. My income as disclosed on my 2008 Income Tax Return is \$57,000.00 per annum. My wife, Jocelyn, is a registered nurse presently employed at home as a homemaker.

JOAN ANN SMITH – ACCIDENT – INJURIES

6. Our daughter, Joan Ann Smith, was a passenger in our family motor vehicle on the 23rd of June, 2006 when it collided with a motor vehicle operated by the defendant, John Joseph Acadia.
7. Our daughter, Joan Ann, was seated in the rear seat in a child's car seat and received numerous cuts and bruises. Her left arm was broken in two places and her most serious injury was a fracture to her pelvis. Her injuries required hospitalization for a period of ten days followed by treatment care and a program of physiotherapy. The 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.
8. Both my wife and I have reviewed all of the medical reports secured by our lawyer, Donald Brown, and I have been in constant communication with our family doctor, Dr. Ralph Withers.
9. Initially our daughter suffered a great deal of pain and had concerns with respect to 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 affects 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 and she occasionally finds herself tired after strenuous exercise, nevertheless she is able to participate in all activities that she previously engaged in prior to the accident, including bicycling, hiking, girl guides camp, music, et cetera.

CONSENT TO ACT AS TRUSTEE - BOND UNDERTAKING

10. I hereby consent to act as trustee for my daughter, Joan Ann Smith, and I undertake to abide by all terms and conditions directed by the Court in any Order it sees fit to issue appointing me as trustee.
11. I undertake to execute a bond in the draft form attached to my affidavit or in such form as may be approved and directed by this Honourable Court
12. Attached hereto and marked as Exhibit * is my undertaking to account.
13. My lawyer, Donald Brown, has explained to me my duties as trustee as required by the settlement order and the undertaking.

APPROVAL

14. I am advised by my lawyer, Donald Brown, and do verily believe, that the all inclusive settlement of \$60,000.00 is a fair and reasonable settlement, and that it is in the best interests of my daughter, Joan Ann Smith, that the proposed settlement be accepted and approved.
15. I am not seeking any trustees fees and the only expenses that I have incurred have been on behalf of my daughter, Joan Ann Smith, as follows: **[here, list any disbursements, costs of medical reports, et cetera, paid by the trustee.]** All of these expenses are listed as disbursements on my lawyer's statement of account and those for which I have advanced funds for payment (\$2,300.00) will be reimbursed to me out of the settlement funds.
16. I entered into a contingency fee agreement with my lawyer, Donald Brown, whereby upon settlement of this action, legal fees will be at the rate of **[insert details of fee agreement]**.
17. I have been provided with a detailed statement of account outlining the time and services performed by my lawyer, Donald Brown, and I am satisfied and approve of payment of him of * Dollars (\$*).

18. I have been advised by my lawyer, Donald Brown, that I have a right to seek independent legal advice as to the settlement and the disbursement of funds and I acknowledge that I have that right to consult independent counsel to the prudence of settlement and the distribution of funds.

DUTIES

19. I have been provided with a copy of the draft Order sought for approval of the settlement, and I undertake to carry out faithfully all duties required by law and specifically as directed in the final Order to be approved by this Honourable Court and any further Orders that it may issue during the period that I am acting as trustee for my daughter, Joan Ann Smith.

NET WORTH

20. My wife and I own joint tenancy 4321 Main Street and the most recent 2009 municipal assessment for our property is in the amount of \$140,500.00. As of our last mortgage statement, 31st of December, 2008, the balance outstanding on our Bank of Montreal mortgage is \$61,500.00 giving us a net equity of \$79,000.00 in the matrimonial home.
21. In addition, we have RRSPs and savings, much of which came from an inheritance from my father, and our additional assets total some \$85,000.00 with our outstanding liabilities on credit cards, our credit line with the Bank of Montreal, and excluding the mortgage, totaling approximately \$11,000.00.
22. Our total net worth is \$153,000.00, and I am prepared to execute a bond in such amount as may be directed by this Honourable Court. I understand that it may be 1.25 the amount of the trust funds (\$39,675.00 x 1.25 = \$49,593.75)
23. My wife, Jocelyn Smith is prepared to sign as a surety.

