

SUPREME COURT OF QUEENSLAND

PRACTICE DIRECTION NO 15 OF 2018

PERSONS UNDER A LEGAL DISABILITY

1. This Practice Direction No 15 of 2018 replaces Practice Direction No 9 of 2007. Practice Directions No 9 of 2007, No 3 of 2009 and No 1 of 2010 are repealed.
2. This Practice Direction is concerned with a proceeding or claim for damages for personal injuries where the plaintiff is a person under a legal disability and the Court is asked to sanction the compromise of the plaintiff's claim pursuant to s 59 of the *Public Trustee Act 1978* or to give judgment for the plaintiff.
3. Rule 98 of the *Uniform Civil Procedure Rules* addresses material to be supplied to the Court on an application for sanction. In addition, the plaintiff should ordinarily provide the Court with a copy of an opinion of counsel in relation to the compromise. In some circumstances, it may be appropriate to obtain the opinion of a solicitor who is an accredited specialist in personal injuries litigation or an experienced solicitor in personal injuries litigation. Unless there are exceptional circumstances, the solicitor who provides the opinion in respect of the compromise should be independent of the solicitors' firm which has taken instructions from the plaintiff and/or prepared the matter.
4. The application for sanction and supporting material (other than the opinion of counsel/solicitor) should be served on the Public Trustee of Queensland five (5) business days before the hearing of the application (except in circumstances where an authorised officer of the Public Trustee has agreed in writing to a shorter period).
5. If an administrator or guardian has already been appointed under the *Guardianship and Administration Act 2000*, the Court should be provided with a copy of the Tribunal's order making the appointment, as the Court may review that appointment. The existing administrator or guardian should be served with the application and supporting material (other than the opinion of counsel/solicitor) five (5) business days before the hearing of the application (except in circumstances where an authorised officer of the administrator or guardian has agreed in writing to a shorter period).
6. If an attorney has been appointed under the *Powers of Attorney Act 1998* and is exercising power pursuant to that appointment in respect of the plaintiff, the attorney should be served with the application and supporting material (other than the opinion of counsel/solicitor) five (5) business days before the hearing of the application (except in circumstances where the attorney has agreed in writing to a shorter period).
7. The plaintiff should prepare a draft order, make copies of it available to the defendant, and any existing administrator, guardian or attorney before the hearing of the application and, in the

case of the Public Trustee, five (5) business days before the hearing of the application, and provide it to the Court at the hearing.

8. Where the plaintiff is an adult, the order should usually provide for the appointment of an administrator (and in an appropriate case also a guardian) under the *Guardianship and Administration Act 2000*, and for the payment of the balance of the compromise sum or judgment sum (after statutory refunds and payment of other sums as directed by the Court) to the administrator.
9. The basis upon which the administrator is to receive and manage the compromise sum or judgment sum should be expressed in the order. In most cases this will be as an administrator pursuant to s 12 of the *Guardianship and Administration Act 2000*, and it will be unnecessary to provide that the compromise sum be held on trust for the plaintiff. The unnecessary creation of a trust should be avoided, as this may affect the level of management fees payable.
10. The order should provide for the registrar of the court to give a copy of the order to the Principal Registrar of the Queensland Civil and Administrative Tribunal. This will trigger the process in the tribunal for approval of a financial management plan. See QCAT Practice Direction No 8 of 2010.
11. Where the plaintiff is a child, the order should provide for the appointment of a trustee to receive, hold and manage the balance of the compromise sum or judgment sum until the plaintiff reaches 18. In matters where the child will or may have an impaired capacity for a financial matter upon attaining the age of 18, a direction may be included in the order that the trustee consider applying to the Queensland Civil and Administrative Tribunal for an order pursuant to s 12 or s 13 of the *Guardianship and Administration Act 2000*.
12. The solicitor acting for the plaintiff must include in a supporting affidavit an estimate of:
 - (a) standard costs recovered or recoverable in the proceeding or in respect of the claim;
 - (b) indemnity costs recoverable in the proceeding or in respect of the claim; and
 - (c) the amount the plaintiff will be paying out of the compromise sum to satisfy the difference between standard costs and indemnity costs.

This is to allay concern the Court may have with respect to the proposed compromise sum being diminished unacceptably by the payment out of the fund of non-recoverable legal costs.

13. Pro forma orders relating to a child plaintiff and an adult plaintiff and a checklist for preparing for the application are annexed to this Practice Direction.



