WEL ON POWERS OF ATTORNEY

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WEL PARTNERS ON POWERS OF ATTORNEY

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FOREWORD

By: Albert Oosterhoff

WEL Partners is a hoppenin' place! Last year the members of the firm published a helpful volume entitled *Guardianship*. Now they put their heads together again and have produced another book, *WEL Partners on Powers of Attorney*. I am pleased and honoured to introduce this very timely book.

In many ways the book is a successor and companion to *Guardianship*. Kerri Crawford (recently moved to B.C.) and Kate Stephens conceived and developed the proposed contents and in the result the new book is very comprehensive in covering the material. It explains the law of powers of attorney in clear, understandable language that will be helpful to interested lay persons as well as the legal profession.

If nothing else, the book should help to put a stop to the egregious solecism of calling an attorney a power of attorney. Judges, lawyers, and lay people often do this, but at least the first two groups should know better. A power of attorney is a document; an attorney is a person; and, by the document, the grantor of the power confers certain powers on the attorney.

The book opens with a short introductory chapter by Kimberly Whaley in which she describes why people should use powers of attorney, especially as they age. But she also cautions about their use when people do not fully understand their import. And she warns against misuse of this device.

In chapter 2, Arieh Bloom gives a helpful definition of a power of attorney. He describes the types of powers and tells us briefly how they are used. Andrea McEwan gives an overview of general powers of attorney, made under the *Powers of Attorney Act*, in chapter 3. These have become the step-child of the modern law of powers of attorney, but they are very convenient devices and it's good to be reminded of their uses.

Continuing powers of attorney for property and powers of attorney for personal care became the glamorous sisters when the *Substitute Decisions Act* came into force in 1992. In chapter 4, Helen Burgess (re-locating to Windsor) describes the first of these devices, its statutory capacity requirements, the kinds of powers a person can grant to her attorney, and the making and termination of continuing powers of attorney for property.

Mark Handelman describes the nature of powers of attorney for personal care in chapter 5. Some of the topics covered are similar to those covered in the previous chapter. But powers of attorney for personal care are unique in some ways and have their own special requirements and Mark discusses them in detail.

In chapter 6, Laura Cardiff ably tackles the difficult topics of capacity to grant and revoke powers and of capacity to manage property and personal care. She also discusses capacity assessments and how one can challenge the validity of powers of appointment. In chapter 7, Kimberly Whaley

provides a very helpful overview of the *Substitute Decisions Act*. She describes important provisions of the Act and includes discussions of cases that have interpreted those provisions.

Andrea Buncic describes the fiduciary duties of attorneys in chapter 8. These include both common law and statutory duties. Some of these duties are the same for attorneys for property and personal care, while others differ. Andrea describes them in great detail. Kimberly Whaley returns in chapter 9 to discuss the very important topics of choosing the right attorney and related issues. In chapter 10, Kimberly also discusses the typical ways in which powers can be misused by attorneys and makes suggestions about how to avoid misuse. Kate Stephens builds on this in chapter 11 by examining how powers of attorney are misused.

In chapter 12, Birute Lyons gives a detailed description of accounting for powers of attorney. It is not only very thorough in covering the materials, but is also written in a clear style that makes this technical subject accessible to all. The chapter is particularly useful because it has two helpful appendices: a sample information summary, and a sample set of attorney accounts.

Lionel Tupman provides a very helpful summary of remedies for victims of power of attorney abuse in chapter 13, including alternative dispute resolution, actions, and applications. He also lists the various causes of action that may arise in abuse cases.

Mental health legislation as it impinges on powers of attorney is discussed in chapter 14. This is a useful chapter, as this topic is often not front and centre when considering powers of attorney. In chapter 15, Krystyne Rusek gives a helpful overview of the obligations of lawyers when drafting powers of attorney and the care they need to take to ensure that the grantor has capacity.

The book concludes with four chapters of checklists that will be helpful not only for lawyers, but also for a number of other groups. The first checklist consists of considerations to be taken into account when dealing with elderly persons. The last three are considerations for grantors, health care providers, and financial advisors.

In sum, the book provides an exhaustive coverage of all issues one can encounter when making and advising on powers of attorney. Highly recommended.

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CHAPTER 1: INTRODUCTION

By: Kimberly Whaley

As the Canadian population ages, more and more individuals are, or should be, turning their minds to planning for potential future illness, disability, or incapacity and its impact on their financial and personal well-being. Many are executing power of attorney ("**POA**") documents as part of their plan. The POA document has long been viewed as one way in which a person can legally protect his or her health and financial interests by planning in advance for when he or she becomes ill, infirm, or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive, and avoidable litigation. In certain circumstances, however, POA documents may *cause* rather than *prevent* conflict.

In our practice, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones' need. We have also seen it used as a means of protection against predators, of which there is a very real risk. Unfortunately, we have also seen these documents used abusively, causing the grantor harm through fraud, neglect, and depletion of wealth. This is often accompanied with negligence in the provision of necessary care requirements.

That Power of Attorney documents are generally a good planning vehicle is a widely shared view. This is evident from the fact that, since 1994, the Ontario Ministry of the Attorney General has distributed free POA kits to the public, and solicitors have routinely recommended them as part of an estate plan. It is, however, not always clear to attorneys what legislative principles they are to follow in carrying out their duties [such as the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "***SDA***") or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "***HCCA***")]. Or, if they are indeed aware of such principles, whether they adhere to them as they are obligated to.

While a POA document can be used for the good of a vulnerable adult or an incapable person, there can also be a dark side to what is in fact a very powerful and far-reaching document. More often than not it becomes apparent that the grantor never fully understood and/or put much thought into the extent of the powers being bestowed, that the chosen attorney truly had the ability to do

the job and fulfill his or her duties, or that the attorney chosen could not be counted on to act in an honest and trustworthy manner. Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

This book will provide some practical guidance on minimizing the risks of abuse related to POA documents by providing a comprehensive overview of these powerful documents. This book will cover helpful topics such as: how to understand the different types of POA documents as well as their provisions; how to diminish the chances of abuse by choosing the right attorney; a review of the duties of attorneys; a survey of common abuses of POA documents which can facilitate the task of identifying financial abuse at an early stage; and a review of the civil and criminal cases and remedies available for those who are victims of abuse through the use of POA documents. This book also provides several checklists to assist in understanding POA documents in general.

This book will be useful for individuals who are executing POA documents themselves as grantors, lawyers who are drafting POA documents or providing advice on them, financial advisors or health care providers who are presented with POA documents, and individuals who have been appointed as an attorney under such a document. We hope you find it helpful and informative.

CHAPTER 2: WHAT IS A POWER OF ATTORNEY?

By: Arieh Bloom

A power of attorney (**"POA")** at its core is a form of agency between the grantor and the attorney acting under the POA. An attorney has been specifically defined in the jurisprudence as:

> An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal. An instrument authorizing another to act as one's agent or attorney.[1]

At common law, a general power of attorney terminates upon the grantor's subsequent mental incapacity or death.

The common law relating to powers of attorney has, however, been supplanted in Ontario by statute. POAs are now governed by the *Powers of Attorney Act* (the "***POAA***")[2] and the *Substitute Decisions Act* (the "***SDA***").[3] The *SDA* is a comprehensive statute which governs, among other things, all aspects of continuing powers of attorney for property and powers of attorney for personal care.[4]

In order to understand how POAs work in the province of Ontario, it is important to understand the legal obligations they impose at law on those parties acting as attorneys under the POA.

In the seminal decision of *Banton v. Banton*,[5] Justice Cullity stated the following with respect to the relationship created between a grantor and the power of attorney:

> An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. As an agent, such an attorney owes fiduciary duties to the donor but these are pale in

1 *Leung Estate v. Leung,* 2001 CarswellOnt 1972 at para 7.
2 R.S.O. 1990, c. P.20.
3 1992, S.O. 1992, c.30.
4 *Spar Roofing & Metal Supplies Limited v. Glynn,* 2016 ONCA 296 at paras 50 and 51.
5 1998 CarswellOnt 3423 at para 151.

> comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property. In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor and, pursuant to sections 32 and 38 of the *Substitute Decisions Act*, he or she is a "...fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit". The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the *Powers of Attorney Act* was amended in 1979 to permit the creation of such powers. It is now made explicit in the provisions of the *Substitute Decisions Act*...

TYPES OF POWERS OF ATTORNEY

In Ontario, there are three types of powers of attorney. There is a power of attorney executed under the *POAA*, a power of attorney for personal care under the *SDA* ("**POAPC**") and a continuing power of attorney for property under the *SDA* ("**CPOAP***").*

A continuing power of attorney for property under the *SDA* is differentiated from a general power of attorney for property under the *POAA*, in that a continuing power of attorney survives the incapacity of the grantor. Specifically, the continuing power of attorney for property must state that it is a continuing power of attorney or that it is intended to be used during the grantor's incapacity to manage property.[6]

Notably, with respect to powers of attorney under the *POAA,* the powers do not continue past the legal incapacity of the grantor. In other words, once the grantor loses capacity, a power of attorney under the *POAA* cannot exercise his/her powers of attorney.

Section 14 of the *SDA* specifically states that if a general power of attorney for property was executed under the *POAA* before the *SDA* came into effect in 1992, or within 6 months after that day, it shall be deemed to be a continuing power of attorney for the purposes of the *Substitute Decisions Act* if it contains a provision expressly stating that it may be exercised during any subsequent legal incapacity of the grantor, is executed in accordance with the *Powers of Attorney Act*, and is otherwise valid.

Therefore, the *SDA* appears to have mitigated the general differences between the powers of attorney at common law, powers under the *POAA*, and those under the *SDA.*

In understanding the purposes of POAs and how they are to be used to serve the grantor under

6 *SDA*, *supra* note 3 at s. 7.

the *SDA*, the comments of Madam Justice Kiteley in *Phelan, Re*[7] are worth repeating. In this case, Madam Justice Kiteley states:

> [22] The *Substitute Decisions Act* is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.
>
> [23] The alternative to such a legislative framework is that incapable persons and their families might be taken advantage of by unscrupulous persons. The social values of protecting those who cannot protect themselves are of "superordinate importance".

It is therefore important to stress that in the exercise of any POA the priority is always the wellbeing of the grantor, and whatever action is taken by the attorney must be in the best interests of that grantor.

In *Nguyen-Crawford v. Nguyen*,[8] Justice Price provided a succinct explanation of what a Power of Attorney is. His Honour stated:

> [T]he relationship between the grantor and grantee of a power of attorney is one of agency which operates on contract principles. The requisite capacity to execute an agency contract involves an appreciation of the nature of the agency and the nature of the appointment.

HOW ARE POWER OF ATTORNEY DOCUMENTS USED?

POA documents, whether for personal care or for property, are used to allow the attorney to make decisions on behalf of the grantor, both before there is legal incapacity and after there is legal incapacity. A continuing power of attorney for property allows a party to make decisions over a person's property as if they were the individual themselves. The most prominent limit on that decision-making power, under the *SDA*, is the prohibition against an attorney making a Will on behalf of the grantor.

7 29 E.T.R. (2d) 82 (1999) O.J. No. 2465 (Ont. S.C.J.) at paras 22 and 23.
8 2010 ONSC 6836 at para 97.

Generally, powers of attorney under the *POAA* are used in limited circumstances where, due to an absence or other temporary issue, the grantor requires someone to manage his or her affairs. For powers of attorney for personal care, those powers of attorney can only be acted on upon the legal incapacity of the grantor of that attorney. Such a document allows the attorney to make personal care decisions on behalf of the grantor. Those decisions involve the healthcare and wellness of the grantor.

CHAPTER 3: GENERAL POWER OF ATTORNEY - *POWER OF ATTORNEY ACT*

By: Andrea McEwan

POWERS OF ATTORNEY GENERALLY

A power of attorney is an instrument that facilitates the maintenance of or control over one's affairs by enabling the grantor of the power to plan for an extended absence, illness, or incapacity. You can grant a power of attorney over the maintenance of your property or in respect of your personal care.

POWERS OF ATTORNEY FOR PROPERTY

A power of attorney for property can be used to grant:

1. specific/limited authority;
2. general authority granting the power to do all things that are permissible under the governing principles and legislation; or
3. continuing authority which survives subsequent incapacity.[1]

In Ontario, there are two types of powers of attorney for property:

1. a general power of attorney, made in accordance with the *Powers of Attorney Act*;[2] and
2. a continuing power of attorney for property ("**CPOAP**"), made in accordance with the provisions of the *Substitute Decisions Act* (the "***SDA***").[3]

1 *Powers of Attorney*, paper authored by Kimberly A. Whaley and Mary L. MacGregor at p. 4 ("Powers of Attorney Paper") presented at the Estate and Trust Summit Forum, November 2003,
2 R.S.O. 1990, c. P. 20.
3 1992, S.O. 1992, c. 30.

The focus of this chapter is the general power of attorney for property contemplated by the *Powers of Attorney Act*.

THE POWERS OF ATTORNEY ACT

The *Powers of Attorney Act* has only three sections. The language of the *Powers of Attorney Act* refers to the "donor". This is different from the *SDA*, which refers to the giver of the power of attorney as the "grantor".

The *Powers of Attorney Act* does not impose any formal requirements for the power of attorney document. This is in contrast to the *SDA* which is formalistic, with a prescribed form, and validity and execution requirements.

Section 2 of the *Powers of Attorney Act* allows an attorney for property to do anything on behalf of the donor that the donor can lawfully do, subject to any conditions or restrictions set out in the power of attorney document itself. This means that an attorney can do almost anything with your property that you could do yourself. There are exceptions however; an attorney cannot sign a testamentary instrument or grant a power of attorney on your behalf.

The *SDA* essentially creates a complete code that regulates CPOAPs and the obligations, accountability, and liability of attorneys who exercise their authority pursuant to a CPOAP, but there is no similar direction in the *Powers of Attorney Act*. Instead, the common law applies.

The relationship created by a power of attorney at law is that of principal and agent. Agency is the fiduciary relationship which exists between two people, one of whom consents to act on the other's behalf.[4] The one who consents to act is the agent, and the one for whom the agent acts is the principal. Under a power of attorney, the attorney is acting as the agent of the donor and the donor is the principal.

Section 3 of the *Powers of Attorney Act* is a saving provision for good faith reliance on a power of attorney that was valid but has since become invalid. It provides that where a power of attorney is terminated, revoked, or becomes invalid, any subsequent exercise of the power by the attorney is valid and binding as between the donor or the estate of the donor and any person, including the attorney, who acted in good faith and without knowledge of the termination, revocation, or invalidity. This may be so even in cases where the power of attorney was fraudulently obtained.[5]

4 *Bowstead on Agency*, 15th Edition, The Carswell Company Ltd. 1985, Article 1.
5 See for example, *Canada Trustco Mortgage Co. v. Gladding*, 1995 CanLii 7041 (ON SC).

WHEN TO USE A GENERAL POWER OF ATTORNEY

There is some confusion amongst lawyers and the general public about which type of power of attorney should be used in which circumstances. As is covered in Chapter 4 of this book, a CPOAP can be used by your attorney both when you are capable and when you are incapable. As a result, it should be used if you are concerned about becoming unable to manage your property in the future and want to give someone the ability to do so on your behalf. Most people who want to grant a power of attorney use a CPOAP instead of a general power of attorney.

A general power of attorney, as contemplated by the *Powers of Attorney Act*, is generally used in business, under a share purchase agreement for example, or for temporary reasons. You may want to give someone a power of attorney over your property if you are leaving on vacation or if you are a university student heading overseas for school and need someone to look after your finances in the interim. In these circumstances, the attorney can act by signing cheques, buying or selling real estate, or dealing with other general financial matters in the donor's absence.

TERMINATING A GENERAL POWER OF ATTORNEY

At common law, a general power of attorney usually ends on death, bankruptcy, or incapacity. However, in certain circumstances a power of attorney may be irrevocable, meaning it will not end on death, incapacity, or bankruptcy. This flows from the agency relationship created by the power of attorney document.

Generally, if a general power of attorney is coupled with an interest, in other words, if adequate consideration is given and if the power of attorney was given for the purposes of securing a benefit to the donee or grantee, it is not revoked by death, incapacity, or bankruptcy.[6] The circumstances in which an irrevocable interest has been found in the English case law, are where the power and authority to do a particular thing was given to a specific individual, the doing of which conferred a benefit upon that individual. The courts have found that the authority to do the "thing" ceases when the benefit is realized.[7]

While this principle has developed in the English case law, it has been cited with approval in Canada. In *Wilkinson v. Young*,[8] for example, the Court stated:

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6 Power of Attorney Paper, *supra* note 1 at pp. 6-7. See also *Spooner v. Sandilands* (1842) 1 Y. & C. Ch. Cas. 390 ("*Spooner*") and *Frith v. Frith*, [1906] AC 254 ("*Frith*") for a discussion of this principle in the English case law. Fridman's Law of Agency, 7th Edition, Butterworths 1996 suggests that irrevocable powers do not terminate on the bankruptcy of the principal but this is beyond the scope of this chapter.

7 *Frith*, *supra* note 6 at pp. 260.

8 [1972] 2 OR 239-241, 1972 CarswellOnt 461 (Ont HCJ) ("*Wilkinson*") at para 5; see also *Spooner*, *supra* note 6.

> Where an agency is created, either for valuable consideration or by deed, and the purpose of the agency is to secure an interest of the agent, the authority normally cannot be revoked, i.e., where the authority is coupled with an interest, the authority is generally irrevocable: *Walsh v. Whitcomb* (1797), 2 Esp. 565, 170 E.R. 456, and, *Smart v. Sandars* (1848), 5 C.B. 895, 136 E.R. 1132. Similarly, where a power of attorney is given to a purchaser for value and is expressed to be irrevocable, the authority is not revocable nor is it revoked by the death or disability of the donor. However, in all cases where the agency is gratuitously created and is created merely for the benefit of the principal, it terminates at law with the latter's death or mental incompetency.

In *Smith v. Humchitt Estate*,[9] the BC Supreme Court applied the principle discussed in *Wilkinson* to the facts of that case. Leonard Humchitt ("**Humchitt**") entered into an agreement to lease his fishing license to David Seymour ("**Seymour**") for one year and to renew the lease automatically for a further 98 years. The plaintiff paid the deceased $15,000 for the agreement to lease. The agreement was binding on the deceased's heirs and, under it, he signed an undated power of attorney authorizing the plaintiff to apply for the license each year on his behalf. The power of attorney explicitly provided that it would not be revoked on his death.

Seymour utilized the fishing license from 1984 to 1987. Humchitt died in 1986. In 1988, Seymour applied for the issuance of a fishing license in his name. His application was denied on the ground that his eligibility for the issuance of a license in Humchitt's name had expired. The license was issued to Humchitt's son instead. Seymour brought an action to enforce the lease agreement.

On the specific point of whether the power of attorney had terminated upon Humchitt's death, the court relied on the principle in *Wilkinson*. Justice Hinds held that because the power of attorney was given to Seymour for value and it clearly provided that it was irrevocable, it was not terminated on Humchitt's death.[10] However, the court concluded that the lease agreement was unenforceable on other grounds.[11]

In light of this line of cases, it is important to carefully draft a general power of attorney for property in order to provide certainty of intention. The document should clearly state the nature and extent of the power being given and should expressly say that it is irrevocable, if that is the grantor's intent.

While beyond the scope of this chapter, it should be noted that there are evidentiary rules with respect to irrevocability on death, incapacity, or bankruptcy that should be considered.

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9 *Smith v. Humchitt Estate*, 1990 CarswellBC 195 ("*Humchitt*").
10 *Ibid*.
11 *Ibid*.

CONCLUSION

The general power of attorney contemplated by the *Powers of Attorney Act* is primarily useful as a temporary tool to assist when you intend to be absent in the short-term (e.g. during a vacation) and you require someone to manage your property for that period of time. In the majority of circumstances, a continuing power of attorney pursuant to the *SDA* will be the best tool to enable your attorney to manage your property during periods of incapacity, and over the long term.

CHAPTER 4: CONTINUING POWER OF ATTORNEY FOR PROPERTY – *SUBSTITUTE DECISIONS ACT*

By: Helen Burgess

INTRODUCTION

Most of us take for granted the fact that we enjoy the ability to freely make decisions about how to manage our property and finances. The reality is, however, that we may one day lose the requisite mental capacity to make those important decisions. The utility in preparing for such an event cannot be understated. By preparing the requisite legal documentation that allows you to designate someone who you trust to make property-related decisions on your behalf, in advance of mental incapacity, you can maintain a level of autonomy by clearly communicating your wishes to the attorney of your choosing.

For that reason, this chapter discusses:

1. Provisions of the *Substitute Decisions Act* (the "***SDA***"),[1] which is the legislation that governs the way in which you can protect yourself in the event of future mental incapacity to manage your property;
2. The Continuing Power of Attorney for Property (the "**CPOAP**"), which is the document that legally authorizes someone to act on your behalf with respect to managing your property;
3. Capacity considerations in executing a CPOAP and managing property; and
4. The formal requirements for executing and terminating a CPOAP.

1 1992, S.O. 1992, c. 30.

THE SUBSTITUTE DECISIONS ACT AND THE CONTINUING POWER OF ATTORNEY FOR PROPERTY

The *SDA* is the legislation that governs powers of attorney for property. It allows a person to delegate decision-making authority to another person, presuming the person is capable of delegating such authority. The person who grants the authority is referred to as the "grantor" and the person who the authority is granted to is referred to as the "attorney".

A CPOAP refers to the legal document that authorizes a person to act on another's behalf in managing property and finances. A CPOAP generally provides the attorney with broad latitude to act as the grantor's agent on a continuing basis from the date it is executed, unless a provision of the document requires a triggering event to effectuate the CPOAP. For example, a CPOAP can stipulate that it only comes into effect upon a finding of the grantor's incapacity to manage property. Further provisions can detail how a finding of incapacity are to be determined.

The person named as attorney in the CPOAP may be authorized to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a Will.[2] This includes making decisions relating to personal and real property, as well as day-to-day finance management and banking. It is for this reason that it is crucial to choose an attorney you trust.[3]

Unlike the attorney's authority under a general power of attorney that was discussed in chapter 3 of this book, which ends once the grantor becomes incapable of managing his or her own property, the attorney's authority to act pursuant to a CPOAP continues in spite of the grantor's subsequent incapacity.

CAPACITY

When we talk about capacity, what does that mean? As discussed in detail in chapter 6, there is no single legal definition of capacity. The *SDA* defines "capable" as "mentally capable" and provides that "capacity" has a corresponding meaning. Generally, all persons are deemed to be capable of making decisions at law; that presumption stands unless and until it is legally rebutted.[4]

Capacity is decision, time, and situation specific. This means that a person may be capable with respect to some decisions, at different times, and under differing circumstances. Therefore, an individual is not globally "capable" or "incapable"; instead, capacity is determined on a case-by-case

2 *SDA*, *supra* note 1 at s. 7(2).
3 See chapters 9, 10, and 11 of this book for a detailed discussion about the importance of choosing the right attorney.
4 *Palahnuk v. Palahnuk Estate*, [2006] OJ No 5304 (SC).

basis in relation to a specific task or decision at a moment in time. That being said, it is important to note that the capacity required to grant a CPOAP is different than that required to manage property; that is, a person may be capable of granting a CPOAP but incapable of managing property.[5]

The *SDA* sets out presumptions of capacity to grant or revoke a CPOAP. In relevant part, section 2 of the *SDA* presumes everyone who is over the age of 18 is capable of entering into a contract. A person may rely on this presumption of capacity when relying on a CPOAP unless there are reasonable grounds to believe either that the grantor is incapable of entering into a contract or of giving or refusing consent.[6]

The capacity to grant a CPOAP comprises both the capacity to decide whether to delegate decisions about property and the capacity to understand the power of attorney document, including the authority it confers.[7]

Section 8 of the *SDA* lists the factors that should be considered when assessing whether an individual possesses the requisite capacity to delegate decisions about property. A person is capable of giving a CPOAP if that person:

1. knows the kind of property he or she has and its approximate value;
2. knows of obligations owed to his or her dependents;
3. knows that the attorney will be able to do on her behalf anything in respect of property that she could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
4. knows that the attorney must account for his or her dealings with the person's property;
5. knows that her or she may, if capable, revoke the continuing power of attorney;
6. appreciates that unless the attorney manages the property prudently its value may decline; and
7. appreciates that the attorney could misuse the authority granted.[8]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had the capacity at the time it was executed.[9]

Compare the factors outlined in section 8 of the *SDA* with section 6, which identifies the requirements for capacity to manage property. Section 6 of the *SDA* states that:

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5 Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity, Kimberly Whaley and Ameena Sultan, ETPJ, Vol. 32, No. 3, May 2013.
6 *SDA*, *supra* note 1 at s. 2(3).
7 *Nguyen-Crawford v Nguyen*, 2010 ONSC 6836 at para 74.
8 *SDA*, *supra* note 1 at s. 8.
9 *Ibid* at s. 9(2).

> A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

It is the responsibility of the solicitor who is retained to draft the CPOAP to assess the client's capacity to grant or revoke a power of attorney, which must not be confused with the grantor's capacity to manage property.[10] However, in making this assessment, a solicitor may encourage or suggest a formal assessment, conducted by a certified capacity assessor, in borderline cases. This is all with a view to advancing the purpose of the *SDA*, which is to protect vulnerable individuals while at the same time respecting their autonomy.[11]

FORMAL REQUIREMENTS OF EXECUTION

In order to create a valid CPOAP, the document must either be called a "Continuing Power of Attorney" or state that it gives the attorney the power to continue acting for the grantor if he or she becomes mentally incapable.[12]

More than one person can be named as an attorney for property in the CPOAP; however, the attorneys shall act jointly unless the CPOAP provides otherwise.[13] This means that, unless otherwise stated, one attorney cannot act without the consent of the other attorney(s).

The CPOAP must be executed in the presence of and signed by two witnesses who are at least 18 years of age. A witness cannot be:

- the attorney or attorney's spouse;
- the grantor's spouse or partner;
- a child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child; or
- a person whose property is under guardianship or who has a guardian of the person.[14]

The CPOAP is effective immediately upon signing, unless it includes a provision that requires it to become effective upon the occurrence of a specific day or event.

10 *Egli v. Egli*, 2005 BCCA 627.
11 See chapter 6 of this book "Capacity to Give and Revoke Powers of Attorney" for a detailed discussion on capacity considerations.
12 *SDA*, *supra* note 1 at s. 7(1).
13 *Ibid* at s. 7(4).
14 *Ibid* at s. 10(2).

If any of the above criteria are not complied with, the CPOAP is not effective unless the court is satisfied, on any person's application, that it is in the interests of the grantor or his or her dependants to declare it to be effective.[15]

TERMINATION

There are a number of ways in which a CPOAP can be terminated. Termination occurs when the attorney dies, becomes incapable of managing property, or resigns.

An attorney under a CPOAP may resign; however, if the attorney has *acted* under the power of attorney, the resignation is not effective until the attorney delivers a copy of the resignation to:

(a) the grantor;

(b) any other attorneys under the power of attorney;

(c) the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person; and

(d) unless the power of attorney provides otherwise, the grantor's spouse or partner and the relatives of the grantor who are known to the attorney and reside in Ontario, if,

(i) the attorney is of the opinion that the grantor is incapable of managing property, and
(ii) the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.

The attorney must also give notice to anyone with whom the attorney dealt with on behalf of the grantor, and with whom future dealings are likely required. The CPOAP will continue if there is more than one attorney who is still willing and able to act, or the CPOAP names a substitute attorney who is able and willing to act.[16]

The CPOAP can also be terminated when:

1. the grantor revokes it, if the grantor is capable of doing so;
2. the court appoints a guardian for property for the grantor;
3. the grantor executes a new CPOAP, unless the grantor provides that there should be multiple CPOAPs; or
4. the grantor dies.

15 *SDA*, *supra* note 1 at s. 10(4).
16 *Ibid* at s. 12.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[17] In order to revoke a CPOAP, the revocation must be in writing and executed in the same way as the CPOAP, with two signing witnesses over the age of 18.[18]

If an attorney continues to act after the CPOAP has terminated or becomes invalid, the person or entity dealing with the attorney is protected from liability and the exercise of the power by the attorney remains valid if that person or entity acted in good faith and without knowledge of the termination or invalidity.[19]

CONCLUSION

The aim of this chapter was to provide the reader with an general overview of Continuing Powers of Attorney for Property under the *Substitute Decisions Act*.

If a person has not executed a CPOAP while capable of doing so, and is later found to be incapable of managing property, the court may appoint a guardian to manage the incapable person's property. Such an appointment can be a lengthy and contentious process. Therefore, it is prudent to consider executing a CPOAP while you are capable so you can communicate your wishes to the attorney of your choosing.

17 *Ibid* at s. 8(2).
18 *Ibid* at s. 12(2).
19 *Ibid* at s. 13(2).

CHAPTER 5: POWER OF ATTORNEY FOR PERSONAL CARE – *SUBSTITUTE DECISIONS ACT*

By: Mark Handelman

INTRODUCTION

The *Substitute Decisions Act* (the "***SDA***")[1] authorizes Powers of Attorney for Personal Care ("**POAPCs**"). A POAPC always appoints an Attorney for Personal Care and may also contain directions for the attorney and health care providers regarding the grantor's treatment wishes -- for example, "no heroic measures" provisions are common.

Generally, a POAPC authorizes the attorney to make personal care decisions under the *SDA*, as well as treatment decisions, decisions about personal assistance services, and decisions about admission to a care facility, all pursuant to the *Health Care Consent Act* (the "***HCCA***").[2] However, unlike a Power of Attorney for Property, a POAPC is not continuing: the authority it grants is only effective after a finding of incapacity under the *HCCA* or incapacity under the *SDA*.

FORMAL REQUIREMENTS

The POAPC must be in writing and witnessed by two persons, neither of whom is an attorney or the spouse or partner of an attorney. The grantor's spouse, partner or child may not be a witness either, nor a person who is less than eighteen years old, or whose property is under guardianship.

1 1992, S.O. 1992, c. 30.
2 1996, S.O. 1996, c. 2, Sched. A.

A witness may also not have a guardian of the person.[3] If these requirements are not met, the Court may, on application, declare the POAPC effective upon being satisfied it is in the grantor's best interests to do so.[4] At the time of execution, the grantor must have been at least sixteen years of age.

REVOCATION AND RESIGNATION

Revocation of a POAPC requires the same capacity as is required to grant it.[5] The formal requirements for revocation are the same as for execution. The issue of capacity is examined in detail in chapter 6 of this book.

When an attorney resigns, the resignation is not effective until a copy of the resignation is delivered to the grantor, any other attorneys and alternates (if any), and if there are no extant alternates, then to the grantor's spouse or partner known to the attorney and residing in Ontario. The attorney is also obliged to provide a copy of the resignation to anyone with whom he or she has dealt as attorney.[6]

ATTORNEYS

The Public Guardian and Trustee (**"PGT**") may be named as attorney, but consent to that appointment from the PGT is required in advance of execution of the POAPC in such cases.[7]

A person who provides health care to the grantor for compensation (including residential, social, training or support services) may not be an attorney for personal care.[8]

Attorneys may be named jointly, severally, jointly and severally, or in the alternative. Where there is more than one attorney, the document should identify what happens when they disagree among themselves. "Majority rule" provisions are acceptable. Where named attorneys disagree among themselves regarding a treatment decision (but not personal care matters), the Consent and Capacity Board (the "**CCB**") has held, effectively, that there is no POAPC and that it has jurisdiction to appoint a representative to make the treatment decision.[9]

3 *SDA*, *supra* note 1 at ss. 48 and 10.
4 *Ibid* at s. 48(4).
5 *Ibid* at s. 47(3).
6 *Ibid* at s. 52.
7 *Ibid* at s. 46(2).
8 *Ibid*. at s. 46(3).
9 See for example *T G (Re),* 2006 CanLII 79926 (ON CCB); and *CM (Re),* 2016 CanLII 46413 (ON CCB).

CAPACITY TO GRANT A POAPC

It is important to note that two different assessments for capacity come into play respecting a POAPC. The first is capacity to grant it. The second, where any treatment or other wishes are contained, is capacity, at that time, to have made the treatment or other decision reflected in the document.[10] Sometimes, a person has capacity to grant the POAPC but does not have the capacity to make the relevant treatment decision.

A person has capacity to grant the POAPC if having the ability to understand whether the proposed attorney has a genuine concern for the grantor's welfare and also appreciates that the attorney may be making decisions for the person.[11]

Where the POAPC contains a treatment direction, such as "I do not want antipsychotic medications", the grantor must be capable of making that treatment decision at the time the POAPC is executed. Capacity to make a treatment decision is governed by the *HCCA*,[12] while capacity for personal care is governed by the *SDA*.[13]

"USE OF FORCE" PROVISIONS

"Use of force" provisions may be included in a POAPC.[14] The grantor may authorize the use of force to compel him or her to have capacity assessed under the *HCCA*, to confirm that the grantor is incapable of personal care, or to compel a different capacity assessment as described in the document. The grantor may also authorize the use of force to provide for the ability to take the grantor to a place for treatment and to be detained or restrained for that treatment.[15] The grantor may also waive the *HCCA* right to have a finding of incapacity made under that statute reviewed by application to the CCB.

However, those provisions are not valid absent a statement by the grantor made within 30 days of executing the POAPC that the effect of those provisions are understood. Additionally, there must have been a formal capacity assessment confirming capacity to understand the effect of those provisions.[16]

In practice, these provisions are rarely used. The assessment requirement can be cumbersome and

10 *SDA*, *supra* note 1 at s. 47(4).
11 *Ibid* at s. 47(1).
12 *HCCA, supra* note 2 at s. 4(1).
13 *SDA*, *supra* note 1 at s. 45.
14 *Ibid* at s. 50.
15 *Ibid.*
16 *Ibid.*

most lawyers are loath to see clients waive fundamental freedoms in advance, especially when the provisions will be invoked in the indeterminate future. As well, the *Mental Health Act* (the "***MHA***")[17] authorizes the involuntary detention of a person to protect him or her – and the public at large – from the risks associated with mental disorder. The *MHA* defines "mental disorder" as "any disease or disability of the mind", which of course includes dementia.[18]

WHEN A POAPC BECOMES EFFECTIVE

To dispel another myth or misuse of terminology, there is no such thing as a continuing POAPC: the grantor must be incapable of making the decision in issue before consent to the decision defaults to the attorney.

For decisions pursuant to the *HCCA* (treatment, admission to a care facility, and personal assistance services) a health practitioner must have made a finding of incapacity in respect of that decision. The definition of capacity for all three is the same: able to understand information relevant to the decision and able to appreciate the likely consequences of giving or refusing consent to it.[19] The *HCCA* also specifically recognizes that a person may be capable with respect to some decisions and incapable with respect to others, and capable at some times but incapable at others.[20]

For decisions pursuant to the *SDA*, a finding of incapacity is unnecessary, provided the grantor is, at the time, incapable of making that decision. The *SDA* defines incapacity as unable "to understand the information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or (un)able to appreciate the reasonably foreseeable consequences of a decision or lack of decision".[21] While the *SDA* does not contain a provision similar to that in the *HCCA* to the effect that capacity is issue and time specific, no one has ever argued that personal care capacity is *not* time and issue specific.

Some POAPCs contain a provision regarding how or by whom capacity will be determined. If so, that provision does not apply to decisions under the *HCCA* because it is the obligation of the health practitioner proposing the treatment, admission to a care facility or personal assistance service to assess capacity as part of the process of obtaining informed consent. This author does not recommend provisions identifying who will assess capacity under the *HCCA*, if only because the usual provision requires the person's physician to do it – and most physicians, respectfully, are not very good at assessing capacity. However, a Capacity Assessor from the Attorney General's capacity

17 R.S.O. 1990, c. M.7.
18 *Ibid* at s. 1.
19 *HCCA*, *supra* note 2 at s. 4(1).
20 *Ibid* at s. 15.
21 *SDA*, *supra* note 1 at s. 45.

assessment office can assess capacity for personal care in the same way he or she would assess capacity to manage property.

EXPRESSING WISHES IN A POAPC

"No heroic measures" provisions are common in POAPCs. Such a provision tells the attorneys that the person does not wish to be kept alive beyond when there is a prospect of recovery, but would rather prefer to be allowed to die with whatever dignity remains in the person's circumstances.

The first problem with expressing wishes in a POAPC is that a person's wishes, values or beliefs may change, but often the POAPC does not get updated accordingly. That is why the *HCCA* recognizes that later wishes prevail over prior ones – even when the prior wishes were in writing and the later ones were not.[22]

The second problem is convincing health care professionals that the POAPC is *not* consent to treatment: it is no more than a guide to the named attorneys as to what the person's wishes, values and beliefs are relevant to the treatment decision. Some other jurisdictions consider an advance directive to be consent to treatment, and health practitioners trained there, or trained in jurisdictions that do not address the issue legally at all, continue to believe that the wish expressed in a POAPC authorizes them to treat the person without consent.

The third, and most common problem, is the failure of the grantor to convey sufficient information to his or her named attorneys that he or she has expressed those wishes. Attorneys for personal care occasionally reject the wish expressed in the POAPC because it is contrary to their own religious beliefs (withdrawing treatment, for example, with the intent of allowing death) or because they believe it contrary to the religious beliefs of the grantor. Or they simply refuse to accept it.

It is therefore vital that a person contemplating a POAPC have discussions with proposed attorneys to ensure they have an understanding of the person's treatment wishes, the religious and cultural beliefs the person would want respected at end of life, and to ensure that the proposed attorney is willing to respect the grantor's expressed wishes.

In *Friedberg et al. v. Korn*,[23] the named attorneys, children of the grantor, refused to follow a "no heroic measures" provision. They said there was no way their mother would have agreed to such a provision because it was contrary to her religious beliefs. The lawyer who drew the POAPC, together with a Will and a power of attorney for property, did not have a specific recollection of bringing the

22 *HCCA*, *supra* note 2 at s. 5.
23 2013 ONSC 960.

provision to the client's attention, but thought she must have. At the Consent and Capacity Board,[24] the wish was held valid and the attorneys were directed to consent to withdrawal of life support, as proposed by the attending physician and in accordance with the "no heroic measures" provision. However, this decision was reversed on appeal to the Superior Court.

CONCLUSION

A POAPC is a vital document. Although the *HCCA* contains a hierarchy of substitute decision-makers, the *SDA* does not – and short of a guardianship application there is no way to legally have personal care decisions made for an incapable person. The POAPC identifies who will make the grantor's personal care, treatment and admission to care facility decisions if he or she becomes incapable, and may also provide guidance as to what those decisions should be. It is a document that merits a serious discussion between the drafting lawyers and the client – and also merits discussion between the client and the proposed attorneys.

24 The Board's authority to adjudicate treatment disputes between substitute decision-makers and the treatment team regarding an incapable is set out in s. 37 of the *HCCA*.

CHAPTER 6: CAPACITY TO GIVE AND REVOKE POWERS OF ATTORNEY

By: Laura Cardiff

INTRODUCTION: AN OVERVIEW OF THE CONCEPT OF "CAPACITY"

A power of attorney document is only valid if the grantor was capable of giving a power of attorney at the time he or she executed the document. Issues often arise with respect to the grantor's alleged incapacity, particularly where a grantor names a new attorney shortly before becoming incapable of managing property (and, to a lesser extent, of managing personal care).

It is important to note, however, that capacity to manage property or personal care is distinct from capacity to grant a power of attorney for property or personal care, and evidence of incapacity to do the former may not necessarily be evidence of incapacity to do the latter. This is so because there is no single legal definition of "capacity". The *Substitute Decisions Act* (the "***SDA***"),[1] which addresses various types of capacity, simply defines "capable" as "mentally capable" and provides that "capacity" has a corresponding meaning.

Nor is there a universal assessment for establishing capacity. Generally, a person must be able to understand and appreciate the information relevant to making that particular decision, be able to apply that information to his or her circumstances, and able to weigh the risks and benefits of a particular decision, or failure to make a decision.[2] Therefore each particular task or decision has its own corresponding capacity characteristics and determining criteria. As the court said in *Banton v. Banton*,[3] "although in each case the question may depend, at least in part, upon the individual's cognitive powers, the nature of understanding required is not the same". As a result, an individual may, for example, be capable of making personal care decisions, but not capable of managing his

1 1992 S.O. 1992, c. 30.
2 *Starson v. Swayze,* [2003] 1 S.C.R. 722 at paras 77 and 78.
3 (1998), 164 D.L.R. (4th) 176, [1998] O.J. No. 3528 (S.C.J.), per Cullity J at para 33.

or her property, or capable of granting a power of attorney document, but not capable of making a Will.

All persons are presumed capable in all respects until the contrary is proven for any particular task or decision. Further, while some decisions may appear more complicated and therefore to have a higher "threshold" for capacity, courts have been clear that it is not correct to view various capacity decisions as falling in a hierarchy.[4] Instead, different types of decisions simply call for different criteria to be applied. As the court said in *Godelie v. Ontario (Public Trustee)*,[5] "[i]t can never be a question of one level [of capacity] being less than another. If it is a question at all, it must be whether one level is different than the other".

In addition to being task specific, capacity is time specific. This means that it is capacity at the time the relevant task is accomplished (in this case, when the power of attorney was granted) that matters, not capacity before or after that time. Although, in certain situations, capacity at the surrounding time periods can provide some evidence as to the likelihood the grantor had capacity at the relevant time.

Capacity is also situation specific, and may vary depending on the situation a person is in. Those who suffer from some confusion or borderline cognitive impairment may be incapable in a situation of great stress or when bombarded by numerous stimuli, but quite capable when in the comfort and familiarity of their own home.

CAPACITY TO GRANT A CPOAP

Because capacity is task specific, the capacity to grant a continuing power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one's property or personal care. The test for capacity to grant or revoke a CPOAP is found at section 8 of the *SDA*. A person is capable of giving a CPOAP if he or she possesses the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

4 See *Covello v. Sturino,* 2007 CarswellOnt 3726 ("*Covello*") at para 21.
5 1990 CarswellOnt 497 (Ont. Dist. Ct.).

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

The factors for determining capacity for revoking a CPOAP are the same as those for granting a CPOAP. Subsection 8(2) of the *SDA* states that a person is capable of revoking a CPOAP if capable of granting one. When considering whether a grantor is capable of revoking a power of attorney, some of the above criteria will necessarily be modified. For example, rather than appreciating that unless the attorney manages the property prudently, its value may decline, the person revoking will need to appreciate the risk of being unable to prudently manage his or her own property. In the case of *Re Grav*,[6] the court agreed with the physician assessor that the person in question was incapable of revoking his CPOAP where he "showed inadequate insight into his cognitive losses and believed he was capable of managing his own finances".

When considering the above criteria, it is important to consider the circumstances of the specific client/grantor. In particular, the first criteria, regarding knowledge of the kind of property and its value, may vary considerably depending on how active a role the grantor plays or has played in his or her own property management. A person who has a high net worth, complex corporate holdings, or a large stock portfolio, may never have managed his or her own property directly, and may rely on advisors to do so. In that context, the inability of a person to list in detail the value of all assets is not an indication of lack of capacity, but merely a sign that the person has delegated this authority. A history of such delegation does not make the grantor incapable of knowing the extent of his or her assets when provided with reports from the relevant professionals, and should not render the person incapable of granting a CPOAP.

As another example, a person may have always relied on his or her spouse to manage his or her finances, but in light of the spouse's recent death, is now required to learn to manage his or her own property while simultaneously dealing with granting a new CPOAP. The client may need more time to be taught about powers of attorney, and about property management in general. The lawyer should consider employing techniques to assist the client in understanding the nature of a power of attorney and the requisite capacity criteria if they are dealing with a potentially borderline case.

6 2007 BCSC 123 at para 11.

It is permissible for the client to work from memory aids, such as notes, when discussing his or her finances.[7]

The last capacity criteria, regarding ability to appreciate that an attorney could misuse his or her authority, can also be particularly situation specific. That criteria requires the grantor to consider the possibility of abuse or misuse in light of the particular attorney in question, not simply the abstract idea of abuse of a CPOAP. In other words, many people will understand that, in theory, a CPOAP could be misused; however, because of a person's vulnerability to financial exploitation, be unable to appreciate that risk in relation to the specific person her or she is naming as attorney, and to comprehend the potential ulterior motives of that person. In a sense, this capacity criteria overlaps with considerations of undue influence, which concept is set out in greater detail below.

Distinction Between Capacity to Grant/Revoke CPOAP and Capacity to Manage Property

In contrast to the factors applied for granting a CPOAP, the factors for determining the capacity to manage property, found at section 6 of the *SDA*, are defined as:

> (a) The ability to understand the information that is relevant in making a decision in the management of one's property; and
>
> (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

Subsection 9(1) of the *SDA* specifies that a continuing power of attorney is valid if the grantor, at the time of executing it, was capable of giving it, even if incapable of managing property. Consider the distinction between the factors or criteria to grant/revoke a CPOAP and to manage property. As one can see, pursuant to these different factors, a person may be capable of granting a CPOAP even if that person cannot understand all the information that may be relevant to making a decision, or failing to make a decision, in the management of his or her property. Capacity to grant a CPOAP only requires that the grantor understand what kind of property he or she has and its general value. All the other criteria relate to understanding the nature of a CPOAP and appreciating the identity of the specific attorney.

Particularly in the case of complex property holdings, a person may well understand the general nature and extent of his or her assets, and understand the nature and effect of a CPOAP and the obligations of an attorney, but no longer be able to manage his or her own property. At the same

7 In the case of *Knox v. Burton*, (2005), 14 E.T.R. 3d) 27, the grantor passed two assessments of her capacity to grant a POAP when she had with her some notes detailing her finances, but failed one assessment where she did not. The grantor is allowed to and indeed should have their own notes or bank/portfolio statements available if they are of assistance.

time, a person may have had an active role in managing his or her own property throughout his or her life, may have fairly straightforward assets, and may remain capable of understanding and conducting the straightforward transactions necessary to maintain management of property. In such a case, the first two criteria of s. 8(1) will be met. The difficulty may arise with understanding information related to the nature and effect of the CPOAP specifically.