INVESTMENT STRATEGY

24. I have consulted with my local manager of the Bank of Montreal and also with several investment and trust counselors, and I propose, if appointed trustee, to invest the entire net proceeds of \$39,675.00 or such sum as is approved by this Honourable Court; one half in a guaranteed investment certificate with a trust company covered by Canada deposit insurance and one half in a mutual fund with one of the major brokerage companies in Canada.

SWORN to at Halifax, in the)
Regional Municipality of Halifax,)
Province of Nova Scotia this)
day of , 20 ,)
before me)
))
))
))
))
))
_____))
Donald Brown, A Barrister of the)
Supreme Court of Nova Scotia)

_____))
Ralph George Smith

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

**PROPOSED TRUSTEE'S UNDERTAKING TO ACCOUNT
CPR RULE 36.14(2)(B)**

I, Ralph George Smith, do hereby undertake to account to the Court and to the Infant plaintiff, Joan Ann Smith, born November 10, 2002, as required by the terms and conditions of the Infant Settlement Order, and more particularly by filing and delivering a statement of receipts and disbursements when a Judge directs, when the trust terminates, and, as the represented party is a child, no more than six months after the represented party's nineteenth birthday, as required by Civil Procedure Rule 36.14(2).

I further hereby acknowledge that Donald Brown, lawyer for the Infant plaintiff, Joan Ann Smith, has explained to me the duties that I would have as trustee under the Infant Settlement Order and pursuant to this Undertaking to Account.

SIGNED at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, this day of , 20 ;

Witness, A Barrister of the
Supreme Court of Nova Scotia

Ralph George Smith

[Supreme Court of Nova Scotia/Intended proceeding in the
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Between:

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Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

LAWYER'S AFFIDAVIT

I, Donald Brown, of Halifax, in the Regional Municipality of Halifax, Province of Nova Scotia, make oath and say as follows:

1. I am the lawyer 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 or 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. This is a motion to seek approval of a proposed settlement for the infant Joan Anne Smith in the global amount of \$60,000.00.
5. Attached to the affidavit of the litigation guardian is a true copy of the birth certificate of the infant plaintiff Joan Anne Smith who was born on the 10th day of November, 2002.

SETTLEMENT (CPR 36.13)

6. I obtained the following medical assessments in presenting the plaintiffs' case:

Exhibit 1

Exhibit 2, etc.

7. Joan Anne Smith suffered injuries in a *, 20* motor vehicle accident. As revealed in the accident and medical reports, she suffered (a summary of the injuries for which compensation is being covered by the proposed settlement).
8. The proposed terms of the settlement are: (CPR 36.13(3)(b))
9. In my opinion the risk in proceeding to trial includes *(See 36.13(5)(d)). *(Include commentary in Explanatory Note – potential risks include liability, causation, problematic heads of loss, stress to plaintiff etc.)*
10. In my opinion the Court would likely award in the range of \$* with each head of loss assessed as follows: (CPR 36.13(3)(c))
11. I have reviewed all the medical reports and carefully considered case law for guidance, and I have concluded that in all the circumstances the proposed settlement should be approved as it is in my opinion in the best interest of the infant. (CPR 36.13(3)(a))

TRUST (CPR 36.14)

12. I have explained to Ralph George Smith the mandatory requirement of a bond being provided by the Trustee of the settlement funds. I am advised by Ralph George Smith and I do verily believe that he is willing to provide his personal bond with sureties and avoid the costs to the trust fund of engaging a bonding company and I do verily believe that he is a fit and proper person to act as Trustee.

N.B.: Whether or not a surety(s) will be required will be dictated by the circumstances and determined by the Chambers Justice.

13. The proposed trustee Ralph George Smith has signed a proposed trustee's undertaking to account, as required by Rule 36.14(2)(b), which undertaking has been filed in support of this motion.