Catherine Holmes
Chief Justice
6 August 2018

CHILD PLAINTIFF ORDER

SUPREME COURT OF QUEENSLAND

REGISTRY:
NUMBER:

Plaintiff: AB (by his/her litigation guardian CD)

and

Defendant: EF

ORDER

Before: Justice GH

Date:

Initiating document: Application filed

THE ORDER OF THE COURT IS THAT –

1A. **[Ed note: if compromise]** The compromise of this proceeding [or claim] on the following terms be sanctioned pursuant to s 59(1) [or s 59(2)] of the *Public Trustee Act 1978*:

- (a) the defendant pay the plaintiff damages in the sum of \$_____, being primary damages in the sum of \$_____ together with further damages in the sum of \$_____ for management fees (“the compromise sum”);
- (b) the defendant pay the plaintiff his/her costs of this proceeding [or the costs of the claim], including the costs of this application, to be assessed on the standard basis (“the standard costs”).

ORDER

Filed on behalf of
[Form 59] R.661

- 1B. [Ed note: if an adjudication or consent judgment for damages] The defendant pay the plaintiff –
- (a) damages in the sum of \$_____ (“the judgment sum”); and
 - (b) costs of the proceeding, including the costs of this application, to be assessed on the standard basis (“the standard costs”).
2. _____ (“the trustee”) be appointed to receive, hold and manage the balance of the compromise sum* after deduction of the amounts identified in sub-paragraphs (a), (b) and (c) of paragraph 6 this order on trust for the plaintiff until he/she attains 18 years.¹
3. The trustee be empowered to invest the balance of the compromise sum* and any accretions in such investments as trustees are empowered to invest in under the *Trusts Act 1973*.
4. The trustee applies such moneys for the maintenance, benefit and support of the plaintiff.
5. Within seven (7) days of this order, the plaintiff’s solicitors serve a copy of it on the trustee.
6. Within twenty-one (21) days of this order or of the defendant’s receipt of the last of any statutory clearances or charges in relation to the compromise sum* (whichever is the later to occur), the defendant pay the compromise sum* as follows –
- (a) to any statutory body having a charge over the compromise sum*, the amount necessary to satisfy the charge;
 - (b) to_____, for out of pocket expenses incurred on behalf of the plaintiff, \$_____;

¹ In matters where the child will or may have an impaired capacity for a financial matter upon attaining the age of 18, there should be contemplated in the order a direction the Trustee consider applying to the Queensland Civil and Administrative Tribunal for an order pursuant to s 12 or s 13 of the *Guardianship and Administration Act 2000*.

(c) to _____, for past personal care and assistance given to the plaintiff,
\$ _____;

(d) to the trustee, the balance,

whose receipt shall in each case be a sufficient discharge for the defendant.

7. Interest under s 59(2) of the *Civil Proceedings Act 2011* shall not be payable by the defendant on any part of the compromise sum* provided that payment is made prior to the expiration of the time period allowed for payment specified in paragraph 6 of this order, and then shall only accrue and be calculated from the day following such expiry.
8. The defendant pay the standard costs to the trustee within twenty-one (21) days of receipt of their assessment or prior agreement between the defendant and the trustee as to their amount.
9. The plaintiff's costs of this proceeding [or the claim], including the costs of this application, be assessed or agreed on the indemnity basis ("the indemnity costs").
10. Following the assessment of the indemnity costs or agreement as to their amount, the trustee is to:
 - (a) pay the indemnity costs to the plaintiff's solicitors from the moneys received under sub-paragraph (d) of paragraph 6 of this order; orunless the trustee in relation to assessed indemnity costs decides to:
 - (b) pay such lesser sum as it may agree with the plaintiff's solicitors; or
 - (c) apply to the court for further directions.
11. The Registrar of the Court place the opinion of counsel/solicitor and the plaintiff's solicitor's affidavit dealing with the estimates of standard costs and indemnity costs read on this application in a sealed envelope marked "Not to be opened without an order of the Court."

12. The envelope containing the opinion of counsel/solicitor and the plaintiff's solicitor's affidavit dealing with the estimates of standard costs and indemnity costs read on this application shall not be opened without an order of the Court.

