POWERS OF ATTORNEY AND FINANCIAL ABUSE[†]

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1. Introduction

In this paper, we raise concerns for the estate planning solicitor in advising clients on power of attorney (hereinafter "POA") documents. As advisors in this thriving practice area, we cannot ignore certain realities: the average life expectancy is rising, and age-related illnesses will occur with increasing frequency. As professional advisors, part of our service and obligation to our clients should be to anticipate the consequences of estate planning on the family and to assist clients in tailoring their planning needs to their particular family dynamics. Careful, considered and creative planning will help to avoid family conflict as well as costly and senseless litigation. Our goal must be to offer practical solutions to problems once they have arisen, and suggest ways in which to deal effectively with the family dynamics so as to minimize further contention and expense.

Solicitors providing their clients with advanced planning advice should consider Cullity J.'s remarks in *Stern v. Stern*[1] on the current realities of estate litigation prior to the death of an incapable person:[2]

> The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.

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† This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Current as of June 2008.

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1. (2003), 49 E.T.R. (2d) 129, 119 A.C.W.S. (3d) 867 (Ont. S.C.J.).
2. *Supra*, at para. 28.

2. Power of Attorney Disasters

Certainly in our practice, we are seeing an ever-increasing number of POA disputes, including the following:

1. Disputes and accounting discrepancies concerning the specific dates upon which the POA became effective, the date of incapacity of the grantor, and the nature and extent of the attorney's involvement;
2. Disputes regarding whether it was the grantor, or the attorney as agent, who was acting at any given stage;
3. Whether the attorney has made unauthorized, questionable or even speculative investment decisions, or decisions resulting in a lack of diversity in the investments;
4. Whether the attorney has taken into consideration the tax effects of the attorney's action or inaction;
5. Whether the attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages from inaction;
6. Whether the attorney has sought professional advice where deemed necessary or appropriate;
7. The attorney's treatment of and dealings under jointly held assets or accounts;
8. Attorney disputes between siblings regarding the capacity/incapacity, action/inactions, of a parent/grantor;
9. Attorney disputes among step-children, children of prior relationships, subsequent spouse/partner;
10. Attorney misappropriation, conversion, or depletion of grantor's assets;
11. Attorneys acting *ultra vires* their power to effect unauthorized testamentary acts;
12. Incapacity of a grantor to grant or revoke a POA;
13. POA obtained from incapable or vulnerable grantor by an individual with improper motives, seeking personal gain, as a result of the exertion of undue influences, or suspicious circumstances;
14. Fraudulently obtained POA;
15. Forged POA;
16. POA used to perpetrate a fraud; and
17. Disputes where one or several attorneys have acted without the knowledge or approval of the others either under a joint, or joint and several, POA.

Some of these issues arise inadvertently. However, an attorney's inattention to these sorts of duties and obligations can cause a multitude of problems later, particularly in a practice area where family emotions run high. Accountability is key.

3. Granting the Power of Attorney

(1) Exercise Caution

The granting of a POA must be carefully considered. It should be emphasized that a POA is a powerful document which 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.[3] In other words, an attorney could mortgage, transfer, or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the power granted.

A grantor should consider carefully the choice of each attorney, and whether there should be more than one attorney. It is also important to be cognizant of any potential for undue influence, abuse, and conflict.

To avoid POA litigation, it is important to consider particular circumstances in each case. Tailoring the POA document to the grantor's needs necessarily includes discussion of the family's circumstances, the age of the proposed attorney, a possible substitute attorney, and whether it is appropriate that there be more than one attorney. What exactly does the grantor want? Who can be trusted to act as the grantor's attorney? Trust is paramount and should be the over-riding consideration. What compensation will the attorney receive? How is the compensation to be calculated? Is the grantor familiar with the *Substitute Decisions Act, 1992* (hereinafter the *SDA*) legislation? Is the attorney sufficiently familiar with the *SDA* legislation and other relevant legislation?