APPROVAL OF ACCOUNT (CPR 36.15)

14. Ralph George Smith entered into a Contingency Fee Agreement with me, as a lawyer for him and Joan Anne Smith, on the 23rd day of July, 2006, a true copy of which is produced and marked as Exhibit * to this my affidavit.
15. The litigation guardian Ralph George Smith has fully complied with all the requirements of Civil Procedure Rule 77.14(4) and I have complied with Civil Procedure Rule 77.14(5).
16. Risks were undertaken by me in my retention on a contingency basis. These risks include.....
17. Produced herewith and marked as Exhibit * are my time sheets and the time sheets of my associates and my paralegal detailed by description, time and hourly rate all the legal services performed for the plaintiffs.
18. The details of the disbursements incurred on the file are listed and produced as Exhibit *.
19. Produced herewith and marked as Exhibit * is a copy of the final account including the projected amount required to conclude counsel's work on the file. Ralph George Smith has been given a copy of Exhibit *.
20. Ralph George Smith has indicated his approval of the fees and disbursements being sought based upon our Contingency Fee Agreement. (summarize agreement.)

SWORN to before me on)
20 , at the City of Halifax)
in the Regional Municipality)
of Halifax)
)
)
)
)
)
)
)
_____)
Barrister of the Supreme Court)
of Nova Scotia)

Donald Brown

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

BOND

KNOW ALL MEN BY THESE PRESENTS THAT I, Ralph George Smith, of 4321 Main Street, Halifax, in the Regional Municipality of Halifax, Nova Scotia, father, trustee of the estate of the Infant plaintiff, Joan Ann Smith, am to be firmly bound to the Infant, Joan Ann Smith, her executors, administrators or assigns, regarding all terms and conditions of the Infant Settlement Order issued by the Supreme Court of Nova Scotia in the above-noted matter and will well and faithfully execute the terms and conditions of the settlement order.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH THAT the trustee, Ralph George Smith, shall receive the trust funds of \$60,000.00 and pay out to himself reimbursements of disbursements paid by him of \$2,300.00 and legal fees to David Brown in the amount of \$13,425.00 plus HST of \$2,013.75. The balance of the settlement funds in the amount \$44,561.25 shall be invested as approved by the Court.

BOND OBLIGATION

We, Ralph George Smith, trustee, Jocelyn Smith, surety and Mary Elizabeth Johnson, surety, jointly and severally bind ourselves to pay the Infant, her executors, administrators or assigns the sum of \$55,701.57, representing one and one quarter times the amount of the trust fund, on breach of any of the conditions as set forth in this bond.

AND IF Ralph George Smith, manages the said trust funds according to the law, the terms and conditions of the Infant Settlement Order in this proceeding, and for the best interests of the Infant, Joan Ann Smith, and faithfully discharges his trust in relation thereto;

AND IF the trustee, Ralph George Smith, carries out the trust herein as follows:

(a) to invest and keep invested the same in investments authorized by the law for the investment of trust funds;

(b) to use the income of the trust fund as the trustee deems necessary or advisable, and if the income is insufficient such of the principal as the trustee deems necessary or advisable, for the medical treatment and care of the Infant, Joan Ann Smith, which may become necessary and arising from the accident;

(c) to manage the trust funds according to law for the best interests of the Infant, and to render an account on oath of the trust fund at such time as the Court may direct and to the Infant when the Infant attains the age of majority;

(d) to settle the balance of the trust remaining by transferring such to the Infant when she reaches the age of majority, or in the case of her death before attaining the age of majority, to the person or persons lawfully entitled thereto;

(e) to abide by and fulfill all the terms, conditions, and requirements of this bond, and all the duties and responsibilities of such trustee in law;

(f) to apply to this Honourable Court or a judge thereof for modification or variation of the terms of this Order with respect to his duties or powers or both, and for such other Orders and directions respecting the disposition of the trust funds as the circumstances may from time to time require;

(g) to abide by and perform all and singular the terms, conditions and any further Order or Orders which may be made by the Court or a Judge from time to time touching the said trust on the duties of the Trustee in relation thereto, and obey and observe the requirements of the law and particularly all of the requirements of this bond, and the Order approving the Infant Settlement.