In the case of *H. (E.)*,[8] the Consent and Capacity Board considered an interesting argument by counsel for Ms. H, the alleged incapable person. Counsel for Ms. H argued that the fact that a lawyer had assessed capacity to grant a power of attorney for property and personal care, and the grantor had executed those documents, should be taken as evidence that Ms. H also had capacity to manage her property at that time. The Board disagreed, and held as follows:

> [32] Although the evidence shows that there is clearly some capacity to manage day to day financial matters such as paying bills and calculating balances in bank accounts, the Board views this as an isolated area of financial capacity that might relate to Ms. H.'s former occupation as a bookkeeper. Quite clearly, she is unable to make other decisions about her own property, particularly those relating to the potential necessity of selling her home and moving to other accommodations…
>
> [34] The Board sees those continuing abilities as a small island of capacity, probably a skill that is retained due to her life-long occupation as a bookkeeper, in an otherwise substantially diminished capacity to manage her own property.[9]

CAPACITY TO GRANT OR REVOKE A POAPC

The criteria to be applied for granting or revoking a POA for personal care ("**POAPC**") are found at section 47 of the *SDA*. A person is capable of giving a POAPC if the person has:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.

As with a CPOAP, a person who is capable of granting a POAPC is deemed capable of revoking a POAPC.[10]

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8 2001 CarswellOnt 8209 ("CCB").
9 *Ibid* at paras 32 and 33.
10 *SDA, supra* note 1 at s.47(3).

The factors for capacity to grant or revoke a POAPC are noticeably different than those for granting or revoking a CPOAP. While the criteria to be applied for assessing capacity to grant a CPOAP incorporates a significant amount of information that the grantor must be able to comprehend, for a POAPC, the grantor is only required to be able to understand whether the proposed attorney for personal care has the grantor's best interests in mind, and that the POAPC means the proposed attorney may be authorized to make such personal care decisions for the grantor.

Issues with respect to capacity to grant or revoke a POAPC arise significantly less often than those with respect to CPOAPs. This is not simply because the factors are more straightforward. There are also arguably fewer issues that arise with respect to abuse of powers of attorney for personal care. Family members, neighbours, and those who may seek to deliberately prey on the elderly will often seek to gain control of an elderly or alleged incapable person's assets by way of a CPOAP, which they then use to orchestrate financial abuse. There is no corresponding motivation for acquiring a power of attorney for personal care over a person.

Further, if a CPOAP is found invalid and the grantor is incapable of granting a new one, anyone wishing to assist that person with property management during a period of incapacity will have to bring an application for guardianship, which is an onerous process. Otherwise, the Public Guardian and Trustee will be appointed substitute decision maker of last resort. In contrast, if a person is found incapable of managing personal care and has no appointed attorney for personal care, most important decisions will be governed by the *Health Care Consent Act* (the "***HCCA***"),[11] which provides for a hierarchy of substitute decision makers, generally family members.

Distinction Between Capacity to Grant/Revoke POAPC and Capacity to Manage Personal Care

A POAPC is valid if at the time it was executed, the grantor was capable of giving a POAPC, even if that person was incapable of managing personal care at the time of execution.[12] Incapacity to manage personal care is defined under the *SDA* s. 45 as follows:

> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The only exception to the provision that a POAPC is valid despite any incapacity to manage personal care is if the POAPC incorporates specific instructions for personal care decisions. Those instructions

11 1996, S.O. 1996, c. 2, Sched. A, s. 20(1).
12 *SDA*, *supra* note 1 at s. 47(2).

are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.[13] If not, the remainder of the document will be valid, but not those specific instructions.

The issue of capacity to make a specific decision will most often arise with respect to the refusal of specific treatment. POAPCs often include a boilerplate clause asking that no "heroic measures" be taken (a vague term that grantors should consider avoiding in favour of a list of specific interventions they do not want) or refusing consent to treatments that would prolong life in a terminal situation.

These decisions with respect to capacity to accept or refuse treatment are governed by the *HCCA*. Section 4(1) of the *HCCA* defines capacity as follows:

> A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Note that this definition is functionally identical to that in s. 45 of the *SDA*, defining incapacity to manage personal care.

The court in *Starson v. Swayze*[14] emphasized that a person must meet both branches of the above test: be capable of understanding the relevant information, and also appreciate the foreseeable consequences. The first criterion requires the person to have "the cognitive ability to process, retain and understand the relevant information", while the latter requires the person "to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof".[15]

ASSESSING CAPACITY

Who Assesses Capacity?

The *SDA* does not specify who may assess the capacity of a person to grant or revoke a CPOAP or a POAPC. This is in contrast to the *SDA* provisions regarding capacity to manage property, which specify that only a person meeting the definition of "capacity assessor" may conduct an assessment of

13 *Ibid* at s. 47(4).
14 *Starson, supra* note 2.
15 *Ibid* at para 78.

capacity to manage property. The definition of capacity assessor is provided by Regulation 293/96 under the *SDA*, and requires that the person has completed training from the Attorney General, has the required insurance, and is a member of one of the designated professional colleges, which include the College of Physicians and Surgeons of Ontario and the College of Social Workers and Social Service Workers, among others.

Capacity to manage personal care is, by common law, assessed by the person interacting with the alleged incapable person. If the *HCCA* applies to the decision, the assessment of whether a person is capable of making the relevant personal care decision, or if the attorney must act in the grantor's place, is performed by the health practitioner who proposes the treatment, or the evaluator, if the decision is in respect to admission to a facility or personal assistance services.[16] If the *HCCA* does not apply to the decision, it is the obligation of the named attorney to assess capacity and confirm incapacity before making the decision as substitute decision maker.[17]

Because the capacity to grant or revoke either kind of power of attorney involves a legal definition of capacity, at first instance it will always be the task of the lawyer to assess the client's capacity to grant or revoke a power of attorney, either for property or for personal care, when asked to prepare such documentation for a client.[18] Solicitors should take careful notes of their assessments of their client's capacity, including why in their view the grantor meets the capacity criteria, and what steps were taken to assess capacity.

It is important for the lawyer, when assessing capacity, to be aware of the individual needs and abilities of the client that are separate from issues of capacity, but may well impair a client's ability to understand the transaction that he or she is undertaking. For example, a client may need to meet with a lawyer or assessor who speaks his or her native tongue in order to properly understand what is being asked. Those whose reading skills are weak may need the document read to them and explained. Those who need glasses or hearing aids should have those forms of assistance with them.

The fact that the primary obligation to assess capacity is on the solicitor does not mean to suggest that a solicitor in discharging this duty of care may not recommend, or even require, a formal assessment by an assessor in borderline cases or even those cases where capacity is clear but where litigation is likely. Keep in mind, however, that it is the capacity at the time the POA is executed that is relevant. The lawyer may have seen the client when the client was capable and the assessor may see the client when he or she is not. Therefore, it would not be appropriate to focus solely

16 See *SDA supra* note 1 at ss. 40, 49(1) and 57; and *HCCA*, *supra* note 11 at s. 10.
17 *SDA*, *supra* note 1 at s. 49(1)(b).
18 *Egli v. Egli*, 2005 BCCA 627. In this case, the trial judge placed greater importance on the evidence of the drafting solicitor than that of a physician in finding that Mr. Egli had the requisite capacity to execute the POA in question.

on expert opinion rather than the client's capacity in the lawyer's office, particularly if there is a significant gap of time, or significantly different circumstances, between the two assessments.

Triggering the Authority of the Attorney

A CPOAP comes into effect immediately upon execution, unless the document specifies otherwise. A POAPC does not come into effect until the grantor is incapable of managing personal care. In either case, the POA document may itself specify how incapacity is to be determined in order to trigger the effectiveness of the document, and if it does so, that provision governs.[19] For example, the grantor may require that his or her family doctor, or two independent physicians, or even a licensed capacity assessor (for capacity to manage property) indicate that the grantor has lost capacity to manage property or personal care. The grantor may also select any other person he or she trusts to make this determination; it need not be a health professional or any person with special training in assessments. If the document indicates that an assessment/confirmation of capacity is required, and a finding of incapacity to trigger the authority of the attorney, and no method for assessment is specified in the document itself, then the following rules apply:

For a POAPC

- Assessment by a licensed capacity assessor as defined in the *SDA* regulations.

For a CPOAP:

- Assessment by a licensed capacity assessor as defined in the SDA regulation,[20] or the issuance of a certificate of incapacity pursuant to the *Mental Health Act*.[21]

Invasive Nature of Capacity Assessments

In situations where capacity is borderline or in dispute, as is the validity of the POAPC or CPOAP, the parties may seek assessments of that capacity, and indeed may seek multiple assessments as each challenges the validity or accuracy of the assessment arranged by the other side. Courts have repeatedly held, however, that capacity assessments should be undertaken carefully and only in limited circumstances due to their invasive nature and negative impact on autonomy. This applies both to assessments of capacity to manage property/personal care, and capacity to grant powers of attorney.

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19 *SDA*, *supra* note 1 at s. 49(2).
20 *Ibid* at s. 9(3).
21 R.S.O. 1990, c. M.7.

In a 2009 ruling in *Abrams v. Abrams*,[22] Justice Low of the Superior Court was asked to grant leave to appeal a decision of Justice Strathy in which Justice Strathy had declined to order an assessment of the applicant's mother's capacity to grant a CPOAP and a POAPC. Justice Low held that Justice Strathy properly exercised his discretion when he denied the applicant's request for further capacity assessments. Justice Low noted that a finding of incapacity has serious implications that infringe upon a person's privacy and autonomy and that capacity assessments should be ordered only when necessary. Justice Low wrote as follows:

> [56] An application for a declaration of incapacity under the *SDA* is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.
>
> [57] That these rights should not be lightly interfered with and that the individual should not be visited with the intrusion into her privacy that an assessment entails simply by virtue of an allegation having been made – even if there is "good reason to believe that there is substance to the allegation" – is reflected in the statutory presumption of capacity and, in respect of the particular issue before the court, in the onus built into s. 79 for the moving party to show that there are reasonable grounds to believe that the person is incapable.[23]

The reference above refers to additional capacity assessments sought by family members, after a CPOAP and POAPC had already been granted.

ATTACKING THE VALIDITY OF A POA DOCUMENT

Because there is a general presumption of capacity, it is up to the person challenging the validity of a POA to provide evidence to satisfy a court, on a balance of probabilities, that the grantor lacked capacity at the time the document was executed, or did not otherwise understand and agree with the contents of the document (perhaps because of a language barrier, failure to obtain proper advice, or inability to read the document). Solicitors' records, medical records, retrospective assessments, and sometimes even financial records may all be useful tools in providing evidence of capacity or lack thereof at the relevant time.

Undue Influence

Another method of attacking a POA is via allegations of undue influence. Undue influence has been explained as the ability of one person to dominate the will of another, whether through manipulation,

22 2009 CanLII 12798 (ON. S.C.D.C.) ["Abrams"].
23 *Ibid* at paras 56 and 57 [emphasis added].

coercion or outright or subtle abuse of power. Undue influence is an equitable principal used by the courts to set aside or invalidate transactions where the grantor's mind was not operating independently. If the POA was executed as a result of undue influence, rather than through an exercise of the grantor's own free will, it is void.

Undue influence can be difficult to prove, given that the conduct amounting to actual undue influence often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence. In the context of testamentary capacity, the Ontario Divisional Court recently provided the following list of circumstantial evidence of undue influence, much of which can be adapted to apply equally to the context of a power of attorney:

(i) the increasing isolation of the testator;

(ii) the testator's dependence on the respondent;

(iii) the substantial pre-death transfers of wealth from the testator to the respondent;

(iv) the testator's expressed yet apparently unfounded concerns that he was running out of money;

(v) the testator's failure to provide a reason or explanation for leaving his entire estate to the respondent and excluding his daughters from it;

(vi) the material changes in circumstances between the time of the first Will from the time of the final Will that would undermine the testator's earlier reasons for favouring his son in his Will;

(vii) the move by the testator which increased his isolation and the control over him by the respondent;

(viii) the circumstances of the making of the Will including:

  (a) using a lawyer previously unknown to the testator and chosen by the respondent;

  (b) the respondent conveying instructions to the lawyer concerning the contents of the Will;

  (c) the respondent apparently receiving a draft of the Will before it was executed by the testator and then the respondent taking the testator to the lawyer to sign the Will; and

(ix) the testator's documented statements that he was afraid of the respondent.[24]

In the case of *inter vivos* transfers (as opposed to testamentary ones), undue influence need not depend on proof of actual undue influence. The person alleging undue influence can rely in certain circumstances on a presumption of undue influence that inheres in the nature of the relationship between the two people. Relationships where presumed undue influence has been found include

24 *Tate v. Gueguegirre*, 2015 ONSC 844 (Div. Ct.) at para 9.

solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency. However, even these close, traditional relationships (i.e. parent and child) do not always attract the presumption, and it is necessary to closely examine the specific relationship for the potential for domination, such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.

In the case of *Cowper-Smith v. Morgan*,[25] the court found the relationship between a daughter and her elderly 86 year old mother "was one in which there was a potential for domination"[26] and which gave rise to a presumption of undue influence, based on the following facts:

(i) The mother relied on the daughter's judgment, especially after her husband died;

(ii) The daughter had a dominant personality and "people did what [the daughter] wanted";

(iii) The daughter had to teach the mother how to write a cheque, as the father was responsible for the finances when he was alive;

(iv) The mother would ask the daughter advice about letters she wanted to write to her sons, the letters were written jointly between the mother and daughter and sometimes in the daughter's handwriting and signed by both or the daughter would write "on behalf" of the mother. The daughter would keep copies of the letters;

(v) The mother would never contradict the daughter and would "nod along with [the daughter's] views"; and

(vi) The daughter paid her mother's bills and looked after her investments, prepared her tax returns and the mother would rely on the daughter and said that she was "always there to help".[27]

As a result, the transfers from the mother to her daughter were declared void.

Suspicious Circumstances

That there is a general presumption of capacity is well known. This means that, as a rule, the burden will be on a person attempting to set aside a power of attorney document to prove that the grantor was incapable at the time. However, courts have held that where there are "suspicious

25 *Cowper-Smith v. Morgan*, 2015 BCSC 1170; appeal dismissed, 2016 BCCA 200.
26 *Ibid* at para 90.
27 *Ibid* at paras 87-90.

circumstances", the burden will be reversed, and it will be on the person seeking to rely on the validity of the document (usually, the named attorney) to satisfy the court as to its validity.

The concept of suspicious circumstances arises from the law of testamentary capacity (capacity to make a Will). Once the propounder of a Will has demonstrated that a Will was duly executed (all formal requirements have been complied with), then there arises a legal presumption that the other requirements of the Will – that testator had capacity and knew and approved of the contents of the Will – have also been met. Those attacking the Will may, however, raise evidence of suspicious circumstances. If the court is persuaded that suspicious circumstances exist, the presumption in favour of the Will's validity is exhausted, and the propounder reassumes the burden of proving that the testator had capacity. Suspicious circumstances may be raised by: (1) the circumstances surrounding the preparation of the document; (2) the circumstances tending to call into question the capacity of the grantor; or (3) the circumstances tending to show that the free will of the grantor was overborne.[28]

Recently, in the case of *Nguyen-Crawford v. Nguyen*,[29] the court held that the doctrine of suspicious circumstances, as usually applied to Wills, also applies to Powers of Attorney. Where there are suspicious circumstances surrounding the execution of a power of attorney, the presumption of capacity under the *SDA* does not operate and the burden of proof with respect to capacity shifts to the grantee of the power of attorney.

In that case, which involved a sibling dispute over the power of attorney for their mother, the court found evidence of undue influence, which served to rebut the presumption of capacity. There were also suspicious circumstances surrounding the execution of the POA. The daughter had arranged the circumstances for the execution of the POA documents and provided the only translation of the documents and of the advice of the drafting lawyer. The court held as follows:

> [I]n the absence of positive evidence that the [Power of Attorney] documents and advice were independently translated, I am not satisfied that Ms. Nguyen-Crawford has met her burden to prove that Mother knew what she was signing or that the powers of attorney were a clear expression of her wishes, especially having regard to the evidence before me, which satisfies me that Mother was substantially dependent on Ms. Nguyen-Crawford at the time.[30]

28 *Vout v. Hay*, [1995] 2 SCR 876 at para 25.
29 2010 ONSC 6836 at para 93.
30 *Ibid* at para 101.

CONCLUSION

Issues of capacity, whenever they arise, can require a complex balancing of the need to respect a grantor's dignity and autonomy, with the equally important need to protect the potentially vulnerable. Drafting solicitors must take care not to presume that the presence of a medical condition, even one such as Alzheimer's or other form of dementia, or a finding of lack of capacity to manage property or personal care, is determinative of capacity to execute the POA. At the same time, lawyers must be diligent in satisfying themselves that the grantor has capacity to execute the document in question, keeping in mind the tests as outlined above, and the need to be alert for red flags of undue influence. Failure to do so will only be to the grantor's detriment later, if allegations of lack of incapacity arise after the fact, and there is insufficient evidence to demonstrate the drafting solicitor did his or her due diligence.

CHAPTER 7: DEMYSTIFYING THE *SUBSTITUTE DECISIONS ACT*

By: Kimberly Whaley

This chapter will take a close look at the *Substitute Decisions Act* (the **"*SDA*"**),[1] the main legislation governing attorneys under power of attorney (**"POA"**) documents, and other substitute decision-makers, such as guardians. While the *SDA* is referred to and explained in sections throughout this book, we are using this chapter to address the *SDA* as it relates to powers of attorney in one convenient place. Below is a review of the more relevant provisions dealing with POA documents, as well as corresponding notable cases.

SDA – GENERAL

Presumption of Capacity

> 2 (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.
>
> (2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.
>
> (3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.

This section of the *SDA* sets out a general presumption that persons over the age of 18 are capable of making their own property decisions and that those over 16 years of age are capable with respect to personal care decisions. These subsections are reflective of our society's respect for a person's right to autonomy and to make his or her own decisions about person and property. Also, it allows individuals to rely on this presumption in dealing with others.

1 1992 S.O. 1992, c. 30.

Case Law:

It was noted earlier that where there are "suspicious circumstances" of undue influence surrounding the execution of a POA document, the presumption of capacity noted in s. 2 of the *SDA* does not operate, and the burden of proof with respect to capacity shifts to the grantee of the POA.[2]

In the leading case of *Koch (Re)*,[3] the Court is mindful of the level of evidence required to rebut this important presumption:

> **Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the SDA**....The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes. It is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others.

In other words, a simple assertion that someone is incapable is not enough to find that someone is incapable.

PART 1 – THE PROPERTY

Capacity to Manage Property

> 6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

This section of the *SDA* deals with when and how to determine if a person is incapable of managing property (not to be confused with incapable of granting or revoking a power of attorney for property, which is discussed below).

Case Law:

In *Koch (Re)*,[4] the court looked at whether section 6 conditions had been met and the level of evidence required to determine if the person is capable to manage property:

2 See *Vanier v. Vanier*, 2016 ONSC 4620 at para 11; and *Nguyen-Crawford v. Nguyen* 2010 ONSC 6836 at para 85.
3 [1997] 33 OR (3d) 485 at para 19 [emphasis added].
4 *Koch*, *supra* note 3 at para 11 [emphasis added].

> Higgins did not establish whether the appellant was able to understand information that is relevant to making a decision in the management of her property. **He (and the Board) assumed that she was not, but there is insufficient evidence to support such an assumption**. Similarly, he did not establish whether the appellant was able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. **He (and the Board) assumed that she was not able, but the supporting evidence is lacking. The appellant may have fully appreciated the consequences [of her decision] and chose to shoulder the attendant risks.** As a result, the requirements of s. 6 of the *SDA* have not been met.

The case of *McMaster v. McMaster*,[5] also addressed section 6:

> [9] The Statute goes on in section 6 to state:
>
> > A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonable foreseeable consequences of a decision or lack of decision.
>
> [10] This fiscal incapacity obviously could be an aspect of "incapacity" as defined, but could also exist without a full blown medical or legal diagnosis of incapacity. **Fiscal incapacity must be objectively scrutinized according to Wilson, J. in *McDougald Estate v. Gooderham*, [2003] O.J. No. 3106** (Ont. S.C.J.) at para. 71. **The key elements are: an ability to understand the information (financial) and to appreciate the consequences of a particular decision.**

In *Flynn v*. Flynn,[6] parties were seeking to have their mother assessed by a capacity assessor under section 79 of the *SDA*. Patillo J. had this to say about section 6:

> [10] Section 6 of the *SDA* defines incapacity to manage property as being unable to understand information that is relevant to making a decision in the management of their property or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision…
>
> [11] The applicants submit that Mrs. Flynn's hallucinations, delusions and disorientation from time to time are sufficient to establish reasonable grounds that she is incapable. I disagree. On the evidence as a whole, I do not think the applicants have established reasonable grounds. **Mrs. Flynn's bonds of hallucinations and delusions do not by themselves establish a lack of capacity as defined in ss. 6 and 45 of the *SDA*. So too with her disorientation. There**

5 2013 ONSC 1115 ("*McMaster*") at paras 9 and 10 [emphasis added].
6 2007 CarswellOnt 10220 ("*Flynn*") at paras 10 and 11 [emphasis added].

> **must be some direct connection between the behaviour and the capacity leading to the conclusion that there is a capacity as it is defined. There is no such connection here.** Accordingly, the applicants fail to meet the second requirement of s. 79(1) too.

Continuing Power of Attorney for Property

> 7(1) A power of attorney for property is a continuing power of attorney if,
>
> a) it states that it is a continuing power of attorney; or
>
> b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property.

This section sets out the characteristics of a POA document required to ensure it is a "continuing" power of attorney, i.e. a POA that endures past the onset of the grantor's incapacity to manage property.

> 7(2) The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.

Section 7(2) describes the expansive scope of the authority of an attorney under a continuing POA for property with respect to the grantor's property – which is anything the grantor could do, if capable, except make a Will.

Case Law:

In *Richardson Estate (Re)*,[7] the Court discussed that the prohibition of an attorney to make a Will on behalf of an incapable person also applies to actions that are akin to testamentary dispositions:

> [65] Counsel for Anne notes that under the ***Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 7(2), a continuing power of attorney may authorize the person named to do on the grantor's behalf anything that the grantor could do, if capable, except make a will.** The power of attorney for property to Anne was in these terms, without qualification. Anne swears that had she realized that Michael had not instructed Canada Life to change the beneficiary, she would have instructed the insurer to do so, using the power of attorney. Counsel submits that Anne could have changed the beneficiary on the policy and, had she known of the "mistake" in designation of the beneficiary, she would have done so.

7 2008 CanLII 63218 (ONSC) ["*Richardson*"] at paras 65 and 66 [emphasis added].

> [66] **I agree with the submission of counsel for Stephenie that the designation of a beneficiary under a life insurance policy is akin to a testamentary disposition. Counsel for Anne could point to no authority to the effect that an attorney can change the designation.** I also query whether it would be a breach of the attorney's fiduciary duty to change the designation in her favour, or to stop making premium payments, when the grantor himself had made no change to the designation for many years and had faithfully made the premium payments.

On appeal, the Ontario Court of Appeal upheld the lower court decision but also addressed the scope of authority of an attorney with respect to changing beneficiary designations:

> After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.[8]

In *Testa v. Testa*,[9] the Court looked at whether an attorney under a POA for property could create an *inter vivos* trust on behalf of the grantor or whether such a trust was akin to a testamentary disposition and therefore a prohibited act:

> [91] Neither party raised the issue as to whether the creation of the trust was a testamentary disposition and outside of the powers of an attorney: s. 7(2) *SDA*.
>
> [92] I prefer the reasoning in *Easingwood v. Easingwood Estate*, 2013 BCCA 182 (CanLII), 85 E.T.R. (3d) 225, of the British Columbia Court of Appeal to that of *Bank of Nova Scotia Trust Co. v Lawson* (2005), 22 E.T.R. (3d) 198, [2005] O.J. No. 5356, (ONSC), and conclude that a continuing attorney for property can create an inter vivos trust that takes immediate effect, and is not dependent on the death of the settlor for its vigor and effect.
>
> [93] **Tony did have the authority to create the trust, as it was effective immediately and not dependent on the death of his mother for its creation. It was an *inter vivos*** trust and not a testamentary disposition. However, he breached his fiduciary duty to his mother as the use of the trust was not used in a way to materially benefit her and improve her situation: *Banton v Banton*.

8 *Richardson Estate v. Mew*, 2009 ONCA 403 at para 51.
9 2015 ONSC 2381 ("*Testa*") at paras 91-93 [emphasis added].

Two or More Attorneys

> 7(4) If the continuing power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.

Case Law:

In *McMaster*,[10] a mother appointed two of her sons as her attorneys under a continuing POA for property, but only advised one of her sons as to the appointment. While the POA document in this case stated that the brothers were to act "jointly and severally" the Court observed that there must be 'transparency' between the two attorneys:

> There is no issue with the validity of the original power of attorney granted by Mary in 1994. It is also conceded to be "a continuing power of attorney" within the meaning of **section 7 of the Statute**; namely that it would continue to prevail in the event of incompetency. It is interesting to note pursuant to **subsection 4** of that section that if there are two persons named as attorneys (as in this case) "the attorneys shall act jointly", unless the power of attorney otherwise provides. **Although the power of attorney provides that the attorneys are appointed both "jointly and severally" there is no limiting phraseology with respect to either of their roles. This mandatory language would presuppose that there would be transparency between the brothers as to the steps either one takes on behalf of their mother**.

Capacity to Give a Continuing Power of Attorney

> 8(1) A person is capable of giving a continuing power of attorney if he or she,
>
> a) knows what kind of property he or she has and its approximate value;
>
> b) is aware of obligations owed to his or her dependants;
>
> c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
>
> d) knows that the attorney must account for his or her dealings with the person's property;
>
> e) knows that he or she may, if capable, revoke the continuing power of attorney;

10 *Supra* note 5 at para 7 [emphasis added].

f) appreciates that unless the attorney manages the property prudently its value may decline; and

g) appreciate the possibility that the attorney could misuse the authority give to him or her.

Capacity to Revoke

8(2) A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

Case Law:

The Court in *Nguyen*[11] examined the relevant criteria set out in the *SDA* regarding capacity to grant a POA document and found that the POA documents signed by the grantor were invalid:

> [73] ...There are two points in time when the capacity of the grantor is material to the validity of a Power of Attorney: the time when the document is executed and the time when the attorney seeks to exercise the power it confers. **A person who seeks to exercise a Power of Attorney must demonstrate that the grantor possessed capacity at the time she executed the Power of Attorney** and that she has since lost that capacity.
>
> [74] The capacity that the *SDA* refers to means mental capacity. The capacity to execute the Power of Attorney comprises both the capacity to decide whether to delegate decisions about personal care or property and the capacity to understand the Power of Attorney and the authority it confers.

The Court also addressed in *Nguyen* the affect that the fact that mother did not speak English had on her capacity to grant a POA document:

> [97] Each case must be dealt with on its specific facts. However, the relationship between the grantor and grantee of a power of attorney is one of agency which operates on contract principles. The requisite capacity to execute an agency contract involves an appreciation of the nature of the agency and the nature of the appointment (i.e. the terms of the contract). **In the present case, in the absence of evidence that the Powers of Attorney and legal advice relating to it were translated to Mother by someone other than the person being granted the power, there is no basis for concluding that she had the specific capacity, which is to say, the understanding of the nature of the document and of the authority it conferred, to execute it**.

11 *Supra* note 2 at paras 73 and 74 [emphasis added].

> [98] There is no evidence that Mother thought she was signing something other than Powers of Attorney in 1998. **However, there is no reliable evidence that she knew she was signing Powers of Attorney, let alone appreciated their implications: She was not afforded independent translation of the terms of the Powers of Attorney or of her lawyer's advice concerning them.**[12]

In *Abrams v. Abrams*,[13] an application was brought for an order that the applicant's mother and father be assessed regarding capacity to grant a POA (among other issues). Several affidavits and medical reports were filed on behalf of the mother alleging she had capacity as well as opposing affidavits and testimony alleging that she did not. With respect to capacity to grant a POA, Justice Brown clarified that while the person may be incapable with respect to some decisions, they may still have capacity to grant or revoke a POA:

> Having read the reports of Dr. Shulman and Dr. McIntyre, it seems clear that Ida has what one of her physicians described as "early Alzheimer's", but that she is nevertheless capable of a degree of personal and household care and that she has a reasonable awareness of her surroundings and circumstances. While she is not capable of the sophisticated reasoning required to manage her financial affairs, she has the capacity to engage in such routine activities as taking a taxi, making and keeping medical appointments, buying groceries and managing basic household affairs. She is also capable of ordinary personal care decisions but lacks the ability to analyze more complex health care decisions. Both Dr. Shulman and Dr. McIntyre were satisfied that Ida had capacity to give the powers of attorney in January, 2007 and April and May, 2008.[14]

In *Bishop v. Bishop*,[15] the Court also addressed the criteria required to find capacity to grant a POA for property:

> [24] At page 18 of his closing submissions, the respondent indicated the following with respect to Dr. Dombrower:
>
> > He stated that Mom "retains the ability to understand and appreciate what a POA is for and why she needs one as well as the consequences of not having a POA." This is all that is required under the terms of the *Substitute Decisions Act, 1992.*
>
> [25] I am not able to agree with the respondent's conclusion. The weight of the evidence in this case, particularly the report of Dr. Dombrower, leads me to the conclusion that Alma

12 *Ibid* at paras 97 and 98 [emphasis added].
13 2009 CanLII 12798 (ON SCDC) ["*Abrams*"].
14 *Ibid* at para 34.
15 2006 CanLII 30585 (ONSC), upheld on appeal, 2007 ONCA 170 ("*Bishop*") at paras 24 and 25 [emphasis added].

> Bishop did not have the capacity to give, revoke, or change her power of attorney in September of 2005. **If Alma Bishop was to give a valid continuing power of attorney for property to the respondent, she ought to have known, been aware of, and appreciated those seven factors outlined under section 8(1) of the *Substitute Decisions Act*.** I am satisfied from a review of Dr. Leifer's handwritten notes, Dr. Dombrower's independent medical report, and the facts and circumstances existing in Alma Bishop's life as at September, 2005 that she did not have this capacity.

In order for a continuing POA for property to be a valid legal document, it must meet the execution requirements (i.e. signature, witnesses etc.) set out in section 10 in the *SDA*:

Execution

> 10(1) A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.
>
> (2) The following persons shall not be witnesses:
>
> 1. the attorney or the attorney's spouse or partner.
> 2. the grantor's spouse or partner.
> 3. a child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
> 4. a person whose property is under guardianship or who has a guardian of the person.
> 5. a person who is less than eighteen years old.
>
> (3) Repealed.
>
> (4) A continuing power of attorney that does not comply with subsections (1) and (2) is not effective, but the court may, on any person's application, declare the continuing power of attorney to be effective if the court is satisfied that it is in the interests of the grantor or his or her dependants to do so.

Case Law:

In the case of *Reviczky v. Meleknia*,[16] a bank acted on a forged POA document. The Court was critical of the lack of scrutiny of the document itself and whether anyone checked to see if it complied with section 10 of the *SDA*:

> It is helpful to recall that the Power of Attorney in issue was a forged document which was

16 2007 CanLII 56494 (ONSC) ["*Reviczky*"].

being used to perpetrate a fraud. The relevance of this Act is not the ineffectiveness of this forged document. **The relevance is the role which the aforesaid sections, particularly section 10, have in determining whether the bank had an opportunity to avoid the fraud.** As I have said, if the Power of Attorney had been scrutinized, several questions in respect of its validity would have been apparent, and pursuing those questions, with either the purported donee or with the purported donor, likely would have prevented the fraud. The Power of Attorney purported to be a continuing power of attorney under section 7(1) but it was witnessed by only one witness, contrary to the mandatory requirements of section 10(1). I do not need to consider whether, under section 10(4), non-compliance with section 10(1) alone means that the power of attorney is invalid. That is because validity of this forged document is not the issue. **The issue is that, if the Power of Attorney had been scrutinized on behalf of the bank, the contravention of section 10(1) and the question of possible invalidity under section 10(4) would have been reasons for making the inquiries which, if made, probably would have prevented the fraud**.[17]

Property Management

Section 32 of the *SDA* below, regarding the duties of a guardian for property, also applies (with necessary modifications) to an attorney under a continuing power of attorney for property:[18]

Duties of Guardian

32.(1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. 1992, c. 30, s. 32 (1).

Personal comfort and well-being

(1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit. 1996, c. 2, s. 20 (1).

Personal care

(1.2) A guardian shall manage a person's property in a manner consistent with decisions

17 *Ibid* at para 64 [emphasis added].
18 See Section 38(1) of the *SDA*.

concerning the person's personal care that are made by the person who has authority to make those decisions. 1996, c. 2, s. 20 (1).

Exception

(1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care. 1996, c. 2, s. 20 (1).

Explanation

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are. 1992, c. 30, s. 32 (2).

Participation

(3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property. 1992, c. 30, s. 32 (3).

Family and friends

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person. 1992, c. 30, s. 32 (4).

Consultation

(5) The guardian shall consult from time to time with, (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and (b) the persons from whom the incapable person receives personal care. 1992, c. 30, s. 32 (5).

Accounts

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property. 1996, c. 2, s. 20 (2).

Standard of care

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. 1992, c. 30, s. 32 (7).

Same

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. 1992, c. 30, s. 32 (8).

P.G.T.

(9) Subsection (8) applies to the Public Guardian and Trustee. 1992, c. 30, s. 32 (9).

Case Law:

An attorney is a fiduciary and must abide by his or her duties as set out in common law and section 32 of the *SDA*.[19] In *McMaster*,[20] the Court canvassed and discussed the above sections:

> [12] The duty of an attorney to cooperate or work with a co-attorney has already been referenced above. Also as stated, the Statute deals with two principle areas of concern: property management and the person (care of). Section 38 provides that the standards and duties of a court-appointed guardian contained in sections 32 and 37 are equally applicable to an attorney.
>
> [13] The base duty is that, "[an attorney] of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honestly and integrity and in good faith, *for the incapable person's benefit*" (emphasis added, Section 32(1). **It is trite to observe that this role is for the benefit of the person who originally held the assets, as in this case Mary.**
>
> [14] Furthermore subsection 32(1.1) provides that, "if [the attorney's] decision will have an effect on the incapable person's personal comfort or wellbeing, the [attorney] shall consider that effect in determining whether the decision is for the incapable person's benefit."

19 For more information on Duties of Attorneys see chapter 8 of this book.
20 *Supra* note 5 at paras 12-16 [emphasis added].

> [15] Subsection 32(3) states that the attorney is to "encourage the incapable person to participate to the best of his or her abilities, in the [attorney's] decision about the property." This subsection is another indication that the incapable person is not necessarily an individual lacking capability or capacity to make basic decisions or fundamentally care for themselves as appears to be in the broad based definition in Section 2(1)1(2). The latter incapacity is identified as such by medical opinions. Under the predecessor legislation, *The Mental Incompetency Act*, it was the custom to produce two affidavits from medical doctors.
>
> [16] Subsection 32(5) provides that the attorney consult with the supportive family members of the incapable person who are in regular contact with the incapable person. The attorney is in the exercise of management of property, to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise (ss. 32(7) and (8).

Also in *Zimmerman v. McMichael Estate*,[21] where a devious attorney under a POA for property used money and property belonging to the grantor for his own benefit, the Court examined the duties of an attorney under a POA for property:

> The conduct of an attorney for property is governed by the provisions of the Substitute Decisions Act, 1992, S.O. 1992, c. 30 ("*SDA*"). An attorney is a fiduciary whose powers and duties must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit: s. 32(1). An attorney who receives compensation for managing property must exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise: s. 32(8).

In *Chu v. Chang*,[22] Justice Brown confirmed it was a breach of a guardian's (or attorney's) fiduciary duty to use litigation to make baseless allegations in a dispute about the incapable person and to make misrepresentations in Court:

> [10] A guardian of property or the person must exercise his powers and duties diligently, with honesty and integrity and in good faith for the incapable person's benefit: Substitute Decisions Act, 1992, S.O. 1992, c. 30, ss. 32 and 66. While I would not go so far as to say that a court-appointed guardian acts as an officer of the court, certainly his fiduciary duties of honesty and integrity require him to approach the court with only the cleanest of hands.
>
> [11] It is a breach of a guardian's fiduciary duties to the incapable person to invoke the process of the court to make baseless allegations against others.

21 2010 ONSC 2947 ("*Zimmerman*") at para 29.
22 2010 ONSC 1816 at paras 10-13.

> [12] It is a breach of a guardian's fiduciary duties to misrepresent the true state of affairs to the court.
>
> [13] It is a breach of a guardian's fiduciary duties to attempt to advance a position before the court in proceedings under the *SDA* which is not motivated solely by a concern, objectively-based, for the best interests of the incapable person but, instead, to initiate proceedings under the *SDA*, including proceedings for directions, which reflect merely an effort by one side of a family to lever the court process to obtain some tactical advantage against another side: *Abrams v. Abrams*, 2010 CanLII 1254 (AB WCAC), 2010 CanLII 1254 (ON S.C.); *Fiacco v. Lombardi*, 2009 CanLII 46170 (ON SC), 2009 CanLII 46170 (ON S.C.), para. 36.

Section 33 of the *SDA,* governing liability for damages, applies equally to attorneys as well as guardians:

Liability of guardian

> 33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty. 1992, c. 30, s. 33 (1).

Same

> (2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability. 1992, c. 30, s. 33 (2).

Exception, corporate directors

> (3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation. 2006, c. 34, s. 24 (1).

Breach of duty

> (4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute. 2006, c. 34, s. 24 (1).

Section 35.1 provides that an attorney cannot dispose of property that the attorney knows will be

gifted under a Will. However, this does not apply to property that must be disposed of to make it necessary for the attorney to comply with his or her fiduciary duties:

Disposition of property given by will

> 35.1 (1) A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will. 1996, c. 2, s. 22**.**

Application

> (2) Subsection (1) does not apply in respect of a specific testamentary gift of money. 1996, c. 2, s. 22.

Permitted dispositions

> (3) Despite subsection (1), (a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or (b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37. 1996, c. 2, s. 22.

Case Law:

In *Tattersall v Baker*,[23] a son was living in his mother's home rent-free while she was living elsewhere. The mother did not have enough funds to pay for her own financial needs and so the attorney sought to have the house sold, even though it was to be gifted to the son in the mother's Will. The Court agreed it should be sold:

> Sharon Tattersall, in accordance with the Act, should not dispose of the William Street property unless it is to discharge her duty of prudent management of Anne Baker's affairs. Given that there is no benefit to Anne Baker in the continued loss generated by the ownership of the property, it is reasonable that the property be sold.[24]

Section 37 sets out the required expenditures that an attorney is responsible for, including the person's support and education and other legal obligations.

23 2003 CanLII 21067 ("*Tattersall*").
24 *Ibid* at para 20.

Required expenditures

37. (1) A guardian of property shall make the following expenditures from the incapable person's property:

1. The expenditures that are reasonably necessary for the person's support, education and care.

2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.

3. The expenditures that are necessary to satisfy the person's other legal obligations. 1992, c. 30, s. 37 (1).

Guiding principles

(2) The following rules apply to expenditures under subsection (1):

1. The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations shall be taken into account.

2. Expenditures under paragraph 2 may be made only if the property is and will remain sufficient to provide for expenditures under paragraph 1.

3. Expenditures under paragraph 3 may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2. 1992, c. 30, s. 37 (2).

Optional expenditures

(3) The guardian may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.

2. Charitable gifts. 1992, c. 30, s. 37 (3).

Guiding principles

(4) The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).

2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.

3. Charitable gifts may be made only if,

i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or

ii. there is evidence that the person made similar expenditures when capable.

4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.

5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.

6. The total amount or value of charitable gifts shall not exceed the lesser of,

i. 20 per cent of the income of the property in the year in which the gifts are made, and

ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable. 1992, c. 30, s. 37 (4).

Increase, charitable gifts

(5) The court may authorize the guardian to make a charitable gift that does not comply with paragraph 6 of subsection (4), (a) on motion by the guardian in the proceeding in which the guardian was appointed, if the guardian was appointed under section 22 or 27; or (b) on application, if the guardian is the statutory guardian of property. 1996, c. 2, s. 24.

Expenditures for person's benefit

(6) Expenditures made under this section shall be deemed to be for the incapable person's

benefit. 1992, c. 30, s. 37 (6).

Case Law:

The Court in *Keller v. Wilson*[25] touched on the discretion that attorneys had in determining whether expenditures were in line with section 37:

> As indicated above, section 32(1) of the *SDA* provides that the powers and duties of guardians, including Attorneys for property, shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. **The power to make gifts or loans from the incapable person's property to friends or relatives is permissive only and is discretionary to the Attorneys. It is for the Attorneys to determine, in their discretion, whether gifts or loans should be made to Mr. Wilson and, in particular, whether any such gifts or loans would be prohibited by application of the rules in subsection 37(4) of the *SDA***.

Compensation

An attorney under a POA for property may receive compensation for his or her services. Compensation for an attorney under a continuing power of attorney is set out in section 40 of the *SDA* (as well as the applicable regulations):

> 40. (1) A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale. 1992, c. 30, s. 40 (1).
>
> (2) The compensation may be taken monthly, quarterly or annually. 1992, c. 30, s. 40 (2).
>
> (3) The guardian or attorney may take an amount of compensation greater than the prescribed fee scale allows,
>
> (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or
>
> (b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves. 1996, c. 2, s. 27.

25 2015 ONSC 6962 ("*Keller*") at para 27 [emphasis added].

Effect of power of attorney

> (4) Subsections (1) to (3) are subject to provisions respecting compensation contained in a continuing power of attorney executed by the incapable person if,
>
> (a) the compensation is taken by the attorney under the power of attorney; or
>
> (b) the compensation is taken by a guardian of property who was the incapable person's attorney under the power of attorney. 1992, c. 30, s. 40 (4).

Case Law:

The Court in *Sitko v. Gauthier Estate*[26] confirmed that compensation cannot be taken randomly when the attorney feels like it:

> [33] Also, the practice of simply taking money from a beneficiaries account on an ad hoc basis, on the theory that it "is owed", is in my view, contrary to the intent of the compensation provisions in s. 40(2) of the Act. This section speaks of an attorney taking compensation at a regular interval: be it monthly, quarterly, or annually. This does not, in my view, permit an attorney to collect compensation by utilizing a grantor's funds to make direct purchases of goods or services for themselves "on account" of an ongoing right to take compensation.
>
> [34] It is a practice that should be discouraged for a number of reasons. It does not permit easy tracking by third parties. It lacks transparency. It is imprecise in that the amount of statutory compensation is calculated by a specific formula, which is not easily reconciled where goods are purchased instead of monies paid directly. It has an income tax ramification for the attorney, which is more easily avoided if the payment is not taken by money. Also in my view, it just does not seem that a reasonable person would think it prudent for any adult to transfer funds to another adult's sole control unless it was a gift or was pursuant to an express agreement or was for consideration.[27]

The *SDA* sets out that it may be paid monthly, quarterly or annually. Not just when the attorney feels like it.

Passing of Accounts

Section 42 governs the process of Passing of Accounts by attorneys and guardians (for a detailed

26 2014 ONSC 5671 ("*Sitko*").
27 *Ibid* at para 33 and 34; See also *Olmuski Estate v. Olmulski* 2014 ONSC 6370 at paras 41 and 42.

discussion of Passing of Accounts, see chapter 12). Section 42 sets out who may apply to have the accounts passed and how the accounts are to be filed, and the power of the Court to make certain Orders:

> 42. (1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. 1992, c. 30, s. 42 (1).

Attorney's accounts

> (2) An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts. 1992, c. 30, s. 42 (2).

Guardian's accounts

> (3) A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property. 1992, c. 30, s. 42 (3).

Others entitled to apply

> (4) The following persons may also apply:
>
> 1. The grantor's or incapable person's guardian of the person or attorney for personal care.
>
> 2. A dependant of the grantor or incapable person.
>
> 3. The Public Guardian and Trustee.
>
> 4. The Children's Lawyer.
>
> 5. A judgment creditor of the grantor or incapable person.
>
> 6. Any other person, with leave of the court. 1992, c. 30, s. 42 (4); 1994, c. 27, s. 43 (2).

P.G.T. a party

> (5) If the Public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious. 1992, c. 30, s. 42 (5).

Filing of accounts

(6) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts. 1992, c. 30, s. 42 (6).

Powers of court

(7) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

(a) direct the Public Guardian and Trustee to bring an application for guardianship of property;

(b) suspend the power of attorney pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;

(d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity; or

(e) order that the power of attorney be terminated. 1992, c. 30, s. 42 (7).

(8) In an application for the passing of the accounts of a guardian of property the court may, on motion or on its own initiative,

(a) adjust the guardian's compensation in accordance with the value of the services performed;

(b) suspend the guardianship pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application; or

(d) order that the guardianship be terminated. 1992, c. 30, s. 42 (8).

Case Law:

With respect to section 42(4)(6) and the granting of leave by the Court for a person not listed in the *SDA* to apply to have accounts passed, the Court in *Overbury v. Stout*[28] determined:

28 2014 ONSC 7034 ("*Overbury*") at para 3.

> The granting of leave pursuant to s. 42(4) No. 6 is discretionary. In determining whether leave should be granted, I agree with the test set out by J.R. Henderson J. in *Ali v. Fruci*, [2006] O.J. No. 1093 (S.C.J.). The court must be satisfied that the Applicant has a genuine interest in the grantor's welfare and that it is reasonable to believe that a court hearing the matter may order the attorney to pass his or her accounts.

