

Implementing Private Infant Settlement Trusts

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Your client is an infant who has suffered a significant personal injury. As a result of your superb counsel work, your client has been awarded a significant judgment (or you have negotiated an excellent settlement on his or her behalf). What can you do now to protect your infant client's interests into the future?

Where an infant is awarded damages in a personal injury case, the manner in which the award is structured will often include a trust established for the benefit of the infant. In many cases, the funds are managed by the Public Guardian and Trustee (PGT), but it is not uncommon for the funds to be held by one or more private trustees. Where a private infant settlement trust is to be established, the terms of the trust must be carefully considered, as proper structuring of the trust is a crucial part of ensuring that the infant plaintiff will receive the maximum benefit possible, whether it be for future care, accommodation, education or other needs.

PUBLIC GUARDIAN AND TRUSTEE, OR PRIVATE TRUST?

When a trust for an infant is contemplated, the parties must consider the relative merits of establishing a private trust as compared to turning the funds over to the PGT to manage. Ultimately the Court must approve the proposed arrangement as being in the interests of the infant, pursuant to subsection 40(8) of the *Infants Act*.

In *Bizovie v. Cornish*, 2004 BCSC 553, the court considered the application by the parents of an infant plaintiff for the appointment of the parents and a private trust company as co-trustees for part of the settlement. This was not a novel arrangement, as the BC courts in a number of prior cases had placed settlement funds with private trustees with the approval of, or at least without opposition from, the PGT. In *Bizovie*, however, the PGT opposed the application on the basis that section 40 of the *Infants Act* together with Rule 58(14) of the Supreme Court Rules constitute a complete code with respect to management of funds for an infant, so that court lacked the jurisdiction to make such an order.

Williamson J. held that the statutory provisions were permissive and did not oust the Court's inherent *parens patriae* jurisdiction with respect to management of funds for infants. In coming to this conclusion, he noted that historically, funds for infants were paid into court, and the PGT would apply to the registry to have funds paid out of court. In 1994, the then Chief Justice William A. Esson authorized the transfer of all such funds

held by the Court to the PGT to be held and administered by it. Williamson J. observed that subsequent legislative changes including subsection 40(8) of the *Infants Act* recognized that the PGT may hold these funds, but held that they did not abolish the court's underlying jurisdiction to deal with the funds, nor require that the PGT must always administer such funds.

As a starting point (as pointed out by the Court in *Bizovie*), depositing funds with the PGT is "normal practice", and in most cases, convenience alone will not be sufficient grounds to depart from this practice. The courts have acknowledged, for example in *Renaerts v. Korn* (1998), 64 BCLR (3d) 131 (SC), that the PGT has considerable expertise in dealing with funds set aside for disabled infants. Therefore, there must be a good reason to establish a private trust. The *Bizovie* decision together with the earlier decision of Williamson J. in *Schrauen v. Schrauen*, 2002 BCSC 1897, indicate that the court will be more likely to approve a private trust if the following circumstances apply:

1. If the private trustee will charge lower fees. This was a significant factor in the *Bizovie* decision. The PGT is entitled, under the *Public Guardian and Trustee Act*, to charge a capital fee of 5%, and will reduce that fee only where it can be shown there is hardship or unfairness to the plaintiff.
2. If the parent or parents who will be co-trustees have significant experience in caring for the infant plaintiff or for other disabled children.
3. If the appointment of a private trustee will provide additional flexibility for the beneficiary that amounts to a material benefit.
4. If the proposed private trust includes sufficient protective structures to safeguard against encroachment on capital.

While *Bizovie* establishes a clear authority to implement a private trust even without the consent of the PGT, the PGT will play a significant role in reviewing and commenting on the terms and conditions of the

proposed trust. Furthermore, the PGT retains the power under the *Public Guardian and Trustee Act* to investigate and audit a private trust where the beneficiary is a minor or an incapacitated adult.