And in such case, these presents shall be void, but otherwise the same shall be and remain in full force and effect.

THIS BOND shall enure to the benefit of and be binding upon the parties hereto, their and each of their heirs, executors, administrators, successors and assigns.

SIGNED, SEALED AND)
DELIVERED in the presence of:)

_____)

_____)
RALPH GEORGE SMITH (seal)

_____)

_____)
JOCELYN SMITH (seal)

_____)

_____)
MARY ELIZABETH JOHNSON (seal)

)

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

ORDER APPROVING INFANT SETTLEMENT

BEFORE THE HONOURABLE JUSTICE IN CHAMBERS:

UPON READING the affidavits of Ralph George Smith, litigation guardian, Donald Brown, lawyer for the plaintiffs, the litigation guardian's statement, the proposed trustee's undertaking to account and the lawyer's certificate and the further documentation and material filed in support of the motion;

AND UPON IT APPEARING that counsel for the Infant has reached a proposed settlement of the Infant's claims whereby the defendant shall pay to the Infant's trustee in trust for the Infant the sum of Sixty Thousand Dollars (\$60,000.00) all inclusive;

AND UPON THE COURT BEING SATISFIED that the proposed settlement is in the best interests of the Infant;

ON THE MOTION OF DONALD BROWN THE FOLLOWING IS ORDERED:

1. **THAT** the settlement of this action on the payment by the Defendants of the all inclusive sum of Sixty Thousand Dollars (\$60,000.00) is hereby approved as a full and final settlement of any claim or claims the Infant has or may have against the defendants for personal injuries arising out of a motor vehicle accident on the 23rd day of June, 2006.

2. **THAT** Ralph George Smith of Dartmouth in the Regional Municipality of Halifax, Province of Nova Scotia, father and litigation guardian of the Infant, born the 10th of November, 2002, is hereby appointed trustee of the Infant, for the purpose of receiving the sum of \$60,000.00 and the carrying out of the trust set. The draft form of bond advanced is hereby approved leaving the amount of the trust funds \$44,561.25. The appointment of Ralph George Smith as trustee being conditional upon entry into a Bond with two sureties each in the amount \$55,701.57 payable to the Infant, her heirs, executors, administrators and assigns.

3. **THAT** the trustee, Ralph George Smith, is hereby authorized to receive the said settlement funds in the amount of \$60,000.00 and is directed to deal with the same as follows:

(a) To pay out of the trust funds to Donald Brown, lawyer for the Infant, lawyer's costs, HST, fees and disbursements herein taxed and approved in the amount of \$13,425.00 with HST of \$2,013.75. The Contingency Fee of Twenty-Five percent approved is based upon the settlement funds of \$60,000.00 less \$4,000.00 attributed to party and party costs and reimbursement to Ralph George Smith of the retainer provided by him in the amount of \$2,300.00.

(b) To invest and keep invested the balance thereof in investments authorized by law for the investment of trust funds;

(c) To use for the following purposes such of the income from the balance of the trust fund as the trustee deems necessary or advisable, and if the income is insufficient such of the principal thereof as the trustee deems necessary or advisable, such purposes being for the medical treatment and care of the Infant, arising from the accident, as she may from time to time require;

(d) To manage the trust funds according to law for the best interests of the Infant, and to render an account on oath of the trust fund at such time as the Court may direct and when the Infant attains the age of majority;

(e) To settle the balance of the trust remaining by transferring such to the Infant when she reaches the age of majority, or in the case of her death before attaining the age of majority, to the person or persons lawfully entitled thereto;

(f) To abide by and fulfill all the terms, conditions, and requirements of the bond, and all the duties and responsibilities of such trustee in law;

(g) To apply to this Honourable Court or a judge thereof for modification or variation of the terms of this Order with respect to his duties or powers or both, and for such other orders and directions respecting the disposition of the trust funds as the circumstances may from time to time require;

4. **THAT** the said Ralph George Smith as trustee is hereby authorized to execute releases on behalf of the Infant upon receipt of the trusts funds.