A great deal of POA litigation, particularly amongst siblings, could be avoided if attorneys were properly advised as to their very strict fiduciary duties, obligations and limitations. Quite often attorneys are not aware of their statutory obligations in acting in accordance with the guidelines provided by the *SDA*.

Accountability may, in certain situations, be better achieved where there are two or more jointly appointed attorneys. Of course, this is dependent on the circumstances of the particular grantor, but would provide a "checks and balances" system, so as to help to avoid abuse

3. *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 7(2) (*SDA*).

where there might be a vulnerability to it. Consider drafting clauses for inclusion in the POA to guide the attorney

Similarly, it is prudent for a solicitor, when taking instructions from a grantor giving a POA, to take the time to assess whether or not there are any family members who might be more appropriately suited to assuming the role of an attorney, particularly where there is a friend, neighbour, caregiver, or stranger, who has taken steps to obtain the POA of a particular person.

Consideration should be given as to whether or not a capacity assessment should be conducted. The issue of incapacity necessarily raises the question of exploitation of vulnerable persons. Many elderly people are predisposed to vulnerability if dependent on another for certain necessities of life. Such dependence may be attributable to physical or mental disability, or simply to the fact that managing all of their own affairs has become overwhelming. Each person has his or her own unique challenges to manage or be managed. Where a fiduciary relationship between two persons exists in the legal sense, the relationship of trust or confidence gives rise to an equitable duty of faithfulness, fidelity and loyalty.

In a Supreme Court of Canada case originating in British Columbia, *Hodgkinson v. Simms*,[4] the dissenting judges, Sopinka and McLachlin, considered the notion of "vulnerability" in the context of fiduciary relationships. This lengthy case raises issues as to whether a fiduciary duty arises and what it entails. We refer you to the judgment for comprehensive review of the law of fiduciaries. According to Sopinka and McLachlin JJ., referring to the judgment of Wilson J. in *Frame v. Smith*,[5] the meaning of vulnerability is:

> the "scope for the exercise of discretion or power" in the fiduciary and to the power of the fiduciary to "unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests".[6]

Sopinka and McLachlin JJ. also referred to the beneficiaries as:

> "at the mercy" of the fiduciary . . .
>
> Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith*. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other . . . vulnerability does not mean merely "weak" or "weaker". It connotes

4. (1994), 117 D.L.R. (4th) 161, [1994] 3 S.C.R. 377, 5 E.T.R. (2d) 1.
5. (1987), 42 D.L.R. (4th) 81, [1987] 2 S.C.R. 99, 23 O.A.C. 84.
6. *Hodgkinson*, *supra*, footnote 4, at p. 218.

> a relationship of dependency, an "implicit dependency" by the beneficiary on the fiduciary.[7]

Wilson J. in *Frame v. Smith* identified the following typical characteristics of a fiduciary relationship:

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.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[8]

The decision in *Koch (Re)*[9] is a clear illustration of how "vulnerability" may arise in respect of physical, rather than mental, circumstances. The decision also illustrates that "vulnerability" can exist whether or not there is a fiduciary relationship. *Koch (Re)* is an appeal case from the Consent and Capacity Board. An excerpt from Quinn J.'s decisionon vulnerability is as follows:

> The assessor/evaluator must be alive to an informant harbouring improper motives. Higgins should have done more than merely accept the complaint of the husband, coupled with the medical reports (the shortcomings of which are chronicled above), before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.[10]

The physical impairment suffered by Ms. Koch in these proceedings was multiple sclerosis. Vulnerability is not necessarily limited to the elderly or those with physical or mental impairments; it can also arise as a result of other circumstances. There are a whole host of other reported cases which could be referenced in this regard.

(2) Assessing Mental Capacity

The SDA sets out stringent guidelines, which are discussed below, regarding the requirements for capacity to grant or revoke POAs.

7. *Hodgkinson*, *supra*, footnote 4, at p. 218.
8. *Frame*, *supra*, footnote 5, at p. 99.
9. (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712 (Ont. Ct. (Gen. Div.)).
10. *Koch (Re)*, *supra*, at pp. 518-19.

