

Structured Settlements

Structured settlements: Hopes and dreams or real and certain | Julius Melnitzer

By Julius Melnitzer



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(August 16, 2019, 8:33 AM EDT) -- Personal injury lawyers should examine the feasibility of structured settlements (a settlement paid out as an annuity, not all in one lump sum) more closely in today's low interest environment, a veteran plaintiff's counsel maintains.

"The bar has become extremely comfortable with structures, partly because there's no real incentive for lawyers to dig deeper," says Joseph Obagi of Connolly Obagi LLP in Ottawa. "Still, they should be looking at structures with a more critical eye, and while that may be complicated because we can't give financial advice, we can certainly point clients in the right direction."

The "right direction," it turns out, includes consideration of managed investment portfolios.

"It used to be that we would send our clients to a financial adviser with a structure in hand, and that's where the money would go, because nobody could touch the tax-free, guaranteed nature of a structure," Obagi says. "But in the last three to five years, advisers at major banks have started to say, 'I can beat this with an investment portfolio.' "

The difficulty with structures, according to Obagi, is that they are currently yielding somewhere in the neighbourhood of two per cent, which doesn't necessarily keep up with inflation.

"You can buy an inflation-indexed annuity, but it's expensive," Obagi says. "And as for the guarantee, sometimes it doesn't carry its value."

Considering alternatives to structures is particularly apt in the case of a young plaintiff.

"If you use the structure, there's really no opportunity for the investment to adjust to better financial times," Obagi said. "This having been said, a structure might still make very good sense for a 70-year-old plaintiff."

But John Rousseau, a principal at Guelph-based McKellar Structured Settlements Inc., says the best approach is often a blended one.

"Typically, part of the settlement is invested and part of it is structured," he said. "But putting all the money in an investment portfolio pits hopes and dreams against the certainty and reality that a structure presents."

Recently, however, in *Connolly v. Connolly and PGT* 2019 ONSC 4148, Justice Sylvia Corthorn of the Ontario Superior Court of Justice took a careful look at the choices and came down in favour of a managed portfolio. The issue arose in the context of Michelle Connolly's (not related to Obagi's partner, Tom Connolly) application for an order appointing her as the guardian of property of her adult son, 23-year-old Taylor Connolly, and approving a proposed management plan.

Taylor, injured in a pedestrian-vehicle accident when he was 8, had about \$1.4 million in settlement funds available. Corthorn concluded that he was incapable of managing property within the meaning of the *Substitute Decisions Act*.

The plan submitted proposed that BMO Nesbitt Burns invest the funds in a conservatively managed portfolio. It provided a comparison of the income earned from the portfolio and reinvestment of net earnings, as well as Taylor's projected worth over time. The court also reviewed three structured settlement options prepared by Burlington-based Henderson Structured Settlements for comparative purposes.

At first instance, however, Corthorn refused to approve the management plan.

"Additional evidence is required in support of the Plan; alternatively, a further revised management plan and evidence in support of it are required," she wrote in *Connolly v. Connolly* [2018] O.J. No. 5157.

As Corthorn saw it, the evidence fell short because it did not deal with:

- The potential negative impact of a downturn in the stock market;
- The potential effect of cost increases in the future, particularly those relating to housing and attendant care; and
- The potential impact of guardianship costs on the investment plan.

The upshot was that first-hand testimony was required not only from BMO but also from Henderson.

In response, Obagi, who represented the Connollys, called James Annis, a financial planner and manager with BMO, to the stand.

"Mr. Annis acknowledged that in some circumstances a structure is preferable to an investment portfolio," Corthorn stated. "He cited as one such example, where the injured/incapable person is older, the individual's future expenses are relatively certain or predictable, and the flexibility of access to capital over time is not important."

Taylor, however, was "at the other end of the spectrum" inasmuch as the evidence established that his expenses were likely to change over time. While indexation was possible, it would not provide the "flexibility required to address the unpredictable timing of the changes in Taylor's expenses" going forward.

Rousseau, however, points out that structures featuring varying payments over time are common and might have presented a feasible

alternative if investigated properly.

"What's most striking is that Corthorn's initial endorsement requiring more evidence contemplated calling both the structured broker and the financial planner, but only the planner testified," he said.

For his part, Obagi maintains that calling the structured broker was neither practical nor necessary.

"It's tough to ask a structured broker to take the stand when your clients are not supporting a structure," he said. "That's especially so because Henderson's numbers were all before the judge and Annis explained how a structure operates."

Corthorn, clearly, was of the same mind.

"I found Mr. Annis to be fair and frank in explaining why, for Taylor, an investment portfolio is preferable to a structured settlement," she wrote in support of her conclusion that an investment portfolio was "reasonable and in Taylor's best interests."

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