PART II – THE PERSON

Section 45 of the *SDA* sets out the criteria or factors to be considered in determining whether someone is capable with respect to personal care decisions:

Incapacity for personal care

> 45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1992, c. 30, s. 45; 1996, c. 2, s. 29.

Case Law:

In the case of *Chu v. Chang*[29] the Court looked at section 45 and the evidence regarding finding incapacity for personal care:

> [14] In his report dated June 7, 2009, Dr. Silberfeld found that Mrs. Chang did not possess the capacity to make personal care decisions. Dr. Chung, in his report of June 12, 2009, was not prepared to go that far, finding Mrs. Chang to be capable, except with respect to health care, but it is clear from the following portion of his report that Dr. Chung was influenced by the availability of constant care for Mrs. Chang's personal care needs:
>
> > It is reassuring that Mrs. Chang's five children admirably in unison to provide her dignity and round the clock care. It is my opinion that with the present protective environment provided by her three sons and two daughters Mrs. Chang meets her needs to be capable of managing nutrition, clothing, hygiene, shelter and safety. However she does not have the ability to retain adequate information for her to meet the minimal needs to be capable of health care.

29 *Supra*, note 23; upheld on appeal, 2011 ONCA 389.

> Ms. Phone, in her December, 2009, capacity assessment of Mrs. Chang, found that she was incapable with respect to personal care.
>
> [15] In light of all the evidence filed by the parties regarding their personal observations of how Mrs. Chang currently conducts herself, as well as the care she needs, together with the three capacity assessments conducted of Mrs. Chang, I conclude that Mrs. Chang is incapable in respect of all functions referred to in section 45 of the *Substitute Decisions Act, 1992* and, as a result, needs decisions to be made on her behalf. **The evidence shows that with her naturally progressing dementia Mrs. Chang now cannot fully understand information relevant to making a decision concerning her own personal care, nor can she appreciate the reasonably foreseeable consequences of a decision. That is not to say that Mrs. Chang is unable to do various tasks herself; obviously she can. Although she moves slowly, she demonstrates admirable mobility for a 98-year old, and she can feed herself food prepared for her. However, the evidence shows that she requires someone to make personal care decisions on her behalf**.[30]

Section 46 governs POAs for personal care and who may or may not act as an attorney under a POA for personal care:

Power of attorney for personal care

> 46. (1) A person may give a written power of attorney for personal care, authorizing the person or persons named as attorneys to make, on the grantor's behalf, decisions concerning the grantor's personal care. 1992, c. 30, s. 46 (1).

P.G.T. may be attorney

> (2) The power of attorney may name the Public Guardian and Trustee as attorney if his or her consent in writing is obtained before the power of attorney is executed. 1996, c. 2, s. 30 (1).

Prohibition

> (3) A person may not act as an attorney under a power of attorney for personal care, unless the person is the grantor's spouse, partner or relative, if the person,
>
> (a) provides health care to the grantor for compensation; or

30 *Ibid* at paras 14 and 15 [emphasis added].

(b) provides residential, social, training or support services to the grantor for compensation. 1992, c. 30, s. 46 (3); 1996, c. 2, s. 30 (2, 3).

Two or more attorneys

(4) If the power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise. 1992, c. 30, s. 46 (4).

Death, etc., of joint attorney

(5) If two or more attorneys act jointly under the power of attorney and one of them dies, becomes incapable of personal care or resigns, the remaining attorney or attorneys are authorized to act, unless the power of attorney provides otherwise. 1992, c. 30, s. 46 (5); 1996, c. 2, s. 30 (4). ***Conditions and restrictions***

(6) The power of attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act. 1992, c. 30, s. 46 (6).

Case Law:

In *Barbuluv v. Cirone*,[31] Justice Brown discussed the contents of a POA for personal care document and a person's wishes with respect to treatment and the *Health Care Consent Act*:

[42] The *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, contains the requirements for a valid power of attorney for personal care. **Section 46 (1)** provides that a person may give a written power of attorney for personal care, authorizing the person, or persons, named as attorneys to make, on the grantor's behalf, decisions concerning the grantor's personal care. The power of attorney may contain instructions with respect to the decisions the attorney is authorized to make: *SDA*, s. 46(7).

[43] Such a power of attorney need not be in any particular form: *SDA*, s. 46(8). The Act provides that a power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it, even if the grantor was incapable of personal care: *SDA*, 47(2).[1] The Act also imposes a requirement that the power of attorney for personal care be executed in the presence of, and signed by, two witnesses, although a court may declare effective a power of attorney that has not met this formality, if the court is satisfied that it is in the grantor's interest to do so: *SDA*, s. 48(1) and (4).

31 2009 CanLII 15889 ("*Barbuluv*") at paras 42-44 [emphasis added].

> [44] In the present case there is no doubt that the 1995 POA met the requirements of the *SDA*, with respect to the capacity of Mr. Barbulov to give a power of attorney for personal care and the formalities of the creation of the document. However, the inquiry into whether a power of attorney expresses a person's wishes with respect to treatment, within the meaning of s. 5 of the *HCCA*, is not limited to questions of capacity and formalities. The intended effect or scope of a wish must be determined: Fleming v. Reid (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), at p. 94; Conway v. Jacques (2002), 2002 CanLII 41558 (ON CA), 59 O.R. (3d) 737 (C.A.), at para. 31. To do so the CCB must determine **whether the contents of a power of attorney for personal care express the wishes of the incapable person. Fundamental to this inquiry is the need for the Board to satisfy itself, on all the evidence, that the person who made the power of attorney for personal care understood and approved of the contents of the document he or she was signing so that it can be said the document expresses the wishes of that person with respect to treatment**.

Section 47 governs a person's capacity to give (and revoke) a power of attorney for personal care:

Capacity to give power of attorney for personal care

> 47. (1) A person is capable of giving a power of attorney for personal care if the person,
>
> (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
>
> (b) appreciates that the person may need to have the proposed attorney make decisions for the person. 1992, c. 30, s. 47 (1).

Validity

> (2) A power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it even if the grantor is incapable of personal care. 1992, c. 30, s. 47 (2).

Capacity to revoke

> (3) A person is capable of revoking a power of attorney *for personal care if he or she is capable of giving one. 1992, c. 30, s. 47 (3).*

Capacity to give instructions

> (4) Instructions contained in a power of attorney for personal care with respect to a decision the attorney is authorized to make are valid if, at the time the power of attorney was executed, the grantor had the capacity to make the decision. 1992, c. 30, s. 47 (4).

Case Law:

In *Re Grav*[32] (while a case from British Columbia, the Court was applying the *SDA* to an Ontario POA), the Court examined the difficulty in pinpointing the date when a person is no longer capable of revoking (or granting) a POA for personal care:

> [9] The Ontario Substitute Decision Act, S.O. 1992, c. 30 (the "SDA"), governs the January 2006 Continuing Power of Attorney. Although I agree with Esther that pursuant to s. 47 of the SDA, Fritz only needed to understand whether Esther has a genuine care for his welfare and to appreciate that Fritz may need to have Esther make decisions for him in order to grant her Continuing Power of Attorney for Fritz's personal care, I have doubts as to whether Fritz had the capacity in 2006 to revoke the 2005 Power of Attorney.
>
> [10] Dr. Robertson provides the only medical evidence before the court on the issue of Fritz's capacity to revoke a previous Power of Attorney. According to Dr. Robertson, as of August 11, 2005, Fritz no longer had the capability to revoke a Power of Attorney. Eberhard had Power of Attorney as of March 4, 2005. This was the last Power of Attorney Fritz granted before August 11, 2005.
>
> [11] Dr. Robertson writes:
>
> > When I saw [Fritz] on August 11, 2005, he was unable to correctly identify the Powers of Attorney, showed inadequate insight into his cognitive losses and believed he was capable of managing his own finances. On my examination of August 11, I concluded that he was incapable o[f] revoking Power of Attorney.
>
> [12] **It is not clear whether Dr. Robertson concluded that Fritz was incapable of revoking Power of Attorney from that date forth or if at certain points in time, he was incapable. In my view, there is insufficient medical evidence to determine at precisely what point Fritz permanently lost his capacity to revoke an earlier Power of Attorney**.

Section 49 governs when a POA for personal care will become effective and an attorney may begin to act on behalf of the grantor:

32 2007 BCSC 123 ("*Grav*") at paras 9-12 [emphasis added].

When power of attorney effective

> 49. (1) A provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if,
>
> (a) the Health Care Consent Act, 1996 applies to the decision and that Act authorizes the attorney to make the decision; or
>
> (b) the Health Care Consent Act, 1996 does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from making the decision unless the fact that the grantor is incapable of personal care has been confirmed. 1996, c. 2, s. 32 (1).

Case Law:

B.(M.) Re[33] looked at what legislation governs the decision to be admitted to a care facility and when an attorney under a POA for personal care may make this decision:

> [4] Mr. Handelman argued that the HCCA, and not the SDA, governs decisions with respect to admission to a care facility, and that adding a provision to a power of attorney authorizing the attorneys to make decisions concerning personal care in accordance with the SDA does not allow the attorneys to make decisions on just anything in the HCCA. The HCCA has sections setting out the different purposes for which decisions can be made, and section 49(1)(a) of the SDA specifically provides that a provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if the HCCA applies to the decision and the HCCA authorizes the attorney to make the decision. It was **Mr. Handelman's contention that section 49(1)(a) of the SDA requires that the power of attorney for personal care must contain provisions that authorize the making of a decision with respect to admission to a care facility. He said that for this reason the different wording of the power of attorney in this case and the one in *Re B*. was a distinction without a difference**.
>
> [. . .]
>
> [6] For the above reasons, the Board agrees with Mr. Handelman's submissions and finds that R. B. and J.B.'s **joint power of attorney for personal care does not authorize them to**

33 2011 CarswellOnt 1858 at paras 4 and 6.

> **make decisions with respect to M. B.'s admittance to a care facility**, and for the same reasons finds that that their power of attorney for personal care does not authorize them to make decisions with respect to personal assistance services for M. B. The Board therefore finds that it has jurisdiction to hold a hearing on C. B.'s application.

Duties of Attorneys for Personal Care

Section 66 governs the duties of attorneys under a POA for personal care:[34]

> 66. (1) The powers and duties of a guardian of the person shall be exercised and performed diligently and in good faith. 1992, c. 30, s. 66 (1).

Explanation

> (2) The guardian shall explain to the incapable person what the guardian's powers and duties are. 1992, c. 30, s. 66 (2).

Subsections 2.1 and 3 deal with decisions under the *Health Care Consent Act*, and the remaining subsections of s. 66 set out further duties, including what the attorney must take into consideration when making decisions: the incapable person's wishes or instructions expressed while capable; their values and beliefs; encouraging the person to participate in the decisions being made; consulting with family; and fostering the independence of the incapable person.

Case Law:

Elmi v. Hirsi[35] looked at the importance of the duty of an attorney to foster an incapable person's independence:

> [42] **Having regard to the need to foster Nadeen's independence and autonomy, albeit within the boundaries dictated by her particular situation, her personal care guardians must act in accordance with the duties and responsibilities outlined in s. 66 of the SDA**. While they must comply with all aspects of s. 66 of the SDA, for purposes of clarity, they must exercise their powers and duties diligently and in good faith, including, but not limited to fulfilling the following obligations:
>
> i) Within 15 days of the court's order (which was made June 19, 2015) permit Nadeen

34 For a more in depth look at the Duties of Attorneys, see chapter 8 of this book.
35 2015 ONSC 6003 at paras 42 and 43 [emphasis added].

to see her s. 3 SDA counsel, so that he may explain to Nadeen the nature of the order and the powers and duties of her guardians. He may provide to Nadeen, for safekeeping, any documents or aids deemed appropriate in the circumstances.

ii) Within 30 days of the yearly anniversary of this order, the guardians must permit Nadeen to see her counsel (or another counsel who has been arranged through ARCH) to have a solicitor-client privileged meeting. During the meeting, Nadeen and counsel may discuss any matters relevant to this order and her wellbeing.

[43] As well, with a view to encouraging and ensuring maximum autonomy for Nadeen, I further order that the guardians **encourage Nadeen to participate, to the best of her abilities, in decisions made on her behalf, foster her independence, and choose the least restrictive and intrusive course of action available and appropriate in any particular situation**.

In *Chu v. Chang*[36] the Court concluded it is a breach of a guardian's (or attorney's) duties to use court proceedings involving an incapable person in an effort to gain a tactical advantage over other parties in a dispute:

> It is a breach of a guardian's fiduciary duties to attempt to advance a position before the court in proceedings under the SDA which is not motivated solely by a concern, objectively-based, for the best interests of the incapable person but, instead, to initiate proceedings under the SDA, including proceedings for directions, which reflect merely an effort by one side of a family to lever the court process to obtain some tactical advantage against another side: Abrams v. Abrams, 2010 CanLII 1254 (AB WCAC), 2010 CanLII 1254 (ON S.C.); Fiacco v. Lombardi, 2009 CanLII 46170 (ON SC), 2009 CanLII 46170 (ON S.C.), para. 36.

Also, in *Barberi v. Triassi,*[37] Justice Mulligan concluded that unilaterally removing the grantor of a POA for personal care from her residence without consulting the other attorneys is a breach of an attorney's duties under this section of the SDA:

> Nina was one of three Personal Care of Power of Attorney at the time she removed her mother from her nursing home. She acted unilaterally without consulting her brothers notwithstanding their meeting with the social worker and agreement to place their mother at the nursing home. Under the circumstances I have no hesitation in finding that she breached her duty as Power of Attorney for Personal Care under the provisions of the Substitute Decisions Act.

36 *Supra* note 23 at para 13.
37 2010 ONSC 3734 at para 14.

Section 78 governs when a person may refuse to be assessed for capacity:

Right to Refuse Assessment

> 78(1) An assessor shall not perform an assessment of a person's capacity if the person refuses to be assessed. 1996, c. 2, s. 54.

A person has a right to refuse an assessment unless one is ordered by the Court (s.78(3)). Also, before performing an assessment for capacity, the assessor must explain the purpose of the assessment, the significance of finding capacity or incapacity and the person's right to refuse to be assessed [s.78(2)].

Koch (Re)[38] discusses that the failure to provide the warning of the person's right to refuse assessment renders a finding of incapacity a nullity:

> The notes of Talosi and Higgins are silent as to whether the appellant was made aware of the significance and effect of a finding of incapacity (that is, the immediate loss of liberty and the freedom to live where and how she chose, in the case of Talosi's interview and the immediate loss of the freedom to manage her property and finances, in the case of Higgins' interview**). This "warning" is a requirement of s. 78(2)(b) of the SDA.** There should be clear and convincing evidence that this warning was given to the appellant. **Had it not been possible for me to decide this appeal on other issues, I would have held that the failure to give a s. 78(2)(b) warning rendered the finding of incapacity by Higgins and Talosi a nullity. They have the burden of establishing that such a warning was given. They failed to do so at the consent and capacity hearing and on this appeal. Their failure is egregious.**

CONCLUSION

The *SDA* is an important piece of legislation to be familiar with, understand, and review when dealing with POA documents.

38 *Supra* note 3 at para 6 [emphasis added].

CHAPTER 8: DUTIES OF ATTORNEYS

By: Andrea Buncic

As an attorney for property acting pursuant to a continuing power of attorney for property (**"CPOAP"**) or an attorney for personal care acting pursuant to a power of attorney for personal care (**"POAPC"**), the attorney is tasked with the very important duty of making decisions on behalf of the incapable grantor. In carrying out this mandate, attorneys are considered fiduciaries and are bestowed with numerous duties under the governing legislation, in equity and at common law. The purpose of this chapter is to provide an overview of these duties and the consequences if such are not fulfilled.

WHAT IS A "FIDUCIARY"?

The term "fiduciary" has given rise to confusion due to its interchangeable use in various scenarios. A fiduciary obligation has been found to exist by the court where a specific type of relationship exists, where the specific circumstances of a relationship give rise to it, or such a finding is required for the provision of an equitable remedy.[1]

Relationships in which a fiduciary obligation has been imposed have been found to possess three general characteristics:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[2]

Where such a relationship is found to exist, the courts will impose an obligation on the fiduciary to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance

1 *International Corona Resources Ltd. v. LAC Minerals Ltd*., 1989 CarswellOnt 126 (S.C.C.) at paras 28-30.
2 *Frame v. Smith*, 1987 CarswellOnt 347 (S.C.C.) at para 39.

depending on the relationship, though it can generally be described as the fiduciary duty of loyalty. This duty of loyalty will most often include the avoidance of conflicts of duty or interest, and a duty not to profit at the expense of the beneficiary.[3]

ATTORNEYS AS FIDUCIARIES AND THE GOVERNING LEGISLATION

Attorneys acting pursuant to a CPOAP or a POAPC, and court-appointed guardians of property or the person, are governed primarily by the *Substitute Decisions Act*[4] and to a degree, the *Health Care Consent Act* (the ***"HCCA"***).[5]

Pursuant to the *SDA*, attorneys for property are legislatively defined as fiduciaries in carrying out their duties and powers.[6] Specifically, the *SDA* holds that an attorney for property is "a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit".[7]

While the *SDA* does not specifically define an attorney for personal care as a fiduciary, it directs that the powers and duties of the attorney shall be exercised and performed diligently and in good faith.[8] Furthermore, because an attorney for personal care has discretionary powers that, when exercised, affect the incapable person's practical and/or legal interests, and an incapable person is particularly vulnerable to the attorney for personal care for this reason, the attorney for personal care will be considered a fiduciary pursuant to common law.

The *SDA* governs the fiduciary obligations of attorneys and their administration of the financial and personal care affairs of the grantor, including mentally incapable grantors, as well as the appointment of guardians for mentally incapable adults. It sets out the powers, duties (both general and specific), the standard of care, liability and associated protection, and compensation applicable to attorneys and guardians.

COMMON LAW DUTIES OWED BY ATTORNEYS FOR PROPERTY AND FOR PERSONAL CARE

As a result of the fiduciary relationship between an incapable grantor and the attorney for property or the attorney for personal care, the common law imposes obligations on what an attorney acting

3 *International Corona Resources Ltd. supra* at note 1.
4 1992 S.O. 1992, c. 30.
5 S.O. 1996, c. 2, Sched. A.
6 *SDA*, *supra* note 4 at ss. 32, 38, 66 and 67.
7 *Ibid* at ss. 32(1) and 38.
8 *Ibid* at ss. 66 and 67.

as a fiduciary must do. These common law duties include:

- The attorney must stay within the scope of the authority delegated in the CPOAP or POAPC;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the grantor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his or her own affairs; if receiving compensation, the attorney may be held to the standard applicable to a professional property or money manager);
- The attorney must not make secret profits;
- The attorney must cease to exercise authority if the POA is revoked;
- The attorney must not act contrary to the interests of the grantor or in a conflict with those interests (known as the duty of loyalty);
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- Where applicable, an attorney has a duty to cooperate with a co-attorney;
- The attorney cannot make, change or revoke a Will on behalf of the grantor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

The foregoing common law duties owed by attorneys for property and for personal care are in addition to any specific duties that may have been set out by the grantor in the POA document itself and those set out in the *SDA*.

STATUTORY DUTIES OF ATTORNEYS UNDER THE SDA

Duties of Attorneys for Property

Section 32 of the *SDA* sets out the duties owed by a court-appointed guardian of property.[9] Section 38 extends most of these statutory duties, with necessary modifications, to an attorney acting under a CPOAP if the grantor is incapable of managing property or the attorney has reasonable

9 *SDA*, *supra* note 4 at s. 32.

grounds to believe that the grantor is incapable of managing property.[10]

When acting, an attorney must first and foremost keep in mind that he or she is a fiduciary and must exercise and perform his or her powers and duties diligently, with honesty and integrity and in good faith, for the incapable person's benefit.[11]

Consideration of the Incapable Person's Comfort, Well-being and Personal Care

When an attorney for property is making a decision and that decision will have an effect on the incapable person's personal comfort or well-being, the attorney must consider that effect in determining whether the decision is for the incapable person's benefit.[12] For instance, an attorney for property's decision to retain a lawyer for her incapable mother with respect to her personal care was held by the court to have been made for her mother's benefit and so was in accordance with this duty owed.[13]

The attorney must manage the incapable person's property in a manner that is consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions.[14] This is not the case, however, if the adverse consequences to the incapable person's property as a result of the decision significantly outweigh the benefits to the person's personal care.[15]

Explanation, Participation and Consultation

An attorney for property has various duties to involve or attempt to involve the incapable person and his or her family and friends in the management of the incapable person's property. Specifically, the attorney must explain to the incapable person what the attorney's powers and duties are.[16] The attorney for property must also encourage the incapable person to participate, to the best of his or her abilities, in the attorney's decisions about the property.[17]

An attorney for property must seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.[18] Additionally, in making decisions with respect to the incapable person's property, the attorney must consult from time to time with supportive family members and friends of the incapable person who are in regular

10 *Ibid* at s. 38.
11 *Ibid* at s. 32(1); *McMaster v. McMaster,* 2013 ONSC 1115 at para 13.
12 *SDA*, *supra* note 4 at s. 32 (1.1).
13 *Barltrop v. Bensette*, 2012 ONSC 2196 at paras 22-23.
14 *SDA*, *supra* note 4 at s. 32 (1.2).
15 *Ibid* at s. 32(1.3).
16 *Ibid* at s. 32(2).
17 *Ibid* at s. 32(3).
18 *Ibid* at s. 32(4).

personal contact with the incapable person, as well as the persons from whom the incapable person receives personal care.[19] This obligation, however, does not require the attorney for property to comply with any or all opinions arising from such consultation.[20]

Making Expenditures on Behalf of the Incapable Person

i. Mandatory Expenditures

There are certain expenditures that an attorney for property must make on behalf of the incapable person from the incapable person's property. These expenditures are collectively referred to herein as the "**Mandatory Expenditures**". These include:

1. The expenditures reasonably necessary for the support, education and care of the incapable person.
2. The expenditures reasonably necessary for the support, education and care of the incapable person's dependants.
3. The expenditures that are necessary to satisfy the incapable person's other legal obligations.[21]

When making Mandatory Expenditures, the attorney must consider the following rules as set out in the *SDA*:

1. The value of the property, the accustomed standard of living of the incapable person and his or her dependants, and the nature of other legal obligations must be taken into account.
2. Expenditures reasonably necessary for the support, education, and care of the person's dependants may be made only if the property is and will remain sufficient to provide for expenditures that are reasonably necessary for the support, education, and care of the incapable person.
3. Expenditures that are necessary to satisfy the person's other legal obligations may be made only if the property is and will remain sufficient to provide for expenditures that are reasonably necessary for the support, education and care of the incapable person and his or her dependants.[22]

19 *Ibid* at s. 32(5).
20 *Robb Estate v. Robb*, 2010 ONSC 3089 at para 21.
21 *SDA*, *supra* note 4 at s. 37(1).
22 *Ibid* at s. 37(2).

The overriding principle must always be that the expenditure is made for the incapable person's benefit.

ii. Optional Expenditures

There are also certain expenditures that an attorney for property has the option of making on behalf of the incapable person from the incapable person's property. These include gifts or loans to the person's friends and relatives, and charitable gifts. These expenditures are collectively referred to herein as the "**Optional Expenditures**".[23]

Before making such Optional Expenditures, the attorney for property should consider the following rules and guiding principles:

1. These Optional Expenditures may be made only if the property is and will remain sufficient to satisfy the Mandatory Expenditures.

2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.

3. Charitable gifts may be made only if,

    i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or

    ii. there is evidence that the person made similar expenditures when capable.

1. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.

2. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.

3. The total amount or value of charitable gifts shall not exceed the lesser of,

    i. 20 per cent of the income of the property in the year in which the gifts are made, and

23 *Ibid* at s. 37(3).

ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable.[24]

Ascertaining the Incapable Person's Testamentary Wishes

An additional duty of an attorney for property under the *SDA* is to make reasonable efforts to determine: (a) whether the incapable person has a will; and (b) if the incapable person has a will, what the provisions of the will are.[25]

Where the incapable person has a will, the attorney for property has a duty not to dispose of property that the attorney knows is subject to a specific testamentary gift in the incapable person's will;[26] however, this does not apply in respect of a specific testamentary gift of money.[27] Moreover, the attorney may dispose of the property that is subject to a specific testamentary gift if the disposition of that property is necessary to comply with the guardian's duties or if they are gifting the property to the person who would be entitled to it under the will and the gift is authorized by the rules applicable to Optional Expenditures, as discussed above.[28]

The Duty to Account, Compensation and the Standard of Care

i. The Accounts

An attorney for property must keep accounts of all transactions involving the property of the incapable person in accordance with the regulations under the *SDA*.[29] Specifically, the accounts maintained by the attorney must include the following:

(a) a list of all the incapable person's assets as of the date of the first transaction by the attorney on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;

(b) an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;

(c) an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;

24 *SDA*, *supra* note 4 at s. 37(4).
25 *Ibid* at s. 33.1.
26 *Ibid* at s. 35.1(1).
27 *Ibid* at s. 35.1(2).
28 *Ibid* at s. 35.1(3).
29 *SDA*, *supra* note 4 at s. 32(6).

(d) an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;

(e) an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;

(f) a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;

(g) an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of, and reason for the liability being incurred or discharged;

(h) an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation;

(i) a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any.[30]

As part of the attorney for property's accounting obligations, the attorney must also keep, together with the accounts, a copy of the CPOAP constituting his or her authority as the attorney for property.[31] Upon the request of the incapable person or the incapable person's attorney for personal care or guardian of the person, an attorney must provide a copy of the accounts and records he or she keeps.[32]

Every attorney must retain the accounts and records until he or she ceases to have authority and one of the following occurs:

1. The attorney obtains a release of liability from a person who has the authority to give the release.

2. Another person has acquired the authority to manage the incapable person's property and the attorney delivers the accounts or records to that person.

3. The incapable person has died and the attorney delivers the accounts or records to the incapable person's personal representative.

4. The attorney is discharged by the court on a passing of accounts under section 42 of the *SDA* and either the time for appealing the court's decision has expired with no appeal being taken or an appeal from the decision is finally disposed of and the attorney is discharged

30 *SDA*, *supra* note 4 at O. Reg. 100/96, s. 2 (1).
31 *Ibid* at s. 2 (2).
32 *Ibid* at s. 5(1).

on the appeal.

5. A court order is obtained directing the attorney to destroy or otherwise dispose of the accounts or records.[33]

Aside from the foregoing, an attorney for property shall not disclose any information contained in the accounts and records except as required by a court order, as required otherwise under the *SDA* or any other Act, or as is consistent with or related to his or her duties as attorney.[34]

ii. Compensation and the Standard of Care

An attorney for property is entitled to be paid for the assistance and services provided under the CPOAP. Subject to any provisions respecting compensation contained in the CPOAP,[35] an attorney may take annual compensation from the property in accordance with the prescribed fee scale.[36] As of April 1, 2000, the prescribed fee scale permits attorneys for property to compensation of:

- 3% on capital and income received by the attorney;
- 3% on capital and income disbursements; and
- 3/5^{ths} of 1% of the annual average value of the assets (this is called the care and management fee).[37]

An individual attorney for property may take compensation in an amount greater than the prescribed fee scale allows with the consent of the Public Guardian and Trustee and the incapable person's attorney for personal care.[38] An attorney for property may take compensation on a monthly, quarterly, or annual basis.[39]

An attorney for property who takes compensation for managing the property of an incapable person under a CPOAP will generally be held to a higher standard of care. Specifically, an attorney who receives compensation for managing property must exercise the degree of care, diligence, and skill that a person in the business of managing the property of others is required to exercise.[40] In comparison, an attorney who does not receive compensation must only exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in the conduct of his or her

33 *Ibid* at s. 6(1).
34 *SDA*, *supra* note 4 at s. 4.
35 *Ibid* at s. 40(4).
36 *Ibid* at 40(1).
37 https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/guardduties.php#compensation
38 *SDA*, *supra* note 4 at s. 40(3)(a).
39 *Ibid* at s. 40(2).
40 *Ibid* at s. 32(8).

own affairs.[41]

iii. Passing of Accounts

The court may, on application, order that all or a specified part of the accounts of an attorney for property be passed.[42] Individuals who may apply for a court order compelling the attorney to pass his or her accounts include:

1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. The Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person, with leave of the court.

Alternatively, an attorney for property may voluntarily apply to pass his or her accounts.[43]

Rule 74.18 of the *Rules of Civil Procedure* governs the Application process for an attorney's passing of accounts.[44] In an application for the passing of an attorney's accounts, the court may:

(a) direct the Public Guardian and Trustee to bring an application for guardianship of property;

(b) suspend the power of attorney pending the determination of the application;

(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;

(d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity; or

(e) order that the power of attorney be terminated.[45]

If the attorney has managed the incapable person's property and exercised his or her powers and duties diligently, with honesty and integrity, and in good faith for the incapable person's benefit, the attorney may have his or her accounts passed by the court without any of the foregoing issues.

41 *Ibid* at s. 32(7).
42 *Ibid* at s. 42(1).
43 *Ibid* at s. 42(2).
44 *Ibid* at s. 42(6); Rule 74.18, *Rules of Civil Procedure*.
45 *SDA*, *supra* note 4 at s. 42(7).

Liability for Breach of Duties

If an attorney for property breaches any of his or her duties, whether arising in equity, at common law or by statute, the attorney may be liable for monetary damages arising from his or her breach.[46] Where the court is satisfied that the attorney for property who committed a breach of duty acted honestly, reasonably, and diligently, however, it may relieve the attorney from all or part of the liability.[47]

Where an attorney for property is acting as a director of a corporation in which the incapable person is a shareholder and he or she breaches his or her duties, the attorney will have to demonstrate to the court that he or she acted honestly, reasonably, and diligently with a view to the best interests of the corporation in order to be relieved from all or part of the liability.[48]

Duties of Attorneys for Personal Care under the SDA

Section 66 of the *SDA* sets out the duties of a guardian for personal care, and section 67 extends these duties, with necessary modifications, to attorneys for personal care acting pursuant to a POAPC.[49] First and foremost, with respect to any duties an attorney for personal care has, he or she must exercise and perform those duties diligently and in good faith.[50]

The Duty to make Decisions on the Incapable Person's Behalf

As an attorney acting under a POAPC, the attorney is tasked with making decisions on behalf of the incapable grantor with respect to his or her personal care. That said, the POAPC document may contain instructions with respect to the decisions the attorney is authorized to make, and the attorney for personal care must act within the confines of the POAPC document.[51]

Where the *HCCA* applies to a specific decision, the attorney for personal care must make that decision in accordance with the provisions of the *HCCA*.[52] Decisions to which the *HCCA* applies include but are not limited to those related to medical treatment, admission to care facilities, and personal assistance services.[53]

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46 *Ibid* at ss. 33 (1) and 33(4).
47 *Ibid* at s. 33(2).
48 *Ibid* at s. 33(3).
49 *Ibid* at ss. 66 and 67.
50 *Ibid* at s. 66(1).
51 *Ibid* at s. 46(7).
52 *Ibid* at s. 66(2.1).
53 *HCCA*, *supra* note 5 at s. 1.

Where the *HCCA* does not apply to a specific decision, the attorney for personal care must make the decision in accordance with the following principles set out in the *SDA*:

1. If the attorney knows of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, the attorney must make the decision in accordance with the wish or instruction.

2. The attorney must use reasonable diligence in ascertaining whether there are such wishes or instructions.

3. A later wish or instruction expressed while capable prevails over an earlier wish or instruction.

4. If the attorney does not know of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, the attorney must make the decision in the incapable person's best interests.[54]

When deciding what the person's best interests are for the purposes of making a decision not governed by the *HCCA*, the attorney for personal care must consider the following factors:

(a) the values and beliefs that the attorney knows the person held when capable and believes the person would still act on if capable;

(b) the person's current wishes, if they can be ascertained; and

(c) the following factors:

    1. Whether the attorney's decision is likely to,
        i. Improve the quality of the person's life,

        ii. Prevent the quality of the person's life from deteriorating, or

        iii. Reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate.

    2. Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision.[55]

54 *SDA*, *supra* note 4 at s. 66(3).
55 *Ibid* at s. 66(4).

Decisions to which the *HCCA* would likely not apply include those made in regards to hygiene, clothing and nutrition.

When making any decision on behalf of the incapable person, the attorney for personal care must also choose the least restrictive and intrusive course of action that is available and is appropriate in the circumstances.[56] Thus, if there are two medical treatments available with respect to a specific illness and one is less invasive than the other, the attorney must choose the less invasive option (holding all other factors equal).

Explanation, Participation and Consultation

An attorney for personal care must explain to the incapable person what his or her powers and duties are, must encourage the person to participate in the attorney's decisions to the best of his or her abilities, and must seek to foster the person's independence as much as possible.[57]

With respect to the incapable person's family and friends, an attorney for personal care must seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.[58] The attorney also has a duty to consult from time to time with supportive family members and friends of the incapable person who are in regular personal contact with the incapable person, and the persons from whom the incapable person receives personal care.[59]

The Duty to Keep Records

An attorney for personal care must keep records of decisions made by him or her on the incapable person's behalf.[60] Specifically, the records maintained by an attorney for personal care must include the following:

(a) a list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date;

(b) a copy of medical reports or other documents, if any, relating to each decision;

(c) the names of any persons consulted, including the incapable person, in respect of each decision and the date;

56 *Ibid*.
57 *Ibid* at ss. 66(2), 66(5) and 66(8).
58 *Ibid* at s. 66(6)
59 *Ibid* at s. 66(7).
60 *Ibid* at s. 66(4.1).

(d) a description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed;

(e) a description of the incapable person's current wishes, if ascertainable and if they are relevant to the decision;

(f) for each decision taken, the attorney's opinion on each of the factors he or she is to consider when determining what the incapable person's best interests are for the purposes of making a decision not governed by the HCCA (as listed above).[61]

In addition to the foregoing records, the attorney must also keep a copy of the POAPC and a copy of any court orders relating to the attorney's authority or the incapable person's care.[62] Upon the request of the incapable person or the incapable person's attorney for property or guardian of property, or the Public Guardian and Trustee, the attorney must provide a copy of the records he or she keeps.[63]

Every attorney for personal care has the same record retention and confidentiality obligations as attorneys for property, as set out above.

REMOVAL OF ATTORNEYS

Removal of Attorneys for Property and for Personal Care under the SDA

Where an individual is concerned that an attorney for property or an attorney for personal care is neglecting to fulfil his or her duties and obligations or is abusing his or her powers, that individual may bring the matter before the court either by way of application or motion (depending on the specific details of the case).[64] Such a proceeding may be commenced by the incapable person's attorney or guardian of property with respect to the attorney or guardian of personal care (or vice versa), the incapable person's dependant, the Public Guardian and Trustee, or by any other person with the permission of the court.[65]

On such a motion or application, the court may by order give such directions as it considers to be for the benefit of the incapable person and his or her dependants and that is consistent with the *SDA*.[66] Thus, if the court is of the view that it would be in the incapable person's interest for the attorney

61 *SDA*, *supra* note 4 at 0. Reg. 100/96, s. 3(1).
62 *Ibid*. at s. 3(2).
63 *Ibid* at s. 5(3).
64 *SDA*, *supra* note 4 at ss. 39(1) and (2), 68(1) and (2).
65 *Ibid* at ss. 39(3) and 68(3).
66 *Ibid* at ss. 39(4) and 68(4).

to no longer act on his or her behalf, the court may order that the CPOAP or POAPC be terminated.

Such an order may also be made by the court with respect to an attorney for property on an application for the passing of the attorney's accounts if the court determines that the attorney has acted in a manner contrary to the incapable person's best interests.[67]

A court will not hastily terminate a CPOAP or POAPC. There must be strong and compelling evidence of misconduct or neglect on the part of an attorney duly appointed under an enduring power of attorney before a court should ignore the clear wishes of the grantor and terminate such power of attorney.[68] Moreover, prior to terminating a CPOAP or POAPC, the court will consider whether the best interests of the incapable person are being served by the attorney.[69]

Examples of actions and decisions made by attorneys resulting in a court order terminating the power of attorney documents include:

- Isolating the incapable person from other family members;[70]
- Failing to prudently manage the incapable person's assets for his or her benefit by:
    - investing the incapable person's funds in risky and volatile investments as opposed to low risk guaranteed investments that would provide a base for the person's continuing support with regard to her standard of living,
    - failing to diversify investments,
    - failing to prepare personal tax returns,
    - encumbering the incapable person's real property,
    - gambling with the incapable person's money by using his or her line of credit to engage in stock transactions,
    - failing to account for the whereabouts of the incapable person's funds,
    - failing to act transparently and potentially misappropriating the incapable person's funds, and
    - failing to cooperate with the co-attorney;[71]
- Failing to provide a monthly accounting; [72]
- Failing to voluntarily pass accounts; [73]
- Failing to provide missing information or documentation with respect to missing funds;[74]

67 *Ibid* at s. 42(7).
68 *Teffer v. Schaefers*, 93 O.R. (3d) 447 (ONSC) at para 24.
69 *Ibid* at para 25.
70 *Chu v. Chang,* 2010 ONSC 294.
71 *McMaster*, *supra* note 11.
72 *Teffer*, *supra* note 68.
73 *Ibid*.
74 *Ibid*.

- Failing to ascertain and secure the incapable person's assets;[75] and
- Failing to follow court orders.[76]

In all of these cases, the power of attorney documents were terminated on the basis that the best interests of the incapable person were not being served.

CONCLUSION

As discussed, attorneys for property and attorneys for personal care have many duties and obligations which they must exercise diligently and in good faith for the incapable person's benefit. Unfortunately, navigating the many decisions that must be made on behalf of an incapable person is not always straightforward or easy. For this reason, it is always recommended that an attorney for property or personal care appointed under a CPOAP or POAPC seek legal guidance and advice prior to the commencement of his or her acting. For more detailed information on Attorney Accountings see chapter 12 and WEL publication, WEL on Fiduciary Accounting, 2nd Edition, Fall 2016, Guardianship, Attorney, Estate & Trust Accounts.[77]

75 *Ibid*.
76 *Ibid*.
77 WEL on Fiduciary Accounting, 2nd Edition, Fall 2016, Guardianship, Attorney, Estate & Trust Accounts

CHAPTER 9: HOW TO CHOOSE THE RIGHT ATTORNEY

by Kimberly Whaley

In this chapter we will look at one of, if not *the* most important aspect of power of attorney (**"POA"**) documents: how to choose the right attorney. Much pain, legal issues, court disputes, and even fraud and abuse may be avoided if you choose an appropriate attorney. While a POA document can be used for the good of a vulnerable adult or an incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document.

More often than not in POA disputes, it becomes apparent that the grantor never fully understood and/or put much thought into the extent of the powers being bestowed, whether the chosen attorney truly had the ability to do the job and fulfill his/her duties, or whether the attorney chosen could truly be trusted to act in an honest and trustworthy manner.

Consequently, there exists a significant risk that a vulnerable or incapable person may fall victim to abuse as a result of having a POA.

Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

While everyone is free to choose whomever they wish to act as either their attorney for property or personal care, there are a few legislative factors that must be met. Furthermore, while you can choose whomever you want as your attorney, this does not mean that you should not put a lot of thought and consideration into this decision. This chapter will provide some guidelines and issues to consider before making this very important choice.

LEGISLATIVE REQUIREMENTS

We know that in Ontario, the *Substitute Decisions Act*[1] governs certain requirements about who can and cannot act as an attorney.[2]

Primarily, the *SDA* requires that an attorney be at least **18 years old** in order to exercise decisional authority under a power of attorney for property,[3] and at least **16 years old** in order to exercise decisional authority under a power of attorney for personal care.[4] The person must also be mentally capable to act as an attorney.

Furthermore, the legislation prohibits you from appointing your health care provider as your attorney for personal care unless that person is your spouse, partner or relative.[5] Similarly, you cannot appoint as your attorney for personal care a person who provides residential, social, training or support services for compensation, unless that person is your spouse, partner or relative.[6]

If you were to appoint an attorney who did not meet the legislative requirements above, the appointment would be invalid and your power of attorney document would not be effective.

OTHER FACTORS AND CONSIDERATIONS FOR A SUCCESSFUL CHOICE

Just because your possible attorney meets the legislative requirements set out above, it does not necessarily mean that he or she will make a good attorney. Other considerations must be made. As previously stated, choosing the right attorney is perhaps the most important decision a person can make in order to protect his or her property or personal well-being in the event that he or she becomes incapacitated.

In deciding on an attorney, a grantor should consider the characteristics of the chosen person. Being an attorney for either property or personal care involves a lot of work and the law expects an attorney to meet a very high standard in performing his or her obligations (this will be discussed in more detail in chapter 8 “Duties of Attorneys”).

Power of Attorney for Property

For your attorney under a POA for property, consider the following characteristics and personality traits:

1 1992, S.O. 1992, c.30.
2 For more on the *SDA* see chapter 7 in this book “Demystifying the *Substitute Decisions Act*”.
3 *SDA*, *supra* note 1 at s. 5.
4 *Ibid* at s.16.
5 *Ibid* at s. 46(3)(a).
6 *Ibid* at s. 46(3)(b).

- Is the person willing to act as your attorney?
- Have you known this person long enough to know his or her personality and character traits?
- Is this person good at handling finances?
- Will he or she make sure you are provided with everything that you need to live comfortably?
- Does he or she have the values of honesty, integrity and accountability?
- Is he or she trustworthy, reliable and responsible?
- Will he or she respect your privacy? The attorney will become privy to a lot of information about your finances. Will he or she be able to keep your confidence?
- Does he or she have any of their own financial troubles (bankruptcy etc.)?
- Does he or she have time and are they available to handle their own finances as well as yours?
- Is he or she easy to contact?
- Does he or she understand the responsibilities of an attorney?
- Also, most importantly can you trust him or her not to misuse your money and make prudent financial decisions?

Power of Attorney for Personal Care

For your POA for personal care, you should also look closely at the character of the person you may choose as your attorney as this person will be making very important decisions about your health and quality of life. This person must be willing to accept the role and the attendant responsibility to make your future healthcare decisions when you are unable to do so. Many people may be uncomfortable with this responsibility, or these types of decisions. It is important to know this now, up front, while you are still capable of executing a POA document. Some questions to ask when choosing an attorney for personal care:

- Is this person willing to act as your attorney?
- Have you known this person long enough to know his or her personality and character traits?
- Is this person willing to talk with you about personal care issues and understand your goals, values, and beliefs?
- Is this person willing to honour and follow your wishes as much as possible?
- Is this person willing to be available and understand your personal care needs?
- Is this person comfortable and willing to ask questions of your medical care providers and talk to your doctors and healthcare team?
- And most importantly, Is this person able to make hard decisions?

Before naming an attorney in a POA document, it is important to consult the person in question and ensure that he or she is willing to act. It can be quite the shock for someone to find out at a later date, when you may be incapacitated, that they have been chosen as your attorney. An attorney has every right to turn down such an appointment. If your attorney does this, unless you have a substitute attorney appointed in your POA document, you will be left without an attorney to make decisions on your behalf. In that case, someone may apply to be your guardian but that decision will be out of your hands.

OTHER OPTIONS FOR ATTORNEYS

Some individuals will choose to appoint a trust company as an attorney. Such companies perform the services of an attorney for a fee. They are sometimes preferred to individuals as they are able to dispense their services impartially and are held to a standard of professional accountability.

Although the Public Guardian and Trustee (**"PGT"**) may act as an attorney of last resort in certain cases, it is important to note that the PGT cannot be named in a POA document unless her approval is obtained beforehand.[7]

Non-Resident Attorneys

While you can choose an attorney who lives outside of the province or country, doing so may cause issues. While there are no bonding or residency requirements for attorneys for property under the *SDA*, some investment firms may be unable to take instructions from non-resident attorneys. Also, depending on the property's value, the tax-filing requirements for non-resident attorneys for property may be burdensome. If you have no family or friends in Canada, consider appointing a trust company.

Number of Attorneys

It is possible, but not necessary, to appoint more than one attorney to act jointly and/or severally on your behalf. This means that you can appoint two or more attorneys to make decisions together, or enable each attorney to act separately. Unless it is specified in the POA document that attorneys are allowed to act "jointly and severally", statutory law assumes that jointly appointed attorneys must make decisions together.[8]

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7 Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf.

8 *SDA, supra* note 1 at ss. 7(4) and 46(4).

It is also possible to assign different responsibilities to separate attorneys.[9] You can also assign one attorney to act on your behalf and a substitute attorney to act for you should death or another event prevent the attorney first named to act.[10] It is important when deciding whether to appoint more than one attorney to consider any potential for conflict between the attorneys. Any conflict down the road can lead to delay in decision-making or even lengthy and expensive litigation that is counter to your personal and financial well-being.

Many people choose their children to act as their attorneys jointly, as they do not wish to upset any one child by not choosing him or her. However, not all of the children are suited for the job. You should only choose the person(s) you think is best for the role and you can avoid any potential conflict by talking to your family in advance and explaining the reasons for your choice.

Disputes also arise when one family member is appointed as power of attorney for property and the other family members are not provided with information on what they are doing with the grantor's money. The family members may speculate that the money is not being handled properly (whether or not this is true), which can lead to conflicts and disputes.

There are a couple of ways to avoid this. One is to appoint more than one attorney and require all decisions be approved by both of them, but this too can lead to disputes if they do not agree on the decisions being made. Another option is to appoint just one attorney but you can specify in your POA document that they must keep all family members (or certain family members) informed of the decisions being made and full information is to be provided. A final option is to name a non-family member, such as a close friend, a trust company or a lawyer to act as your attorney under a POA for property. A friend or acquaintance may carry less emotional baggage and may be better suited to act as your attorney.