5. **THAT** upon payment of the settlement funds by the defendants, this action shall stand dismissed.

DATED at Halifax, Province of Nova Scotia this day of ,
20 .

PROTHONOTARY

CONSENTED TO:

David Brown, Lawyer for the Plaintiffs

Marjorie Joans, Lawyer for the Defendants

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

AFFIDAVIT OF JUSTIFICATION

I, Mary Elizabeth Johnson, of Halifax, in the Regional Municipality of Halifax, Province of Nova Scotia, hereby make oath and say as follows:

1. **THAT** I reside at 4329 Main Street, Halifax, and I have been a neighbor of Ralph George Smith, his wife and children for five years.
2. **THAT** I am a life insurance agent and have been a member of the life insurance business for twenty-seven years, and operate my own broker firm under the firm name and style of Johnson's Little/Big Insurance.
3. **THAT** I am a widow and I own my own home and attached hereto and marked Schedule "A" is a brief summary of my assets and liabilities and I confirm that my net worth is in excess of \$148,000.00.
4. **THAT** I am prepared to act as a surety on the appointment of Ralph George Smith as trustee for the settlement trust for his daughter, Joan Ann Smith, and I fully understand and appreciate that I will be jointly and by myself liable to the full extent of the bond in the event of any breach thereof by Ralph George Smith, and that I shall remain so bound until I am released from my surety by order of this Honourable Court.

[Supreme Court of Nova Scotia/Intended proceeding in the
Supreme Court of Nova Scotia]

Between:

Ralph George Smith as Litigation Guardian
of Joan Ann Smith, infant, and Ralph George Smith

Plaintiffs

- and -

Acadian Truckers Limited and John Joseph Acadia

Defendants

AFFIDAVIT OF JUSTIFICATION

I, Mary Elizabeth Johnson, of Halifax, in the Regional Municipality of Halifax, Province of Nova Scotia, hereby make oath and say as follows:

1. **THAT** I reside at 4329 Main Street, Halifax, and I have been a neighbor of Ralph George Smith, his wife and children for five years.
2. **THAT** I am a life insurance agent and have been a member of the life insurance business for twenty-seven (27) years, and operate my own broker firm under the firm name and style of Johnson's Little/Big Insurance.
3. **THAT** I am a widow and I own my own home and attached hereto and marked Schedule "A" is a brief summary of my assets and liabilities and I confirm that my net worth is in excess of One Hundred Forty-Eight Thousand Dollars (\$148,000.00).
4. **THAT** I am prepared to act as a surety on the appointment of Ralph George Smith as trustee for the settlement trust for his daughter, Joan Ann Smith, and I fully understand and appreciate that I will be jointly and by myself liable to the full extent of the bond in the event of any breach thereof by Ralph George Smith, and that I shall remain so bound until I am released from my surety by order of this Honourable Court.

SWORN to at Halifax, in the)
Regional Municipality of Halifax,)
Province of Nova Scotia this)
day of , 20 ,)
before me)

Donald Brown, A Barrister of the)
Supreme Court of Nova Scotia)

Mary Elizabeth Johnson

SCHEDULE "A"

ASSETS

1. Home, 4329 Main Street, Halifax, Nova Scotia. The most recent municipal assessment for 2009 of \$151,000.00.
2. Cottage/Camp in Hants County. The most recent municipal assessment, 2009, \$47,500.00. There is no mortgage on my cottage/camp.
3. RRSP's. Estimated after tax worth, \$22,000.00.
4. Canada Savings Bonds and savings, \$5,000.00.

LIABILITIES

1. Home, 4329 Main Street, Halifax, Nova Scotia. The present balance of the mortgage, \$55,000.00.
2. Bank of Montreal line of credit, \$12,000.00.
3. Outstanding credit card debts, \$4,800.00.
4. Balance of loan to mother, \$3,500.00.
5. Current household debts, \$1,700.00.