There are different assessments, or tests and requirements for capacity depending on the task. For instance, the capacity required to make a Will is different from that to grant or revoke a POA for property, and for personal care. Mental incapacity is often sought by fraudsters as a tool instrumental in abuse.

The solicitor drafting a Will, POA, or testamentary document has a legal obligation to make some assessment of a client's mental capacity. The guiding principles for the lawyer derive from statute and precedent. Lawyers, however, for the most part are not easily persuaded that they are able to undertake such tasks and this is particularly so in cases where incapacity is not obvious. In such cases, detailed notes, as well as proposing options, become imperative. Consider the value of a capacity assessment to protect your clients desision and your assessment.

In *Hall v. Bennett Estate*,[11] the defendant solicitor was found negligent by the trial judge for failing to draft a Will because he was unsure that there was the requisite capacity. Speaking for the Ontario Court of Appeal, Charron J.A. (as she then was) concluded that the trial judge's approach to liability was flawed:

> . . . the relevant question with respect to testamentary capacity was not whether Bennett [the deceased] in fact was capable of making a will but whether a reasonable and prudent solicitor in Frederick's [the solicitor's] position could have concluded that he did not. As it turned out, this crucial question . . . was never addressed by the trial judge. Hence, as I will explain, it is my view that the trial judge's mischaracterization of the issues led him into error. [emphasis added][12]

The court also found that the absence of a retainer will usually be determinative with respect to the question of whether a duty of care is owed:

> . . . there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform. Insofar as [any possible liability to the client in tort] is concerned, in the absence of a retainer, there would have to be other circumstances that gave rise to a duty of care . . . There is no suggestion that anything of the sort happened in this case
>
> Insofar as the potential liability and negligence to a third party is concerned, the existence of a duty of care . . . will depend on the presence of both foreseeability and proximity . . . absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care.[13]

11. (2003), 227 D.L.R. (4th) 263, 64 O.R. (3d) 191, 50 E.T.R. (2d) 72 (C.A.).
12. *Hall*, *supra*, at para. 12.

Aside from issues of capacity, solicitors should also be alert to situations of suspicious circumstances and undue influence that can apply equally to POA situations as well as to the drafting and execution of Wills.[14] The Ontario Court of Appeal affirmed in *Knox v. Burton*,[15] that there is a presumption of capacity. In the absence of suspicious circumstances, the onus is on the one asserting incapacity to prove it on a balance of probabilities.

(3) The *Substitute Decisions Act*

The *SDA* sets out the framework within which decisions regarding the management of property and personal care can be made. The *SDA* is a collection of statutory duties for attorneys and is codified to prescribe the rules for the attorney. Attorneys as well as those granting the POA should be familiar with this Act.

The *SDA* applies not only to attorneys under a POA, but also to statutory guardians and to court-appointed guardians. The *SDA* sets out separately the types of duties applicable to attorneys for property and for personal care of incapable persons.

4. Attorney for Property

Turning specifically to the duties of an attorney for property, an individual who manages the property of an incapable person can be an attorney under a continuing POA[16] or a guardian of property,[17] either court-appointed,[18] or appointed by statute. The statutory guardian in Ontario is the Public Guardian and Trustee.[19]

The POA for property is commonly used to ensure that the financial affairs of a person are looked after either in one's absence, on an agency basis, or during a period of incapacity to act on one's own behalf.

13. *Hall*, *supra*, at paras. 56-7.
14. *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549; *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113, 102 A.C.W.S. (3d) 457 (Ont. S.C.J.); *Ostrander v. Black* (1996), 12 E.T.R. (2d) 219, 62 A.C.W.S. (3d) 1255 (Ont. Ct. (Gen. Div.)); *Vout v. Hay* (1995), 125 D.L.R. (4th) 431, [1995] 2 S.C.R. 876, 7 E.T.R. (2d) 209; *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 82 A.C.W.S. (3d) 400 (Ont. Ct. (Gen. Div.)), supp. reasons 164 D.L.R. (4th) 176 at p. 244, 83 A.C.W.S. (3d) 531 (Ont. Ct. (Gen. Div.)), to name but a few.
15. (2005), 14 E.T.R. (3d) 27, 137 A.C.W.S. (3d) 1076 (Ont. C.A.), affg 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.).
16. *SDA*, s. 38(1).
17. *SDA*, s. 31(1).
18. *SDA*, s. 22(1).
19. *SDA*, s. 15-16.