CONCLUSION

Choosing an attorney may be one of the most important decisions in your life. While no one ever chooses to become incapacitated or unable to make decisions about their health and finances, we must all be prepared for this possibility. Planning now while you are still capable is important. Take some time to consider who would be the best attorney for you. Make a list of your candidates and make sure they meet the legislative requirements. Then think about their personalities and other responsibilities they may have in their life. Will they have time or be available to be your attorney? Change your attorney if their life situation changes. Above all, make sure they know that you have appointed them as your attorney; tell them why you have chosen them, and what their responsibilities will be.

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9 *Ibid* at ss. 7(6) and 46(7).

10 Ministry of the Attorney General, "Powers of Attorney", online: Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf; see *SDA* at s. 7(2) and 46(2).

CHAPTER 10: COMMON WAYS IN WHICH POWERS OF ATTORNEY GO AWRY

By: Kimberly Whaley

That a power of attorney ("**POA"**) document is an extremely powerful tool cannot be understated. For example, a POA for property enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a will. An attorney under a POA for personal care will be making serious decisions about your health and well-being, including decisions about your medical treatment, diet, clothing, hygiene, housing and safety. Consequently, there are a number of ways in which a POA document can be used to the detriment of a grantor. Some common scenarios, in which we see the procurement or use of a POA go awry, are discussed below in addition to suggestions on how to avoid potentially disastrous results.

GRANTOR GRANTS A POWER OF ATTORNEY WHILE INCAPABLE OR UNDER UNDUE INFLUENCE

As discussed previously in this collection, a person must have the requisite capacity to grant a POA document. But remember, a CPOAP and a POAPC remain valid even if, after execution, the grantor becomes incapable of giving a POA. Also, a continuing POA for property is valid if the grantor at the time of executing it is capable of granting a POA, even if he or she is incapable of managing property.[1]

However, if the person does not have the requisite capacity to grant the power of attorney document in the first place, then the POA is invalid and not effective.[2] This means that the grantor would no longer have an attorney to make decisions on his or her behalf with respect to property or personal care. In such a case, a friend or family member (or someone the grantor may not approve of) may

1 *Substitute Decisions Act, 1992,* S.O. 1992, c. 30, (the "***SDA***") at s.9.
2 *Ibid*.

apply to become a guardian of the person or guardian of property.[3]

In order to avoid such a scenario, it is important to execute your POA documents now while you are still capable, and encourage your loved ones and friends (or clients) to execute them as well. Too many people wait until they notice that a loved one is starting to lose cognitive functions before they suggest that a POA might be in order. By that time, questions could arise as to the person's capacity to grant a POA document. There is no better time than the present to execute a POA document.

Often when a POA is attacked on grounds of incapacity, an alternative allegation is made that the grantor was unduly influenced to execute the POA and that the POA should be set aside accordingly. In general, to establish undue influence, the burden of proof rests with the party alleging it. The extent of the influence must amount to coercion as simple influence is not enough. The grantor's free will must be overborne.[4] Undue influence with respect to POA documents is discussed in further detail in chapter 6.

However, being aware of the potential claims of incapacity and undue influence, seeking independent legal advice, documenting your wishes to execute the POA and the reasons why you have chosen the attorney you have chosen, are all simple ways to avoid having your POA document set aside.

DISPUTES ABOUT EFFECTIVE DATE / DATE OF INCAPACITY

Another common way that POA documents can go awry is when a dispute arises concerning the specific date upon which the POA document becomes effective and the attorney may start acting on your behalf.

POAs may become effective at different times. For example, much to the surprise of many, a continuing POA for property is effective *immediately upon signing* unless there is a provision or "triggering" mechanism in the document that directs that it will come into effect in accordance with a specified date or event, such as incapacity of the grantor.[5] If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism in the document, failing which the *SDA* offers guidance. The *SDA* provides that if the continuing POA for property states that it comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the POA comes into effect when: a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor

3 For more information on Guardianships see *"Whaley Estate Litigation on Guardianships"* 2015.
4 See *Abrams v. Abrams* 2008 CanLII 67882 (ONSC); and *Nguyen-Crawford v. Nguyen* 2010 ONSC 6836 at para 85.
5 *SDA*, *supra* note 1 at s. 7(7).

is incapable of managing property; or b) the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*, 1996, c.2, s.5.[6]

The *SDA* also provides that a POA for personal care does not become effective unless the *Health Care Consent Act*[7] applies to the decision and that *Act* authorizes the attorney to make the decision or, the *HCCA* does not apply and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the POA document that prevents the attorney from making the decision, unless the fact that the grantor is incapable of personal care has been confirmed.[8]

Needless to say, the above determinations for when the POA comes into effect may not be that clear and obvious to everyone. An attorney may begin acting when he or she should not or fail to act when he or she should.

How can you avoid these scenarios? First of all, have a clearly defined triggering mechanism in your POA document for when the POA becomes effective. Secondly, have the conversation with your attorney and make sure he or she understands when the POA becomes effective, his or her obligations, and when decisions can start being made on your behalf.

MULTIPLE ATTORNEY ISSUES

If a POA document names two or more persons as attorneys, the attorneys must act jointly (as in, all must agree to the decisions together) *unless* the POA document provides otherwise.[9] You can stipulate in your POA document that the attorneys can act "jointly and severally" meaning that they can make the decisions either together or separately.

Sometimes, if there are multiple attorneys, one attorney may act without the knowledge, approval, or acquiescence of the others, either under a joint or 'joint and several' POA. Another issue arises when attorneys are required to make decisions jointly and they cannot agree. This can lead to a dispute amongst the attorneys and a delay in important decisions being made on your behalf to your financial or personal detriment.

Another issue can arise when an urgent decision needs to be made about your personal care or finances and one of your attorneys cannot be reached. If you have multiple attorneys who must act jointly, then any available attorney cannot make the decision alone and he or she must wait until the other attorney can be reached.

6 *Ibid* at s. 9(3).
7 1996, S.O. 1996, c. 2, Sched. A.
8 *SDA*, *supra* note 1 at s. 49(1).
9 *Ibid* at s. 7(4).

In order to avoid these issues, make sure you are choosing multiple attorneys for the correct reason. For example, some choose multiple attorneys so that none of their children will be left out. This is not a good reason to have multiple people making decisions on your behalf. If you must appoint more than one attorney, a mechanism should be in place for resolving any disputes among them.

Disputes also arise when one family member is appointed as power of attorney for property and the other family members are not provided with information on what they are doing with the grantor's money. The family members may speculate that the money is not being handled properly (whether or not this is true), which can lead to conflicts and disputes.

There are a couple of ways to avoid this; one option is to appoint just one attorney but you can specify in your POA document that they must keep all family members (or certain family members) informed of the decisions being made and full information is to be provided. Another option is to name a non-family member such as a close friend, a trust company or a lawyer to act as your attorney under a POA for property. A friend or acquaintance may carry less emotional baggage and may be better suited to act as your attorney.

'COMPETING' POWER OF ATTORNEY DOCUMENTS

Too often there may be "competing" POA documents - where two or more attorneys argue over the validity of certain POA documents. These disputes often lead to contentious court proceedings. It is important to note that granting a new POA cancels any previous power of attorney document.[10] Before granting a new POA, a grantor should ensure that there is no pre-existing POA document that he or she wishes to keep in existence.

Unfortunately, a common scenario occurs where an adult child feels that he or she can decide who should be mother or father's attorney and ask the parent to sign a power of attorney document appointing him or her as the attorney. Mother or father often don't want to make "waves" in the family and agree to execute the document. However, sister or brother disagree with this choice and ask mother or father to execute a new POA document appointing them as the new attorney. Mother or father once again acquiesce.

One way to potentially avoid such a scenario is to have someone other than a family member act as your attorney. Someone with less emotional baggage or no feelings of jealousy or resentment may be better suited for the job.[11]

10 *SDA*, *supra* note 1 at s. 12(d).

11 See chapter 9 in this book on "How to Choose the Right Attorney" for guidance on how to avoid this scenario.

FAILING TO TAKE INTO CONSIDERATION TAX EFFECTS

With respect to a POA for property, issues can arise when the attorney fails to take into consideration the tax effects of his or her actions or inactions. For example, if an attorney decides to transfer joint ownership of the grantor's property with another person, such as a family member, and where beneficial ownership is changed, there will be an immediate disposition of property for income tax purposes (and immediate tax owing).

One way to avoid this is to make sure you appoint an attorney who has some financial savvy and who is aware of all risks and possible tax effects of the decisions being made. Or if the attorney is not aware of the risks and tax effects, he or she knows when and who to ask for assistance.

ATTORNEY FAILS TO SEEK PROFESSIONAL ADVICE

Similarly, an attorney may fail to seek professional advice when it is appropriate or necessary, which can lead to difficulties with your finances or investments. Attorneys are allowed to seek out, and are encouraged to seek out, professional advice when required. Professional advice may be needed from tax advisors, accountants, investment and financial advisors, or even advice from lawyers.

FINANCIAL REPORTING AND RELATED ISSUES

Finally, another way in which POA documents may go awry is through issues around financial reporting or financial record keeping. As noted in chapter 8 "Duties of Attorneys", attorneys for property must keep detailed financial records regarding all transactions completed on behalf of the grantor. They must also keep an ongoing list of assets, details of investments, securities, liabilities, compensation, including details of amounts, dates, interest rates, the wishes of the incapable person, and so on.

An attorney for property must be prepared for the passing of such accounts in the event it is required by the grantor, or with leave of the Court requested by an interested person, or indeed after the death of the grantor if required by the Estate Trustee.[12] The court may order that all or a specified part of the accounts of an attorney be passed.[13] The accounts are filed in the court office and follow the same procedure as the passing of estate accounts.[14]

Although the passing of accounts may not be required, it may still be advisable to do so because

12 Discussed in more detail in chapter 12 of this book "POA Accounting".
13 *SDA*, *supra* note 1 at s. 42(1).
14 *Ibid* at s. 42(6).

once the accounts have been passed, they have received court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Issues arise when attorneys fail to keep track of the records or receipts or transactions made on behalf of the grantor. Once again, making sure you choose an attorney who is responsible and who can understand basic financial accounting and record keeping could prevent these issues.

Along with financial reporting issues are issues over compensation.[15] Attorneys for property are statutorily entitled to compensation pursuant to the *SDA*.[16] The compensation taken should be in accordance with the prescribed fee schedule. Section 40 sets out the guidelines to follow when an attorney is taking compensation. Often the POA document itself will provide guidance; however, in cases where the document is silent, section 40(1) of the *Regulations* to the *SDA* provide that compensation may be taken as follows:

> An attorney may take annual compensation from the property of:
>
> - 3% of capital and income receipts,
> - 3% on capital and income disbursements, and
> - 3/5 of 1% on the annual average value of the assets as a care and management fee.[17]

Notwithstanding such provision within the *SDA,* the attorney can also seek to have compensation increased or reduced by the court when passing accounts.

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in certain circumstances; however, accounts or records must be produced to the incapable person, the incapable person's other attorneys, and the Public Guardian and Trustee if required.[18]

CONCLUSION

There are many ways in which power of attorney documents can go awry or cause serious unforeseen issues. In order to avoid or prevent the situations highlighted, simple steps such as choosing an appropriate attorney and discussing the associated responsibilities when acting as an attorney, will go a long way in avoiding these issues.

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15 See chapter 12 of this book "POA Accounting" for more information on financial reporting, attorney compensation and related issues.
16 *SDA*, *supra* note 1 at s. 40(1).
17 *Ibid* at s. 40(3).
18 *Ibid* at s. 42(3).

CHAPTER 11: MISUSE AND ABUSE OF POWERS OF ATTORNEY

By: Kate Stephens

INTRODUCTION

Power of attorney documents are powerful tools that, when executed and used effectively, protect the interests of individuals who are no longer capable of managing their own affairs. Unfortunately, POAs also create an inherently imbalanced power relationship between a grantor and an attorney, and this leaves the grantor vulnerable to an attorney's misuse or abuse of the POA. This is especially true with respect to continuing powers of attorney for property, where an attorney can typically do anything with respect to a grantor's property that the grantor could do if capable, except make a will.[1] In fact, the potential for abuse is so great that in order for an individual to have the capacity to grant a CPOAP, he or she must appreciate the potential for an attorney to misuse the authority granted to him or her.[2]

The misuse and abuse of a CPOAP encompasses everything from the mismanagement of a grantor's property to outright theft by an attorney. With respect to a power of attorney for personal care, where there is no real financial motive for misusing the POA (unless the attorney for personal care is also the attorney for property), inappropriate actions of an attorney are generally related to a lack of regard for the individual's health and personal needs or breaches of fiduciary duty, such as the duty to consult with an incapable grantor's supportive family and friends,[3] or the duty to foster regular personal contact between an incapable grantor and supportive family and friends.[4]

Often, in the case of more serious abuse, the POA document itself may have been obtained by

1 *Substitute Decisions Act, 1992*, S.O. c. 30 at s. 7(2) [the "***SDA***"].
2 *Ibid* at s. 8(1)(g).
3 *Ibid* at s. 66(7).
4 *Ibid* at s. 66(6).

fraudulent or inappropriate means with the intent to commit such abuse. More often than not, however, the inappropriate use of the authority granted by a CPOAP or POAPC is the result of negligence or self-interested behaviour. This chapter will draw primarily on case law to provide examples of how POAs may be misused and abused.

MISUSE AND ABUSE IN CIVIL LAW

The *SDA* and the common law place several duties on an attorney for property or personal care.[5] Most importantly, the *SDA* holds that an attorney for property is "a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit".[6] An attorney for personal care, meanwhile, must exercise his or her powers and duties diligently and in good faith.[7] Some attorneys fail to live up to these statutory requirements.

The civil cases below illustrate the ways that someone acting under a POA can breach his or her duties to the detriment of a grantor, and how the Court has judged attorneys in such cases.[8]

Barberi v. Triassi Estate

In the case of *Barberi v. Triassi*,[9] Liboria Triassi had appointed her three adult children – Nina, John, and Joseph – as her joint attorneys for property and personal care. Mrs. Triassi suffered a stroke in 2002, and passed away on February 12, 2004.

After Mrs. Triassi's stroke, her three children, acting under the joint POAs and after consultation with a social worker, decided to move their mother to a nursing home. The day after Mrs. Triassi entered the facility, Nina removed her mother and took her to her own home without discussion, consultation, or agreement with John and Joseph. Mrs. Triassi continued to reside with Nina until she was admitted to hospital shortly before her passing in 2004.

During the time that Mrs. Triassi lived with her, Nina took $22,855.69 from her mother's pension funds as compensation for her care. The Court held that Nina had breached her duties in failing to consult with her brothers before removing her from the nursing home, and in holding a joint bank account with her mother without the consent of the other attorneys. The Court therefore

5 For a detailed discussion of the duties of attorneys, please see chapter 8 of this book "Duties of Attorneys".
6 *SDA*, *supra* note 1 at ss. 32(1) and 38.
7 *Ibid* at ss. 66 and 67.
8 Please see chapter 13 of this book for a detailed discussion of the legal remedies available in cases where POA documents or the actions of an attorney are in dispute.
9 2010 ONSC 3734.

determined that Nina was not entitled to compensation and that the $22,855.69 formed part of Mrs. Triassi's estate.

Interestingly, John and Joseph were also found to have breached their duties as estate trustees for Mrs. Triassi's estate in failing to provide Nina with an accounting or with her share of the estate as per their mother's will, and so the Court held that Nina was entitled to 1/3 of her mother's estate.

Nguyen-Crawford v. Nguyen

The case of *Nguyen-Crawford v. Nguyen*[10] involves a dispute among five siblings over the validity of POA documents executed by their mother, Tuyet Ngoc Nguyen ("**Ms. Nguyen**"). Ms. Nguyen's youngest daughter, Thuy Nguyen-Crawford (**"Thuy**") was granted a POAPC and CPOAP by her mother in 1998. Ms. Nguyen suffered a stroke in 2008, triggering Thuy's decision-making power under the 1998 POAs. The other four siblings (the **"Older Siblings**") obtained new POAs from Ms. Nguyen in 2009.

Thuy and the Older Siblings brought competing Applications with respect to the 1998 and 2009 POAs. The Older Siblings eventually conceded that the 2009 POAs were invalid due to Ms. Nguyen's incapacity; however, the older siblings alleged that Thuy exercised undue influence over Ms. Nguyen with respect to executing the 1998 POAs and so they were also invalid. The Older Siblings thus made an Application to become Ms. Nguyen's guardians for property and personal care.

The dispute became heated as the Older Siblings alleged that Thuy had depleted Ms. Nguyen's assets through risky iTRADE investments, and denied Thuy access to Ms. Nguyen both by phone and in person. Specifically, the Older Siblings alleged that Thuy and her husband, Darren, had forged Ms. Nguyen's signature on documents related to her iTRADE investment account over which Thuy and Darren had power of attorney.

The Court held that the 1998 POAs were invalid due to undue influence by Thuy. This undue influence finding arose from the fact that Ms. Nguyen did not speak English, and she received no translation of the POA documents, nor of the legal advice provided by the drafting solicitor, other than the translation provided by Thuy, on whom the documents bestowed extensive powers.

The Court also held that while there was insufficient evidence to demonstrate that the iTRADE investments that Thuy and her husband made on her mother's behalf amounted to fraud, the investments were certainly beyond the risk tolerance that Ms. Nguyen was known to have had. Again, relying on the fact that Ms. Nguyen did not receive independent translation of documents

10 2010 ONSC 6836.

related to the iTrade account, the Court held that the trades made by Thuy and Darren were either made without Ms. Nguyen's authority or by the exercise of undue influence.

The Court ordered that the Older Siblings be made Ms. Nguyen's guardians for personal care and for property, but did not order Thuy to pass her accounts as Ms. Nguyen's attorney.

Fareed v. Wood

Fareed v. Wood[11] concerns a solicitor, Orlin Wood, who was appointed as attorney for Vera McLeod (the "**Deceased**") under a general POA in 1992, and as the executor and trustee under her Last Will and Testament after she died in 1999. The Deceased's stepdaughter and beneficiary, Jane Fareed, brought an application for a passing of accounts after Mr. Wood failed to obtain a Certificate of Appointment of Estate Trustee, distribute the estate, or provide any information to the Deceased's beneficiaries.

While acting as the Deceased's attorney, Mr. Wood did not make separate accounts with respect to work he did as her solicitor and as her attorney. Any accounts Mr. Wood did keep were lacking in sufficient detail and many confirmatory documents were missing. Mr. Wood claimed $130,373 in fees for his work as the Deceased's attorney and solicitor. Additionally, more than $100,000 was transferred to a woman named Mrs. Paul, who was not a beneficiary of the Deceased's estate, with no explanation provided. Mr. Wood did not take money or make transfers from the Deceased or her estate for his own benefit, other than for fees and disbursements.

The Court held that Mr. Wood had been negligent and had breached his fiduciary duty to the Deceased. The Court also held that Mr. Wood's fees were unconscionable, and ordered him to repay the $130,373 paid or billed for his work as the Deceased's attorney and solicitor, along with pre-judgment interest.

Gironda v. Gironda

In *Gironda v. Gironda,*[12] three sons, Frank, John, and Salvatore (the "**Applicants**") challenged the 2005 CPOAP and POAPC granted by their mother, Caterina, to their brother, Vito. They also challenged Caterina's 2005 Will, and several *inter vivos* gifts made by Caterina to Vito. As was the case in *Nguyen-Crawford v. Nguyen* above, the person whose capacity was at issue, Caterina, did not speak English.

Vito lived with his parents his whole life and, following the death of his father in 2003, he lived

11 2005 CarswellOnt 2572, [2005] O.J. No. 2610.
12 2013 ONSC 4133, 2013 CarswellOnt 8612.

with his mother alone until 2011 when Caterina was 90 years old. Vito and the Applicants fought often, and police were called on several occasions due to threats allegedly uttered by Vito, an issue complicated by the fact that he was the licensed owner of several firearms, including handguns. Vito provided extensive care to his mother, but also frequently lost his temper and tried to prevent the Applicants from seeing her.

In 2005, Caterina made new POAs, with Vito as her sole attorney, and a new Will, which left her house to Vito. In 2008, Caterina transferred the house to Vito for two dollars, retaining only a life interest in the property. In 2009, Caterina was alleged to have given all of her money, totalling roughly $175,000, to Vito as a gift. In 2011, Caterina suffered a fall and was living full time in a care facility during the proceedings.

The Court held that Caterina's 2005 Will and POAs were in fact valid. However, the Court held that the 2008 transfer of the house from Caterina to Vito was invalid due to Caterina's lack of capacity, and Vito conceded that he held the 2009 cash transfer of $175,000 in trust for the benefit of Caterina. However, notwithstanding the validity of the 2005 POAs, the Court appointed Vito's brothers, Frank and John, as guardians of Caterina's property and person.

This case has an unfortunate epilogue, as Vito was found murdered in December of 2013. The murder remains unsolved.

Zimmerman v. McMichael Estate

Zimmerman v. McMichael Estate[13] is an unfortunate example of an unscrupulous attorney taking large sums of money for his personal benefit under the powers conferred by a POA. The proceedings commenced as an Application by Adam Geoffrey Zimmerman (**"Mr. Zimmerman**") to pass his accounts with respect to his work as attorney for property of Signe K. McMichael (the "**Deceased**") and as the trustee of the Signe McMichael Trust (the "**Trust**").

Mr. Zimmerman met the Deceased and her husband (together, the "**McMichaels**") in the 1980s. The McMichaels were wealthy art collectors, who donated a large collection of Canadian national treasures to the Province of Ontario in 1966. Immediately following her husband's death in 2003, the Deceased executed a POA appointing Mr. Zimmerman as her attorney for property. This property was worth roughly $5,000,000 at the time. In May 2004, the Deceased established the Trust and directed that all her assets, save $250,000 set aside for bequests, be transferred to the Trust, with Mr. Zimmerman as the sole trustee. In essence, Mr. Zimmerman had complete control over the Deceased's property, which he exercised until his removal as trustee in 2009.

13 2010 ONSC 2947, 2010 CarswellOnt 3481.

The Deceased's closest relatives, the Fenwicks, brought an Application against Mr. Zimmerman in 2008 to declare the POA and Trust void, and to have Mr. Zimmerman pass his accounts. In several instances, Mr. Zimmerman failed to appear in Court, failed to file necessary documents or failed to comply with Court Orders. The Court found that Mr. Zimmerman's accounts were incomplete, inadequate, and at times, simply false.

The Objection to Accounts filed by the Fenwicks contains 28 pages of unexplained charges by Mr. Zimmerman to the Trust. He charged personal expenses, meals, hotels, and airfare to the Trust, in addition to his compensation, and made several large cash withdrawals. All told, during his management of the Trust, Mr. Zimmerman paid himself $365,462.50 CAD and $85,400.00 USD. He also mingled Trust assets with his own property, and engaged in several other conflicts of interest and breaches of duty.

Though there is much in Mr. Zimmerman's actions to discredit him, it should be noted that he at all times provided appropriate care for the deceased in his capacity as her attorney for personal care.

Mr. Zimmerman was ordered to repay the amounts he took out of the Trust, as well as more than $300,000 in additional legal costs. Mr. Zimmerman died suddenly in early 2011, leaving his estate to contend with the debts he owed to the Deceased and her estate.

MISUSE AND ABUSE IN CRIMINAL LAW

In some severe cases of POA misuse, the Crown will elect to charge the offending attorney with a criminal offense. Though criminal charges are not always laid in cases involving fraud and theft in the use of POAs, "theft by person holding power of attorney" is a specific offence under the *Criminal Code.*[14] If the facts of the case allow it, a charge of theft by POA is often laid in conjunction with a charge under s. 334(a) of the *Criminal Code* for theft of a sum in excess of $5,000 and/or a charge under s. 380(1) of the *Criminal Code* for defrauding the public or any person of a sum in excess of $5,000.

The criminal cases below detail instances of theft and fraud under a power of attorney, and demonstrate the extreme vulnerability of grantors when they fall prey to an unscrupulous attorney.

R v. Hooyer

In *R v. Hooyer*,[15] Daniel Hooyer ("**Daniel**") was convicted of fraud and theft pursuant to ss. 331

14 R.S.C. 1985, c. C-46 at s. 331.
15 2016 ONCA 44.

and 380(1) of the *Criminal Code.* Daniel had known Paul Carroll ("**Paul**") since he was a child. Daniel was Paul's substitute attorney for property and personal care (after Paul's wife) and was the residual beneficiary of the estates of both Mrs. and Mr. Carroll. When Mrs. Carroll passed away in 2004, Daniel began acting as Paul's attorney and continued to do so until 2011. During this time, Paul was suffering from dementia and living in a care facility.

After he became Paul's attorney, Daniel moved into Paul's residence and treated it as his own. He dissipated almost all of Paul's assets, diverting $378,552.67 for his own use and benefit. The fraud charge was laid because Daniel used invoices from the care facility to receive reimbursement from Veterans Affairs Canada, to which Paul was entitled as a veteran, and used the reimbursed funds for his own benefit and not for Paul's care.

Throughout his attorneyship, Daniel paid almost no attention to Paul's personal care. He failed to pay bills at Paul's care facility, resulting in Paul's care being downgraded, and did not even visit Paul for several years until his death in 2013. By the end of his life, Paul had to rely on charity for basic necessities, including clothing and other personal items.

Daniel was sentenced to two years less a day for the theft conviction and six months concurrent for the fraud conviction.

R. v. Kaziuk

In *R. v. Kaziuk*,[16] Roman Kaziuk ("**Roman**") held a CPOAP, executed in 2006, with respect to his 86-year-old mother, Mrs. Kaziuk. In 2006, Mrs. Kaziuk was financially well off, with two condos in Oakville and a residence in Miami, all of which she owned mortgage-free. She had significant savings in her bank account, a car, and credit cards.

When Roman went into arrears with respect to mortgage payments on his personal residence, he obtained a loan to cover the arrears after signing an Authorization and Direction that he was acting under his mother's POA, creating mortgages on one of Mrs. Kaziuk's Oakville properties. Roman had a portion of the loan deposited directly into his own account.

Roman later obtained two additional loans by falsely claiming that his mother had died, and in order to secure same, presented his mother's Last Will and Testament stating that he was the sole beneficiary and executor of his mother's estate. Roman never paid back any of the loans, and in fact, did not use such funds to pay off his mortgage arrears, resulting in his personal property being sold under a Power of Sale.

16 2013 ONCA 217, aff'g 2011 ONCJ 851, rev'g 2012 ONCJ 34, leave to appeal to SCC refused, 13969 (10 October 2013).

These were not the only instances of Roman defrauding his mother, and as the result of his actions, she lost her life savings. Mrs. Kaziuk was evicted from her condo in 2011, and the banks seized her other properties. By 2013, Mrs. Kaziuk was residing in a residence for the homeless run by the Salvation Army.

Roman was found guilty of theft and fraud pursuant to ss. 334(a) and 380(1) of the *Criminal Code*. A charge for theft by power of attorney was not laid, but was proven beyond a reasonable doubt, and so was considered as an aggravating factor on sentencing pursuant to s. 725(1) of the *Criminal Code.* The trial judge sentenced Roman to 10 years in prison for the fraud and theft, but the sentence was reduced to 8 years on appeal.

It is notable that, as with *R v. Hooyer* above, the abusive attorney in this case was a beneficiary of the grantor's estate. With prudent management of the grantor's assets, the attorneys in both of these cases could have helped the grantors to live out the rest of their lives in comfort, and received substantial bequests, in addition to compensation for their actions as attorneys, upon the death of the grantor. However, both attorneys chose to use their authority under the POAs for short-term financial gain to the detriment of the grantors. These cases thus highlight the need for prudent selection of an attorney, and the need to ensure that a POA contains appropriate checks and balances on the authority of an attorney, even where that attorney is a family member or close friend.

CONCLUSION

These cases demonstrate that POA documents can be misused and abused in a variety of ways, with devastating consequences to the quality of life of the grantor in the most serious cases. Unfortunately, it is likely that instances of abuse or misuse of POAs are underreported. Many grantors may not report abuse because a family member or friend is the one carrying it out. Equally, they might keep quiet because they depend on their attorney for their personal and financial needs, because they are intimidated or threatened by their attorney, or simply because they are unaware of the theft.

For grantors, it is important to carefully consider the contents of the POA document you wish to execute and to seek independent legal advice with respect to same.[17] It is equally as important to choose the right attorney(s), as discussed in chapter 9 of this volume. Finally, those who work with the elderly or incapable, or count them amongst their family and friends, must be vigilant in looking for signs of financial or other abuse by an attorney.

17 Please see chapter 17 of this book on "Consideration for Grantors".

CHAPTER 12: POWER OF ATTORNEY ACCOUNTING - TIPS AND TRAPS

By: Birute Lyons

INTRODUCTION

A fiduciary is a person who holds a legal or ethical relationship of trust with another person. An attorney for property appointed by a grantor under a continuing power of attorney for property is a fiduciary and is subject to the governing provisions of the *Substitute Decisions Act*.[1] "Fiduciary accounting" describes the legal duty of an attorney for property to maintain financial accounts and records of all transactions involving the grantor or incapable person in the management of his or her property. The attorney acting under a CPOAP is to act in accordance with the statute governing the appointment, namely the *SDA* and its regulations. Accounts and records kept by the attorney for property must be made available to the grantor or incapable person whose property is being managed on request.

APPLICATION TO PASS ACCOUNTS

An application by an attorney for property to "pass" accounts (also referenced in this chapter as a "passing of accounts" "passing" and "accounting") is a formal procedure governed by statute that results in court approval of the relevant period of property management. The jurisdiction and procedure for the passing of accounts by an attorney for property are set out in the *Rules of Civil*

1 1992 S.O. 1992, c. 30. The SDA defines a CPOAP as:

> 7. (1) A power of attorney for property is a continuing power of attorney if,
>
> (a) it states that it is a continuing power of attorney; or
>
> (b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property. 1996, c. 2, s. 4 (1).

Procedure (the "***Rules***") in Rules 74.16 through 74.18 inclusive.[2] As with any application, the court has the jurisdiction on an accounting application to grant the relief sought, dismiss, adjourn, or direct a trial, in whole or in part, and with or without terms. This jurisdiction applies to applications to pass accounts in accordance with Rule 38.10(1) (a) of the *Rules*.[3]

A passing of accounts is not strictly, in legal terms, a mandatory requirement. Rather, an attorney for property may choose to pass his or her accounts or alternatively, an attorney for property may be compelled to do so by those legally entitled to request a passing, including:

1. the grantor's or incapable person's guardian of the person or attorney for personal care;
2. a dependent of the grantor or incapable person;
3. the Public Guardian and Trustee;
4. the Children's Lawyer;
5. a judgment creditor of the grantor or incapable person; and
6. any other person, with leave of the court.[4]

Also "any other person" may apply for a passing of accounts, but only with leave of the court.[5] It should be noted that the right to compel an accounting is not an absolute right, regardless of the circumstances; rather, it remains within the discretion of the court to either grant or refuse such an order.

Although a passing of accounts may not be required, it may nevertheless be advisable for an attorney for property to make an application for a passing, since once the accounts have been passed, the accounts will have received court approval and cannot be questioned at a later date by persons having had notice of the passing (exceptions will apply in the case of fraud by the attorney for property or mistake).

A passing of accounts application may go uncontested if no one "objects" to the accounts by filing a Notice of Objection. Where there is an uncontested passing of accounts and an unopposed order is sought, in many instances a court attendance before a judge may be avoided as long as all of the requirements under Rule 74.18 have been complied with.

Where there is an objection to the accounts, there will be a contested hearing for a passing of accounts.[6] The hearing may proceed on the date specified in the Notice of Application to Pass

2 RRO 1990, Reg. 194, as amended under the *Courts of Justice Act*, RSO 1990, c C.43.
3 *Ibid* at r. 38.10(1)(a): "On the hearing of an application the presiding judge may a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms."
4 *SDA, supra* note 1 at ss. 42(1)-(8).
5 *Ibid* at ss. 42(1)-(8).
6 *Rules*, *supra* note 4 at r. 74.18(11)-(13).

Accounts on the objections raised in the Notices of Objection to the Accounts as filed. The attendance may result in disposition of the matter or an Order Giving Directions respecting steps to be taken to its disposition. An Order Giving Directions is "designed to provide the parties with a procedural framework in which to prepare the proceeding for final adjudication."[7] It compels the parties to give the necessary forethought to implement a process and the procedure that is most likely to lead to a just, expeditious and cost-effective determination.

The benefits of an Order Giving Directions are, generally speaking, their flexible and consensual nature as every application to pass accounts is unique. Some objections may be about the fiduciary's failure to keep accurate records; some may be about the propriety of claimed or stated expenses; some may be concerned over poor investment decisions; and others may be about misappropriation/ misallocation of assets; just to name some of the more common objections. A well-negotiated and well-crafted Order Giving Directions is less likely than the "default" procedure (i.e. no fixed procedure) to result in wasteful interlocutory motions.

Costs

The costs of an unopposed Judgment are addressed in the *Rules* at Rule 74.18(10) and Tariff C, and for an opposed hearing they are set out in Rule 74.18(13). In respect of costs, often the costs set out at Tariff C are insufficient. The court has the discretion to modify costs awards and a Request for Increased Costs may be made.[8]

Compensation

Under the *SDA,* an attorney for property has a statutory right to compensation, pursuant to a fee schedule set out in the legislation. The current rate is set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee.[9] The compensation can be taken monthly, quarterly or annually.[10] If consent in writing is given by the grantor or incapable person's attorney under a Power of Attorney for Personal Care, if any, the attorney for property may take compensation in an amount greater than the prescribed fee schedule.[11]

This chapter will examine in detail the proper procedure and process involved in preparing, passing and reviewing the accounts of a grantor or incapable person, including the documents to be filed and the service of those documents; the role of the OPGT; attorney for property's compensation;

7 Consolidated Practice Direction Concerning the Estates List, Toronto Region, July 1, 2014 ["Practice Direction"] at para 44.
8 *Ibid at* r. 58.01; *Courts of Justice Act, supra* note 4, s. 131; *Re Briand Estate* (1995), 10 ETR (2d) 99 (Ont. Gen. Div.).
9 *SDA,* Ontario Regulation 26/95, s. 1(a) through (c).
10 *SDA*, *supra* note 1 at s. 40(2).
11 *Ibid* a s. 40(3)(a).

and costs. This chapter will also address some helpful tips and traps when preparing attorney accounts.

Importantly, this chapter includes the new rules and regulations (effective January 1, 2016) affecting passing of accounts proceedings.

PART I: KEEPING ACCOUNTS

1. General

An attorney for property is a fiduciary, pursuant to section 32 of the *SDA* "whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit." As such, an attorney for property shall deal with an incapable person's property and "in accordance with the regulations, keep accounts of all transactions involving the property".[12]

Attorneys for property have a serious responsibility to keep good, detailed and understandable accounts that reflect their diligence and transparency. The accounts are really a snapshot of their handling of a grantor's or incapable person's property. If the assets are administered over long periods of time and are of considerable volume, attorneys may wish to pass their accounts every few years. This relieves them of any liability to further account for transactions during the period of accounts that have been passed.

Ontario Regulation 100/96, s. 1, applies to attorneys under continuing powers of attorney, statutory guardians of property, court-appointed guardians of property, attorneys under powers of attorney for personal care and guardians of the person. Ontario Regulation 100/96, subsection 2(1) sets out the specific components and the form of accounts and records to be maintained by an attorney under a continuing power of attorney, as follows:

> (1) The accounts maintained by an attorney for property under a continuing power of attorney shall include,
>
> (a) a list of all the grantor's or incapable person's assets from the date of the first transaction by the attorney on the grantor's or incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;
> (b) an ongoing list of assets acquired and disposed of on behalf of the

12 *SDA*, *supra* note 1 at s. 32(6).

grantor or incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;

(c) an ongoing list of all money received on behalf of the grantor or incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;

(d) an ongoing list of all money paid out on behalf of the grantor or incapable person, including the amount, date, purpose of the payment and to whom it was paid;

(e) an ongoing list of all investments made on behalf of the grantor or incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;

(f) a list of all the grantor's or incapable person's liabilities from the date of the first transaction by the attorney for property on the grantor's or incapable person's behalf;

(g) an ongoing list of liabilities incurred and discharged on behalf of the grantor or incapable person, including the date, nature of and reason for the liability being incurred or discharged;

(h) an ongoing list of all compensation taken by the attorney for property, if any, including the amount, date and method of calculation;

(i) a list of the assets, and value of each, used to calculate the attorney's care and management fee, if any. O. Reg. 100/96, s. 2(1).

An attorney for property continues to maintain such accounts until the attorney for property ceases to have authority to act and the role as attorney for property is terminated by the court on a passing of accounts under s. 42 of the *SDA.*

In accordance with s. 42 of the *SDA,* an attorney for property has a statutory duty to account and may choose to voluntarily pass accounts or may be required to pass accounts by Order of the court. Subsections 42 (2), (3) and (4) of the *SDA* set out who is entitled to apply to pass the accounts, whether it is an attorney or other person(s), and subsections 49(3) and (4) of the *Estates Act*[13] set out the powers of a judge on the passing of any accounts.

13 R.S.O .1990, c E.21.

Subsection 32(12) of the *SDA* states that "the *Trustee Act*[14] does not apply to the exercise of an attorney for property's powers or the performance of an attorney's duties." It would however appear that the procedural requirements remain the same, despite subsection 32(12) of the *SDA*, as subsection 23(1) of the *Trustee Act* provides that the proceedings and practice for a passing of accounts for a trustee are the same as for an estate trustee.

2. Procedure

The procedures governing the obligation to prepare accounts and the requirement to keep and maintain accurate records in a specific format are set out in Rule 74.17 of the *Rules*, as follows:

> ***Form of Accounts***
>
> 1.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,
>
> (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
>
> (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
>
> (c) an account of all money received, but excluding investment transactions recorded under clause (e);
>
> (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
>
> (e) where the estate trustee has made investments, an account setting out,
>
> (i) all money paid out to purchase investments,

14 R.S.O.1990, c T.23.

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

(f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires.

(2) The accounts required by clauses (1)(c), (d) and (e) shall showthe balance forward for each account.

(3) Where a will or trust deals separately with the capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.[15]

Accounts must be consistent with the form set out in Rule 74.17 and shall contain a full and detailed list of all of the grantor's or incapable person's assets as of the date of the first transaction by the attorney for property, cross-referenced to entries in the accounts that show the acquisition or disposition of the assets, an account of all money received and disbursed on behalf of the grantor or incapable person (separated as to capital and revenue), a statement of property remaining, an investment account (investment items recorded are not included when calculating compensation and are only used when calculating a care and management fee), a statement of compensation claimed/taken by/paid to the attorney for property, if any, including the method of calculating the compensation, and a statement of liabilities, contingent or otherwise, at the date of the accounts.

The attorney for property must be familiar with the transactions within the accounts and be in a

15 O. Reg 484/94, s.12.

position to make the accounts available to be reviewed, if required, and to satisfactorily respond to any reasonable questions raised by the grantor or a person with a financial interest in the assets of the grantor or incapable person. If the attorney is aware that there may be difficulties with the administration or persons having a financial interest in the future then proper and complete accounts will certainly offer some protection to the attorney for property down the road. Many harmonious relationships between attorneys for property and those having a financial interest in the future end very quickly when transparency and information is lacking. The attorney for property's record-keeping should be governed by the possibility that the accounts may eventually be scrutinized by those with a financial interest or by the courts.

The accounts are compiled from a multitude of sources and weaved together in chronological order so that there is an entry for every related transaction that takes place. The transactions recorded are **actual** cash amounts; figures are not rounded up or down. There is no "depreciation" and/or "accrual" type of accounting when maintaining attorney for property accounts.

As a general rule, the more information recorded in each entry, the better. The detail must be sufficient to enable anyone unfamiliar with the administration to clearly understand everything that has transpired during the accounting period. The grantor or incapable person or anyone with a financial interest is entitled to full and complete information as to the status of the assets, the nature of investments, the quantum of income generated and the disbursements made. Failure to provide such detail in a timely fashion in a format that is easily understood may result in the attorney for property being cited to pass accounts before the court. Proper attorney for property accounts provide up-to-date information as to the overall status of the attorney's administration.

Although not forming part of the accounts submitted to the court, the specific detail from all entities holding assets and all receipts/disbursements recorded in bank and brokerage statements, supported by electronic copies of cancelled cheques, invoices, and vouchers often referred to as source documents, must be kept and be available in the event an attorney for property is required to pass the accounts at a hearing and may also be viewed by any opposing parties on a passing of accounts.

3. Gathering and Maintaining Information

It is self-sabotage not to be organized and devote the time necessary to your fiduciary duty as an attorney for property under a CPOAP to maintain proper financial records. Yes, it is time consuming but wise to ensure early on that all source documents will be made available by redirecting them to the attorney for property. Correspondence should be kept with the source documents to support the attorney for property's efforts to obtain information and documents.

To start, consider preparing an Information Summary (see **APPENDIX "A"** to this chapter as an example) recording the information an attorney for property will need to refer to in administering the grantor or incapable person's property. In the future, you will be glad you did this for your reference. To supplement this Summary, consider including a list of contacts at the bank, brokerage company, accountant's office and of any family members, attorneys for personal care etc. with telephone numbers, addresses and email addresses.

Tip: Keep a copy of the supporting documents attached to the Information Summary to verify the source of the figures recorded therein for assets and liabilities from the date of commencing the accounts.

Keep appraisals of assets, copies of property deeds, reporting letters with enclosures, insurance policies and tax returns. Where anything has to be calculated that is not readily obvious, for example, a statement of income paid out, these documents should be close at hand.

Keep a copy of the CPOAP constituting the authority of the attorney for property and a copy of the grantor's Will, if there is one, with the Information Summary.

An attorney for property must be familiar with the grantor's Will, if there is one. As a precaution, the attorney for property needs to know what personal assets, if any, pass as a testamentary bequest on the death of the grantor. These assets must be preserved until the grantor departs this world.

Tip: If new assets are discovered or assets change – e.g. a house must be sold and decisions must be made regarding investment of the sale proceeds or holding personal effects for future distribution – keeping the terms of the grantor's wishes as per his or her Will available for reference is paramount.

Tip: A grantor's or incapable person's financial accounts and transactions must be kept completely separate from the attorneys. <u>Never</u> borrow or use the grantor or incapable person's money for the attorney for property or family and friends unless the attorney for property is allowed by the court to receive a specific amount as compensation for his or her work as the attorney for property (see Compensation section).

4. Preparing Accounts

If an Information Summary, which includes a true and accurate inventory of all the assets and liabilities, has been prepared (as in the example provided) and includes the assets and liabilities of which the attorney for property is aware, then the preparation of a Statement of Original Assets and

Liabilities will be relatively easy to prepare. The bank and brokerage account statements generally provide information to record in a Statement of Original Assets.

Arrangements can certainly be made for an account preparer, accountant, or lawyers to prepare the accounts – it must be remembered they will charge an hourly rate for their time spent on behalf of the attorney for property, and they will usually ask for a deposit up front (called a retainer) when hired. They will hold this deposit in trust until the attorney for property is sent a bill for the work done, and it may be necessary to top up the retainer before they will continue any further work. It is the attorney for property's responsibility to maintain accounts, so it should be kept in mind that the cost of any work done on behalf of the attorney for property may need to be deducted from any compensation the attorney for property ultimately is entitled to receive.

Tip: If an account preparer is hired, the attorney for property may be required to personally pay them. An attorney for property may be challenged for paying a third party for services from the grantor's or incapable person's assets. Account preparers will not start any work if they do not have a retainer. This is not unreasonable – they are, after all, running a business.

Often account preparers are not supplied with sufficient information to prepare the accounts properly – nor can they invent details! The accounts need to reflect **actual** receipts and disbursements with sufficient detail to explain each of them. Delays and costs are incurred where an account preparer has to constantly follow up to obtain information or documents. It is not an account preparer's responsibility to get in touch with the bank/investment brokers. Remember: they have other clients, and if the accounts cover a long period of time it can be a lengthy process to have the accounts prepared. Efforts ought to be made to ensure that an account preparer is supplied with absolutely everything, and in an organized manner. Remember, the attorney for property– not the preparer – needs to be familiar with every entry in the accounts!

A sample of attorney accounts can be found as **APPENDIX "B."** If an asset and liability summary has been prepared, in detail, then that summary provides a good start to preparing an attorney for property's accounts.

5. Accounts

The accounts can be prepared using specific software programs for keeping financial records, a spreadsheet program like *Excel* or by inserting Tables in *Word*. The attorney for property should use a program they are comfortable with. To start, prepare a template similar to the sample accounts at **APPENDIX "B"** to this chapter.

Statement of Original Assets

This is a statement recording, in detail, all the assets and their values as at the date the attorney for property begins the financial administration of the grantor's or incapable person's affairs: note this means on the actual date the attorney for property commenced transactions on behalf of the grantor or incapable person, not at the beginning or end of the month. Each asset ought to be numbered and when recording transactions relating to the individual asset, for ease of reference, to make reference to such asset number within the particulars.

Note for securities or original investments made by the grantor the market value of the asset is recorded in the Statement of Original Assets as at the date the attorney begins financially administering the assets, as the attorney is only responsible for the asset from that date forward. Although, some account preparers include two columns one subtitled as the "book value" of the asset [i.e. the actual price the grantor paid on originally acquiring the asset] and the other with the market value of securities on the date the attorney begins financial administration of the grantor's or incapable person's financial affairs. In some circumstances, it can be useful to include the "actual book value" in the particulars, for any account reviewer to have a complete picture when there may be tax issues.

A notation needs to be recorded on the Statement of Original Assets under a column entitled "Disposed of – item No. and page No." to define the status of a particular asset. For example, "CR1-6" denotes the capital receipt transaction number and the page number under capital receipts as a cross-reference recording the disposition of a particular original asset, whether partial or complete. Although an attorney for property is preserving the grantor's assets and only selling an asset if necessary for the benefit of the grantor.