EMPLOYING AN INFANT SETTLEMENT TRUST

An infant settlement may be comprised of a lump sum payment, a structured settlement annuity, or both. A structured settlement annuity can be a useful tool to fund ongoing care costs and to ensure that the infant does not exhaust the funds set aside for him or her. On the other hand, a lump sum held in trust for the infant generally offers greater flexibility.

In some cases, the entire settlement may be paid into a trust, as was done in *McGlone v. Kelly*, 2003 BCSC 240. This arrangement would usually offer the greatest flexibility and may be sensible where the award is smaller or the risk of the fund being depleted is low. In many of the reported cases involving private infant settlement trusts, the settlement has been comprised of a structured settlement annuity together with a lump sum payment, with the trust being employed only for the lump sum portion. That was the case in *Bizovie*, *Schrauen*, and in *Renaerts*.

However, a private infant settlement trust also offers the flexibility of acquiring a structured settlement annuity within the trust. This was done in the case of *Strachan v. Winder*, 2005 BCSC 59, and *Jack v. Martin*, 2001 BCSC 1857. Having the structured settlement annuity payments received by the trustees centralizes the management of the entire settlement for the infant. If the annuity payments exceed the infant's requirements in a given time period, the trustees can simply retain the excess within the trust. Conversely, if the annuity payments are not sufficient to provide for the infant's needs the trustees can increase distributions of income from the trust.

CHOOSING AND CHANGING TRUSTEES

If a private infant settlement trust appears to be in the best interests of the infant, the selection of the trustees is an important decision.



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In most cases, a regulated trust company will be appointed together with the caregiving parent or parents as co-trustees. Having a reputable trust company act as trustee provides the benefit of investment and management expertise, as well as neutrality and stability. Having one or both parents as co-trustees gives the impartial corporate trustee the benefit of having direct input from the infant's primary caregivers who presumably best understand the infant's needs.

Although less common, there is precedent in the reported cases for having a private trust company appointed as sole trustee. This may be an option to consider if the parents are unavailable or unable to act, for example due to personal financial difficulties.

There is also precedent in the case law for appointing an individual professional, such as a lawyer or accountant, as co-trustee with the parents rather than a trust company. In *Schrauen*, the trust was approved on the basis of the parents being co-trustees with an accountant. However, the trustees in that case were required to post a performance bond, and this should generally be expected in the absence of a regulated trust company.

The *Jack* decision is unusual in that it involved the appointment of a parent as a sole trustee, without the requirement of a bond. The amount at issue in that case was quite small. Such an arrangement would almost certainly not be approved as being in the infant's best interests where larger sums are at issue.

The trust deed establishing the terms of the trust should contain provisions dealing with the resignation and appointment of trustees. These provisions may give the trustees the power to appoint replacement trustees without court approval. However, the trust deed should require that one of the trustees be a neutral party, whether a trust company or professional, and should restrict the powers of the other trustees to act if there is no neutral party acting. The trust deed should also provide that notice of all changes in trustees be given to the PGT.

Given the significant tax and legal implications that would arise if the trust ceased to be resident in Canada, it would also be prudent for the trust deed to require that the trustees be resident in Canada, subject to a Court order approving otherwise. If the infant ceases to be resident in Canada, it may be in the infant's best interests for the residence of the trustees and the governing law of the trust to be changed to the jurisdiction where the child resides. In such a case the Court will want to ensure that there is appropriate supervision of the trust in the child's home jurisdiction by public authorities. It would also be necessary in that case to obtain specific legal and accounting advice regarding the impact of changing the trust's residence, including tax issues, foreign currency fluctuations, and the impact of the trust on benefits that may be available to the child in the new jurisdiction.

SAFEGUARDING CAPITAL

One of the factors that the court will consider when deciding to approve a private infant settlement trust, as stated in the *Schrauen* and *Bizovie* decisions, is whether the proposed trust adequately safeguards against encroachment on capital.

In *Renaerts*, the PGT asked the court to order that any encroachment on capital would require the prior approval of the PGT. Instead, the court approved a per-distribution limit of \$5,000 and an annual limit of \$25,000, with any encroachments on capital in excess of those amounts requiring the approval of the PGT. A similar restriction has been approved in subsequent cases, including *Bizovie*, as an adequate safeguard against capital encroachment.