13. Each of the parties, the trustee and the plaintiff's solicitors have liberty to apply in respect of these orders.

Signed:

*Replace with 'judgment sum' where appropriate

ADULT PLAINTIFF ORDER

SUPREME COURT OF QUEENSLAND

REGISTRY:
NUMBER:

Plaintiff: AB (by his/her litigation guardian CD)

and

Defendant: EF

ORDER

Before: Justice GH

Date:

Initiating document: Application filed

THE ORDER OF THE COURT IS THAT -

1A. [Ed note: if sanction as well as administration order required] The compromise of this proceeding [or the claim] on the following terms be sanctioned pursuant to s 59(1) [or s 59(2)] of the *Public Trustee Act 1978*:

- (a) the defendant pay the plaintiff damages in the sum of \$_____, being primary damages in the sum of \$_____ together with further damages in the sum of \$_____ for management fees (“the compromise sum”);

ORDER

Filed on behalf of
[Form 59] R.661

- (b) the defendant pay the plaintiff his/her costs of this proceeding [or the costs of the claim], including the costs of this application, to be assessed on the standard basis (“the standard costs”).
- 1B. **[Ed note: if an adjudication or consent judgment for damages]** The defendant pay the plaintiff –
- (a) damages in the sum of \$ _____ (“the judgment sum”); and
- (b) costs of the proceeding, including the costs of this application, to be assessed on the standard basis (“the standard costs”).
2. **[Ed note: if administrator appointed for a financial matter]** Pursuant to s 12 of the *Guardianship and Administration Act 2000* _____ (“the administrator”) be appointed administrator for the plaintiff to receive and manage the balance of the compromise sum* after deduction of the amounts identified in sub-paragraphs (a), (b) and (c) of paragraph 8 of this order.
3. **[Ed note: if the Public Trustee of Queensland is appointed administrator]** Pursuant to s 59(4) of the *Public Trustee Act 1978*, any moneys paid to the administrator under this order be held and applied as administrator for the plaintiff pursuant to s 12 of the *Guardianship and Administration Act 2000*, and not on trust for the plaintiff.
4. **[Ed note: if guardian appointed for a personal matter]** Pursuant to s 12(1) of the *Guardianship and Administration Act 2000* _____ be appointed guardian for the plaintiff for a personal matter namely **[Ed note: eg, with whom the plaintiff is to live, where the plaintiff is to live, the provision of care assistance and medical treatment to the plaintiff]**.

5. The administrator be empowered to invest all moneys received and held under this order pursuant to s 51 of the *Guardianship and Administration Act 2000*.
6. Within seven (7) days of this order, the plaintiff's solicitors serve a copy of it on the administrator appointed by this order [**Ed note: insert, if appropriate, 'and on any administrator or guardian appointed by the Queensland Civil and Administrative Tribunal'**].
7. Within sixty (60) days of the date of this order, the administrator give the Queensland Civil and Administrative Tribunal a financial management plan within the meaning of the *Guardianship and Administration Act 2000* for approval.
8. Within twenty-one (21) days of this order or of the defendant's receipt of the last of any statutory clearances or charges in relation to the compromise sum* (whichever is the later to occur), the defendant pay the compromise sum* as follows –
 - (a) to any statutory body having a charge over the compromise sum*, the amount necessary to satisfy the charge;
 - (b) to _____, for out of pocket expenses incurred on behalf of the plaintiff, \$ _____;
 - (c) to _____, for past personal care and assistance given to the plaintiff, \$ _____;
 - (d) to the administrator, the balance,whose receipt shall in each case be a sufficient discharge for the defendant.
9. Interest under s 59(2) of the *Civil Proceedings Act 2011* shall not be payable by the defendant on any part of the compromise sum* provided that payment is made prior to the expiration of the time period allowed for payment specified in paragraph 8 of this order, and then shall only accrue and be calculated from the day following such expiry.

10. The defendant pay the standard costs to the administrator within twenty-one (21) days of their assessment or prior agreement between the defendant and the administrator as to their amount.
11. The plaintiff's costs of this proceeding [or the claim], including the costs of this application, be assessed or agreed on the indemnity basis ("the indemnity costs").
12. Following the assessment of the indemnity costs or agreement as to their amount, the administrator is to:
 - (a) pay the indemnity costs to the plaintiff's solicitors from the moneys received under sub-paragraph 8(d) of this order; orunless the administrator in relation to assessed indemnity costs decides to:
 - (b) pay such lesser sum as it may agree with the plaintiff's solicitors; or
 - (c) apply to the court for further directions.
13. The Registrar of the Court –
 - (a) place the opinion of counsel/solicitor and the plaintiff's solicitor's affidavit dealing with the estimates of standard costs and indemnity costs in a sealed envelope marked "Not to be opened without an order of the Court"; and
 - (b) provide a copy of this order and copies of the affidavits (excluding those relating solely to liability) read on this application to the Principal Registrar of the Queensland Civil and Administrative Tribunal forthwith. Those affidavits that relate solely to liability that should not be provided to the Principal Registrar are listed below:

[Ed note: list or otherwise identify affidavits]
14. The envelope containing the opinion of counsel/solicitor and the plaintiff's solicitor's affidavit dealing with the estimates of standard costs and indemnity costs read on this application shall not be opened without an order of the Court.