This is important because the accounts will also contain a Statement of Original Assets as at the end of the accounting period and only those assets which have not been realized or only partially realized are recorded there.

Capital/Revenue Receipts

There is an essential question to consider when faced with an accounting decision: Is the transaction capital or revenue? Keeping them separate is not always required; however, doing so assists a reviewer of the accounts in understanding what revenue or income was earned or received during the attorney's accounting period.

As a general rule, transactions which arise from the redemption of original assets are capital in nature whereas income earned is characterized as revenue. To illustrate, consider a bank

account held by the grantor or incapable person, which is then closed by the attorney for property. The balance in the bank account is recorded as a capital receipt. All interest generated in the bank account up to the date the attorney for property assumes administration would be recorded under capital as accrued interest and any income after the date the attorney for property assumes administration would be recorded as a revenue receipt.

Tip: Keeping bank and investment statements, whether electronic or hard copies, in individual folders/binders, in chronological order (e.g. one for Receipts and another for Disbursements) will greatly simplify posting entries from source documents. All original receipts and vouchers should be retained and kept in chronological order with the source documents.

Tip: It is useful to photocopy or scan department store receipts before their ink fades. Keep the photocopy with the original receipt stapled to it. Perhaps place both in plastic pocket folders specially made for binders and available in most Dollar Stores or office supply stores.

If, for example, an attorney for property needs to sell the grantor's house, an original asset, the proceeds of sale are recorded as a capital receipt in the accounts. There are various methods of recording sales of real estate, but commonly the adjustments are recorded as separate entries. If property taxes and utility expenses prior to the sale were recorded in the revenue account, the adjustments on the sale price should be credited (or debited) to the revenue account as individual items. Some prefer to record the net proceeds of sale under capital receipts, with a summary of the adjustments within the particulars for the transaction. *(The "Balance due on closing," i.e. the amount of net funds received, is found on a Statement of Adjustments provided by the lawyer who handled the house sale and usually accompanies the reporting letter. Other deductions are made, such as any balance of real estate commission, legal fees and repayment of any liabilities directed and relating to the house.)*

The profits (gains) from the sale of any investment(s) made during the accounting period are recorded as capital receipts. Similarly, losses are recorded as capital disbursements.

In addition to revenue receipts arising from original assets, all income generated from investments made by the attorney for property are properly recorded as revenue receipts.

Revenue receipts, as the name suggests, is where all the income of the grantor or incapable person would be recorded, e.g. pensions, interest from investments, etc.

Capital/Revenue Disbursements

Improvements – as compared with maintenance and repairs to a real property – are often more difficult to determine for the purposes of recording them under capital or revenue. As a general rule, improvements are recorded under capital, while ongoing maintenance expenses are recorded under revenue. An attorney for property has a duty to preserve the assets; therefore, any repairs are considered capital transactions. Insurance is customarily recorded under revenue.

Revenue disbursements include expenditures that are necessary for the support and care of the grantor or incapable person, e.g. nursing home fees, medical expenses, personal care expenses, etc. The purchase of, say, a wheelchair or new bed for the grantor or incapable person may be more appropriately recorded under capital disbursements.

Any bank charges, including safety deposit box fees or investment management fees, are considered revenue disbursements.

Discretionary expenditures that have been determined and were customarily made by the grantor **may** be made if (before becoming incapable) the grantor would make those gifts. For example, if Aunt Georgia gave each nephew and niece $1,000 on their respective birthdays each year, then provided there are sufficient funds available and the grantor's wishes are being met, these gifts can be continued.

Similarly, if the grantor previously made charitable gifts, these **may** continue provided they do not represent more than 20% of the grantor's income in the year the donation is made.

Tip: If the grantor or incapable person has expressed that he or she does not wish to make a gift or donation, the attorney for property must follow those wishes. An attorney for property should not make a gift or donation to a family member or friend or make a charitable donation that is contrary to the grantor's express wishes. Remember, where possible and practical, keep the grantor informed of his or her expenditures and the status of his or her assets – the attorney for property is, after all, looking after the grantor's assets! Ownership remains in the name of the grantor or incapable person.

Tip: If any difficulty arises an attorney for property may apply to the court for directions on how to resolve it. The court will provide directions as to how to deal with any issues. A lawyer can provide the services of bringing an application for directions to the court.

Investments

Investment is an area where an interesting twist comes into play. The *Rules* clearly state that a

separate investment account must be maintained where a trustee, here an attorney for property, has made investments of trust funds. Although it appears straightforward, the establishment and maintenance of a proper investment record within the accounts seems, for some, to be a challenge in the accounting process. One needs to consider whether to record the transaction as an original asset or as an investment. Investment entries should not be co-mingled with capital receipts and capital disbursements.

Legislation in the 1950s required a separate account for investments to limit the compensation calculated as a result of investing trust funds. Trustees seemed to change investments more frequently than was necessary in order to achieve greater capital receipt and disbursement totals and consequently to increase the amount of compensation claimed. Separating the investment transactions from the capital transactions eliminated that practice.

An investment account may be considered something of a fiction. It does not relate to original assets in any way but instead records the use of funds arising from the realization/sale of an original asset. Take as an example the net proceeds from the sale of a house that can now be invested. Say the attorney decides to invest the proceeds by purchasing a Treasury Bill for a 30 day period. The proceeds from the sale of an original asset, in this case the house, that are subsequently invested in the purchase of a Treasury Bill would be recorded under investments. The investments made by the attorney can be recorded under separate headings entitled Investment Disbursements and Investment Receipts; however, most often the investment account is a chronological statement with two columns, one to record purchases and one to record sales. The total purchase price of an investment (including brokerage fees) is recorded as an Investment Disbursement. The subsequent sale or realization of an investment records the initial price paid for the investment, less any gain, as an Investment Receipt. The gain is recorded under Capital Receipts so that the attorney may claim a percentage of compensation on the gain. Similarly, any losses are recorded as Capital Disbursements. Note that compensation is calculated and claimed on net gains.

The investment portion of the accounts is strictly related to principal funds. Any interest earned or dividends received in relation to the various investments are not recorded in the investment statement but under Revenue Receipts. In the case of mutual funds where dividend re-investments occur, the dividends are recorded under Revenue Receipts and the re-invested amounts are recorded under Investments as Investment Disbursements since they periodically increase the number of units held.

The accounts must balance. The difference between the Receipts and the Disbursements should be the cost of investments held at the end of the accounting period.

The separation of investments serves a number of practical purposes. The separation enables anyone to review, at a glance, the nature of the investments and whether they comply with *The Trustee Act.* Also they reveal whether the attorney has been diligent with investment obligations or merely rolling over term deposits on maturity dates. Of course, the nature of investments must be in accordance with the individual needs of the grantor or incapable person. A review of the investments also reveals information as to the rate of return obtained on the investments and whether the maximum was obtained.

The substance or absence of investments could influence the care and management fee.

A review of the investments on hand at the end of the accounting period ought to indicate whether the holdings are balanced as between equity and income producing assets.

Compensation

The compensation calculation, using the tariff for attorney compensation, is recorded in a statement at the end of the accounts. Note that any non-compensable transactions, e.g. transfers between accounts or overpayments that are subsequently refunded, should be deducted from the Capital/ Revenue Receipt/Disbursement totals prior to calculating compensation.

Section 40 of the *SDA* provides that an attorney for property may take an annual compensation from the property under control, in accordance with a prescribed fee scale[16] currently set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee, provided there is no express provision in a CPOAP for compensation. If the compensation is predetermined in a CPOAP then that arrangement would govern the compensation to be taken. Under the *SDA*, an attorney has a unique statutory right to compensation. The compensation may be taken monthly, quarterly or annually (*SDA* s. 40(2)). If consent in writing is given by the grantor or the incapable person's guardian of person or attorney under a power of attorney for personal care, if any, the attorney may take an amount of compensation greater than the prescribed fee scale [*SDA* s. 40(3)(a)].

The standard of care that applies to an attorney for property depends on whether compensation is received or not. Subsection 32(8) of the *SDA* states that an attorney "who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise." Under s. 32(7) an attorney for property who does not receive compensation is judged by a lower standard and is only required to "exercise a degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs."

16 O. Reg. 159/00

PART II: COURT PROCEDURES TO PASS ACCOUNTS

As indicated by Rule 74.16 of the *Rules of Civil Procedure*, Rules 74.16 to 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money.

The following reproduces the relevant text from the *Rules,* and provides brief annotations with more detail on procedures for compliance. The *Rules* and annotations reflect the changes that came into effect on January 1, 2016.

Material to be Filed

1.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

(a) the estate accounts for the relevant period verified by an affidavit of the estate trustee (Form 74.43);
(b) a copy of the certificate of appointment of the applicant as estate trustee;
(c) a copy of the latest judgment, if any, of the court relating to the passing of accounts.

The accounts are attached to the affidavit verifying the accounts as an exhibit. The attorney for property swears or affirms that the accounts are complete and correct and that all persons having a financial interest in the property of the grantor or incapable person have been named. If there is more than one attorney, they must each swear an affidavit, unless sworn or affirmed jointly at the same time.

A copy of any previous judgment of the court relating to a former passing of accounts is filed in part to provide any carry-forward figures for Capital/Revenue Receipts/Disbursements and Investments including a list of remaining original assets/trustee investments as a starting point for the current period of accounts.

An attorney under a CPOAP shall also keep, together with the accounts, a copy of the CPOAP or court Order constituting the authority of the attorney, or relating to the attorney's authority or to the management of the grantor's or incapable person's property (O. Reg. 100/96. s. 2).

Issuing a Notice of Application

The *Rules* state the following with respect to the issuance of a Notice of Application:

> 1.19 (2) On receiving the material referred to in subrule (1), the court shall issue a notice of the application to pass accounts (Form 74.44). O. Reg. 484/94, s. 12.

In addition to the *Rules*, the particular requirements of the local court office through which the accounts are being passed should be checked in advance as minor procedural steps (e.g. procedure for choosing the hearing date) can vary among the court offices.

The court office will provide a hearing date and time for insertion on the notice of application to pass accounts.

Incorporated in the notice of application is a notice to any person having a financial interest in the property of the grantor or incapable person indicating that such person can object to the accounts (Form 74.45).

Service of Documents and Notice Requirements

Rule 74.18 (3) to (5) of the Rules set out the service requirements, as follows:

> **Service**
>
> (3) The applicant shall serve the notice of application and a copy of a draft of the judgment sought on each person who has a contingent or vested interest in the estate.[17]
>
> (3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3).[18]
>
> (3.2) Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).[19]

17 O. Reg. 484/94, s. 12.
18 O. Reg. 377/95, s. 6.
19 O. Reg. 193/15, s.12 (1).

(4) Where the person is served in Ontario, the documents shall be served at least **60** days before the hearing date specified in the notice of application.[20]

(5) Where the person is served outside Ontario, the documents shall be served at least **75** days before the hearing date specified in the notice of application.[21]

Person under Disability or Unknown

(6) If a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,

(a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person, and

(b) there is no litigation guardian to act for the person on the passing of accounts.[22]

Lengthy notice periods of **60 days before the hearing date specified in the notice of application if service is in Ontario** and at least **75 days for service outside of Ontario** are required to give the persons served time to prepare, serve, and file their objections, if any.

Objections and Requests for Further Notice

Rules 74.18(7) to (8.1) specify the options open to someone served with the notice of application and draft judgment. Such a recipient may file a notice of objection if they wish to object, or – as of January 1, 2016 – if they do not object but wish to continue to be served with notice of any further steps in the application, they may serve a new form called a "Request for Further Notice" (Form 74.45.1), included below.

Notice of Objection to Accounts

74.18 (7) A person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35** days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts (Form 74.45).

Request for Further Notice [new form commencing January 1, 2016]

1.18 (8) A person who is served with documents under subrule (3) or (3.2) and who does

20 *Ibid* at s. 12 (2).
21 O. Reg. 193/15 s. 12 (3).
22 O. Reg. 193/15, s. 12 (4).

not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35** days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts (Form 74.45.1). (O. Reg. 193/15, s. 12 (4).

(8.1) Unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,

(a) receive notice of any further step in the application;
(b) receive any further document in the application;
(c) file material relating to costs under subrule (8.6), (11) or (11.2); and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11).

FORM 74.45.1

Courts of Justice Act

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF *(insert name)*, deceased.

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

I *(insert name)* have been served with a notice of application to pass accounts. By serving this request for further notice, I acknowledge that:

I do not object to the accounts but wish to receive notice of any further step in the application, including a request for costs or a request for increased costs, and

I shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, this request for further notice.

I further acknowledge that, unless the court orders otherwise, I am entitled to,

(a) receive notice of any further step in the application to pass accounts;
(b) receive any further document in the application;
(c) file material relating to a request for increased costs on the application at least 10 days before the hearing date of the application; and
(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs.

DATE SIGNATURE

(Name, address and telephone number of person requesting further notice)

RCP-E 74.45.1 (February 1, 2015)

Next Steps Before Hearing

Rules 74.18(8.2) to (14) specify next steps between service of the notice of application and draft judgment and the ultimate disposition. These steps, and who is involved in them, differ depending on whether any notices of objection or requests for further notice have been filed.

No Response

1.18 (8.2) Unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

(a) receive notice of any further step in the application;
(b) receive any further document in the application;
(c) file material on the application; or
(d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

Response to Application – Public Guardian and Trustee or Children's Lawyer

1.18 (8.3) If the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, as the case may be, shall, at least **30** days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

(a) a notice of objection to accounts (Form 74.45)
(b) a request for further notice in passing of accounts (Form 74.45.1);
(c) a notice of no objection to accounts (Form 74.46); or
(d) a notice of non-participation in passing of accounts (Form 74.46.1).

Withdrawal of Objection

74.18 (8.4) A person who wishes to withdraw a notice of objection to accounts shall, at least **15** days before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48). O. Reg. 193/15, s. 12 (4).

When a Hearing not Required

74.18 (8.5) An applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

(a) no notices of objection to accounts are filed; or

(b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule. (O. Reg. 193/15, s. 12 (4))\

Request for Costs

74.18 (8.6) Subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least **10** days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49) or 74.49.1) and file the request with proof of service. (O. Reg. 193/15, s. 12 (4).)

Judgment on Passing of Accounts Granted Without Hearing

74.18 (9) The court may grant a judgment on passing accounts without a hearing if, at least **five** days before the hearing date of the application, the applicant files with the court,

(a) a record containing,

(i) an affidavit of service of the documents served under subrule (3), (3.1) or (3.2),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record; (O. Reg. 193/15, s. 12 (8))

(b) a draft of the judgment sought, in duplicate; and

(c) if the Children's Lawyer or the Public Guardian and Trustee was served with

documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be. O. Reg. 484/94, s. 12; O. Reg. 69/95, ss. 19, 20; O. Reg. 332/96, s. 4 (2, 3); O. Reg. 575/07, s. 1, O. Reg. 193/15, s. 12(9).

Costs

74.18 (10) Where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4). O. Reg. 55/12, s. 12 (5), O. Reg. 193/15, s. 12 (10).

Request for Increased Costs

74.18 (11) Where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),

a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

a costs outline (Form 57B). O. Reg. 55/12, s. 12 (5).

74.18 (11.1) Unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least **15** days before the hearing date of the application:

Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.

Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).

The Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (12).

74.18 (11.2) Any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least **10** days before the hearing date of the application. O. Reg. 193/15, s.12 (13).

74.18 (11.3) Where a request for increased costs is served under subrule (11), the person making the request shall, at least **five** days before the hearing date of the application, file with the court a supplementary record containing, O. Reg. 193/15, s. 12 (14))

the documents served under that subrule, together with an affidavit of service of those documents; and

an affidavit containing,

a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

the factors that contributed to the increased costs. O. Reg. 55/12, s. 12 (5).

Judgment on Increased Costs Granted Without Hearing

74.18 (11.4) The court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies. O. Reg. 55/12, s. 12 (5).

Contested Passing of Accounts (Hearing)

74.18 (11.5) If one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least **10** days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,

a consolidation of all the remaining notices of objection to accounts; and

a reply to notice of objection to accounts (Form 74.49.4). O. Reg. 193/15, s. 12 (15).

(11.6) The documents referred to in subrule (11.5) shall be served on,

every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;

every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and

(c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (15).

(11.7) If the application to pass accounts proceeds to a hearing, the applicant shall, at least **five** days before the hearing date, file with the court a record containing,

the application to pass accounts;

the documents referred to in subrule (11.5);

any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

any requests for further notice in passing of accounts (Form 74.45.1);

any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15).

(11.8) If the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order. O. Reg. 193/15, s. 12 (15).

(11.9) If the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,

(a) the applicant shall indicate that it is the applicant's draft order; and

(b) any person referred to in clause (11.6) (a) may file an alternative draft order at least **three** days before the hearing date of the application or, with leave of the court, at the hearing.O. Reg. 193/15, s. 12 (15).

(12) No objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (6).

(13) At the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account

or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts. O. Reg. 193/15, s. 12 (16).

Trial may be directed

74.18 (13.1) On the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

respecting the issues to be tried and each party's position on each issue;

respecting the timing and scope of any applicable disclosure;

respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s. 12 (17).

Directions regarding mediation

74.18 (13.2) In making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 12 (17).

Form of Judgment

74.18 (14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51. O. Reg. 484/94, s. 12.

APPENDIX A – SAMPLE INFORMATION SUMMARY

GENERAL INFORMATION RE: GEORGINA SMITH

DATE OF BIRTH:	APRIL 8, 1932
PLACE OF BIRTH:	EXETER, DEVON, ENGLAND
DATE OF CONTINUING POWER OF ATTORNEY FOR PROPERTY	AUGUST 3, 2016
DATE OF COURT APPOINTED GUARDIAN:	JULY 4, 2016
DATE OF INCAPACITY:	JUNE 3, 2016
RESIDENTIAL ADDRESS	SWEET COMFORT NURSING HOME ROOM 4 - 1 DRAKES ROAD TORONTO, ON M9M 3E3
TELEPHONE:	(416) 247-1743
MARITAL STATUS:	WIDOW
LAST INCOME TAX RETURN FILED:	2013
DOMICILE:	ONTARIO
CITIZENSHIP:	CANADIAN
S.I.N.:	412 968 044
NAME OF DOCTOR:	NIGEL HADEN – Geriatrician TEL: (416)486-2567
COURT FILE NO:	**01-0046/15** SUPERIOR COURT OF JUSTICE TORONTO, ON

LAWYERS:

FLORENCE ANGEL

ANGEL, GILBERT & EGAN

600 – 900 ST. CLAIR AVENUE

TORONTO, ON M0M L7L

TEL: (416) 647-0723

FAX: (416) 647-0700

Email: Flo@AGELawyers.com

SUMMARY OF TASKS

LAND

46 Elder Avenue, Weston, ON	Obtain two independent appraisals of market value of house from realtors and list house for sale once furniture and household items removed. *File amended Management Plan once house is sold to show how proceeds will be managed.*
Cottage at Source Lake, ON 60	Arrange automatic debit for payment of one-half of cottage property taxes, Georgia's brother has agreed to continue to maintain cottage and boats at his own expense.
VALUABLES	Investigate - appraisals may have already been done – locate same Locate key to safety deposit box Store jewelry in current safety deposit box at bank Painting at AGO (on loan until DOD)

SAVINGS AND SAVINGS PLAN	Notify of change - convert TD Canada Trust Plan 60 and Scotia GIC bank accounts to trust accounts on behalf of Georgia Smith Continue to hold TD Every Day Savings account #11-6287833 (as it passes to friend on Georgia's death) and convert passbook to electronic monthly statements Open chequing account Request bank to provide statements with electronic copies of cancelled cheques Order cheque books
SECURITIES AND INVESTMENTS	Notify of change - bank and investment brokers re: investments Arrange for stock/share certificates in SDB to be held by investment brokers and placed in new investment portfolio under separate account number (no dispositions) Request monthly statements from investment brokers and instruct that any securities and/or investments be held in trust at maturity/renewal dates
BONDS AND DEBENTURES	On maturity transfer funds to Investment portfolio When all bonds and debentures matured, file amended Management Plan to show how proceeds will be managed.
ACCOUNTS RECEIVABLE	Mortgage from sister – notify of new banking particulars to arrange for her continued mortgage payments to Georgia Smith

OTHER PROPERTY

Notify bank - list contents of safety deposit box, obtain stocks/shares and check for

- any unidentified assets and appraisals
- locate Will, title documents and mortgage from sister
- insurance policies on Georgia Smith's life re beneficiary designations
- any pre-paid funeral documents
- deed re cemetery plot

Place antique furniture in storage after appraisal, arrange insurance for storage unit and dispose of general household items to charity (discuss with family)

LIABILITIES

Cancel credit and department store cards and pay balances

Pay ambulance fees and outstanding dental and footcare bills

INCOME

Notify Government re OAS and CPP pensions and State Pension in UK re appointment and change

Arrange for annuity payments from Georgia's deceased husband's annuity to be paid into new chequing account (annuity ceases on Georgia's death)

Arrange for income payments from "Discretionary Trust" where Georgia has a lifetime interest from her father's estate to be made to new chequing account

Obtain amortization schedule re: mortgage from sister and for electronic fund transfers from sister to new chequing account

Arrange for surplus/shortfall of income to/ from new chequing account to/from investment account

EXPENSES

Arrange pre-authorized debit from chequing account re nursing home fees

Speak to personal care attorney re budget for personal care costs, clothing, medicines, medical services, recreation and entertainment for Georgia

Continue all existing expenses re house until it is sold including gardening and snow shoveling

WILL

SPECIFIC LEGACIES

NAME AND ADDRESS OF BENEFICIARIES	DATE OF BIRTH	RELATIONSHIP	PARTICULARS
NATHANIEL SMITH 61 BALMORAL AVENUE OTTAWA, ON M4V 1K8	18+	BROTHER	$400,000.00 MUSKOKA BOAT/MOTOR and PETERBOROUGH 'MERMAID' CEDAR STRIP CANOE (1956) TRANSFER 50% LEASEHOLD INTEREST IN COTTAGE AT SOURCE LAKE, ALGONQUIN PARK (99 year lease-expires 2072)
MRS. EDITH WALLSHINGHAM 109 JOHN STREET KITCHENER, ON K8J 8V1	18+	SISTER	2KT DIAMOND/EMERALD GOLD RING (Mother's) ANTIQUE FURNITURE (originally at Parent's home)
MS. SYLVIA SMITH 9 KING STREET BOWMANVILLE, ON L9P 5M3	18+	NEICE	$100,000.00 SAPHIRE PLATINUM EARRINGS AND NECKLACE VINCENT CONSTABLE PAINTING ("*Cottage in Valley*")

MS. NIGELLA MILO 51 WILSON ROAD LONDON, ON J0L 3T0	18+	GODDAUGHTER	ROYAL DOULTON BONE CHINA DINNER SERVICE ("*Paradise*" pattern 40 pcs.)
MS. MONA BLISS APT 1- 911 WOLMER AVENUE GEORGETOWN, ON L9E I8P	18+	FRIEND	BALANCE AT DATE OF DEATH IN TD CANADA TRUST EVERY DAY SAVINGS ACCOUNT NO. 0744- 6287832
GOD HELP THE AGED 1951 YONGE STREET P.O. BOX 2640 TORONTO, ON M9M 3E3	N/A	CHARITY	$ 50,000.00
ST. JOHN THE EVANGALIST CHURCH 215 DONALD STREET TORONTO, ON M3C 3P5	N/A	CHARITY	$ 20,000.00
TOTAL CASH LEGACIES		$ 570,000.00	**PERSONAL EFFECTS TO BE APPRAISED AT DOD**

RESIDUE

NAME AND ADDRESS OF BENEFICIARIES	DATE OF BIRTH	RELATIONSHIP	PARTICULARS
NATHANIELSMITH and SYLVIA SMITH (Addresses as above)	18+	BROTHER AND NEICE	100% OF RESIDUE IN EQUAL SHARES

FUNERAL INSTRUCTIONS Cremation (pre-paid funeral arrangements

No Service or Interment)

GENERAL REMINDERS

Meet with accountant re preparation of outstanding 2014 T1 tax return

Cancel memberships and subscriptions

Attend house to meet with appraisers and movers re moving antique furniture to storage

Arrange for delivery of wing chair, reading lamp and family photos from house to nursing home for Georgia

Attend nursing home on delivery of items for placement in Georgia's room

Change locks on house Arrange vacancy insurance

Arrange for neighbor/property manager to check house daily pending sale

Redirect mail

Notify home security service re changes Cancel telephone and cable

SUMMARY OF ASSETS AND LIABILITIES

SUMMARY	AMOUNT
REAL ESTATE	
- 46 Elder Avenue, Weston, ON, approximately	$ 2,500,000.00
- 50% leasehold interest in cottage at Source Lake, Algonquin Park	$ 100,000.00
BANK ACCOUNTS	$ 107,004.60
GUARANTEED INVESTMENT CERTIFICATES	$ 175,028.50
INVESTMENTS	$ 919,178.10

MUTUAL FUNDS	$ 796,044.70
BONDS & DEBENTURES	$ 178,000.00
HOUSEHOLD ITEMS AND VEHICLES	$ 206,614.15
RECEIVABLES – MORTGAGE	TBD
OTHER ASSETS (JEWELLERY/ART WORK) approximately	TBD
TOTAL VALUE	$ 4,981,870.05
LIABILITIES	- 5,559.10
NET VALUE	**$ 4,976,310.95**

REAL ESTATE

PROPERTY	VALUE
46 ELDER AVENUE WESTON, ON M9M 3E3 (pending appraisal) approximately	$ 2,500,000.00
COTTAGE AT SOURCE LAKE, ALGONQUIN PARK 50% LEASEHOLD INTEREST, approximately	$ 100,000.00
TOTAL	**$ 2,600,000.00**

CASH ON DEPOSIT

ACCOUNT NO.	NAME AND ADDRESS OF BANK	BALANCE
	TD CANADA TRUST 291 DUNDAS STREET WEST TORONTO, ON M3L 1Y5	
011-3127434	PLAN 60 ACCOUNT	$ 56,501.85
011-6287832	EVERY DAY SAVINGS	$ 48,876.75

		$ 105,378.60
	SCOTIABANK 623 COLLEGE STREET TORONTO, ON M3M 0W3	
2472597	GUARANTEED INVESTMENT ACCOUNT	$ 1,626.00
	TOTAL CASH ON DEPOSIT	**$ 107,004.60**

GUARANTEED INVESTMENT CERTIFICATES

QUANTITY	DESCRIPTION	VALUE
$ 10,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 345 MONTHLY PAY 3.0826% DUE DEC 14/15	$10,000.00
10,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 451 MONTHLY PAY 3.2016% DUE SEPT 8/15	10,000.00
10,028.44	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 433 MONTHLY PAY 3.2767% DUE JAN 1/16	10,028.50
15,000.00	BANK OF NOVA SCOTIA NON-RDM MTHLY GIC NO. 439 3.600% DUE JULY 25/17	15,000.00
15,000.00	BANK OF NOVA SCOTIA NON-RDM MTHLY GIC NO. 805 3.350% DUE SEPT 5/15	15,000.00
20,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 1045 MONTHLY PAY 3.2346% DUE JUNE 23/15	20,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 9007 3.500% DUE FEB 12/16	10,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 9008 3.500% DUE FEB 21/16	10,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 991 3.000% DUE MAY 24/16	10,000.00
25,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 501 2.500% DUE NOV 25/15	25,000.00
30,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 348 3.200% DUE AUG 12/15	30,000.00
	TOTAL GUARANTEED INVESTMENT CERTIFICATES	**$175,028.50**

INVESTMENTS

# SHARES	DESCRIPTION	CERTIFICATE AND ACCOUNT NO(S)	VALUE PER UNIT	TOTAL VALUE
1,440	DENISON MINES COMMON	00000111	1.940	$ 2,793.60
800	ABERDEEN ASIA-PACIFIC INCOME INVESTMENT CO (FORMERLY FIRST AUSTRALIA PRIME INCOME INVESTMENT CO)	SW008582	7.35	5,880.00
1,900	BANK OF NOVA SCOTIA COMMON	00010632STSP	58.16	110,204.00
100	FORTE RESOURCES INC (WORTHLESS SECURITY)	00000201		0.00
		(above in SD Box)		**$118,877.60**
	ROBERTSTON GMP (see attached investment statement with **book values** of holdings)	Investment Portfolio No. GP742-008		$800,300.50
		TOTAL INVESTMENTS		**$919,178.10**

MUTUAL FUNDS

NO. OF UNITS	DESCRIPTION	ACCOUNT NO.	PRICE PER UNIT	VALUATION
30,000.000	TD CANADIAN MONEY MARKET FUND	3694131	10.000	$300,000.00
50,004.504	TD SHORT TERM BOND FUND	3694132	9.922	496,044.70
		TOTAL MUTUAL FUNDS		**$796,044.70**

BONDS AND DEBENTURES

PAR VALUE	DESCRIPTION	SERIAL NO.(S)	VALUE
$ 6,000.00	CANADA SAVINGS BONDS SER 50 DUE NOV 1/16	RS050M0154068A (1 X 1,000 RS050V0070129K (1 X 5,000)	$ 6,000.00
6,000.00	CANADA SAVINGS BONDS SER 50 DUE NOV 1/17	RS050M0256770J (1 X 1,000) RS050V0092256A (1 X 5,000)	6,000.00
10,000.00	CANADA SAVINGS BONDS SER 51 DUE NOV 1/18	RS051V0076922K/30J (2 X 5,000)	10,000.00
20,000.00	CANADA SAVINGS BONDS SER 52 DUE NOV 1/17	RS052V0055993A/94M (2 X 5,000) RS052L0039821A (1 X 10,000)	20,000.00
10,000.00	CANADA SAVINGS BONDS SER 54 DUE NOV 1/18	RS054V6035665A, V7295965H (2 X 5,000)	10,000.00
10,000.00	CANADA SAVINGS BONDS SER 72 DUE NOV 1/15	RS072M0061360D, M3832856L M3946692D, M5880027M, M7750816H (5 X 1,000) RS072V5219936J (1 X 5,000)	10,000.00
10,000.00	CANADA PREMIUM BOND SER 3 DUE NOV 1/18	RP003V5254136A, V5743456B (2 X 5,000)	10,000.00
5,000.00	CANADA PREMIUM BOND SER 21 DUE NOV 1/15	RP021V5314964C (1 X 5,000)	5,000.00
15,000.00	CANADA PREMIUM BOND SER 27 DUE NOV 1/15	RP027V3312296C (1 X 5,000) RP027L7386717A (1 X 10,000)	15,000.00
10,000.00	CANADA PREMIUM BOND SER 35 DUE NOV 1/14	RP035V3531146D, V4352256L (2 X 5,000)	10,000.00
20,000.00	CANADA PREMIUM BOND SER 40 DUE NOV 1/14	RP040V1908416D, V6093366H (2 X 5,000), RP040L4915776H (1 X 10,000)	20,000.00
5,000.00	CANADA PREMIUM BOND SER 46 DUE NOV 1/15	RP046V6742146K (1 X 5,000)	5,000.00
6,000.00	CANADA PREMIUM BOND SER 52 DUE NOV 1/16	RP052M3851176L (1 X 1,000) RP052V8714116C (1 X 5,000)	6,000.00
5,000.00	CANADA PREMIUM BOND SER 58 DUE NOV 1/17	RP058V8070046M (1 X 5,000)	5,000.00
30,000.00	ONTARIO HYDRO BONDS SER 9 DUE JUNE 15/16	459840000	30,000.00
10,000.00	ONTARIO HYDRO BONDS SER 10 DUE JUNE 15/17	459950001	10,000.00
		TOTAL BONDS AND DEBENTURES	**$178,000.00**

OTHER ASSETS

PARTICULARS	VALUE5
HOUSEHOLD GOODS, FURNITURE & PERSONAL EFFECTS (including Muskoka boat and Peterborough canoe atcottage)	$ 200,000.00
JEWELLERY	TBD
PAINTING	TBD
GOVERNMENT OF CANADA	
- JULY 2015 CANADA PENSION PLAN – SURVIVOR'S BENEFIT	417.95
- JULY 2015 OLD AGE SECURITY	526.85
MANULIFE ANNUITY NO. 78431 - JULY 2015 (CEASES ON DEATH)	1,920.00
INCOME FROM DISCRETIONARY TRUST RE ESTATE OF CARL JONES August monthly payment direct deposited into TD PLAN 60 account ($4,000.00 per month)	
STM ALLSTREAM INC - REFUND OVERPAYMENT OF ACCOUNT	63.90
MARKLAND ROOFING - REFUND DEPOSIT RE 46 ELDER AVENUE	3,000.00
CASH FOUND IN HOUSE AND WALLET	685.45
TOTAL OTHER ASSETS	**$ 206,614.15**

LIABILITIES

CREDITOR NAME AND ADDRESS	PARTICULARS	AMOUNT $
ATTORNEY FOR PERSONAL CARE UNIT 40 – 200 PORT AVENUE TORONTO, ON M3C 3X2	ITEMS PURCHASED FOR GEORGIA SMITH	37.95
RECEIVER GENERAL FOR CANADA CONTRACT NO G500-339 P.O. BOX 12000 BATHURST, N B E2A 4T6	2012 INTEREST REFUND	29.90
CITY OF TORONTO-FIRE & PARAMEDIC 510 IVY STREET TORONTO, ON M3B 1B9	AMBULANCE SERVICE JULY 3, 2015	152.00

MARIANNE MENZES 42 - 194 WHITE CRESCENT TORONTO, ON M3K 1L6	PURCHASES AND VISITS WITH GEORGIA SMITH	574.15
CANADA REVENUE AGEN- CY 875 HERON ROAD OTTAWA, ON K1A 1B1	2013 T1 TAXES	1,068.10
BART NEILSON 301 NOTRE DAME AVENUE ETOBICOKE, ON M3H 1B9	ACCOUNTANT RE 2013 T1	3,697.00
	TOTAL LIABILITIES	**$ 5,559.10**

APPENDIX B – SAMPLE ATTORNEY ACCOUNTS

PROPERTY OF ELLA SMITH BY HER ATTORNEY

STATEMENT OF ACCOUNTS

for the period June 17, 2013 to February 27, 2015

for Attorney for Property

John B. Good

144 Flett St., Bowmanville, ON

NOTE: This sample Attorney for Property Accounts contains some deliberate errors. Can you spot them?
Answers noted under "Trustee's Investments" on Page 156

CONTENTS:

PROPERTY OF ELLA SMITH BY HER ATTORNEY SUMMARY

AS AT FEBRUARY 27, 2015

Capital Account		
Balance Forward (no previous accounting)	$-	
Receipts	$3,057,367.83	
Disbursements	$487,540.20	
Capital Balance		**$2,569,827.63**
Revenue Account		
Balance Forward (no previous accounting)		
Receipts	$155,802.50	
Disbursements	$41,210.97	
Revenue Balance		**$114,591.53**
Total Balance		**$2,684,419.16**
Consisting of:		
Trustee Investments		$670,045.00
Scotiabank - Gain Plan #67112 58359		$35,625.20
CIBC - Powerchequing #45002 76320		$180,507.24
BMO - Joint Chequing #10174 82516 (registered to Ella Smith and John B. Good JWRS)		$220,001.22
BMO - Investment #10174 7789 (registered to Ella Smith and John B. Good JWRS)		$1,578,240.50
TOTAL		**$2,684,419.16**

STATEMENT OF ORIGINAL ASSETS

AS AT JUNE 17, 2013

Asset No.	Assets	Book Value	Disposed of Item Page No
	Real Estate		
1	39 Lady Valentina Ave., Vaughan, ON	$2,180,000.00	CR28-7
	Bank Accounts		
2	**Scotiabank,** Yonge & St. Clair Gain Plan Account No. 67112 58359	$32,891.45	
3	**CIBC,** Yonge & St. Clair Powerchequing Account No. 45002 76320	$45,689.20	
4	**TD Canada Trust,** Yonge & Eglinton Account No. 780 1598 488	$82,335.90	CR15-7
	Guaranteed Investment Certificate		
5	**Effort Trust** #0072000244 2 year Non-Redeemable GIC, 4.5%, maturing July 1, 2015, interest paid annually	$250,000.00	
	Bonds		
6	**Canada Savings Bonds,** Series 44, $50,000.00, maturing November 1, 2015	$50,000.00	
7	**Ontario Savings Bond,** $20,000.00 Certificate No. 010987132, maturing September 30, 2015	$20,000.00	
	Registered Retirement Plan		
8	**Scotiabank Private Client Group** 66 King St., Suite 1200, Toronto, ON Scotia iTRADE RIF Account No. 554-90082-61	$134,762.32	CR 4, 6, 7, 8, 11, 12, 14, 16-18, 19-23, 25, 26 -7
	Mutual Funds		
9	Scotia Private Client Group - 4,592.527 units @ $12.74 Scotia Canadian Income Fund Account No. 4327800	$58,508.79	CR 13, 27-7
10	Scotia Private Client Group - 7,540.883 units @ $10.26 Scotia Cassels Short-Mid Government Bond Fund Acccount No. 4327800	$77,369.46	
11	Scotia Money Market Fund 352.768 shares @ 10.00 per share	$3,527.68	CR5 - 7

	Investments	
	Richardson GMP Limited 541 King St. E. Toronto, ON M6K 1L3 Richardson GMP Portfolio No. 785009-001	
12	Bank of Nova Scotia 25,000 shares @ $58.37	$1,459,250.00
13	Royal Bank of Canada 18,000 shares @ 63.32	$1,139,760.00
14	Toronto Dominion Bank 5,550 shares @ $52.31	$290,320.50
15	BCE Inc. 10,500 shares @ $54.60	$573,300.00
16	Cash Account	$28,864.00
	Personal effects	
17	Household contents	$10,230.00
18	Jewellery - in Scotiabank Safety Deposit Box #11	$87,940.00
	TOTAL ASSETS	**$6,524,749.30**

STATEMENT OF LIABILITIES

AS AT JUNE 17, 2013

Creditor	Particulars	Outstanding Balance
American Express	Account No. 4538 998 6109	$2,110.43
Receiver General	2013 T1 Tax Return	$101,921.66
	2014 T1 Tax Return	TBD
	2015 T1 Tax Return	TBD
	TOTAL LIABILITIES	**$104,032.09**

STATEMENT OF UNREALIZED ORIGINAL ASSETS

AS AT FEBRUARY 27, 2015

Assets	Book Value
Bank Accounts	
Scotiabank, Yonge & St. Clair Gain Plan Account No. 67112 58359	$35,625.20
CIBC, Yonge & St. Clair Powerchequing Account No. 45002 76320	$89,504.18
Guaranteed Investment Certificate	
Effort Trust #0072000244 2 year Non-Redeemable GIC, 4.5%, maturing July 1, 2015, interest paid annually	$250,000.00
Bonds	
Canada Savings Bonds, Series 44, $50,000.00, maturing November 1, 2015	$50,000.00
Ontario Savings Bond, $20,000.00 Certificate No. 010987132, maturing September 30, 2015	$20,000.00
Mutual Funds	
Scotia Private Client Group - 7,540.883 units @ $10.26 Scotia Cassels Short-Mid Government Bond Fund - Account No. 4327800	$77,369.46
Richardson GMP Portfolio No. 785009-001	
Bank of Nova Scotia 20,000 shares @ $58.37	$1,167,400.00
Royal Bank of Canada 18,000 shares @ 63.32	$1,139,760.00
Toronto Dominion Bank 4,000 shares @ $52.31	$209,240.00
BCE Inc.10,500 shares @ $54.60	$573,300.00
Household Contents & Personal effects	
Household contents	$10,230.00
Jewellery - in Scotiabank Safety Deposit Box #11	$87,940.00
TOTAL ASSETS	**$3,710,368.84**

STATEMENT OF LIABILITIES

AS AT FEBRUARY 27, 2015

Creditor	Particulars	Outstanding Balance
American Express	Account No. 4538 998 6109	$6,720.00
Receiver General	2013 T1 Tax Return	$101,921.66
	2014 T1 Tax Return	TBD
	2015 T1 Tax Return	TBD
	TOTAL LIABILITIES	**$108,343.20**

CAPITAL RECEIPTS

JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	18-Jun-13	To record opening balance Scotiabank #67112 58359 21	32,891.45
2	18-Jun-13	To record opening balance CIBC #45002 76320	45,689.20
3	18-Jun-13	To record opening cash balance Richardson GMP #785009-001	28,864.00
4	1-Jul-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
5	3-Jul-13	Sale Scotia Money Market Fund 352.768 shares @ 10.00 (Asset No. 11) [CIBC 4502 76320]	3,527.68
6	1-Aug-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
7	1-Sep-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
8	1-Oct-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
9	3-Oct-13	Transfer to BMO # 10174 82516 [CIBC 4502 76320]	180,000.00
10	28-Oct-13	Transfer to BMO # 10174 82516 [CIBC 4502 76320]	40,000.00
11	1-Nov-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
12	1-Dec-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
13	20-Dec-13	Sale Scotia Canadian Income Fund 2,592.895 units @ 12.74 (Asset No. 9) [CIBC 4502 76320]	29,144.14
14	1-Jan-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
15	6-Jan-14	Received TD Canada Trust #780 1598 488 (Asset No. 4) [CIBC 4502 76320]	82,520.45
16	1-Feb-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
17	14-Feb-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	110,385.68
18	1-Mar-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
19	1-Apr-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54

20	1-May-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
21	1-Jun-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
22	1-Jul-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
23	1-Aug-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
24	31-Aug-14	Transfer to BMO #10174 82516 [CIBC 4502 76320]	25,000.00
25	1-Sep-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
26	1-Oct-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
27	1-Nov-14	Sale of Scotia Canadian Income Fund 1,646.632 units @ 12.74 (Asset No. 9) [CIBC 4502 76320]	20,978.09
28	30-Nov-14	Sale of 39 Lady Valentina Ave., Vaughan, ON (Asset No. 1) Sale price $2,220,000.00 Less: Tax adjustment - 4,582.00 Commission - 150,516.00 Legal fees - 3,842.00 [CIBC 4502 76320]	2,061,060.00
29	1-Dec-14	Sale of 5,000 Bank of Nova Scotia shares @ 58.37	291,850.00
30	5-Dec-14	Sale of 1,550 Toronto Dominion Bank shares @52.31	81,080.50
		TOTAL	**3,057,367.83**

CAPITAL DISBURSEMENTS

JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	3-Oct-13	Transfer from CIBC #4502 76320 to BMO #10174 82516	180,000.00
2	28-Oct-13	Transfer from CIBC #4502 76320 to BMO #10174 82516	40,000.00
3	4-Nov-13	Balmler Construction - deposit re extension 144 Flett St., Bowmanville, ON	50,000.00
4	30-Nov-13	Oshawa Electric - rewiring Flett St., Bowmanville, ON (invoice #5608)	5,342.50
5	31-Aug-14	Transfer from CIBC #4502 76320 to BMO #10174 82516	25,000.00
6	31-Aug-14	Balmler Construction - balance re extension 144 Flett St., Bowmanville, ON	130,492.45
7	15-Sep-14	Clean Edge Painting - Invoice 541 - 144 Flett St., Bowmanville, ON	5,000.00
8	24-Nov-14	Purchase 2014 Lexus RX350 SUV [registered to John B. Good]	51,705.25
		TOTAL	**487,540.20**

REVENUE RECEIPTS

JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	30-Jun-13	Interest - Scotia Gain Plan	1,355.87
2	15-Jul-13	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
3	31-Jul-13	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
4	31-Jul-13	Dividend re 25,000 BNS shares @.66 [Richardson 785009-001]	16,500.00
5	24-Aug-13	Dividend re 18,000 RBC shares @ .72 [Richardson 785009-001]	12,960.00
6	15-Oct-13	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
7	30-Oct-13	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
8	30-Oct-13	Dividend re 25,000 BNS shares @.66 [Richardson 785009-001]	16,500.00
9	24-Nov-13	Dividend re 18,000 RBC shares @ .74 [Richardson 785009-001]	13,320.00
10	30-Dec-13	Interest - Scotia Gain Plan	1,355.88
11	15-Jan-14	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
12	31-Jan-14	Dividend re 25,000 BNS shares @ .68 [Richardson 785009-001]	17,000.00
13	31-Jan-14	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
14	15-Apr-14	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	16,500.00
15	30-Apr-14	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
16	30-Apr-14	Dividend re 25,000 BNS shares @ .70 [Richardson 785009-001]	17,500.00
17	22-May-14	Dividend re 18,000 RBC shares @ .73 [Richardson 785009-001]	13,140.00
		TOTAL	**155,802.50**

REVENUE DISBURSEMENTS

JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	3-Sep-14	Elizabeth Davies - nursing care services - Cheque #7663	1,198.00
2	14-Sep-14	Nana Mendes - nursing care services - Cheque #7664	1,158.00
3	30-Sep-14	Laura Miles - nursing care services - Cheque #7665	1,400.00
4	3-Oct-14	Audrey Chevalier - nursing care services - Cheque #7666	1,316.00
5	10-Oct-14	Ritchies Auctioneers - appraisal services - Cheque #7668	367.50
6	19-Oct-14	Nana Mendes - nursing care services - Cheque #7669	840.00
7	31-Oct-14	Elizabeth Davies - nursing care services - Cheque #7670	1,392.00
8	19-Nov-14	Audrey Chevalier - nursing care services - Cheque #7671	1,316.00
9	30-Nov-14	Tippet-Richardson Limited - moving - Vaughan to Bowmanville Cheque #7672	10,150.00
10	30-Nov-14	Laura Miles - nursing care services - Cheque #7673	1,400.00
11	4-Dec-14	Shoppers Medicare - walker Cheque #7674	1,852.80
12	1-Jan-15	Rogers Cable Communications - services 08/23/14 to 09/22/14 - Cheque #7675	32.19
13	1-Jan-15	Bell Canada - final services 08/18/14 - 9/27/14 - Cheque #7676	60.16
14	4-Jan-15	Shoppers Drugmart - personal care items - American Express	444.94
15	15-Jan-15	Flying Dutchman - dinner - American Express	88.74
17	15-Jan-15	Butlers Healthcare - invoices #803145 & 802879 - Cheque #7677	283.20
18	22-Jan-15	Integra Care - invoice dated September 5, 2014 - Cheque #7678	417.20
19	22-Jan-15	Manulife Financial - quarterly premium payment re life policy #7857279-9 - Cheque #7679	15,338.24
20	23-Jan-15	Nana Mendes - nursing care services to 12/10/14 - Cheque #7680	840.00
21	25-Jan-15	Audrey Chevalier - nursing care services to 1/14/15 - Cheque # 7681	1,316.00
		TOTAL	**41,210.97**

TRUSTEE'S INVESTMENTS

JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Transaction	Purchase	Sale
1	14-Jul-14	BMO 1 yr. GIC 2.25%, maturing July 14, 2015 - Certificate No. 400-345	200,000.00	
2	31-Aug-14	BMO 1 yr. GIC 2.62%, maturing Aug 31, 2015 - Certificate No. 400-346	140,000.00	
3	20-Dec-14	Partial redemption of Certificate No. 400-345		50,000.00
4	31-Dec-14	Bank of Nova Scotia, 5,000 shares @ 60.03 - BMO Investment #7789 [Ella and John JWROS]	300,150.00	
5	31-Dec-14	Toronto Dominion Bank 1,450 shares @ 55.10 BMO Investment #7789 [Ella and John JWROS]	79,895.00	
		Remaining under investment		670,045.00
		Total	**720,045.00**	**720,045.00**

ANSWERS - re deliberate errors

1. House extension on attorney's property
2. Not preserving attorney's assets
3. Purchase of car in attorney's name and no accounting re same as Trustee Investment
4. Moving Ella from Vaughan to Bowmanville to live in attorney's house -explanation needed
5. Totals in bank accounts do not correspond with remaining totals in Accounts
6. Opening joint bank/investment account registered with Ella and John with right of survivorship
7. Non compensable transfers not deducted in compensation calculation
8. Unaccounted for income
9. No accounting re income tax
10. No explanation re appraisal
11. Life insurance policy taken out on Ella's life

COMPENSATION STATEMENT

JUNE 17, 2013 TO FEBRUARY 27, 2015

	CAPITAL			
	Capital Receipts	$3,057,367.83		
Less:	Non-compensable Capital Receipts			
	CR 1 - opening balance Scotiabank	-$32,891.45		
	CR 2 - opening balance CIBC	-$45,689.20		
	Transfers	-$245,000.00		
	3% of net amount	$3,057,367.83	**$91,721.03**	
	Capital Disbursements	$487,540.20		
Less:	Non-compensable Capital Disbursements			
	3% of net amount	$487,540.20	**$14,626.21**	
	REVENUE			
	Revenue Receipts	$155,802.50		
Less:	Non-compensable Revenue Receipts			
	3% of net amount	$155,802.50	**$4,674.08**	
	Revenue Disbursements	$41,210.97		
Less:	Non-compensable Revenue Disbursements			
	3% of net amount	$41,210.97	**$1,236.33**	
	Total Compensation			**$112,257.65**
	Care and Management			
	3/5 of 1% per annum on average market value of $2,400,934 for 1.7 years		$24,489.52	
	Total Care and Management			**$24,489.52**
	TOTAL COMPENSATION CLAIMED			**$136,747.17**

CHAPTER 13: REMEDIES FOR VICTIMS OF POWER OF ATTORNEY ABUSE

By: Lionel Tupman

OVERVIEW

Powers of Attorney ("**POAs**") are documents by which one or more people become authorized to undertake certain tasks or actions on behalf of another person. By drafting the POA and executing the document in accordance with the statutory formalities prescribed under the *Substitute Decisions Act* (the "***SDA"***) or the *Powers of Attorney Act* (as the case may be), the "grantor" of the POA authorizes the attorney (or the "grantee") to carry out specific tasks on behalf of the grantor. Other chapters in this collection address the necessary formalities with which a grantor must comply to execute a valid POA including the requirement that the grantor be decisionally capable of granting a POA.[1]

Under the *SDA*, a grantor may execute two distinct types of POAs: a POA for Property ("**POAP**") and a POA for Personal Care ("**POAPC**"), as described more fully elsewhere in this collection.[2]

Primarily, this chapter is concerned with improper conduct of Attorneys under a POAP or a Continuing Power of Attorney for Property ("**CPOAP**"), since it is primarily in relation to these documents that civil litigation is often appropriate and indeed necessary.