In the current economic environment, however, in which a trust making conservative investments may earn very little income, query whether instituting a fixed limit on capital encroachments would always

be in the best interests of the child. In our view there is merit to the more flexible approach employed in the *McGlone* decision. In that case, the court ordered that prior approval of the PGT would be required for “extraordinary encroachments” in excess of \$25,000 per year. Extraordinary encroachments was defined as encroachments other than for payment of listed types of expenses as set out in the reasons for judgment in that case. The listed expenses related to the special care needs of the child. By using this approach, the trustees would not be required to seek the approval of the PGT for capital encroachments made for items that are necessities for the child.

“INVESTING” IN THE FAMILY RESIDENCE

Some infant settlement trusts will give the trustees the flexibility to contribute a certain portion of the trust fund toward the purchase of a family home. In *McGlone*, for example, the trustees were authorized to expend up to \$125,000 in making a “Residential Investment.” The rationale behind making such a provision is that the family may need additional space or special fixtures in their home to properly provide for the special needs of their injured child. In our experience, however, having the trustees of the infant’s trust own a share in the family home can raise difficult issues. There can be a fine line between the trust contributing to improve the family home to account for the infant’s special needs, and the infant subsidizing the living costs of the rest of the family.

Furthermore, if the child’s parents in their own capacity are co-owners with the family home (which also happens to be trust property), and they separate or divorce, the trustees may be caught in the middle of a dispute over property ownership. If, for example, the parents become unable to pay the mortgage on their share of the property, there may be a conflict of interest between the parents acting in their own capacity and acting in their role as trustees.

In some cases, especially where the infant’s family is financially destitute, there may be no other option but for the trust to purchase outright a home for the infant and his or family so as to ensure that the infant has a suitable place to live. However, we suggest that co-ownership of the family residence by the trust should be avoided where possible, and that any arrangement where the trust will invest in the family residence should be carefully thought through so that the interest of the infant is secured.

BENEFICIAL INTEREST AT MAJORITY AND ON DEATH

One of the benefits of a private trust is that it can continue on to benefit the infant into adulthood if he or she is still incapacitated. If the infant remains incapacitated beyond age 19, it will be necessary for the parents or other persons to obtain an order for committeehip. If the infant settlement funds vest in the child at that time, the parents may need to post an expensive performance bond. If instead the trust can be continued, the bond may not be required.

However, the PGT will oppose a trust that presumes the infant to be incapacitated beyond the age of 19, on the basis that the child’s funds should not be withheld if he or she is adult and capacitated. Accordingly, the trust should require the trustees to apply to the Court for a determination of the infant’s incapacity if the trustees believe the infant to be incapacitated on turning 19.

Similarly, the trust should ensure that on the death of the beneficiary, the beneficiary has the unfettered ability to dispose of the remaining trust property, if he or she has the capacity to do so. The beneficiary should be given the power to dispose of the remainder of the trust by power of appointment. Failing the exercise of that power, the trust property should devolve in accordance with the residue of the beneficiary’s will, or to the beneficiary’s heirs in accordance with the intestate succession scheme set out in the *Estate Administration Act*.

VARIATION OF THE TRUST

Given that an infant settlement trust is created pursuant to the court’s *parens patriae* jurisdiction and remains subject to oversight by the court and the PGT, any variation of the terms of the trust should require a subsequent order of the court, with notice to be given to the PGT of any application.

CONCLUSION

Ensuring that your infant client’s interests are protected long after you have obtained that successful judgment or settlement is extremely important. The intricacies of trusts and the instruments which form the foundation for them can be vexing for even the most experienced counsel. Assistance from a solicitor experienced in the area of trusts can be crucial to ensuring that all of the issues discussed in this article (along with the myriad of others which can arise in any given case) are dealt with systematically and thoroughly. In light of the potential benefit which can be gained and the detriment which can be avoided, obtaining assistance in this regard should be given serious consideration.

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