15. Each of the parties, the administrator, [Ed note: insert, if appointed, “the guardian”] and the plaintiff’s solicitors have liberty to apply in respect of these orders.

Signed:

*Replace with ‘judgment sum’ where appropriate

PRACTICE DIRECTION NO 15 OF 2018
PERSONS UNDER A LEGAL DISABILITY
CHECKLIST

1. For an application for the sanction of a settlement for a person under a disability pursuant to s 59 of the *Public Trustee Act 1978*, the Court should ordinarily be provided with:
 - (a) an advice from a barrister or independent solicitor with appropriate experience;
 - (b) an affidavit of the litigation guardian;
 - (c) an affidavit of the plaintiff's solicitor;
 - (d) a separate affidavit of the plaintiff's solicitor dealing with the estimate of standard costs and indemnity costs;
 - (e) an affidavit of the administrator or trustee;
 - (f) a draft order.
2. The independent advice and supporting affidavits are not served on the defendant. It is only necessary for the defendant to be provided with a draft order.
3. The advice from the barrister or solicitor should ordinarily include:
 - (a) an analysis of the liability issues;
 - (b) an analysis of the issues relating to damages and an assessment of the likely award of damages were the matter to proceed to trial;
 - (c) an explanation as to why, in all the circumstances, the settlement is for the benefit of the person under the disability. (See *Stephenson v Geiss* [1998] 1 Qd R 542.)
4. The affidavit of the litigation guardian should include:
 - (a) a statement by the litigation guardian that instructions have been given for the settlement or compromise of the proceeding or claim (UCPR r 98(2)(b));
 - (b) a statement by the litigation guardian that advice, orally or in writing, was provided in relation to the prospects of success on liability and quantum;

(c) if there is an application to the Court for a sum to be paid out to the litigation guardian on account of gratuitous care and assistance and/or out-of-pocket expenses, a description (with supporting evidence where appropriate) of:

- (i) the services actually provided;
- (ii) the full market value of those services; and/or
- (iii) the out-of-pocket expenses;

(See *Grevett v McIntyre & Anor* [2002] QSC 106 at [6] and *Huet v Irvine* [2003] QSC 387 at [13].)

(d) a statement by the litigation guardian that advice has been received of an estimate of standard costs and indemnity costs.

5. An affidavit of the plaintiff's solicitor should include:

- (a) a brief procedural history of the claim;
- (b) a summary of the liability issues, annexing the relevant documents on liability;
- (c) a summary of the quantum issues, annexing the relevant medical reports and quantum documents, including a schedule or statement of loss and damage;
- (d) an explanation as to why the settlement or compromise is in the plaintiff's best interests (UCPR r 98(2)(a));
- (e) if an order under the *Guardianship and Administration Act 2000* (or other relevant order) is in place, proof of service on the existing administrator or guardian of the application, the supporting material (other than the opinion of counsel/solicitor) and the draft order in accordance with the Practice Direction;
- (f) proof of service on the Public Trustee of the application, supporting material (other than the opinion of counsel/solicitor) and the draft order in accordance with the Practice Direction;
- (g) if an attorney has been appointed under the *Powers of Attorney Act 1998* and is exercising power pursuant to that appointment in respect of the plaintiff, proof of service on the existing attorney of the application, the supporting material (other than

the opinion of counsel/solicitor) and the draft order in accordance with the Practice Direction;

- (h) confirmation that the schedule or statement of loss and damage was prepared on instructions from the litigation guardian;
 - (i) a statement that the Practice Direction has been otherwise complied with in all respects.
6. A separate affidavit of the plaintiff's solicitor that should cover:
- (a) an estimate of the standard costs;
 - (b) an estimate of the indemnity costs (to address the court's concern with respect to the proposed compromise sum being diminished unacceptably by the payment out of non-recoverable legal costs).
7. An affidavit from the administrator or trustee to be appointed should include:
- (a) relevant matters as to why the administrator or trustee should be appointed, including the trustee or administrator's history and qualifications;
 - (b) an estimate of the fund management costs;
 - (c) if a sum is to be paid out to the litigation guardian or other party, a statement that the payment out will not unacceptably diminish the fund such that it would impact the plaintiff's future needs or, if that matter cannot be addressed by the administrator or trustee at the time of the sanction, an acknowledgement by the administrator or trustee that the application for payment out will be considered after a management plan has been prepared. (See *Grevett v McIntyre & Anor* [2002] QSC 106 and *Huet v Irvine* [2003] QSC 387.)