When an attorney utilizes the POA document under which he or she is appointed as attorney improperly, interested parties may seek to commence civil litigation against the attorney to hold him or her to account for the misuse of authority under the POA. Civil litigation is, of course, an expensive remedy. Parties will often seek to employ less expensive dispute resolution methods such as alternative dispute resolution, family meetings or facilitative mediation. While such interested

1 For further detail on the formal requirements of granting a POA and decisional capacity to grant a POA, please see chapters 4, 5, and 6 in this book.

2 For further detail regarding the distinction between POAPs and POAPCs, please refer to chapters 4 and 5 in this book.

parties are often the grantor of the POA or the children or relatives of the grantor, certainly situations arise in which unrelated third parties such as neighbours, financial advisors, accountants or even bank staff commence litigation or other dispute resolution proceedings against an attorney after observing potential misconduct by the attorney.

The bases on which an attorney may be sued in civil litigation are manifold as described more fully in the next section, however the primary principle on which all of the applicable causes of action is premised is that attorneys are fiduciaries for the grantor of the POA and must, as a result, undertake actions on behalf of the grantor honestly and in good faith for the benefit of the grantor. Attorneys who take a personal benefit from the property of the grantor (except in accordance with the compensation permitted at law) have breached the duty of trust and loyalty owed to the grantor as a fiduciary.

In large part, the remedies available in the context of POA abuse are remedies in equity that aim to do justice between the parties to the litigation.

This chapter will first address alternative dispute resolution possibilities, and will then turn to an analysis of the legal causes of action and remedies available in the context of POA abuse.

ALTERNATIVE DISPUTE RESOLUTION

Broadly speaking, alternative dispute resolution ("**ADR**") refers to all dispute resolution methods which are not traditional civil litigation. In POA abuse cases, ADR may include family meetings in the absence of counsel, family meetings with counsel for the parties present, or mediation before an impartial third party mediator with or without counsel present. Generally, ADR procedures are less expensive than traditional civil litigation.

If the monetary value of the POA abuse is not significant, or if the funds owned by the person under attorneyship are modest, ADR may be an appropriate model for dispute resolution.

In addition, traditional civil litigation usually results in the imposition of a decision from a Court. Parties may be pleased or displeased with this decision, but will not have any control over the exercise of the Court's discretion. We often tell clients that civil litigation is an inherently uncertain procedure, since lawyers cannot always anticipate the way in which the Court will rule. When family dynamics and conflict are the cause of a dispute over a POA or the actions of an attorney, Court proceedings, while final in the result, may have extremely destructive consequences for the future of the family dynamic.

ADR by contrast, often permits parties to sculpt their own resolution, and may permit the resolution of family conflict which is at the route of the POA dispute.

Family Meetings With or Without Counsel

Sometimes, POA disputes arise as a result of poor communication. A formalized meeting at which family members sit down and discuss the issues in dispute may go a long way to resolving the POA dispute.

If it would be beneficial for the parties, either because of the acrimony of the dispute, or because of the facts or family dynamics at play, to have lawyers present, it is often advantageous for the parties to retain lawyers to represent them and guide them in the course of the family meeting. These options are relatively inexpensive and may result in a quick resolution of the POA dispute.

Mediation

Mediation is a process where parties attend at a designated time and place before an impartial third party mediator who is generally selected in advance through mutual agreement of the parties. The mediator usually spends most of the day "shuttling" between separate rooms in which the parties are caucused to communicate ideas, and hopefully, offers to settle the conflict.

Usually, lawyers must be present with parties at mediation because the more formalized process may require the assistance of counsel for lay parties to participate effectively. That said, parties must select their counsel with care, since lawyers may in some circumstances cause parties to entrench their positions and become "positional", thus frustrating the possibility of a resolution.

Parties generally prepare "Mediation Briefs" for the mediator which provide the mediator with all necessary information for the mediator to attempt to resolve the dispute. There is of course a cost associated with the preparation of mediation briefs and the mediator's fees, however this cost is generally a fraction of the cost of full-blown traditional civil litigation.

It is important to note that civil litigation procedure in Ottawa, Essex County and Toronto, requires parties to attend a mediation at some point in the proceedings prior to trial of the matter on its merits. Thus mediation cannot generally be avoided once litigation is commenced in these jurisdictions. Mediating early, however (that is, prior to the start of litigation), may resolve a matter more quickly and easily than waiting to attend mediation once litigation is started. This is partly because parties often become entrenched in their litigious positions once litigation is commenced because of the money they have spent to litigate. The conflict takes on a motivation of its own, i.e., parties seek to

win to recoup, to the extent possible, their costs.

In sum, ADR can be a very effective method of resolving POA disputes because it permits the parties to discuss the issues in dispute, and hopefully come to a resolution that will permit them to continue to enjoy a familial relationship, or alternatively, to resolve legal issues efficiently and cost effectively. Various options exist for ADR procedures, and the specific procedure to be employed must be considered in the context of each dispute. Sometimes, parties may wish to start with a family meeting and then escalate the ADR procedure to a full mediation if a resolution is not forthcoming.

Most cases settle. This is a fact of modern litigation. Whether at mediation, or after years of litigation, parties usually decide, at some point, that continuing protracted litigation is not worth the expense, or alternatively, parties grow tired of the strain of litigation and seek to achieve a resolution through settlement.

ADR is not, however, always the answer. Where parties to a dispute are unreasonable, where they have acted dishonestly or where they have perpetrated serious harm to a person under attorneyship, the only answer may be civil litigation as described in the next section of this chapter.

CIVIL LITIGATION

Civil litigation is litigation which takes place before the Courts. In Ontario, litigation involving POA disputes takes place before the Superior Court of Justice.

There are two types of procedures which may be employed in bringing a case before the Court in Ontario: Actions and Applications.

Actions

An Action is a civil proceeding with which many readers may be familiar from television or media. Actions are commenced by the Plaintiff, who files a Statement of Claim (or in some circumstances, by Notice of Action) and are defended by the Defendant, who files a Statement of Defence. These documents are called “pleadings”, and pursuant to the *Rules of Civil Procedure*, these documents are required to state every fact and allegation on which the Plaintiff and Defendant rely to prove or defend their case. Several other types of pleadings may also be filed but at the most basic level, actions require a Statement of Claim and a Statement of Defence.

Once pleadings have been filed in accordance with the timelines prescribed in the *Rules of Civil*

Procedure, the next step is for the parties to produce Affidavits of Documents. These are sworn documents which attach all documents in the parties' power, possession or control relevant to a matter in issue in the proceeding. These Affidavits of Documents are sent to the other side in the dispute for their review.

Following documentary production, parties must attend Examinations for Discoveries. These are examinations by counsel of a party in the proceeding before a court reporter under oath, in relation to all facts and matters in issue in the proceeding. Parties may be asked questions, *inter alia*, about the documents produced in the Affidavit of Documents, and all facts surrounding the cause of action and any applicable defences raised.

Motions may be made by a party in the proceeding at any time prior to trial, though certain motions require leave of the court such a motion for summary judgment filed after a matter is "set down" for trial. The purposes of motions, generally speaking, is to obtain a court order structuring the procedure to be followed in the action, or to obtain, define, exclude, or otherwise organize the evidence in the proceeding. Parties are often surprised at the cost of bringing and responding to motions – this is a very costly endeavor, but in many instances, motions are an essential part of the civil litigation process to ensure that a party is able to limit evidence before a court, or obtain evidence necessary to prove their case.

The next step in an action is often mediation (described above), although mediation may take place at any point in the proceeding.

Finally, before trial, the parties are required to attend a Pre-Trial Conference, at which a judge of the Superior Court will probe possibilities for settlement with parties prior to the matter proceeding to trial.

Trial in civil litigation is an extremely costly endeavor and involves many hours of preparation by counsel. Procedure at trial is beyond the scope of this chapter, but in general, the procedure to be followed is consistent with what many parties to civil litigation may anticipate:

1. Opening statements;
2. Evidence called by the Plaintiff in chief;
3. Cross examination by the Defendant;
4. Evidence called by the Defendant in chief;
5. Cross examination by the Plaintiff; and
6. Closing statements.

Though some trials may take only a few days, trials often take weeks or even months to complete. The cost of trial is significant and may reach several hundred thousand dollars.

In general, proceedings commenced by way of Action are more expensive and move more slowly than proceedings commenced by Application. Parties may anticipate an Action to take in or around two years to complete.

Applications

Applications are proceedings permitted under the *Rules of Civil Procedure* in relation to prescribed subject matter. Disputes regarding POAs may be prosecuted by Application pursuant to Rules 74 and 75.

Applications are commenced by issuing and serving a Notice of Application together with a supporting Affidavit (sworn written evidence) in support of the Notice of Application. The Notice of Application contains the "laundry list" of relief sought by the Applicant along with the grounds for the relief sought. The Affidavit contains all relevant evidence necessary for the Applicant to prove his or her case and obtain the order sought. In response, the Respondent (upon whom the Application was served) will usually file a Responding Record, which contains a Responding Affidavit.

In the most basic iteration of an Application, the parties file their respective Records and will sometimes seek to cross-examine the opposing Affiants on the contents of the Affidavits filed. Such cross-examinations take place before a court reporter under oath and the transcripts of the cross-examinations may be filed as evidence with the Court. In Toronto, Essex County and Ottawa, mediation is mandatory in all Applications. Following mediation and cross-examinations (if any) the parties will attend a hearing before the Court on the basis of the written record filed and the Court will render a decision on the matter in dispute.

Applications involving POA disputes may involve many more steps, however. Rule 75 of the *Rules of Civil Procedure* permits parties to disputes involving POAs to apply to the Court for the opinion, advice and directions of the Court with respect to the matters in dispute. As such, the procedure on Applications involving POA disputes often follows the following pattern:

1. Notice of Application is filed;
2. Parties attend for an initial "scheduling" appointment before the Court (in Toronto);
3. The parties often agree to a form of Order Giving Directions, which organizes the timetable, steps and evidence to be employed in the proceeding;

4. The Respondent delivers, in accordance with the Order Giving Directions, the Responding Record and other documents required;

5. The parties may examine for discovery or cross-examine (in some cases) parties, affiants or non-parties with knowledge relevant to a matter in issue in the proceeding;

6. The parties attend mediation; and

7. If no settlement is obtained, the parties attend a hearing of the matter on its merits and the Court renders a decision.

Generally, a party may anticipate an Application to take approximately 1 to 1.5 years to complete though there are exceptions to this general rule.

Applications are the preferable procedure by which POA disputes may be brought before the Court, *inter alia*, because of the Court's somewhat broad discretion to provide its opinion, advice and directions pursuant to the *Rules of Civil Procedure*. The process in Applications is also generally more efficient and cost-effective than in Actions. Most matters involving POA disputes are, therefore, brought by way of Application.

In sum, civil litigation is often the only method in which POA disputes may be adequately dealt with. Notwithstanding the information in this chapter, it is always advisable to consult legal counsel if civil litigation is contemplated, since the choice of strategy and procedure can have a significant impact on the outcome of the proceeding and the relief attainable or sought.

The next section of this chapter will address, briefly, the bases on which claims may be advanced in the context of POA disputes.

Causes of Action

Several causes of action are available to the Plaintiff or Applicant in the context of POA abuse litigation. These causes of action are frequently inextricably linked to the remedies which flow from them in equity.

Unjust Enrichment and Applicable Remedies

The doctrine of unjust enrichment operates where one party is enriched, a second party is correspondingly deprived, and the enrichment has occurred for no juristic reason. For example, where an attorney has improperly received a benefit out of the property of the grantor of a POA for no juristic reason, the attorney may have been unjustly enriched.

There are several equitable remedies which a Court may employ in a case involving unjust enrichment. In the seminal case, *Peter v. Beblow*,[3] the Supreme Court of Canada considered the various remedies available to litigants and courts in the context of unjust enrichment. The Court stated:

> [3] "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust.
>
> ...
>
> [4] In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in Rawluk, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in Pettkus v. Becker, supra, and Sorochan v. Sorochan, supra, as I understand those cases. It was also affirmed by La Forest J. in Lac Minerals, supra.

The Court goes on to provide important guidance regarding the appropriate remedy in cases of unjust enrichment, stating the following:

> To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award›s being paid as well as the special interest in the property acquired by the contributions: *per* La Forest J. in *Lac Minerals.* The value of that trust is to be determined on the basis of the actual value of the matrimonial property -- the «value survived» approach. It reflects the court›s best estimate of what is fair having regard to the contribution which the claimant›s services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.[4]

In addition to the foregoing remedies for unjust enrichment, Courts may Order disgorgement of all amounts wrongly appropriated by the wrongdoer, inclusive of interest or the amounts earned by

3 [1993] 1 SCR 980, 1993 CanLII 126 (SCC) at paras 3 and 4.

4 *Ibid* at para 34.

the wrongdoer as a result of the unjust enrichment. In *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*,[5] the Court considered the remedy of disgorgement, and stated the following:

> The disgorgement of amounts obtained through wrongdoing is one of the fundamental principles of restitutionary law. Restitutionary law is "a tool of corrective justice" that seeks to take money away from the party who has unjustly taken it and return it to the party who unjustly lost it. While a defendant cannot invoke the passing-on defence, the direct purchasers cannot deny that they have passed on the overcharge to the indirect purchasers. Where indirect purchasers are able to demonstrate that overcharges were passed on to them, they are entitled to claim those overcharges.[6]

Ultimately, the thrust of the remedies applicable to unjust enrichment is to put the wronged party in the position it would have enjoyed had the unjust enrichment not occurred. This principle extends to the potential gains which may have been obtained by the wrongdoer as a result of the unjust enrichment.

A practical example in the context of POA abuse could be as follows: an attorney for property is acting on behalf of an incapable grantor pursuant to a validly executed CPOAP. The attorney transfers title of the incapable person's house into the attorney's name solely, and begins to rent out the house to tenants, retaining all profits derived from the rental of the property.

The incapable grantor (or someone acting on the incapable grantor's behalf, whom I shall refer to as the "**Plaintiff**") would be in a position to advance a claim against the Attorney for unjust enrichment. In the scenario described, the Plaintiff could appropriately seek the imposition of a constructive trust over the property and disgorgement from the Attorney.

Clearly, a monetary remedy would not compensate the incapable person for the unjust enrichment described herein. The incapable person no longer retains legal title to the house. However, the imposition of a constructive trust provides an appropriate remedy for the incapable person, since the incapable person will receive beneficial ownership of the house, and in conjunction with other remedies described below, will be made whole.

Disgorgement is also appropriate in this scenario because the attorney has derived profit from renting out space in the house to tenants. Given that the asset improperly diverted from the incapable person was the subject of unjust enrichment, the profits which flow from the wrong committed by the attorney should properly be disgorged and repaid to the incapable person.

Of course, it is appropriate to seek damages from the attorney in the scenario described above, as

5 [2013] 3 SCR 545, 2013 SCC 58 (CanLII).

6 *Ibid* at para 23; See also P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed., vol. I, at p. 3-1); and also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC. 1 (CanLII), [2007] 1 S.C.R. 3, at paras 32 and 47.

damages may always be pleaded in the alternative to claims for constructive trust and disgorgement.

Breach of Fiduciary Duty

In *Frame v. Smith*,[7] the Supreme Court of Canada considered the circumstances in which fiduciary duties may be found, and identified the following three characteristics of such circumstances: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.[8] Clearly, the relationship between attorney and grantor satisfies these general requirements. It is not controversial that a fiduciary relationship is created by the granting of a POA, particularly since the *Substitute Decisions Act* mandates the existence of such a relationship.

Pursuant to ss. 32 and 38 of the *Substitute Decisions Act*, attorneys for property under CPOAPs are deemed to be fiduciaries of the grantor of the document under which they take their authority where the grantor is incapable of managing his or her own property. More broadly speaking, an attorney appointed under a general POA pursuant to the *Powers of Attorney Act*[9] is also appropriately considered a fiduciary of the grantor of the POA given, in particular, the relationship of trust and vulnerability between the attorney and grantor.[10]

Many remedies may be sought by a victim of breach of fiduciary duties. Damages, the imposition of a constructive trust, or disgorgement may all be appropriate remedies. A finding of breach of fiduciary duties is more often a question of fact than a complex legal analysis, since the circumstances which may constitute a breach of fiduciary duties are not easily definable.

In general, the following are some examples of actions on the part of attorneys, which may give rise to a claim for breach of fiduciary duties:

a) Improper taking of compensation from the assets of a person under attorneyship by an attorney;

b) Improvident depletion or diversion of assets by the attorney;

c) Misappropriation of finances by an attorney; and

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7 [1987] 2 S.C.R. 99
8 *Ibid* at para 136.
9 R.S.O. 1990, c. P.20.
10 *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377; See *Harris v. Rudolph*, 2004 CanLII 17457 (ON SC).

d) Failure to adequately account by an attorney (discussed more fully below).

More complex factual situations may complicate an analysis of breach of fiduciary duties. For example, where assets are owned jointly by an attorney and a person under attorneyship, it may be difficult to ascertain the extent of the benefit of the assets to which each person is respectively entitled. In such circumstances, it may be necessary to obtain the opinion, advice and direction of a Court regarding the respective entitlements of the attorney and the person under attorneyship.

In such circumstances, it may still be appropriate for a Plaintiff to assert a claim on the basis of breach of fiduciary duty, seeking remedies of damages, the imposition of a constructive trust or disgorgement. However, language should be included in a pleading to demonstrate that the issue of the respective entitlements of the attorney and the person under attorneyship to a share in the asset (or profits) in question is live.

Presumption of Resulting Trust

The presumption of resulting trust is a presumption of law which operates as both "cause of action", in that it grants a rebuttable *prima facie* legal entitlement to the Plaintiff, and a self-contained remedy, in that failure of the Defendant to rebut the presumption of resulting trust vests beneficial ownership of a particular asset in the Plaintiff. In the seminal case *Pecore v. Pecore*,[11] the Supreme Court of Canada described the presumption of resulting trust in detail, stating the following:

> [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E. E. Gillese and M. Milczynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
>
> [26] In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

The presumption of resulting trust arises whenever property is transferred from one adult to another

11 *Pecore v. Pecore*, [2007] 1 SCR 795, 2007 SCC 17 (CanLII) at paras 24-26.

gratuitously. If the transferee is able to adduce sufficient evidence of the transferor's intention that the transferee was to receive beneficial ownership of the property, the presumption may be rebutted and the transfer will not be set aside.

However, the evidence required to rebut the presumption is often difficult to obtain for the transferee, and when the transferor's decisional capacity to transfer property or "gift" property is at issue, it may be impossible for the transferee to demonstrate the transferor's intention in transferring the property.

The presumption of resulting trust is of great utility in cases of POA abuse. Where an attorney gratuitously conveys property under attorneyship to the attorney, while legal title may have transferred to the attorney, beneficial ownership of the asset in question remains with the grantor.

A Plaintiff may, therefore, advance a claim on the basis that the attorney holds the property in question in trust for the benefit of the grantor, and seek a declaration that legal title to the asset be restored to the Plaintiff.

Resulting trust is generally pleaded in tandem with other causes of action described herein, but as discussed above, constitutes both a cause of action and a remedy.

Using the scenario described above, a claim may be advanced by a Plaintiff in relation to the presumption of resulting trust. The attorney who transferred legal title to the house is presumed at law to hold the house for the benefit of the incapable person. Thus a claim advanced on behalf of the incapable person would seek, *inter alia*, a declaration that the house was held in resulting trust for the incapable person, and an Order restoring legal title to the house to the incapable person. Unless the attorney in this scenario is able to demonstrate that the incapable person manifested the capable intention of gifting the property both legally and beneficially to the attorney, it is likely a Court would find that the house was held in trust for the incapable person and that legal title should be restored to the incapable person.

Civil Fraud

Civil fraud is a cause of action which may be advanced by or on behalf of a person under attorneyship against an attorney who has acted improperly in the conduct of her duties. In many cases, unless the Plaintiff has convincing evidence indicating a strong *prima facie* case of fraud as against the attorney, fraud is not pleaded given the significant reputational impact of a pleading in fraud against an attorney. If a Plaintiff fails to prove that an attorney is liable for civil fraud, the Plaintiff may be liable for costs on an increased scale, or may, if otherwise successful in the action, disentitle herself

to a costs award.[12]

As such, it is important that fraud be claimed only in circumstances which indicate a strong *prima facie* case.

For example, in *Hamilton v. Open Window Bakery Ltd.*,[13] the Supreme Court of Canada stated the principles applicable to costs where civil fraud is not proven as follows:

> In Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, The Law of Costs (2nd ed. (loose-leaf)), at para. 219.

In *Bruno Appliance and Furniture, Inc. v. Hryniak*,[14] the Supreme Court of Canada summarized the elements required to prove the tort of civil fraud as follows:

> (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

In POA abuse matters, this cause of action is most appropriate to circumstances in which a POA document is executed by a grantor as a result of fraud, and consequently, the grantor suffers a loss.

Closely related to the doctrine of civil fraud is the doctrine of undue influence, discussed below.

<u>Undue Influence</u>

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where through exertion of the influence of the mind of the grantor, the mind falls short of being wholly independent. Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions

12 *Kilitzoglou et al v Curé et al*, 2016 ONSC 3468 (CanLII) at paras 38 and 39.
13 *Hamilton v. Open Window Bakery Ltd.,* [2004] 1 SCR 303, 2004 SCC 9 (CanLII) at para 26.
14 *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126, 2014 SCC 8 (CanLII) at para 21.

involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as POAs.

Where a party seeks to set aside a POA document for one reason or another (whether fraud, undue influence or suspicious circumstances) civil litigation may be an appropriate remedy and in most instances, such proceedings should be commenced by Application, in which a party seeks a declaration from the Court that the impugned POA document is invalid and/or void for one reason or another.

Injunctive Relief

Most people are familiar with the common television portrayal in which litigants seek and rapidly obtain a "court order" or "restraining order" prohibiting another party in a dispute from some action or another. In Canada, such prohibitive Orders are generally referred to as injunctive relief.

Courts in Ontario have the jurisdiction pursuant to the *Courts of Justice Act* and the *Rules of Civil Procedure* to make Orders prohibiting parties from doing certain things or requiring certain actions to be undertaken.

For example, in the context of POA litigation, parties may be restrained from accessing or dealing with the assets of a person under attorneyship, or alternatively, may be required to deliver all assets and documents in their power or control to a court appointed third party such as an Interim Guardian or permanent Guardian.

If the injunctive relief sought by a party to litigation is "interim" (i.e., an Order is sought for preservation of property pending resolution of the matter on its merits), the general test which must be satisfied by the party seeking the injunction is as follows:

The Party must demonstrate that in making the Order:

1. There is a serious issue to be tried in the matter before the Court;
2. The Applicant will suffer irreparable harm if the Order is not granted; and
3. The "balance of convenience" (i.e., who suffers more greatly as a result of the Order made—whether Applicant or Respondent) favours the party seeking the injunction.[15]

In the context of POA litigation, injunctive relief is often sought because of the risk to a person under attorneyship at the hands of an attorney who has, or is suspected to have, breached his or

15 *MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311, 1994 CanLII 117 (SCC).

her fiduciary duties. For example, where an attorney is alleged to have improvidently depleted the assets of the person under attorneyship, it may be necessary for parties to the litigation to obtain a prohibitive Order restraining the attorney from accessing the person's assets pending resolution of the matter on its merits.

That said, injunctive relief is somewhat extraordinary in civil litigation in that Courts are often disinclined to make Orders restraining or requiring particular conduct on the part of litigants. As such, injunctive relief must not be sought lightly, and parties seeking injunctive relief must mount a *prima facie* case with sufficient evidence to satisfy the Court that such an extraordinary remedy is necessary.

It is important for parties to consult legal counsel when considering moving for Orders requiring or restraining conduct of other parties.

Passing of Accounts

One of the most useful remedies in the context of POA abuse is the procedure known as Passing of Accounts referenced in chapters 8, and 12.[16] The name of this procedure is somewhat misleading, in that the "Passing" does not involve transfer of the accounts from one party to another as many counsel and litigants often mistakenly believe at first instance.

At law, attorneys are required to account to persons under attorneyship, whether the POA is granted under the *Substitute Decisions Act* or the *Powers of Attorney Act*. It is foundational to the duties of an attorney that careful accounts of all expenses paid and income received by or on behalf of the person under attorneyship be kept by the Attorney for any period during which the Attorney is acting.

A person under attorneyship may require the attorney to account at any time, and the Attorney is required at law to keep his accounts ready for inspection at all times. Where the person under attorneyship is incapable of requesting or reviewing the accounting, another interested party may request an accounting from the attorney, though leave of a Court is required before an Order will be granted requiring the attorney to account to the third parties. This leave is, in practice, often granted as a matter of course.

Generally, accounting by an attorney, whether by Court order or otherwise, proceeds initially on an informal basis; i.e., the attorney produces her legers to the party seeking the accounting, and may attempt to explain any discrepancies in the accounts to avoid a formal accounting or "Passing of Accounts".

16 For a detailed discussion of Passing of Accounts, see chapter 12 of this book.

If the party seeking the accounting is not satisfied with the informal accounting, the next step is to require the Attorney to Pass their accounts pursuant to *Rule* 74.18 of the *Rules of Civil Procedure*.

The procedure on a Passing of Accounts requires the attorney to file accounts in a special format called Court format, and to serve their accounts on all interested parties (who may be those persons entitled to notice pursuant to the Order granting leave to request the accounting). The Accounts are filed as Exhibits to an Affidavit of Verification in an Application before the Court. In accordance with timelines prescribed in the *Rules of Civil Procedure*, the recipients of the accounts must review the accounts and determine whether they wish to object to any discrepancies they identify, in which case these persons thus become called "Objectors".

The Objectors file Notices of Objection with the Court, and the Applicant (Attorney) will generally attempt to address, in a Response to Notice of Objection, the discrepancies.

Ultimately, if the Objections are not resolved, a hearing on the Passing of Accounts will take place. Procedures for such hearings vary widely in jurisdictions around Ontario. In Toronto, generally, Passing of Accounts proceed on the basis of the written record filed with the Court, while elsewhere in Ontario, the attorney may be required to submit to cross-examination in Open Court in relation to the Accounts and the discrepancies alleged by the Objector(s).

Ultimately, if the attorney is unable to explain and justify the discrepancies noted in the Accounts, a Court may adjudge that the attorney is required to repay the amounts erroneously or improperly taken or lost, or may decrease any compensation taken by or claimed by the attorney.

A Passing of Accounts is a very effective method of demonstrating an attorney's improper conduct, and indeed, the other causes of action discussed in this chapter often cannot be adequately proven or identified absent an accounting that comprehensively demonstrates the malfeasance of the attorney.

Passing of Accounts are highly technical, and legal advice should generally be sought before commencing such proceedings.

CONCLUSION

This chapter aims to provide a more general overview of the various procedures, legal bases, and remedies available to persons engaged in POA disputes. The law relating to POA disputes is complex and nuanced, as are the procedures available to parties engaged in such disputes. On a basic level, all routes originate from the same foundational principle that the attorney must act in the utmost good faith and for the benefit of the person under attorneyship. Trust and fiduciary

obligations are paramount.

However, there are many ways that POA disputes can be resolved, and many bases on which claims may be advanced. Where finances are limited, ADR procedures may be the most appropriate method of dispute resolution. Where breach of fiduciary duties has occurred, court proceedings may be necessary. Where imminent risk of ongoing harm to the person under attorneyship exists, injunctive relief may be appropriate and necessary.

In conclusion, many options exist for parties engaged in POA disputes, and seeking legal advice from qualified practitioners experienced in such disputes may assist parties in selecting the appropriate dispute resolution methods, procedures, causes of action and remedies to resolve their dispute effectively and efficiently.

CHAPTER 14: MENTAL HEALTH LEGISLATION AND POWERS OF ATTORNEY

By: Kerri Crawford

INTRODUCTION

There is very little academic literature that examines powers of attorney ("**POAs**") in the context of mental illness that is not necessarily age-related and degenerative, rendering such circumstances particularly challenging. When thinking about POAs, we tend to focus on an elderly population faced with an increased likelihood that they may, over time, become mentally incapable. Moreover, degenerative and age-related conditions often progress slowly, with an individual able to realize, over time, the necessity of having a POA in place. Mental health issues do not always follow a predictable pattern, and it can be difficult to know when and how a person – whether an attorney or grantor – fits into the broad scheme of provincial mental health legislation.

This chapter reviews some of the key legislation pertaining to mental health that may be applicable in a context of a POA. It is not an exhaustive review but rather, is meant to provide the reader with an overview of the relevant issues and predominant legislation governing mental health and substitute decision-making in Ontario.

The legislation reviewed in this chapter pertains, to a great extent, to findings of incapacity and related provisions. The *Substitute Decisions Act* [1] and the *Health Care Consent Act* [2] contain key provisions regarding personal care. Pursuant to the *SDA*, a person may be found incapable with regard to personal care. Under the *HCCA*, a person may be found incapable with regard to treatment, admission to a long-term care facility, or personal assistance services. With respect to property, a person may be found to lack the capacity to manage property pursuant to either the *SDA*

1 *1992*, S.O. 1992, c. C.30.
2 *1996*, S.O. 1996, c. 2, Sched. A.

or the *Mental Health Act*,[3] though such a finding under the *MHA* is only to be made with regard to a psychiatric patient, as discussed in greater detail below. The role of the Consent and Capacity Board ("**CCB**") and relevant procedures are also discussed.

OVERVIEW OF KEY LEGISLATION

Substitute Decisions Act, 1992

Generally speaking, the *SDA* governs the granting of POAs for personal care or property, and delineates the process for an individual to be appointed by the Court as a guardian where a particular person has not executed a POA, or where the validity of a POA is challenged.

In a proceeding under the *SDA*, if a person does not have legal representation, and if that person's capacity is in issue, the court may direct the Public Guardian and Trustee (the "**PGT**") to arrange for legal representation to be provided, and the person will be deemed to possess the requisite capacity to retain and instruct counsel.[4]

If, in a proceeding under the *SDA*, a person's capacity is in issue and the court is satisfied that there are reasonable grounds for believing that the person is incapable, the court may order that the person be assessed by one or more assessors.[5] Such an order may require the person:

a) to submit to the assessment;

b) to permit entry to his or her home for the purpose of the assessment; or

c) to attend at a particular place and time.[6]

In the event of a person hindering an assessment, the court has various options at its disposal under the *SDA*, including issuing an Order restraining a person other than the one whose capacity is in issue from hindering or obstructing an assessment,[7] issuing an order for the enforcement of an assessment Order (in which case a police officer will apprehend the person whose capacity is at issue and bring that person to a specified location to be assessed),[8] and charging a person hindering or obstructing an assessment.[9]

3 R.S.O. 1990, c. M.7.
4 *SDA*, *supra* note 1 at s. 3.
5 *Ibid* at s. 79(1).
6 *Ibid* at s. 79(2).
7 *Ibid* at s. 80.
8 *Ibid* at s. 81.
9 *Ibid* at s. 89.

All assessments of capacity conducted pursuant to the *SDA* must be done in accordance with a prescribed form,[10] and the assessor shall provide written notice of his or her findings to the person who was assessed.[11] Before conducting the assessment, the assessor must explain to the person being assessed the purpose of the assessment, the significance and effect of a finding of capacity or incapacity, and the person's right to refuse to be assessed pursuant to section 78(1).[12] However, if the assessment was ordered by the court under section 79 of the *SDA*, or if a POA for personal care authorizes the use of force to permit the assessment and the provision is effective under the *SDA*, the assessment may be conducted despite the person's refusal to be assessed, and without explaining the information described above.[13]

Health Care Consent Act, 1996

The stated purposes of the *HCCA* include but are not limited to providing rules respecting consent to treatment that apply consistently in all settings; facilitating treatment, admission to care facilities, and personal assistance services for persons lacking the requisite capacity to render decisions about such matters; enhancing the autonomy of persons for whom treatment, admission to a care facility or personal assistance services is proposed; and to ensure a significant role for supportive family members when a person lacks the capacity to make a decision pertinent to the purposes of the *HCCA*.[14]

The *HCCA* does not deal with the capacity to manage property. Generally, the *HCCA* sets out the requirements for determining capacity with respect to treatment decisions, admission to care facilities, and personal assistance services. It also addresses how to go about obtaining informed, voluntary consent from a capable patient or substitute decision-maker and allows for findings of incapacity to be reviewed by the CCB.

The *HCCA* also stipulates when treatment may be administered, if the situation constitutes an emergency, and when treatment may be commenced following the resolution of an appeal of a finding that an individual lacks capacity.

Mental Health Act

Broadly speaking, the *MHA* delineates the requirements for voluntary, informal and involuntary admission to a psychiatric facility, as well as the management of psychiatric out-patients pursuant

10 *Ibid* at s. 78(4).
11 *Ibid* at s. 78(5).
12 *Ibid* at s. 78(2).
13 *Ibid* at s. 78(3).
14 *HCCA*, *supra* note 2 at s. 1.

to community treatment orders. Though there are numerous procedural requirements in place in the *MHA* pertaining to circumstances in which a patient lacks capacity to make treatment decisions, the *MHA* itself does not directly address capacity with respect to treatment.

THE CONSENT AND CAPACITY BOARD

Among the purposes of the *HCCA* is to enhance the autonomy of persons for whom treatment or admission to a care facility is proposed, or who are to receive personal assistance services, by, *inter alia*, allowing those who have been found to be incapable to apply to a tribunal for a review of the finding, and allowing incapable persons to request that a representative of their choice be appointed by the tribunal for the purpose of making decisions on their behalf.[15] To further this goal, the *HCCA* delineates many of the responsibilities of the CCB.

Upon receiving an application, the CCB will fix a time and place for a hearing.[16] That hearing will take place within seven days from receipt of the Application, unless the parties agree to postpone it.[17] If a person who is or may be incapable with respect to treatment, admission to a care facility or a personal assistance service, is a party to a CCB proceeding, and does not have legal representation, the CCB may direct Legal Aid Ontario to arrange for such representation, and the person shall be deemed to have capacity to retain and instruct counsel.[18] If this type of legal representation is provided and no certificate is issued pursuant to the *Legal Aid Services Act, 1998*, the person is responsible for his or her legal fees.[19]

Prior to the hearing, the parties will be given an opportunity to examine and copy any documentary evidence that will be produced and any report whose contents will be given in evidence at the hearing.[20] Importantly, the person who is the subject of the treatment, admission or personal assistance service, as well as the person authorized to represent him or her, are entitled to examine and copy any medical or other health record prepared in respect of that person (subject to certain provisions of the *MHA*, the *Home Care and Community Services Act, 1994*, and the *Child and Family Services Act*).[21]

Once the CCB reaches a decision, a copy of the decision is provided to each party (or the person who represented the party) within a day of the ending of the hearing.[22] If any party requests reasons for

15 *HCCA*, *supra* note 2 at s. 1.
16 *Ibid* at s. 75(1).
17 *Ibid* at s. 75(2).
18 *Ibid* at s. 81(1).
19 *Ibid* at s. 81(2).
20 *Ibid* at s. 76(1).
21 *Ibid* at s. 76(2).
22 *Ibid* at s. 75(3).

the CCB's decision within 30 days from the day the hearing ends, then within four business days of the request the CCB will issue written reasons and provide a copy of these reasons to each person who received a copy of the decision.[23]

Decisions of the CCB may be appealed by a party to the proceeding. The proper appeal route is to the Superior Court of Justice on a question of law or fact, or both.[24] Notice of such an appeal must be served on the other parties and filed with the Court within seven days of receiving the CCB's decision.[25] On an appeal, the Superior Court of Justice may:

a) exercise all the powers of the CCB;

b) substitute its opinion for that of a health practitioner, an evaluator, a substitute decision-maker or the CCB; and

c) refer the matter back to the CCB, with directions.26

PROPERTY

Guardianship of Property

The court may, on the application of any person, appoint a guardian of property for a person who is incapable of managing property.[27] An order appointing a guardian of property for a person shall include a finding that the person is incapable of managing property and that, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.[28]

Generally, the court will not appoint a person who provides health care or residential, social, training, or support services to an incapable person for compensation as that person's guardian of property.[29] However, an attorney for personal care, or an attorney under a continuing POA are among the people who are exempt from this prohibition.[30] In making such an appointment, the court in most circumstances will consider:

a) whether the proposed guardian is the attorney under a continuing POA;

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23 *HCCA*, *supra* note 2 at s. 75(4).
24 *Ibid* at s. 80(1).
25 *Ibid* at s. 80(2).
26 *Ibid* at s. 80(10).
27 *SDA*, *supra* note 1 at s. 22(1).
28 *Ibid* at s. 25(1).
29 *Ibid* at s. 24(1).
30 *Ibid* at s. 24(2).

b) the incapable person's current wishes, if they can be ascertained; and

c) the closeness of the relationship of the applicant to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.[31]

Statutory Guardianship

According to section 15 of the *SDA*, if a certificate is issued under the *MHA* certifying that a person who is a patient of a psychiatric facility is incapable of managing property, the PGT is the person's statutory guardian of property.[32] It is also possible, under section 16 of the *SDA*, for a person to request an assessor to perform an assessment of another person's capacity or of his or her own capacity in order to determine whether the PGT should become the statutory guardian of property.[33] In order to pursue this avenue, however, the request must state, *inter alia*, that the person requesting the assessment has made reasonable inquiries and has no knowledge of the existence of any attorney under a continuing POA that gives the attorney authority over all of the other person's property.[34] If an assessor finds the person to lack the requisite capacity to manage property, the assessor may issue a certificate of incapacity,[35] which will be given to the incapable person and the PGT.[36] Upon receipt of the certificate, the PGT is the person's statutory guardian of property.[37] The PGT must then inform the person that the PGT has become the person's statutory guardian of property and that the person is entitled to apply to the CCB for a review of the finding that he or she is incapable with respect to managing property.[38]

Any of the following people can apply to the PGT to replace the PGT as an incapable person's statutory guardian of property:

1. The incapable person's spouse or partner.

2. A relative of the incapable person.

3. The incapable person's attorney under a continuing POA, if the POA was made before the certificate of incapacity was issued and does not give the attorney authority over all of the incapable person's property.

31 *Ibid* at s. 24(5).
32 *Ibid* at s. 15.
33 *Ibid* at s. 16.
34 *Ibid* at s. 16(2)(b).
35 *Ibid* at s. 16(3).
36 *Ibid* at s. 16(4).
37 *Ibid* at s. 16(5).
38 *Ibid* at s. 16(6).

4. A trust corporation within the meaning of the *Loan and Trust Corporations Act*, if the incapable person has a spouse or partner who consents in writing to the application.[39]

A statutory guardianship of property will be terminated under the following circumstances:

a) the incapable person gave a continuing POA before the certificate of incapacity was issued;

b) the POA gives the attorney authority over all of the incapable person's property;

c) the PGT receives,

   i. the original POA, or a copy of it that is authenticated in a manner satisfactory to the PGT,

   ii. a written undertaking signed by the attorney to act in accordance with the POA, and

   iii. proof satisfactory to the PGT of the identity of the person named as the attorney in the POA; and

d) if someone has replaced the PGT as the statutory guardian as described above, the statutory guardian receives,

   iv. a copy of the POA that is authenticated in a manner satisfactory to the statutory guardian, and

   v. a written undertaking signed by the attorney to act in accordance with the POA.[40]

If a statutory guardianship is terminated as above, and within six months the POA is terminated because of the attorney's resignation, the PGT or the person who replaced the PGT as statutory guardian may elect to resume being the incapable person's statutory guardian of property until another person is appointed as guardian of property under section 17 or 22 of the *SDA*.[41]

A statutory guardianship of property may also be terminated by the court on the application of a person who is subject to the statutory guardianship of property.[42]

39 *SDA*, *supra* note 1 at s. 17(1).
40 *Ibid* at s. 16.1(1).
41 *Ibid* at s. 16.1(2). An exception to this provision is delineated at section 16.1(3).
42 *Ibid* at s. 20.3(1).

Serious Adverse Effects

Under the *SDA*, the PGT has a duty to investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result.[43] For the purposes of this provision, serious adverse effects include loss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependants.[44] If the PGT investigates and finds there are reasonable grounds to believe the person is incapable of managing property and that the prompt appointment of a temporary guardian of property is required to prevent serious adverse effects, the PGT will apply to the Court for an order appointing the PGT as temporary guardian of property.[45] The Court may appoint the PGT as temporary guardian of property for no more than 90 days.[46] Importantly, the Order may suspend the powers of any attorney under a continuing POA during the term of the temporary guardianship.[47]

Assessment of Capacity to Manage Property Upon Admission to a Psychiatric Facility

Upon a person's admission to a psychiatric facility, a physician will examine that person to determine whether he or she is capable of managing property.[48] The person's attending physician may examine him or her at any time to determine whether the patient is capable of managing property.[49] If the physician determines that the person is not capable of managing property, he or she will issue a certificate of incapacity, and the officer in charge will transmit the certificate to the PGT.[50] Notably, if the person's property is under guardianship pursuant to the *SDA*, or if the physician believes on reasonable grounds that the person has a continuing POA under the *SDA* that provides for management of the person's property, then the examination to determine capacity will not take place.[51]

If a physician issues a certificate of incapacity or a notice of continuance, the physician will advise the patient of this and will notify a rights adviser.[52] The rights adviser will meet with the patient and explain the significance of the certificate or notice and the right to have the patient's capacity to manage property reviewed by the CCB.[53] The person may request that the rights adviser assist

43 SDA, supra note 1 at s. 27(2).
44 *Ibid* at s. 27(1).
45 *Ibid* at s. 27(3.1).
46 *Ibid* at s. 27(6).
47 *Ibid* at s. 27(8).
48 *MHA*, *supra* note 3 at s. 54(1).
49 *Ibid* at s. 54(2).
50 *Ibid* at s. 54(4).
51 *Ibid* at s. 54(6).
52 *Ibid* at s. 59(1).
53 *Ibid* at s. 59(2).

him or her with an application to the CCB to obtain legal services.[54] It is important to note that the patient may refuse to meet with the rights adviser.[55] It is also noteworthy that the same rights advice is not accorded in the course of assessments under the *SDA*.

If a certificate of incapacity has been issued, then within 21 days prior to that person's discharge from a psychiatric facility the attending physician will examine him or her to determine if he or she is capable of managing property.[56]

POWERS OF ATTORNEY AND THE PERSON

Court Ordered Guardianship of the Person

The court may, on any person's application, appoint a guardian of the person for a person who is incapable of personal care.[57] An order appointing a guardian of the person shall include a finding that the person is incapable in respect of the functions referred to in section 45 of the *SDA* (health care, nutrition, shelter, clothing, hygiene or safety),[58] or in respect of some of them, and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.[59]

As with guardianship of property pursuant to the *SDA*, a person who provides health care or residential, social, training or support services to an incapable person for compensation is not permitted to be appointed as his or her guardian of the person.[60] However, an exception exists for the incapable person's spouse, partner or relative or the incapable person's guardian of property, the attorney for personal care, or the attorney under a continuing POA for property.[61] There may also be an exception to the prohibition if the court is satisfied that there is no other suitable person who is available and willing to be appointed.[62]

Consent to Treatment

Treatment has been given an extensive definition in the *HCCA*. In that Act, treatment is defined as including anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community

54 *Ibid* at s. 59(4).
55 *Ibid* at s. 59(3).
56 *Ibid* at s. 57.
57 *SDA*, *supra* note 1 at s. 55(1).
58 *Ibid* at s. 45.
59 *Ibid* at s. 58(1).
60 *Ibid* at s. 57(1).
61 *Ibid* at s. 57(2).
62 *Ibid* at s. 57(2.1).

treatment plan, but does not include:

a) the assessment for the purpose of the *HCCA* of a person's capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the *SDA* of a person's capacity to manage property or a person's capacity for personal care, or the assessment of a person's capacity for any other purpose,

b) the assessment or examination of a person to determine the general nature of the person's condition,

c) the taking of a person's health history,

d) the communication of an assessment or diagnosis,

e) the admission of a person to a hospital or other facility,

f) a personal assistance service,

g) a treatment that in the circumstances poses little or no risk of harm to the person,

h) anything prescribed by the regulations as not constituting treatment.[63]

A health practitioner who proposes a treatment for a person cannot administer the treatment, and must take reasonable steps to ensure it is not administered, unless:

a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or

b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with the HCCA.64

The requisite elements of consent to treatment pursuant to the *HCCA* include:

1. The consent must relate to the treatment.

2. The consent must be informed.

3. The consent must be given voluntarily.

63 *HCCA*, *supra* note 2 at s. 2(1).
64 *Ibid* at s. 10.

4. The consent must not be obtained through misrepresentation or fraud.[65]

If a plan of treatment is to be proposed for a person, a health practitioner may, on behalf of all of the health practitioners involved in the plan of treatment,

a) propose the plan of treatment;

b) determine the person's capacity with respect to the treatments referred to in the plan of treatment; and

c) obtain a consent or refusal of consent in accordance with this Act,

   i. from the person, concerning the treatments with respect to which the person is found to be capable, and

   ii. from the person's substitute decision-maker, concerning the treatments with respect to which the person is found to be incapable.[66]

It is important to note that consent that has been given by or on behalf of the person for whom the treatment was proposed may be withdrawn at any time by the person, if capable with respect to the treatment at the time of the withdrawal, or by the person's substitute decision-maker if the person is incapable with respect to the treatment at the time of the withdrawal.[67] In addition, a person may be incapable with respect to a treatment at one time and capable at another, or incapable with respect to some treatments and capable with respect to others.[68] If a person becomes capable with respect to a treatment after consent to that treatment was given or refused on his or her behalf, the person's decision to give or refuse consent to the treatment will govern.[69]

Treatment must not begin if:

a) a health practitioner proposes a treatment for a person and finds that the person is incapable with respect to the treatment;

b) before the treatment is begun, the health practitioner is informed that the person intends to apply, or has applied, to the CCB for a review of the finding; and

c) the application to the CCB is not prohibited by subsection 32(2) of the *HCCA*.[70]

65 *Ibid* at s. 11.
66 *HCCA*, *supra* note 2 at s. 13.
67 *Ibid* at s. 14.
68 *Ibid* at s. 15.
69 *Ibid* at s. 16.
70 *Ibid* at s. 18(1).

In addition, treatment must not begin if:

a) a health practitioner proposes a treatment for a person and finds that the person is incapable with respect to treatment;

b) before the treatment is begun, the health practitioner is informed that,

   i. the incapable person intends to apply, or has applied, to the CCB to be appointed as the representative to give or refuse consent to the treatment on his or her behalf, or

   ii. another person intends to apply, or has applied, to the CCB to be appointed as the representative of the incapable person to give or refuse consent to the treatment on his or her behalf; and

c) the application to the CCB is not prohibited by subsection 33(3) of the HCCA.71

In the event that a health practitioner is of the opinion that there is an emergency within the meaning of section 25(1) of the *HCCA*, the above provisions preventing treatment from beginning do not apply.[72]

If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by, *inter alia*, the incapable person's attorney for personal care (if the POA confers authority to give or refuse consent to the treatment).[73] Such consent may be given or refused by the attorney only if he or she:

a) is capable with respect to the treatment;

b) is at least 16 years old, unless he or she is the incapable person's parent;

c) is not prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on his or her behalf;

d) is available; and

e) is willing to assume the responsibility of giving or refusing consent.[74]

An attorney for personal care, if the POA confers authority to give or refuse consent to the treatment, may only do so if no person described in an earlier paragraph of subsection 20(1) of the *HCCA*

71 *HCCA*, *supra* note 2 at s. 18(2).
72 *Ibid* at s. 18(4).
73 *Ibid* at s. 20(1).
74 *Ibid* at s. 20(2).

meets the requirements listed above.[75] The only person listed above the attorney for personal care in that subsection is the incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.[76] If two or more persons who are described in subsection 20(1) of the *HCCA* and who meet the requirements listed above disagree about whether to give or refuse consent, and if their claims rank ahead of all others, the PGT shall make the decision.[77]

A substitute decision-maker who consents to a treatment on an incapable person's behalf may consent to the incapable person's admission to a hospital or psychiatric facility or other health facility for the purpose of the treatment.[78] If the incapable person is 16 years old or older and objects to being admitted to a psychiatric facility for treatment of a mental disorder, consent to his or her admission may be given only by his or her guardian of the person, if the guardian has authority to consent to the admission, or his or her attorney for personal care, if the POA contains a provision authorizing the attorney to use force that is necessary and reasonable in the circumstances to admit the incapable person to the psychiatric facility and the provision is effective under subsection 50(1) of the *SDA*.[79]

Before giving or refusing consent to a treatment on an incapable person's behalf, a substitute decision-maker is entitled to receive all the information required for an informed consent.[80] If consent to a treatment is refused on an incapable person's behalf by his or her substitute decision-maker, the treatment may be administered despite the refusal if, in the opinion of the health practitioner proposing the treatment, there is an emergency, and the substitute decision-maker did not comply with the principles for giving or refusing consent found in section 21 of the *HCCA*.[81]

The authority to administer a treatment under section 25 or 27 of the *HCCA* (involving emergency treatment) includes authority to have the person admitted to a hospital or psychiatric facility for the purpose of the treatment, unless the person objects and the treatment is primarily treatment of a mental disorder.[82]

A person who is the subject of a treatment may apply to the CCB for a review of a health practitioner's finding that he or she is incapable with respect to the treatment.[83] This provision, however, does not apply to a person who has a guardian of the person (if the guardian has authority to give or refuse consent to the treatment) or a person who has an attorney for personal care (if the POA contains

75 *Ibid* at s. 20(3).
76 *Ibid* at s. 20(1).
77 *Ibid* at s. 20(6).
78 *Ibid* at s. 24(1).
79 *Ibid* at s. 24(2).
80 *Ibid* at s. 22(1).
81 *Ibid* at s. 27.
82 *HCCA*, *supra* note 2 at s. 28.
83 *Ibid* at s. 32(1).

a provision waiving the person's right to apply for the review and the provision is effective under subsection 50(1) of the *SDA*).[84]

It should be noted that there is a restriction on repeated applications such that, if a health practitioner's finding that a person is incapable with respect to a treatment is confirmed on an application under section 32 of the *HCCA*, the person shall not make a new application for a review of a finding of incapacity with respect to the same or similar treatment within six months after the final disposition of the earlier application, unless the CCB gives leave in advance.[85]

A substitute decision-maker or a health practitioner who proposed a treatment may apply to the CCB for directions if the incapable person expressed a wish with respect to treatment, but,

a) the wish is not clear;

b) it is not clear whether the wish is applicable to the circumstances;

c) it is not clear whether the wish was expressed while the incapable person was capable; or

d) it is not clear whether the wish was expressed after the incapable person attained 16 years of age.[86]

A health practitioner who intends to apply for directions shall inform the substitute decision-maker of his or her intention before doing so.[87]

If a substitute decision-maker is required by the principles for giving or refusing consent delineated in section 21 of the *HCCA* to refuse consent to a treatment because of a wish expressed by the incapable person while capable and after attaining 16 years of age, the substitute decision-maker may apply to the CCB for permission to consent to the treatment despite the wish, or the health practitioner who proposed the treatment may apply to the CCB to obtain permission for the substitute decision-maker to consent to the treatment despite the wish.[88]

A health practitioner who intends to apply under to the CCB to obtain permission for the substitute decision-maker to consent to the treatment despite the wish, as described above, shall inform the substitute decision-maker of his or her intention before doing so.[89] If consent to a treatment is given or refused on an incapable person's behalf by his or her substitute decision-maker, and if the

84 *Ibid* at s. 32(2).
85 *Ibid* at s. 32(6).
86 *Ibid* at s. 34(1).
87 *Ibid* at s. 35(1.1).
88 *Ibid* at s. 36(1).
89 *Ibid* at s. 36(1.1).

health practitioner who proposed the treatment is of the opinion that the substitute decision-maker did not comply with the principles for giving or refusing consent listed in section 21 of the *HCCA*, the health practitioner may apply to the CCB for a determination as to whether the substitute decision-maker complied with section 21 of the *HCCA*.[90]

Admission to a Care Facility

A care facility is defined in the *HCCA* as a long-term care home as described in the *Long-Term Care Homes Act, 2007*, or a facility prescribed by the *HCCA* regulations as a care facility.[91] If a person's consent to his or her admission to a care facility is required by law and the person is found by an evaluator to be incapable with respect to the admission, consent may be given or refused on the person's behalf by his or her substitute decision-maker in accordance with the *HCCA*. The person responsible for authorizing admissions to the care facility shall take reasonable steps to ensure that the person's admission is not authorized unless the person's substitute decision-maker has given consent on the person's behalf in accordance with the *HCCA*.[92]

Before giving or refusing consent on an incapable person's behalf to his or her admission to a care facility, a substitute decision-maker is entitled to receive all the information required in order to make the decision.[93] The authority to consent on an incapable person's behalf to his or her admission to a care facility includes the authority to withdraw the consent at any time prior to admission.[94]

If a person is found by an evaluator to be incapable with respect to his or her admission to a care facility, the person's admission may still be authorized and the person admitted, in the absence of consent if, in the opinion of the person responsible for authorized admissions to the care facility, the incapable person requires immediate admission to a care facility as a result of a crisis, and it is not reasonably possible to obtain an immediate consent or refusal on the incapable person's behalf.[95] If admission to a care facility is authorized in this fashion, the person responsible for authorizing admissions to the care facility shall obtain consent (or refusal of consent) from the incapable person's substitute decision-maker promptly after the person's admission.[96]

A person may apply to the CCB for a review of an evaluator's finding that he or she is incapable

90 *Ibid* at s. 37(1).
91 *HCCA*, *supra* note 2 at s. 2(1).
92 *Ibid* at s. 40(1).
93 *Ibid* at s. 43(1).
94 *Ibid* at s. 45.
95 *Ibid* at s. 47(1).
96 *Ibid* at s. 47(2).

with respect to his or her admission to a care facility.[97] This does not apply to a person who has a guardian of the person (if the guardian has the authority to give or refuse consent to the person's admission to a care facility) or a person who has an attorney for personal care (if the POA contains a provision waiving the person's right to apply for the review and the provision is effective under subsection 50(1) of the *SDA*).[98]

A substitute decision-maker (or the person responsible for authorizing admissions to a care facility) can also apply to the CCB for directions if the incapable person expressed a wish with respect to his or her admission to the care facility, but:

a) the wish is not clear;

b) it is not clear whether the wish is applicable to the circumstances;

c) it is not clear whether the wish was expressed while the incapable person was capable; or

d) it is not clear whether the wish was expressed after the incapable person attained 16 years of age.[99]

If consent to a person's admission to a secure unit of a care facility is given on an incapable person's behalf by a substitute decision-maker, the person may apply to the CCB for a determination as to whether his or her substitute decision-maker complied with the principles for giving or refusing consent, as delineated by section 42 of the *HCCA*.[100] In addition, if consent to admission to a care facility is given or refused on an incapable person's behalf by his or her substitute decision-maker, and if the person responsible for authorizing admissions to the care facility is of the opinion that the substitute decision-maker did not comply with the principles for giving or refusing consent set out in section 42 of the *HCCA*, the person responsible for authorizing admission to the care facility may apply to the CCB for a determination as to whether the substitute decision-maker complied with section 42 of the *HCCA*.[101]

Hospitalization under the MHA

The *MHA* sets out provisions pertaining to hospitalization of patients due to mental disorder. A patient means a person who is under observation, care and treatment in a psychiatric facility, which

97 *Ibid* at s. 50(1).
98 *Ibid* at s. 50(2).
99 *Ibid* at s. 52(1).
100 *Ibid* at s. 53.1(1).
101 *Ibid* at s. 54(1).

in turn is defined as a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the Minister of Health and Long-Term Care.[102] Mental disorder is defined in the *MHA* as constituting any disease or disability of the mind.[103] Under this legislation, an informal patient is defined as a person who is a patient in a psychiatric facility, having been admitted with the consent of another person under section 24 of the *HCCA*. An involuntary patient refers to a person who is detained in a psychiatric facility under a certificate of involuntary admission, a certificate of renewal or a certificate of continuation.[104]

Notably, those provisions of the *MHA* referring to a patient contemplate that the term "substitute decision-maker" pertains to the person who would be authorized under the *HCCA* to give or refuse consent to a treatment on behalf of the patient, if the patient were incapable with respect to the treatment under that Act, unless the context requires otherwise.[105]

Upon the recommendation of a physician, any person who is believed to be in need of the observation, care and treatment provided in a psychiatric facility may be admitted thereto as an informal or voluntary patient.[106] There is no authorization provided in the *MHA* for a psychiatric facility to detain or restrain an informal or voluntary patient.[107] However, it is noteworthy that, pursuant to section 19 of the *MHA*, the attending physician may change the status of an informal or involuntary patient to that of an involuntary patient by completing and filing with the officer in charge a certificate of involuntary admission.[108]

Where a physician examines a person and has reasonable cause to believe that the person:

a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself;

b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; or

c) has shown or is showing a lack of competence to care for himself or herself,

d) and if in addition the physician is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,

e) serious bodily harm to the person;

102 *MHA*, *supra* note 3 at s. 1(1).
103 *Ibid* at s. 1(1).
104 *Ibid* at s. 1(1).
105 *Ibid* at s. 1(1).
106 *Ibid* at s. 12.
107 *Ibid* at s. 14.
108 *Ibid* at s. 19.

f) serious bodily harm to another person; or

g) serious physical impairment of the person,

the physician may make application for a psychiatric assessment of the person.[109]

Similarly, where a physician examines a person and has reasonable cause to believe that the person,

a) has previously received treatment for mental disorder of an ongoing or recurring nature that, when not treated, is of a nature or quality that likely will result in serious bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person; and

b) has shown clinical improvement as a result of the treatment,

c) and if in addition the physician is of the opinion that the person;

d) is apparently suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one;

e) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment; and

f) is incapable, within the meaning of the *HCCA*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained,

the physician may make an application for a psychiatric assessment of the person.[110]

Such an application for psychiatric assessment is sufficient authority for seven days from and including the day on which it is signed by the physician, to any person to take the person who is the subject of the application in custody to a psychiatric facility forthwith, and to detain the person who is the subject of the application in a psychiatric facility and to restrain, observe and examine him or her in the facility for not more than 72 hours.[111]

Pursuant to circumstances listed in the *MHA*, it is also possible for a justice of the peace to issue an

109 *Ibid* at s. 15(1).
110 *MHA*, *supra* note 3 at s. 15(1.1).
111 *Ibid* at s. 15(5).

order for the examination of a person by a physician,[112] or for a police officer to do so.[113]

If, after examining the patient, the attending physician is of the opinion both that the patient is suffering from a mental disorder of a nature and quality that will likely result in serious bodily harm to the patient or another person or serious physical impairment of the patient (unless the patient remains in the custody of a psychiatric facility) and that the patient is not suitable for admission or continuation as an informal or voluntary patient, then the attending physician shall complete a certificate of involuntary admission, a certificate of renewal or a certificate of continuation.[114]

An involuntary patient may be detained, restrained, observed and examined in a psychiatric facility,

a) for not more than two weeks under a certificate of involuntary admission; and

b) for not more than,

   i. one additional month under a first certificate of renewal,

   ii. two additional months under a second certificate of renewal,

   iii. three additional months under a third certificate of renewal, and

   iv. three additional months under a first or subsequent certificate of continuation, that is completed and filed with the officer in charge by the attending physician.[115]

Community Treatment Orders ("CTOs")

A person who is the subject of a CTO must comply with a community treatment plan (CTP).[116] If the person does not comply, he or she may be forcibly returned to the physician who issued the CTO in order for an examination to be conducted.[117] A person who is the subject of a proposed CTO must meet the criteria for involuntary committal pursuant to the MHA.[118] While it is possible for a person to consent to his or her own CTO, if the person is found to be incapable of doing so the person's substitute decision-maker may consent to the CTO on the person's behalf.

A physician may issue or renew a CTO under section 33.1 of the *MHA* if:

a) during the previous three-year period, the person,

112 *Ibid* at s. 16.
113 *Ibid* at s. 17.
114 *Ibid* at s. 20(5).
115 *Ibid* at s. 20(4).
116 *Ibid* at s. 33.7.
117 *Ibid* at s. 33.3(1).
118 *Ibid* at ss. 33.1(4)(c)(i) and (iii).

i. has been a patient in a psychiatric facility on two or more separate occasions or for a cumulative period of 30 days or more during that three-year period, or

ii. has been the subject of a previous CTO under this section;

b) the person or his or her substitute decision-maker, the physician who is considering issuing or renewing the CTO and any other health practitioner or person involved in the person's treatment or care and supervision have developed a CTP for the person;

c) within the 72-hour period before entering into the CTP, the physician has examined the person and is of the opinion, based on the examination and any other relevant facts communicated to the physician, that,

i. the person is suffering from a mental disorder such that he or she needs continuing treatment or care and continuing supervision while living in the community,

ii. the person meets the criteria for the completion of an application for psychiatric assessment under subsection 15(1) or (1.1) of the *MHA* where the person is not currently a patient in a psychiatric facility,

iii. if the person does not receive continuing treatment or care and continuing supervision while living in the community, he or she is likely, because of mental disorder, to cause serious bodily harm to himself or herself or to another person or to suffer substantial mental or physical deterioration of the person or serious physical impairment of the person,

iv. the person is able to comply with the CTP contained in the CTO, and

v. the treatment or care and supervision required under the terms of the CTO are available in the community;

d) the physician has consulted with the health practitioners or other persons proposed to be named in the CTP;

e) subject to subsection (5) of the MHA (described below), the physician is satisfied that the person subject to the order and his or her substitute decision-maker, if any, have consulted with a rights adviser and have been advised of their legal rights; and

f) the person or his or her substitute decision-maker consents to the community treatment

plan in accordance with the rules for consent under the HCCA.[119]

A CTO expires six months after the date it is issued, unless it is renewed or terminated in accordance with the *MHA*. A CTO may be renewed for a period of six months at any time prior to its expiry and within one month after its expiry.[120]

Notably, the person who is being considered for a CTO, or who is subject to such an order, and that person's substitute decision-maker, if any, have a right to retain and instruct counsel and to be informed of that right.[121]

Use of Force

The *SDA* contains a special provision pertaining to the use of force. Specifically, section 50 of the *SDA* stipulates that a POA for personal care may contain one or more of the following provisions:

1. A provision that authorizes the attorney and other persons under the direction of the attorney to use force that is necessary and reasonable in the circumstances,

    i. to determine whether the grantor is incapable of making a decision to which the *HCCA* applies,

    ii. to confirm, in accordance with subsection 49(2) of the *SDA*, whether the grantor is incapable of personal care, if the POA contains a condition described in clause 49(1)(b) of the *SDA*, or

    iii. to obtain an assessment of the grantor's capacity by an assessor in any other circumstances described in the POA.

2. A provision that authorizes the attorney and other persons under the direction of the attorney to use force that is necessary and reasonable in the circumstances to take the grantor to any place for care or treatment, to admit the grantor to that place and to detain and restrain the grantor in that place during the care or treatment.

3. A provision that waives the grantor's right to apply to the CCB under section 32, 50 and 65 of the HCCA for a review of a finding of incapacity that applies to a decision to which the HCCA applies.[122]

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119 *MHA*, *supra* note 3 at s. 33.1(4).
120 *Ibid* at s. 33.1(12).
121 *Ibid* at s. 33.1(8).
122 *SDA*, *supra* note 1 at s. 50(2).

A POA for personal care may contain one or more of the above provisions, but such a provision is not effective unless both of the following circumstances exist:

1. At the time the POA was executed or within 30 days afterwards, the grantor made a statement in the prescribed form indicating that he or she understood the effect of the provision and of subsection 50(4) of the *SDA*, and

2. Within 30 days after the POA was executed, the assessor made a statement in the prescribed form,

    i. indicating that, after the POA was executed, the assessor performed an assessment of the grantor's capacity,

    ii. stating the assessor's opinion that, at the time of the assessment, the grantor was capable of personal care and was capable of understanding the effect of the provision and of subsection 50(4) of the *SDA*, and

    iii. setting out the facts on which the opinion is based.[123]

The force provisions are subject to any condition and restriction contained in the POA that is consistent with the *SDA*.[124]

CONCLUSIONS

Depending upon the legislative scheme at hand, a person may have different rights and obligations. For example, as described above, a person found to be incapable of managing property under the *MHA* is entitled to rights advice,[125] while a person found incapable of managing property under the *SDA* for the purposes of assessing whether the PGT should be the person's statutory guardian of property will not receive such rights advice, and instead will receive a copy of the certificate of incapacity and will be informed by the PGT of the right to apply to the CCB.[126]

Furthermore, there are other legislative provisions that frequently come into play in the context of an individual found to be lacking requisite capacity for a given decision based on mental health issues. For example, Ontario's *Personal Health Information Protection Act, 2004* involves, *inter alia*, the collection, use and disclosure of personal health information, which is frequently implicated in situations involving lack of decisional capacity and mental illness.

123 *Ibid* at s. 50(1).
124 *Ibid* at s. 50(4).
125 *Ibid* at s. 59.
126 *Ibid* at s. 16(4) and (6).

Ultimately, while an exhaustive review of mental health and the law in Ontario is beyond the scope of this chapter, the above legislative overview demonstrates how detailed and complex mental health legislation can be, and gives an indication of the key provisions that may be significant to attorneys and grantors in the context of a POA. For more detailed information on Guardianship, see WEL 2015 publication, Whaley Estate Litigation on Guardianship.[127]

127 Whaley Guardianships, Whaley Estate Litigation on Guardianship

CHAPTER 15: CONSIDERATIONS FOR LAWYERS DRAFTING POWERS OF ATTORNEY

By: Krystyne Rusek

This chapter provides advice to lawyers who are retained to prepare powers of attorney ("**POAs**") for personal care and/or property.

OVERVIEW

A lawyer retained to prepare powers of attorney for a client has the onerous burden of ensuring that the client's wishes are carried out, while protecting both the lawyer and the client from future litigation relating to the POA. This chapter will set out the areas of concern for the drafting lawyer and how these concerns may be practically addressed.

The WEL checklist "Guidelines and Best Practices for the Estate Planning Lawyer" is included in chapter 16 and sets out issues and questions to be considered when acting for a client in the preparation of estate planning documents.

PROFESSIONAL OBLIGATIONS

The drafting solicitor is under a duty of care to ensure that the POA reflects the grantor's true intentions, and to minimize any adverse circumstances that result in the POA being invalidated or misused. This duty imposes an obligation to do more than just receive instructions and prepare documents.

In this ever more litigious environment, the drafting lawyer must be attuned to the risks of suits involving challenges to the POA based on incapacity or undue influence, as well as suits involving misuse or abuse of the power of attorney.

Simultaneously, the lawyer must protect herself against claims of negligence, whether in the context of one of the aforementioned claims, or in an entirely separate claim.[1]

As a preliminary concern and as in all areas of practice, the lawyer must satisfy the obligations under our governing rules.

The Law Society's *Rules of Professional Conduct* impose strict requirements on the drafting solicitor, with respect to professional obligations to the client, including but not limited to:

- Competence in the subject area of estate planning (r. 3.1-1)
- Scope of retainer (r. 3.2-1A)
- Clients with diminished capacity (r. 3.2-9) and medico-legal reports (r. 3.2-9.1)
- Confidentiality (r. 3.3-1)
- Conflicts of interest in representing multiple family members in estate planning (r. 3.4)
- Joint retainers by spouses (r. 2.04(6) and 3.4-5)

TAKING INSTRUCTIONS

In taking instructions from the client with respect to POA documents, there are a number of preliminary issues for the lawyer to consider:

1. Ascertaining who the client is and the scope of the retainer;
2. Assessing the client's capacity to provide instructions and to give and revoke a power of attorney;
3. Assessing the client's volition and identifying any indicia of undue influence or suspicious circumstances;
4. Purpose of the power of attorney and selection of attorney.

1. Client and Retainer

Where possible, instructions should be obtained directly from the client. Where a client has authorized the lawyer to accept instructions from another person, the lawyer should still review

1 *See Barbulov v. Huston* 2010 ONSC 3088 (CanLII), wherein the plaintiff claimed that the power of attorney for personal care did not reflect his father's wishes (the claim was dismissed on the grounds that no duty of care was owed to the son).

those instructions with the client at the subsequent appointment.

As part of this initial step, the solicitor must assess whether the client has capacity to instruct counsel. The factors in this assessment are set out and discussed in chapter 6. In the case of giving instructions for POAs, a client needs to understand what he is asking the lawyer to do and the options available, as well as the pros and cons of these options. The client must also understand and appreciate that the lawyer represents the client and has a duty to the client. Lastly, the client must understand and appreciate the contractual nature of the retainer agreement, including fees to be paid.[2] Where the client has a language barrier or other difficulty in communication, a lawyer has an obligation to accommodate that client, either by the use of an independent interpreter or assistive device.

When in doubt about a client's capacity, or who is actually giving instructions, a lawyer is entitled to refuse the retainer. The retainer is usually the very basis of the relationship between a solicitor and a client. Hence, insofar as the client is concerned, the absence of a retainer will usually be determinative, and no duty of care will arise in respect of the preparation of a will. It is simply a matter of common sense that there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform.[3]

However, once the retainer is accepted, it is important to ensure that all steps necessary to protect the client and the lawyer are taken.

2. Capacity to Give and Revoke a POA

As discussed in chapter 6, capacity is decision-specific, time-specific and situation-specific. The capacity to grant or revoke a POA must therefore be assessed within the context of each appointment with a client. A client may be capable at the time instructions are given, but no longer capable at the time the document is ready to be reviewed and signed.

As stated, while there is no presumption of capacity to make a POA in the *Substitute Decisions Act* (the "***SDA***"),[4] a person is entitled to rely upon the presumption of capacity unless there are reasonable grounds to believe that capacity is lacking. Notwithstanding this, a drafting solicitor has an obligation to satisfy herself that the client has capacity to give instructions for and execute a POA.[5] This is especially true when the client is elderly or infirm or in cases where the client intends

2 See Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0; and Clare Burns & Anastasja Sumakova , LSUC, *Compelling Capacity and Medical Evidence*, October 2015 at p.40.
3 *Hall v. Bennett Estate*, 2003 CanLII 7157 (ON CA).
4 1992 S.O. 1992, c. C.30.
5 *Ibid.*

to make a significant change to previous documents.

As well, there is no single definition of capacity, but rather factors to be considered in assessing particular decisional capacity. A solicitor must know the factors to be considered and apply them at each encounter with the client. For ease of reference, the factors are:

1. Knowledge of what kind of property he or she has and its approximate value;
2. Awareness of obligations owed to his or her dependants;
3. Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
4. Knowledge that the attorney must account for his or her dealings with the person's property;
5. Knowledge that he or she may, if capable, revoke the continuing power of attorney;
6. Appreciation that unless the attorney manages the property prudently its value may decline; and
7. Appreciation of the possibility that the attorney could misuse the authority given to him or her.

Some solicitors find the use of checklists to be beneficial. Ultimately, it is the lawyer's judgment that must prevail in determining if a client has the requisite capacity.

The following are some indicators that a client may not have capacity to provide instructions for and sign a power of attorney:

- Intellectual impairment
- Memory deficits
- Disorientation
- Poor attention
- Delusions, paranoia or other distortions of reality
- Unresponsiveness or inability to make a decision
- Decisions that are not supported by reasonable explanations

As well, while not indicators of incapacity, the following factors may increase the standard of inquiry required of the drafting lawyer:

- Advanced age
- History of significant medical problems or reliance on numerous medications
- Recent emotional or psychological issues

Where a solicitor has any doubts as to whether a client has capacity to provide instructions for and execute a POA, it is highly recommended that a formal capacity assessment be obtained. Often, to avoid the costs of a formal assessment, solicitors may seek a medical opinion letter from the family physician. This practice should be discouraged where reasonable. First, the assessment of capacity is based not on medical factors, but on statutory factors and it is unlikely that a physician will apply the statutory factors in a comprehensive manner. Second, should litigation arise, it is likely that the medical records upon which the opinion was based may be called into evidence. A formal assessment, done by a designated capacity assessor, will give the drafting solicitor peace of mind and will also be persuasive evidence to a court in the event of litigation. The request should come from the lawyer and the purpose for which the assessment is required should be stated.

3. Volition and Undue Influence

Undue influence may be found where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power.[6]

The drafting lawyer must ensure that the client is freely giving his own instructions and is not being unduly influenced by any party to give the power of attorney. In order to do so, the drafting solicitor must be aware of the indicia of undue influence as well as evidence of suspicious circumstances.

This inquiry can often be done in the form of preliminary, general conversation. The grantor may be asked about his health and living situation. The grantor should be asked the purpose of the appointment and of the documents to be prepared. If there are changes being made to existing documents, the grantor should be questioned in detail about the reasons for same.

The following are some suspicious circumstances that might give rise to undue influence:

- advanced age

6 *Dymterko Estate v. Kulikovsky*, (1992) CarswellOnt 543 (SC).

- history of significant health issues and/or reliance on medications
- physical or emotional dependency of the grantor on the attorney
- social isolation
- recent bereavement
- family conflict
- instructions that are inconsistent with prior POAs
- verbal instructions or written instructions provided by a party other than grantor
- grantor accompanied by another person, who indicates a desire to be present throughout appointment
- recent amendments to testamentary documents
- recent transfer of property for nil or nominal consideration

Where there are indicia of undue influence, a solicitor is under a higher degree of care and inquiry with respect to ascertaining the grantor's intentions.[7]

4. Purpose of a POA and Selection of Attorney

In the case of a power of attorney for property, a lawyer must review the reasons that a grantor is making the POA. If the intention is that it be used for a specific transaction or for a specific period of time, a limited power of attorney may be appropriate. Where planning for future incapacity or physical inability to manage property, a continuing power of attorney for property will be the vehicle of choice.

In discussing the choice of attorney, the drafting lawyer should discuss:

1. Residence of the attorney and proximity to the grantor;
2. Time commitment required of the attorney;
3. Knowledge and skills required;
4. Family dynamics;

7 *Hussy v. Parsons* 1997 CanLII 15988 (NL SCTD); *Walman Estate v. Walman,* 2015 ONSC 185; *Gironda v. Gironda*, 2013 ONSC 6474).

5. Consistency of the grantor's and attorney's values and beliefs regarding medical and end-of-life decisions; and

6. Potential for deadlock in decision-making.

DRAFTING THE POWERS OF ATTORNEY

Careful drafting is essential. Typographical errors, misspelled names, and errors in paragraph numbering or reference can all lead to ambiguity in the interpretation of a POA. Where there are existing POAs to be amended, it is often helpful to review these in order to compare the spelling of names and specific instructions.

Have the final draft read over at least twice, by different people, to catch these types of mistakes. As well, where appropriate, send the grantor a draft for review. Make sure that the document is locked for editing and watermarked with "draft" so that it cannot be changed or executed without further communication.

1. Effective Date

As discussed in chapter 5 of this book, powers of attorney for personal care only take effect upon the incapacity of the grantor. In contrast, as discussed in chapter 4, depending upon the wording, a CPOAP may take effect upon execution or upon the occurrence of a triggering event, such as a finding of incapacity pursuant to a formal assessment, a letter of opinion from the family physician or lawyer, or written instructions from the grantor. Discuss with your client whether any of these options is appropriate.

Often, where a client has selected a single attorney to act alone, it may be in the client's best interests to require some independent evidence of incapacity before the POA may be used. However, it is important to also consider the costs and potential delay involved in obtaining this independent evidence. Another option is for the client to leave the POA with the drafting solicitor, with specific instructions to release the document pursuant to written instructions. This unfortunately puts the drafting lawyer in the difficult position of being responsible for both retention of the power of attorney and controlling access to it.

2. Appointment of Trust Companies

With the increasing incidence of POA litigation, it is important to discuss with your client the option of appointing a trust company as the attorney for property, either alone or in conjunction with a

family member or friend.

Clients are often concerned about the anticipated cost of having a trust company act as attorney, however these concerns must be weighed against other factors such as:

- Potential family disputes
- Age of intended attorney
- Size and complexity of assets

Many trust companies have a formal compensation agreement that must be attached to a POA for property and as a result, the trust company will need to be contacted in advance of the execution of the power of attorney.

3. Single Attorney or Multiple Attorneys

Obviously, it is advisable to have your client appoint an alternate attorney, or where appropriate, a "co-attorney". This prevents the POA from lapsing in the event of the attorney being unable or unwilling to act. It also allows for oversight of activities undertaken by an attorney in regard to the grantor's property.

4. "Jointly" versus "Jointly and Severally"

Where appointing more than one "original" attorney, the grantor must decide if the attorneys will act "jointly" or "jointly and severally". This will often depend on the grantor's level of trust with each attorney; if the grantor is confident that each attorney is responsible enough to act alone, and the potential for misuse of the POA is minimal, the grantor may prefer to allow the attorneys to act separately. This will provide flexibility and efficiency in the use of the power of attorney. However, it may also open the door to potential misuse or abuse of the POA by eliminating the checks and balances of having two separate individuals act together.

Additionally, the appointment of multiple attorneys to act jointly may result in deadlock, and possible litigation, in the event that the attorneys cannot agree on a course of action. Where more than two attorneys are appointed to act jointly, it is generally recommended that a "majority rules" clause be incorporated into the POA.

5. Specific Instructions

POAs, whether for property or personal care, are often considered an "add-on" to the preparation of a will for a client. They are often prepared in accordance with the solicitor's standard template and rarely is there any customization of either of these documents.

The case of *Freidberg et al. v. Korn*[8] highlights the problems that arise in the use of boiler-plate clauses with respect to "end-of-life" clauses in POAPCs. In this case, a no "artificial or heroic" measures clause had been included in the power of attorney signed by Mrs. Freidberg. The lawyer's evidence was that this clause had not been reviewed in detail with the client. The Superior Court of Justice overturned the finding of the Consent and Capacity Board, holding that there was insufficient evidence to establish that the grantor understood the effect of the clause or knew and approved of the power of attorney.

While the use of templates and precedents can be a cost-effective and appropriate tool, solicitors are urged to tailor the POA to the client's wishes by obtaining detailed instructions and having thorough discussions with the client.

i) <u>POAPC</u>

While Living Wills are not yet common, nor binding, in Ontario, it is possible to include in the POA specific instructions to reflect the grantor's wishes. Specific instructions to be canvassed with the client can include:

- "End-of-life" or "no heroic measures" clauses
- Specific cultural or religious requirements in medical treatment
- Requirement for written evidence of incapacity

ii) <u>CPOAP</u>

It is also possible to include specific instructions within a CPOAP, to reflect the grantor's intention. Some possibilities to consider are:

- Conditions regarding the sale of real property
- Powers and restrictions on borrowing funds

8 2013 ONSC 960.

- Powers and restrictions on making gifts or loans to family members or friends, including the ability to transfer property into joint ownership
- How joint accounts are to be administered and used
- Provision for financial support of family members
- Power to delegate investment management to a qualified third party professional
- Power to undertake "estate" planning transactions such as estate freezes or settling/varying inter vivos trusts
- Power to seek advice or to appoint agents for limited functions
- Limitations on revocation of prior POAs (e.g. in other jurisdictions or in shareholder agreements) to allow them to continue

6. Compensation

Under the *SDA*, an attorney for property is entitled to compensation for acting as attorney, in accordance with a specified tariff. A grantor may wish to compensate the attorney at a different rate than prescribed and the drafting lawyer should include a clause to reflect this, or attach a compensation agreement as a schedule to the POA. In some cases, the grantor may wish to have the attorney accept no compensation except for out-of-pocket expenses. The drafting lawyer should advise the grantor that the attorney may not accept the appointment, in light of the lack of compensation, and that any attorney for property may apply to the court for increased compensation in cases where the extent and value of services merits the increase.

Unlike an attorney for property, an attorney for personal care is not statutorily entitled to compensation under the *SDA*. Given the case law in Ontario permitting compensation of attorneys for personal care in certain situations,[9] the drafting lawyer may wish to canvas the idea of compensation for the attorney. The POA would need to specifically state the entitlement and the basis on which it will be calculated, such as an hourly rate. In most cases, it is appropriate to at least provide for reimbursement of out-of-pocket expenses of the attorney for property.

7. Recognition in Other Jurisdictions

A POA prepared in Ontario may not be recognized in a foreign jurisdiction, either because it does

9 See *Re Brown*, 1999 CarswellOnt 4628; *Kiomall v. Kiomall*, 2009 CarswellOnt 2246; *Cheney v. Byrne (Litigation Guardian of)*, 2004 CarswellOnt 2674.

not follow the formalities or because there is a statutory regime in place. The drafting solicitor should review with any client who holds assets in another jurisdiction, or travels often to another jurisdiction, the option of making a POA specific to that jurisdiction, or preparing an Ontario power of attorney that satisfies the requirements of said jurisdiction.

Some jurisdictions will recognize a POA so long as it meets the formal requirements of the jurisdiction in which the grantor resides, while others require that it satisfy the formal requirements of the jurisdiction in which it was made.

Even where an Ontario POA may be recognized in a foreign jurisdiction, for certain transactions, such as those involving real estate, some countries require that a power of attorney for property be "legalized" before it is effective.

EXECUTION

It is the responsibility of the drafting lawyer to ensure that the client understands and approves the contents of the POA prior to executing the document. The lawyer should have the client read over the document carefully and check the spelling of all names. Each clause should be read by the client and explained by the lawyer. Errors in the documents, such as typographical errors, misspelled names and paragraph numbering and references can be corrected by hand and initialled by the grantor. Once the client has approved the final version of the POA, the lawyer must ensure that the formal requirements of execution are satisfied.

Specific issues may arise with respect to approval and execution of the power of attorney:

1. Language Barriers

Where the grantor is not comfortable with the English language, an independent interpreter should be used to translate the text of the documents, the explanation by the lawyer, and any questions posed by the grantor. Powers of attorney that have been executed pursuant to translation should state this in the signature block.

2. Visual Disabilities

Where the grantor is not able to read, the document must be read aloud to the grantor and the signature block amended accordingly.

3. Inability to Sign

Where a grantor does not have the ability to sign his or her name, there are a number of options. If the grantor can write initials, this will be sufficient to act as a signature. If the grantor can mark an "X", the signature block needs to be amended to reflect this.

4. Video Recording

In certain situations, such as where family conflict may arise, a video recording may be advisable to support capacity, knowledge and approval, and to rebut claims of undue influence. This would include situations where it is likely that the power of attorney will be challenged where a document has been translated or read aloud to the grantor or where the grantor signs with an "X". Any video recording must be uninterrupted and unedited.

As well, a video recording can be made of the reading of the document to the grantor and the grantor's verbal agreement.

NOTES TO FILE AND REPORTING

1. Notes

The issue of proper notes to file has been discussed above, but it cannot be emphasized enough that detailed, contemporaneous notes protect both the client and the lawyer. For most people, it is almost impossible to remember with any certainty the details of a conversation that occurred a number of years prior.

First and foremost, notes should be dated. It is also recommended that the lawyer note the start and end time of the appointment. The demeanor of the grantor and ability to communicate should be noted. The notes should record who was present and whether the presence of a third party was at the request of the grantor. The notes should record the nature of the discussion.

It is essential that a solicitor take detailed notes in regard to the questions asked in the assessment of capacity. In the absence of a formal capacity assessment, solicitor notes may be determinative to the issue of capacity.[1] Notes should also be made with respect to specific instructions given by the grantor and any questions asked by the grantor. In the case referred to above of *Freidberg v. Korn*, the lawyer's lack of specific notes with respect to the "end-of-life" clause, combined with her inability to recollect the discussion, were significant factors in the finding that the "end-of-life"

1 *Egli v. Egli*, 2005 BCCA 627 (CanLII).

clause in the power of attorney did not constitute a prior capable wish.

Notes should be made on the draft copy of amendments required, or concerns expressed by the grantor. The practice of keeping the noted-up draft is recommended. Some solicitors find checklists to be beneficial. This practice is highly recommended in that a solicitor's "usual practice" will be under scrutiny in the event that litigation over the POA arises.

> The time required for making, reviewing, and rectifying or adding to notes should be factored into the fee to be charged to the client. In the event of litigation, production of these notes will almost certainly be ordered and both the notes and the solicitor will be subject to intense scrutiny as part of examinations and/or a hearing. Solicitor notes also offer some protection against negligence suits.

2. Reporting Letters

A detailed reporting letter is another safeguard against claims of negligence against drafting solicitors. Your reporting letter should:

- Confirm the general instructions as to ability of attorney to act jointly or "jointly and severally"
- Confirm instructions regarding effective date
- Set out the compensation structure
- Confirm any specific instructions
- Reiterate the potential for misuse and abuse
- Confirm whether the grantor received original copies and how many
- Recommend a regular review of the power of attorney to ensure that it continues to reflect the grantor's situation and intentions

CONCLUSION

Powers of Attorney are powerful documents that often place a spotlight on drafting solicitors when they are subject to litigation. As such, it is important for drafting solicitors to be diligent in ensuring that a POA reflects the grantor's wishes while protecting the lawyer and the client, to the extent possible, in any future litigation.

CHAPTER 16 – WEL CHECKLISTS

CHECKLIST # 1 - GUIDELINES AND BEST PRACTICES FOR THE ESTATE PLANNING LAWYER

1. Interview the client alone.

2. Take comprehensive and contemporaneous notes - record the questions asked and the answers given. Include observations about your client's condition and notes on any discussions you had with caregivers or family members regarding the client's medical condition.

3. Ask probative, open-ended questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document.

4. Determine intentions – consider evidence of intention and indirect evidence of intention.

5. Obtain comprehensive information from the client, which may include information such as:

    a. Intent regarding testamentary disposition / reason for appointing a particular attorney or to write or re-write any planning documents; and

    b. Any previous planning documents and their contents, and copies of them.

6. Determine relationships between the client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context).

7. Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step other and dependants.

8. Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest or of attorneys named in a power of attorney, seem rational in the circumstances?

9. What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Joint bank accounts? Debts? Loans? Mortgages? Etc.

10. Is the client making a marked change in the planning documents are compared to prior documents?

11. Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

12. Does the client have a physical impairment of sight, hearing, mobility or other?

13. Have there been any recent changes in the planning documents in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

14. Have numerous succession planning documents of a similar nature been made by this client in the past?

15. Has the client made any gifts? If so, in what amount, to whom and what was the timing of any such gifts?

16. Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

17. Has the client had any recent significant medical events?

18. Overall do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

19. Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?

20. Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

21. Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

22. Undue Influence: Take note of any indicators of undue influence, although be mindful of the distinction that exists between capacity and undue influence:

    a. Is the client physically dependant on another or is the client vulnerable?

    b. Is there an individual who tends to come with your client to his or her appointments or is in some way significantly involved in his or her legal matter? If so, what is the nature of the relationship between this individual and your client?

    c. Is your client well supported? Supported by only one family member or more? Is there a relationship of dependency between the client and a family member?

    d. Is there conflict within your client's family?

    e. Is your client isolated from familial support? Does s/he benefit from some other support network?

    f. Is the client independent with respect to personal care and finances, or does s/he rely on one particular individual, or a number of individuals? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

    g. Based on conversations with your client, his/her family members or friends, what are his or her character traits?

    h. Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

    i. If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sough; whether the client was alone with his or her lawyer while providing instructions; who were the witnesses to the document and why those particular witnesses were chosen.

    j. Is the client requesting to have another individual in the room while giving instructions or executing a planning document, and if so, why?

    k. In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling or to have a genuine interest in

implementing the grantor's intentions?

l. Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

m. Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?

n. Have any previous lawyers seemed overly or personally involved in the legal matter in question?

o. Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play; and

p. Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer.

CHECKLIST # 2 - CONSIDERATIONS FOR POWERS OF ATTORNEY AND THE ELDERLY

Anyone dealing with individuals and power of attorney documents (lawyers, health care providers, financial advisors, and attorneys themselves) should be aware of the special considerations that exist with older adults. Our population is ageing rapidly, and the statistics confirm that with longevity comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders, and other conditions involving reduced functioning and capability.

There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerability and dependency. Factors affecting capacity include: normal aging, disorders such as depression, which are often untreated or undiagnosed, schizophrenia, bipolar disorders, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction. These sorts of issues unfortunately invite opportunity for elder abuse, and exploitation, including misuse and abuse of power of attorney ("**POA**") documents.

Below are some "red flags" or considerations when dealing with older adults and POA documents, including indicators of incapacity, undue influence, and financial abuse.

General concerns or red flags regarding an older adults incapacity, vulnerability and susceptibility to abuse:

- ✔ The client suffers from memory loss, disorientation, confusion.
- ✔ The client has difficulty speaking or communicating.
- ✔ The client does not appreciate the consequences of the decisions he or she is making.
- ✔ The client refuses to follow appropriate advice.
- ✔ He or she shows confusion over recent transactions, or is concerned that money is missing (when it is not).
- ✔ They are socially isolated.
- ✔ There is a conflict in the family or amongst family members.
- ✔ Is your client going through a recent bereavement?
- ✔ Is he or she dependant on another person for care?

- ✔ Is there an adult child or spouse dependant on your client for financial help (i.e. is someone living with them rent free, is the older adult buying all their food etc.)?
- ✔ Does the older client or adult dependant abuse alcohol or drugs?
- ✔ Does the client suffer from depression or anxiety?
- ✔ Do they have an unusual fear of, or sudden change in feelings about a particular person or group of people?
- ✔ Does your client now appear to be unable to understand simple instructions or financial concepts which he or she was able to understand previously (be aware that physical and cognitive impairments such as diminished mental capacity may appear suddenly in clients)?
- ✔ Has there been a sudden change in appearance or poor hygiene, or displays of behaviour that are out of character?
- ✔ Are they always accompanied by a caregiver who is over-protective or dominating?
- ✔ Has the client's mailing address been changed to an unfamiliar or unexplained address?
- ✔ Has there been a change in the client's ability to perform activities of daily living, including self-care, daily finances, or medication management?

Concerns with respect to POA documents and potential abuse or misuse:

- ✔ Be aware of predatory or otherwise inappropriate recommendations or advice from an attorney under a POA document, especially if it looks like they are taking advantage of vulnerable older adult clients or improperly instilling fear about choices being made.
- ✔ Be alert if the client appoints an attorney who appears to be inappropriate to the advisor (someone they barely know, a stranger, etc.).
- ✔ Has the client made any indication that he or she may have been forced or unduly influenced to execute the POA document in favour of the attorney (e.g., "I didn't really want him as my attorney but he is so good to me and I don't want to upset him")?
- ✔ What is the attitude of the attorney with respect to the grantor and his or her personal care decisions or property decisions?

- ✔ Does the attorney appear to be controlling, or have a genuine interest in respecting the grantor's intentions?
- ✔ Has your client's financial activity changed once an attorney under a POA document takes over? Is it in line with the investor's stated financial goals?
- ✔ Are unusual cheques or withdrawals being made on the older adult's account?
- ✔ Trust your gut, does something 'fishy' seem to be happening?
- ✔ Is the attorney overprotective and/or keeping the older adult isolated?
- ✔ Double check that the POA document itself is properly witnessed and executed.

CHECKLIST # 3 - CONSIDERATIONS FOR GRANTORS

Below are some considerations for grantors when executing a power of attorney ("**POA**") document:

Power of Attorney for Property Considerations

✔ Do you have a power of attorney for property? If not, why not?

If you already have a POA for property remember executing a new POA terminates any previous POA for property documents you may have.

✔ Have your considered consulting a lawyer before executing your POA document?

✔ If you are executing a POA document for property, is it a *continuing* POA for property document?

✔ Are you mentally capable of granting a power of attorney for property?

Pursuant to section 8 of the *Substitute Decisions Act* ("***SDA***"), to be capable of granting a continuing power of attorney for property, a grantor requires the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

✔ Do you have a "triggering" mechanism in your POA document for when your attorney may begin to act on your behalf?

✔ Do you want to impose any conditions or restrictions on the decisions your attorney may make?

✔ Do you have two witnesses for your POA document?

Are the witnesses at least 18 years of age and NOT

- your spouse or partner, child, or someone the you treat as a child,
- the attorney, or attorney's spouse or partner,
- anyone who is not mentally capable of managing their property or making their own personal care decisions?

✔ Is anyone unduly pressuring you into making them your attorney for property?

✔ With respect to your choice of attorney for property:

- Is the person at least 18 years of age?
- Are they mentally capable to be an attorney for property?
- Is the person willing to act as your attorney?
- Have you known this person long enough to know his or her personality and character traits?
- Is this person good at handling finances?
- Will they make sure you are provided with everything that you need to live comfortably?
- Do they have the values of honesty, integrity and accountability?
- Are they trustworthy, reliable and responsible?
- Will they respect your privacy? They will become privy to a lot of information about your finances. Will they be able to keep your confidence?
- Do they have any of their own financial troubles (bankruptcy, etc.)?
- Do they have time and are they available to handle their own finances as well as yours?
- Are they easy to contact?
- Do they understand their responsibilities as an attorney?
- Also, most importantly, can you trust them not to misuse your money and will they make prudent financial decisions?

✔ If you are choosing multiple attorneys are they acting "jointly" or "jointly or severally"?

✔ Do you have a substitute attorney in case your attorney becomes incapable or chooses not to act?

✔ Once you've executed the POA document, have you given a copy to your attorney, financial advisor, bank or anyone else who may need a copy in the future?

Power of Attorney for Personal Care Considerations

✔ Do you have a POA for personal care document? If not, why not?

If you already have a POA for personal care remember executing a new POA terminates any previous POA for personal care documents you may have.

✔ Have your considered consulting a lawyer before executing your POA document?

✔ Are you mentally capable of granting a POA for personal care?

Pursuant to section 47 of the *SDA*, to be capable of granting a power of attorney for personal care, a grantor requires the following:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.

✔ Do you want to impose any conditions or restrictions on the type of personal care decisions that the attorney can make?

✔ Do you have two witnesses for your POA document?

Are the witnesses at least 18 years of age and NOT

- your spouse or partner, child, or someone the you treat as a child,
- the attorney, or attorney's spouse or partner,
- anyone who is not mentally capable of managing their property or making their own personal care decisions?

✔ Is anyone unduly pressuring you into making them your attorney for personal care?

- ✔ With respect to your choice of attorney for personal care:
    - Is this person willing to act as your attorney?
    - Have you known this person long enough to know his or her personality and character traits?
    - Is this person willing to talk with you about personal care issues and understand your goals, values, and beliefs?
    - Are they willing to honour and follow your wishes as much as possible?
    - Are they willing to be available and understand your personal care needs?
    - Are they comfortable and willing to ask questions of your medical care providers and talk to your doctors and healthcare team?
    - And most importantly, are they able to make hard decisions?
- ✔ If you are choosing multiple attorneys are they acting “jointly” or “jointly or severally”?
- ✔ Do you have a substitute attorney in case your attorney becomes incapable or chooses not to act?
- ✔ Once executed, have your given a copy to your attorney and kept a copy in a safe place?

CHECKLIST # 4 - CONSIDERATIONS FOR HEALTHCARE PROVIDERS

Healthcare providers must be cognizant of clients who may or may not be capable with respect to personal care decisions, including decisions regarding treatment and admission to long-term care facilities.

Health practitioners (including doctors, nurses, dentists, physiotherapists, occupational therapists, psychologists, and psychiatrists, etc.) cannot treat a patient without consent. Under the *Health Care Consent Act* ("***HCCA***")[1] if the health practitioner seeks consent to treatment, admission to a care facility, or to provide personal assistance services, then the health practitioner (or evaluator) must first determine if a patient is capable in respect to the particular type of decision to be made (treatment, admission, personal assistance services). Only then, if the health practitioner believes that the person is incapable in respect to the decision to be made, can the health practitioner turn to a substitute decision-maker, including potentially an attorney under a power of attorney (POA) for personal care.

Below are some specific considerations for healthcare providers and POA for personal care documents:

Is Your Patient / Healthcare Client Capable of Making Personal Care Decisions?

✔ The factors to be applied in order to establish whether there is requisite capacity to make personal care decisions are found at section 45 of the *Substitute Decisions Act* ("***SDA***"):[1]

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety. The factors to be applied for determining the capacity required for managing personal care are:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

1 1996 S.O. 1996, c.2 Sched. A.

- ✔ With respect to consent to treatment:

  Under the *HCCA* section 4 (1),

  A person is capable of consenting to a treatment if the person is able to:

  (a) "understand" the information that is relevant to making a decision about the treatment, and

  (b) "appreciate" the reasonably foreseeable consequences of a decision or lack of decision.

- ✔ A person who is sixteen years of age or older is presumed to be capable of making personal care decisions, including treatment decisions, unless reasonable grounds to suspect incapacity exist.

- ✔ As there are various tasks that are covered by "personal care", a person may be capable with respect to one of more personal care decisions, and not capable with respect to others.

- ✔ Capacity to make personal care decisions can only be assessed by a qualified assessor, as defined under the *SDA* and the applicable regulations. Unless an assessment is ordered by a court, an individual has the right to refuse to be assessed.

- ✔ Capacity to consent or refuse treatment must be assessed by the health practitioner proposing the treatment.

Considerations When You Are Presented with a Power of Attorney for Personal Care:

- ✔ Is the document signed by the grantor?

- ✔ Does the signature match any signature you may have on file for the grantor?

- ✔ Is the document witnessed by two witnesses?

- ✔ Are the witnesses at least 18 years of age and NOT

  1. The grantor's spouse or partner, child, or someone the grantor treats as a child,
  2. The attorney, or the attorney's spouse or partner,
  3. Anyone who is not mentally capable of managing their property or making their own personal care decisions?

✔ Is the attorney at least 16 years old and NOT:

1. the grantor's health care provider (unless that person is a spouse, partner or relative of the grantor); or
2. a person who provides residential, social, training or support services for compensation, unless that person is the grantor's spouse, partner or relative.

✔ Do you have another POA on file for this client/patient? Make sure you are relying on the most recent and valid POA document (remember executing a new POA terminates any previous POA document).

✔ Are there any conditions or restrictions in the POA document? For example, a grantor may decide that he or she wants an attorney in a POA for personal care to make other personal decisions for him or her, such as decisions about nutrition, safety, clothing, but NOT decisions in respect to health care or treatment.

Make sure you see a copy of the POA document to determine if the attorney has the authority to make the decision rather than just relying on the attorney's assertions.

✔ Is there more than one attorney? How do they exercise their powers? Jointly? Severally? Or by majority?

✔ Do you have the contact information for the attorney or attorneys?

✔ Remember a power of attorney for personal care only becomes effective when an individual becomes mentally incapable of making some or all of his or her personal care decisions.

✔ Under the *SDA*, a provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if,

(a) the HCCA applies to the decision and that Act authorizes the attorney to make the decision; or

(b) the HCCA does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from making the decision unless the fact that the grantor is incapable of personal care has been confirmed.

- ✔ Sometimes, the decision that a person is mentally incapable is not up to the attorney or anyone else the grantor names. Instead a health care professional will decide whether the patient is mentally incapable. This happens in situations concerning the patient's:

    1. Health treatment;
    2. Admission to a long-term care facility; or
    3. Need for personal assistance services, such as bathing and eating, while individual is in a long-term care facility.

    This means an attorney or other substitute decision-maker cannot make treatment decisions unless a health practitioner first decides that the patient is incapable of making them themselves.

    These decisions may be reviewed by the Consent and Capacity Board.

- ✔ Before a healthcare provider can take consent or refusal from an attorney under a power of attorney for personal care, first:

    1. Determine if the patient is mentally capable or not in respect to the decision to be made (treatment, admission to long term care, personal assistance services);

    2. If the patient is incapable, determine if there is a guardian of the person with authority to give or refuse consent in priority to the attorney (guardians have priority over attorneys under the *HCCA*);

    3. If there is no guardian of the person with authority to give or refuse consent, determine:

        i. If the attorney is an attorney in a POA for personal care as opposed to a POA for property;

        ii. If there is a POA for personal care, whether the attorney has the authority to give or refuse consent to treatment, admission, personal assistance services, depending on the type of decision that needs to be made;

        iii. Whether the attorney meets the requirements for a substitute decision maker under the *HCCA* s.20(2) (see next point).

✔ Check to ensure that the attorney meets the requirements to be a substitute decision maker under *HCCA* s.20(2):

1. Capable in respect to the treatment proposed for the incapable person?
2. At least 16 years old (unless he or she is the incapable person's parent)?
3. Not prohibited by a court order or separation agreement from having access to the patient or of giving or refusing consent on his or her behalf?
4. Available and willing to assume the responsibility of giving or refusing consent?

If not, then the health practitioner must turn to the next person on the list in highest priority that meets these qualifications under the *HCCA*

CHECKLIST # 5 - CONSIDERATIONS FOR FINANCIAL ADVISORS

All financial advisors and planners, at some point in their careers, will be faced with dealing with power of attorney ("**POA**") for property documents. It is important that financial professionals be informed and understand the use and possible misuse of these powerful documents. Financial professionals must also be alert to the possibility of fraudulently obtained POA documents and the risks to the older adult, the cognitively impaired, the vulnerable, the dependant, and the incapable. Fraudulently obtained or fraudulently used documents can wreak havoc for grantors and third parties alike. To that end, we advise everyone when dealing with powers of attorney to be cautious and vigilant, to make enquiries, and to be constantly aware of both the risks and benefits that attach to the preparation and use of a POA document. Below are some special considerations for those in the financial industry with respect to POA documents.

Considerations When Presented with a POA for Property Document:

- ✔ Is the document signed by the grantor?
- ✔ Does the signature match the signature of the grantor you have on file?
- ✔ Is the document witnessed by two witnesses?
- ✔ Are the witnesses at least 18 years of age and NOT
    - the grantor's spouse or partner, child, or someone the grantor treats as a child;
    - the attorney, or attorney's spouse or partner;
    - anyone who is not mentally capable of managing their property or making their own personal care decisions.
- ✔ Is it a *general* or a *continuing* POA for property (i.e. can the attorney act for the grantor even if the grantor is mentally incapable)?
- ✔ Does the POA document set out any conditions or restrictions?
- ✔ Is there a triggering mechanism for when the attorney can begin acting?
- ✔ Is the attorney under the POA document at least 18 years old?
- ✔ Do you have another POA on file for this client? Make sure you are relying on the most recent and valid POA document (executing a new POA terminates any previous POA document).

- ✔ Is there more than one attorney? If so, how do they exercise their powers? Jointly? Severally? Or by majority? Is there a mechanism in place if they disagree?
- ✔ Do you have the contact information for the attorney or attorneys?

Is Your Client Capable of Managing Property? Decisional Capacity

- ✔ Does the POA document specify that the attorney may only act when the grantor becomes incapable of managing property?
- ✔ The standard for determining the requisite decisional capacity to manage property is found at section 6 of the *Substitute Decisions Act, 1992* ("***SDA***")[2]. Capacity to manage property is defined as:
    - The ability to understand the information that is relevant in making a decision in the management of one's property; and
    - The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
- ✔ Although the factors in assessing capacity to manage property are straight-forward, a finding of incapacity to manage property is not easily made. This assessment is not one that is conducted informally.
- ✔ Under the *SDA* there are a class of designated "capacity assessors" who may be requested to assess an individual's legal capacity with respect to managing property by conducting capacity assessments.
- ✔ If someone is found incapable of managing property, either an attorney under a power of attorney for property, or a court appointed guardian of property, can make decisions with respect to their person property on their behalf.

  If there is no attorney or anyone willing to become a guardian, the PGT may be appointed as a statutory guardian of property under the *SDA*.

✔ There are only two circumstances under which a person can be deemed incapable of managing property:

- The first circumstance is if a person is admitted to a psychiatric facility, at which point the Mental Health Act3 requires that a physician assess the person's capacity to manage property.
- Following that initial assessment, an attending physician is authorized by the MHA to assess the patient further, at later times, to determine whether the patient is capable of managing property. If the assessing physician finds the patient to be incapable of managing property, the physician is required to issue a formal certificate of incapacity and deliver a copy of the certificate to the Public Guardian and Trustee.
- The second circumstance is by an assessment by an authorized capacity assessor. Unless the assessment is ordered by a court, a person has the right to refuse to have his or her capacity to manage property assessed by an assessor.
- A person can only request that another person's capacity be assessed in limited circumstances.

Red Flags For Incapacity to Manage Property and Potential of Abuse / Misuse of Power of Attorney Documents:

Where a client appears to lack the capacity to understand an investment or to provide informed consent, financial advisors and their firms should consider having in place procedures to follow, such as getting advice from a senior advisor, or contacting a trusted family member, or the person designated in the client's POA document.

Financial advisors should also have in place policies and procedures to deal with POA for property documents, and possible red flags of abuse and misuse of those documents.

Some red flags involving signs of incapacity, vulnerability or susceptibility to abuse and the misuse of a POA document include the following:

The client appears to be unable to understand simple instructions or financial concepts which he or she was able to understand previously (be aware that physical and cognitive impairments such as diminished mental capacity may appear suddenly in clients).

- ✔ The client suffers from memory loss, disorientation, confusion.
- ✔ The client has difficulty speaking or communicating.
- ✔ The client does not appreciate the consequences of the decisions he or she is making.
- ✔ The client refuses to follow appropriate investment advice.
- ✔ The client exhibits confusion over recent financial transactions or is concerned that money is missing when it is not.
- ✔ They have been social isolated.
- ✔ There is conflict in their family or amongst family members.
- ✔ They are going through a recent bereavement.
- ✔ The client is dependent on another to provide care.
- ✔ The client is financially responsible for an adult child or spouse.
- ✔ The client abuses alcohol or drugs.
- ✔ They suffer from depression or anxiety.
- ✔ The client has an unusual fear of, or sudden change in feelings about, a particular person or people.
- ✔ Change in appearance or poor hygiene, or client displays behaviour that is out of character.
- ✔ Accompanied by a caregiver who is overly protective or dominating.
- ✔ The client's mailing address has been changed to an unfamiliar or unexplained address.
- ✔ Change in ability to perform activities of daily living, including self-care, daily finances, or medication management.
- ✔ Be aware of predatory or otherwise inappropriate recommendations or advice from others (or from an attorney under a POA document). Especially if it looks like they are taking advantage of vulnerable adult clients or improperly instilling fear in the clients about investments or investment choices.

- ✔ Be alert if the client gives a POA document to someone who appears to be inappropriate to the advisor (someone they barely know, a stranger, etc.).
- ✔ Does client indicate that he or she may have been forced or unduly influenced to execute the POA document in favour of the attorney?
- ✔ What is the attitude of the attorney with respect to the grantor and his/her property? Does the attorney appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- ✔ Has the investor's financial activity changed since an attorney under a POA document took over? Is it in line with the investor's stated financial goals? Are unusual cheques being written or transfers being made?
- ✔ Be aware that the death or incapacity of a spouse can have a significant impact on the investment relationship especially if the other spouse had no involvement in financial management of household.
- ✔ Remember that it is presumed that every person has the legal capacity to make decisions in their own interest. Mental incapacity must be proven before a person is deprived of this decision making power.
- ✔ Manage risk by "knowing your client"; take steps to ensure the client understands and can give instructions; set the stage for meeting with the client and meet at times when the client is alert.

How to Communicate Effectively With Your Clients About Power of Attorney Documents:

- ✔ Always ask new clients if they have a POA document and ask for a copy of the document during initial meeting; discuss who the appointed attorney is and how to contact them.
- ✔ If they don't have a POA document encourage them to get one. Explain the benefits of executing powers of attorney as a matter of routine with clients.
- ✔ Talk to your clients if anyone should be consulted in the event the client is unavailable or incapacitated. Should this third person receive copies of account statements and confirmations, etc.? If so, get the client to consent to disclosure.
- ✔ Offer clients the option of using a limited power of attorney that only allows certain limited transaction to be made (e.g., bill payments and deposits).

- ✔ Consider requiring that copies of all confirmations and account statements be sent to both the account holder and the power of attorney.

- ✔ The issue of confidentiality and older adults is challenging. Often older adults have family members who are highly involved with their personal and financial affairs.

  However, a financial advisor or investment planner should adhere to their duties of confidentiality, except where the client gives permission to divulge information to particular individuals.

- ✔ It is essential when dealing with older adult clients to ensure that their privacy rights are not compromised because of their age, despite the otherwise well-meaning intentions of family members or other individuals.

- ✔ Proactive advice is always helpful – before a client becomes incapable or shows signs of diminished capacity – and it is a good idea to have a conversation with the client to find out if he or she has executed a power of attorney document and who is the appointed attorney. If one is not executed, make a recommendation that one be done.

- ✔ Once a power of attorney is in place, a financial advisor or investment manager might want to consider a meeting to meet the attorney before te grantor becomes incapable.

- ✔ If a client experiences serious cognitive decline before a power of attorney is put in place, the advisor is limited by privacy and confidentiality issues.

- ✔ If the family notices a decline in cognitive functions first, they hopefully will see that the older adult executes a power of attorney document, or if the older adult does not have the capacity to grant one, a family member can apply for a court order appointing them as a guardian and then notify the advisor.

- ✔ It is a good idea to have these conversations now, before the person becomes incapacitated.

- ✔ Notably, in situations where a capable grantor appoints an attorney to deal with property, the attorney is considered to be an agent of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal).

  Though the fiduciary standard or expectation is lower in such a relationship, an attorney in this position is still a fiduciary with a duty only to the grantor and should, therefore, keep written documentation of instructions and act diligently and in good faith.

- ✔ After-the-fact litigation or disputes and complaints involving older adult clients can be difficult. The client, regretfully, may no longer be alive or capable of providing a statement and, as a result, assertions can be made by other interested parties (e.g., a beneficiary or estate trustee) about what "should have" been done. Document evidence of your interactions with your clients.

- ✔ Educating investors about the benefits of having a power of attorney is important.

  Encourage your clients while they are still in good health to share details of their financial affairs with trusted family members, lawyer and/or other professionals to protect their financial affairs in case incapacity sets in.

- ✔ Document conversations with clients in case they have difficulties with lack of recall or to help resolve any misunderstanding.

  Send follow-up letters to document and confirm what was discussed. Use easy to understand plain language and consider using larger font for written material.

- ✔ Document suspected diminished capacity or elder abuse and escalate the matter to a supervisor if required.

CHECKLIST # 6 - ATTORNEY CHECKLIST - DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE SUBSTITUTE DECISIONS ACT, 1992 (the "SDA")

An Attorney MUST...

- ✔ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act*, 1992 (the "***SDA***") and the *Health Care Consent Act*, 1996 (the "***HCCA***").

- ✔ Be 18 years of age.

- ✔ Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision.

- ✔ Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:

    - Is the power a "Continuing" Power of Attorney?
    - Is the power limited to a particular period of incapacity?
    - Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
    - Is the power to be exercised solely or jointly with another?

- ✔ Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will.

- ✔ Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:

    - Is the grantor aware of the scope of property possessed?
    - Is the grantor aware of the approximate value of property possessed?
    - Is the grantor aware of obligations owed to dependants?
    - Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
    - Is the grantor aware that an attorney has a duty to account for all actions taken?
    - Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
    - Is the grantor appreciative of the risks of entrusting property to the attorney?

- ✔ Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself.

- ✔ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing.

- ✔ Be aware of the statutory obligations of resignation:

    - Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/ relatives, if applicable;
    - Notify persons previously being dealt with on the grantor's behalf.

- ✔ Be aware that a Power of Attorney terminates upon the death of the grantor.

- ✔ Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care.

- ✔ Explain to the grantor its powers and duties and encourage the grantor's participation in decisions.

- ✔ Facilitate contact between the grantor and relatives or friends.

- ✔ Consult with relatives, friends and other attorneys on behalf of the grantor.

- ✔ Keep accounts of all transactions.

- ✔ Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs:

    - Ordinary prudence v. Professional prudence.

- ✔ Be aware of the legal liability assumed for a breach of an attorney's duties

- ✔ Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will.

- ✔ Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care.

- ✔ Be aware of the rights and duties to make application to the court for directions if deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions.

- ✔ Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order.

- ✔ Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney.

- ✔ Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations.

- ✔ Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority.

- ✔ Do not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee.

- ✔ Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts.

There are limits and restrictions for authority of Estate Planning, and gifting by the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:

- **Duties**

  32. (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit;

- **Personal comfort and well-being**

  (1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit;

- **Personal care**

  (1.2) A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions;

- **Exception**

  (1.3) Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care;

- **Explanation**

  (2) The guardian shall explain to the incapable person what the guardian's powers and duties are;

- **Participation**

  (3) A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property;

- **Family and friends**

  (4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person;

- **Consultation**

  (5) The guardian shall consult from time to time with,

  (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

  (b) the persons from whom the incapable person receives personal care.

- **Accounts**

  (6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property;

- **Standard of care**

  (7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs;

- **Same**

  (8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise;

- **P.G.T.**

  (9) Subsection (8) applies to the Public Guardian and Trustee;

- **Management plan, policies of P.G.T.**

  (10) A guardian shall act in accordance with the management plan established for the property, if the guardian is not the Public Guardian and Trustee, or with the policies of the Public Guardian and Trustee, if he or she is the guardian;

- **Amendment of plan**

  (11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval;

- **Application of Trustee Act**

  (12) The Trustee Act does not apply to the exercise of a guardian's powers or the performance of a guardian's duties;

- **Liability of guardian**

  33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty;

- **Same**

  (2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability;

- **Exception, corporate directors**

  (3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation;

- **Breach of duty**

  (4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute.

The following further restrictions and limitations should be considered in light of a decade of case law on the subject of Attorney duties, obligations and the authority of the Attorney to conduct Estate Planning on behalf of the Grantor of a Power of Attorney:

- ❑ An Attorney may not change a beneficial designation of life insurance or a "Plan". Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person's death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario. R. S. O. 1990, C.I.8 as amended) and a "Plan" pursuant to the *Succession Law Reform Act, (*R.S.O. 1990, Chapter S.26), are considered testamentary

Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty *(Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII). [2001] B.C.J. [No. 2547]).*

- An Attorney may want to protect an incapable person's assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton* v. *Banton*, *1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.).*
- An Attorney may complete transactions already entered into by an incapable person.
- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher* v. *Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.).*
- An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.
- An Attorney may settle an "*Alter Ego Trust"* or *inter vivos* trust. Similarly, certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor's Last Will and Testament, or otherwise if the ultimate beneficiary consents. The planning must be in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. Attorneys may settle *inter vivos* trusts as long as the trust does not contravene the intentions of the Grantor and is considered to be in the Grantor's best interests as defined by the SDA. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. A trust which is contrary to a Grantor's intentions (for example, where a trust has the effect of adding beneficiaries not named in a Will or avoids a gift established by a Will) then the trust may be successfully challenged. Tax considerations must also be factored into any planning (*Easingwood v. Cockcroft*, 2013 BCCA 182).
- Attorney's should always consider, in the context of any decision taken, obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.
- An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.
- An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.

CHECKLIST # 7 - ATTORNEY CHECKLIST - DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO THE SUBSTITUTE DECISIONS ACT, 1992 (the "SDA")

An Attorney MUST…

- ☐ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the" SDA") and the *Health Care Consent Act*, *1996*
- ☐ Be aware that an individual of 16 years of age is capable of giving or refusing consent of one's own personal care.
- ☐ Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor's behalf.
- ☐ Be aware that if the attorney is the Public Guardian and Trustee, his or her consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid.
- ☐ Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor.
- ☐ Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
    - o Is the power to be exercised solely or jointly?
    - o Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?
- ☐ Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
    - o Does the grantor have the ability to understand and appreciate the role of the attorney and in particular the risks associated with the appointment?
    - o Does the grantor have capacity to give instructions for decisions to be made as to personal care?
    - o Is the grantor aware of the Power to revoke the Power of Attorney if capable?
    - o The grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care.
- ☐ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing.

- ☐ Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself.
- ☐ Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions.
- ☐ Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document
    - The HCCA applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions.
    - The HCCA prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney.
    - Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the SDA?
    - What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?
- ☐ Be aware that special provisions exist in the SDA and the HCCA addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment.
- ☐ Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the SDA and the HCCA.
- ☐ Arrange for a capacity assessment at the request of the grantor, except where there as been an assessment performed in the six months immediately previous.
- ☐ Be aware the statutory requirements concerning resignation:
    - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/ relatives, if applicable
    - Notify persons previously being dealt with on the grantor's behalf
- ☐ Be aware that a Power of Attorney for personal care terminates on the death of the grantor.
- ☐ Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care.

- ☐ Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions.
- ☐ Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor.
- ☐ Keep records of all decisions made on the grantor's behalf.
- ☐ Facilitate contact between the grantor, relatives and friends.
- ☐ Consult with relatives, friends and other attorneys on behalf of the grantor.
- ☐ Facilitate the grantor' independence.
- ☐ Make decisions which are the least restrictive and intrusive to the grantor.
- ☐ Not use or permit the use of confinement, monitoring devices, physical restrain by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another.
- ☐ Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the HCCA.
- ☐ Maintain comprehensive records:
    - o A list of all decisions made regarding health care, safety and shelter
    - o Keep all medical reports or documents
    - o Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor
- ☐ Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required.
- ☐ Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority.
- ☐ Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records.

CHECKLIST # 8 – CAPACITY CHECKLIST RE: ESTATE PLANNING CONTEXT

Capacity Generally

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[1]

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.[2]

In determining the ability to understand information relevant to making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

(a) The nature of the act of making a Will (or testamentary document) and its effects;

(b) The extent of the property of which he or she is disposing of; and

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[3]

Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:

- A "*disposing mind and memory*" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and

1 *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161.

2 Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013.

3 *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.).

- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. [4]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[5]:

> *"If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity."*

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.[6]

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act* [7] defines a "Will" to include the following:

> (a) a testament,
>
> (b) a codicil,
>
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) any other testamentary disposition. ("testament")

- *A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.8 Therefore, capacity is determined on the criteria applied to determining testamentary capacity*

- *A testamentary disposition may arguably include the transfer of assets to a testamentary trust.9 The criteria to be applied, is that of testamentary capacity.*

- *The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.*

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4 The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz,* 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne* Estate (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (BailII).

5 *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227.*

6 *Laszlo v Lawton*, 2013 BCSC 305,SCBC.

7 R.S.O. 1990 c.s.26 as amended subsection 1(1).

8 S.51(10 of the *Succession Law Reform Act*.

9 S 1(1)(a) of the *SLRA.*

Capacity to Grant or Revoke a Continuing Power of Attorney for Property ("CPOAP")

Pursuant to section 8 of the *Substitute Decisions Act,* [10] to be capable of granting a Continuing Power of Attorney for Property ("CPOAP"), a grantor requires the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[11]

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[12]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.[13]

When an Attorney should act under a CPOAP

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act.* [14]

10 R. S.O. 1992, c 30, as am.
11 *SDA,* subsection 8(2).
12 *SDA*, subsection 9(1).
13 *SDA,* subsection 9(2).
14 R.S.O. 1990, c. M.7.

Capacity to Manage Property

The criteria for assessing the capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

(a) The ability to understand the information that is relevant in making a decision in the management of one's property; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. [15]

A person may be incapable of managing property, yet still be capable of making a Will.[16]

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the *Substitute Decisions Act*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.[17]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[18]

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[19]

When an Attorney should act under a POAPC

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

15 See also *Re. Koch* 1997 CanLII 12138 (ON S.C.).
16 *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291.
17 *SDA*, subsection 47(1).
18 *SDA*, subsection 47(3).
19 *SDA*, subsection 47(2).

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

Capacity under the Health Care Consent Act, 1996[20]

Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

(a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[21]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[22]

Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.[23]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[24] Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[25] Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[26]

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20 S.O. 1996, C.2 Schedule A.
21 G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
22 *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859.
23 *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6.
24 *SDA, supra* note 2.
25 *SDA,* subsection 2(1).
26 *SDA*, subsection 2(3).

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

(a) The ability to understand the nature of the gift; and

(b) The ability to understand the specific effect of the gift in the circumstances.[27]

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.[28]

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[29] which as set out above, requires the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.[30]

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

(a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;

(b) The ability to understand the extent of the property in question; and

(c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.[31]

A person must understand the nature of the marriage contract, the state of previous marriages,

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27 *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6.
28 *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487.
29 See for example: *Park v. Park,* 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII).
30 *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6.
31 *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.).

one's children and how they may be affected by the marriage.[32]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[33]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[34]

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.[35] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

a) Understand what they have asked the lawyer to do for them and why,

b) Be able to understand and process the information, advice and options the lawyer presents to them; and

c) Appreciate the advantages, disadvantages and potential consequences of the various options.[36]

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[37]

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;

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32 *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.).

33 *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik.

34 *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494.

35 Staff lawyer at ARCH Disability Law Centre.

36 At page 3.

37 *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon,* 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D..

- The exertion of pressure so as to overbear the volition and the wishes of a testator;[38]
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion[39]

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependancy.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[40]

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.[41]

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences. [42]

Psychological pressures creating fear may be tantamount to undue influence.[43]

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document … "cannot be said to be that of the deceased."[44]

Undue influence must be corroborated. [45]

Suspicious circumstances will not discharge the burden of proof required.[46]

* See Undue Influence Checklist

Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

(a) circumstances surrounding the preparation of the Will;

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38 *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162.
39 *Wingrove v. Wingrove* (1885) 11 P.D. 81.
40 *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.).
41 *Wingrove v. Wingrove* (1885) 11 P.D. 81.
42 *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.).
43 *ribe v Farrell,* 2006 BCCA 38.
44 *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58.
45 S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; Orfus Estate v. Samuel & Bessie Orfus Family Foundation, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224.
46 *Vout v Hay*, at p. 227.

(b) circumstances tending to call into question the capacity of the testator; or

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[47]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[48]

47 *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin,* (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.).*

48 *Laszlo v Lawton, 2013 BCSC 305 (CanLII).*

CHECKLIST # 9 - SUMMARY OF CAPACITY CRITERIA

The following is a synopsis which attempts to summarize the various criteria or factors, and/or 'test' so to speak respecting certain decisional capacity evaluations:

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Manage property	*Substitute Decisions Act, S.O. 1992, c.30 ("SDA"),* s. 6	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	*SDA,* s. 45	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	*SDA,* s. 8	(a) Knowledge of what kind of property he or she has and its approximate value; (b) Awareness of obligations owed to his or her dependants; (c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney; (d) Knowledge that the attorney must account for his or her dealings with the person's property; (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney; (f) Appreciation that unless the attorney manages the property prudently its value may decline; and (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Grant and revoke a POA for Personal Care	*SDA,* s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; and (b) Ability to understand the specific effect of the gift in the circumstances. *In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.*
Make a Will ***Testamentary Capacity***	Common law	(a) Ability to understand the nature and effect of making a Will; (b) Ability to understand the extent of the property in question; and (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Create a trust	Common law	(a) Ability to understand the nature of the trust; and (b) Ability to understand the trust`s specific effect in the specific circumstances. *In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to Undertake Real Estate Transactions	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances. *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children. Also possibly required: capacity to manage property and the person Dr. Malloy[5] stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.
Capacity to separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry)[6].
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[7].

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Capacity to instruct counsel	Common law	(a) Understanding of what the lawyer has been asked to do and why; (b) Ability to understand and process the information, advice and options the lawyer presents to them; and (c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[8]
Capacity to give evidence	*Evidence Act*, R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)	*18. (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).* ***Challenge, examination*** *(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).* ***Exception*** *(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).*
	Canada Evidence Act, R.S.C. 1985, c.C-5, S. 16(1)	***Witness whose capacity is in question*** *16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine* *(a) whether the person understands the nature of an oath or a solemn affirmation; and* *(b) whether the person is able to communicate the evidence*

CHECKLIST # 10 - UNDUE INFLUENCE CHECKLIST

Undue Influence: Summary

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney.

The Courts' Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968):[1]

> *"To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,— these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made."*

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,[2] stated:

> "*Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not mean.*"[3]

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing

1 (1968) LR 1 P&D.
2 *Craig v Lamoureux*, [1919] 3 WWR 1101.
3 *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

on a mind "overborne" and "lacking in independence". We see in *Hall v Hall*, influence of a more subtle characterization which when read together with more recent cases, arguably the application and scope of the doctrine is broadened.

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[4]

In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[5]

Relationships Where There is an Imbalance of Power

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid. [6]

Multiple Documents

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[7]

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4 *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

5 *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).

6 *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.

7 See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

Language

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[8] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[9]

Other factors indicative of undue influence

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.[10]

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property. [11]

Not All Relationships of Dependency Lead to Findings of Undue Influence

As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the genuine willingness of the grantor to effectuate an otherwise questionable

8 See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

9 Nguyen Crawford v Nguyen, 2009 CarswellOn 1877; Grewal v Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

10 *Juzumas v Baron*, 2012 ONSC 7220.

11 *Covello v Sturino*, 2007 CarswellOnt 3726.

transaction in favourable manner.[12]

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[13]

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*[14] provided a (non-exhaustive) list of indicators of undue influence:

- ❑ The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- ❑ The testator is socially isolated;
- ❑ The testator has experienced recent family conflict;
- ❑ The testator has experienced recent bereavement;
- ❑ The testator has made a new Will that is inconsistent with his or her prior Wills; and
- ❑ The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.15

In *Tate v. Gueguegirre*[16] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- ❑ Increasing isolation of the testator, including a move from his home to a new city;
- ❑ The testator's dependence on a beneficiary;
- ❑ Substantial pre-death transfers of wealth from the testator to the beneficiary;

12 See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

13 *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

14 *Gironda v Gironda*, 2013 CarswellOnt 8612.

15 *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

16 2015 ONSC 844 (Div. Ct.).

- ❑ The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- ❑ The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- ❑ The beneficiary conveyed the instructions to the lawyer;
- ❑ The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- ❑ There were documented statements that the testator was afraid of the respondent.[17]

Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.[18]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[19]

Although the leading Supreme Court of Canada ("SCC") case of *Vout v Hay* held that "*the extent of proof required is proportionate to the gravity of the suspicion*,"[20] the more recent SCC case of *C(R) v McDougall*[21] held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*[22] elicited the principles that apply to the standard of proof relating to undue influence:

> "*The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's."*[23]

17 *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
18 *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
19 *Nguyen Crawford v Nguyen,* 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
20 *Vout v Hay* at para 24.
21 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
22 (1993), 90 Man R (2d) 245 (Man QB) at para 38.
23 (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention, that the transaction was made as a result of the donor's "*full, free and informed thought*."[24]

See also *Buccilli et al v. Pillitteri et al*,[25] where the Court stated that:

> "*The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely*."[26]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[27] recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[28]

In *Leger v Poirier*,[29] the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing*

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24 *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.
25 2012 ONSC 6624, upheld 2014 ONCA 337.
26 *Buccilli, supra* note 248 at para. 139.
27 *Shrader v Shrader,* [2013] EWHC 466 (ch).
28 See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.
29 *Leger v Poirier*,[1944] SCR 152.

mind and memory" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[30]

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly "unnatural" dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.[31]

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual

30 *Vout v Hay,* [1995] 2 SCR 876 (SCC).
31 Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[32]

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence demonstrating that the requisite formalities have been complied with and that the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[33]

Lawyer's Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- ❑ Is there conflict within your client's family?
- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

32 Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).
33 Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

- ❑ If the client is isolated, does he/she live with one particular individual?
- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- ❑ Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.
- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?
- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- ❑ Has the client had any recent significant medical events?
- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- ❑ Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- ❑ Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?
- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- ❑ Is the client making a marked change in the planning documents as compared to prior documents?
- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- ❑ Does the client have a physical impairment of sight, hearing, mobility or other?
- ❑ Is the client physically dependant on another?
- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- ❑ Interview the client alone;
- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/ to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
- ❑ Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;
- ❑ Address recent health changes;
- ❑ Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- ❑ Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations ...?
- ❑ Consider evidence of intention and indirect evidence of intention; and
- ❑ Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers

Checklist

- ❑ Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;
- ❑ Determine Intentions;
- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);
- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant

information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[34] and

- ❑ Be mindful of the *Rules of Professional Conduct*[35] which are applicable in the lawyer's jurisdiction.

34 For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf
*For other related resources, see WEL "Publications, Website": www.welpartners.com/resources

35 *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

CHECKLIST # 11 - GROUNDS TO ATTACK AN INTER VIVOS GIFT

GROUND	CRITERIA
Decisional Capacity	In order to be found to have the requisite decisional capacity to make a gift, a donor requires the following: (a) The ability to understand the nature of the gift; and (b) The ability to understand the specific effect of the gift in the circumstances. The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the factors for determining requisite testamentary capacity arguably apply.
Undue Influence	**1) Direct or Actual undue influence**: • Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[1] • Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[2] **2) Presumed undue influence** or undue influence by relationship: • Under this class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused.[3] • Does the "potential for domination inhere in the relationship itself"?[4] • Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, "as well as other relationships of dependency which defy easy categorization."[5] • A gratuitous transfer from a parent to a child does not automatically result in a presumption of undue influence, but it will be found where the parent was vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[6]

GROUND	CRITERIA
Resulting Trust	• Where there is a gratuitous transfer between a parent and an independent adult child there is a presumption of resulting trust.[7] • The presumption applies only where the evidence to rebut it on the balance of probabilities is insufficient. • The onus rests on the transferee (person who received the gift) to demonstrate the parent intended a gift.[8]
Non Est Factum	• *Non est factum* is the plea that a deed or other formal document is declared void for want of intention: "[W]here a document was executed as a result of a misrepresentation as to its nature and character and not merely its contents the defendant was entitled to raise the plea of *non est factum* on the basis that his mind at the time of the execution of the document did not follow his hand."[9] • Non est factum places the legal onus on the person attacking the transfer or gift to prove "no intention".
Unconscionable Bargain	A gift or other voluntary wealth transfer is prima facie unconscionable where: 1) The maker suffers from a disadvantage or disability, such as limited capacity, lack of experience, poor language skills, or any other vulnerability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests; and 2) The transaction affects a substantial unfairness or disadvantage on the maker.[10]
Unconscionable Procurement	1) A significant benefit obtained by one person from another; 2) An active involvement on the part of the person obtaining that benefit in procuring or arranging the transfer from the maker.[11]

(GROUNDS TO ATTACK AN INTER VIVOS GIFT endnotes)

1. *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.C.A., Ch.*Div.) at p. 181.*

2. *Allard v. Skinner* (1887), L.R. 36 Ch. D. 145 (Eng.*C.A., Ch.Div.); Bradley v. Crittenden, 1932 CarswellAlta 75 at para.6.*

3. *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.*R. (3d) 277 at para. 14.*

4. *Geffen v. Goodman Estate*, [1991] 2 *S.C.R. 353 at para. 42.*

5. *Geffen v. Goodman Estate*,[1991] 2 *S.C.R. 353 at para. 42.*

6. *Stewart v. McLean 2010 BCSC 64, Modonese v. Delac Estate 2011 BCSC 82 at para. 102*

7. *Pecore v. Pecore 2007 SCC 17.*

8. *Bakken Estate v. Bakken* 2014 *BCSC 1540 at para. 63.*

9. *Marvco Color Research Ltd. v. Harris*, [1982] *2 S.C.R. 774, 141 D.L.R. (3d) 577.*

10. *Morrison v. Coast Finance Ltd. 1965 CarswellBC 140 (C.A.).*

11. John Poyser, Capacity and Undue Influence, (Toronto*: Carswell, 2014) at p.580.*

The Power of Attorney: a power granted by one person (the grantor) to another person (the grantee), for the purposes of authorizing the grantee to make decisions on behalf of the grantor.

The Power of Attorney is granted in written form by an executed document governed by statute. There are different types of power of attorney documents granting limited powers, powers that survive incapacity, powers relating to personal care, to treatment decisions, property management, and discrete limited transactions.

The appointed attorney, is called an 'attorney' and is authorized to act in accordance with the powers granted in the power of attorney document itself and the governing legislation as well as the common law.

An attorney is a fiduciary who is in a position of trust and whose duty is to act honestly, prudently and with integrity and must account for all decisions made on behalf of the grantor.

The power of attorney document can be drafted by a lawyer, but it can also be drafted by a lay person or printed off the internet. To be valid, it must comply with the requirements for due execution in accordance with the particular governing legislation.

Our power of attorney book addresses many current issues surrounding the creation of these documents, the duties, powers and obligations granted under them, their misuse and abuse and the current climate of substitute decision making. Last Year we compiled a companion publication on Guardianship, a different regime of substitute decision making.

Our hope is to share our knowledge so as to help inform clients and the public at large on this very powerful and useful tool that can create a very effective substitute decision making regime if granted wisely, yet can also be abused causing catastrophic results if not granted in a careful considered way.

Please Enjoy,
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