A person is considered incapable of managing property if unable to understand information that is relevant to making a decision in the management of one's own property, or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.[20]

The validity of a POA is dependent on the grantor having the capacity to give a POA. The POA can be a Continuing POA, for example if it is called such, or if it provides that it is to continue during subsequent incapacity. By the same token, the POA can be limited by specific operating dates, events, or other contingencies.

To have a valid Continuing POA, the attorney needs to be appointed before the grantor becomes incapable of giving a POA.[21]

A Continuing POA terminates upon the execution of a new one unless the document provides for multiple POAs to exist. Therefore, care should be taken in the case of drafting a POA where one may already exists for property in another jurisdiction. The new document may revoke the existing document in the other jurisdiction. Similarly, the problem is not overcome by providing for the new POA to simply cover "worldwide assets" since such assets may not be covered by the Ontario POA. Therefore, when drafting the new POA, care should be taken so that it co-exists with the POA in the foreign jurisdiction. Care to effect the client's intention should be made comprehensively
A person is capable of revoking a Continuing POA if he or she is capable of giving one.[22] The powers granted to an attorney acting on behalf of an incapable person are extensive. An attorney operating under a Continuing POA has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will.[23] These powers are governed by the *SDA* and any court imposed conditions.[24]

In *Egli (Committee of) v. Egli*,[25] the British Columbia Court of Appeal considered the question of where to draw the line between capacity and incapacity to grant a POA. Hall J.A., speaking for the court, found that while it may not be necessary for the test for capacity to grant a POA to be the same as the test for testamentary capacity, "the donor must have a general appreciation of the enabling power he or she is bestowing upon the donee of the power. The donor must be cognizant of the circumstance that the donee is being granted a broad

20. *SDA*, s. 6.
21. *SDA*, s. 8(1).
22. *SDA*, s. 8(2).
23. *SDA*, ss. 7(2), 31(1), 38(1).
24. *SDA*, ss. 31(3) and 38(1).
25. (2005), 262 D.L.R. (4th) 208, 20 E.T.R. (3d) 159, 362 W.A.C. 148.

power to deal with the property of the donor."[26] It was also held that the capacity of the donor is always a factual determination to be made by the trial judge.

Recently, in *PIPED Act Case Summary #278*,[27] the Privacy Commissioner found that a bank's request that an individual acting as a power of attorney produce the entire POA document was not an attempt to collect more information than necessary and was in compliance with Principle 4.4 of the PIPEDA.

In *Desharnais v. Toronto Dominion Bank*,[28] the British Columbia Court of Appeal commented on the unfortunate absence of available guidance where the duty of care owed by a bank faced with transfer documents was concerned.[29] Most recently the British Columbia Supreme Court ruled that an attorney did not have authority to change an RRSP beneficiary designation. The court found that the change in a designated beneficiary amounted to a testamentary disposition and therefore that an attorney under the British Columbia *Power of Attorney Act*[30] is not permitted to exercise a testamentary power.

An attorney for a grantor who is not incapable of dealing with property 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 has been said to be lower in such a relationship, nevertheless, an attorney in this position is still a fiduciary with a duty to account to the grantor and should therefore keep written documentation of instructions.

In *Banton v. Banton*,[31] Cullity J. discusses many of the principles regarding an attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an attorney and a trustee. In addition to managing property, encouraging the incapable person's participation in decisions, consulting with family members and making reasonable expenditures, the attorney for property must consider whether a given transaction is in the "best interests" of the individual for whom the attorney is acting. The attorney for property also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA*.[32]

26. *Egli*, *supra*, at para. 33.
27. *PIPED Act Case Summary #278*, [2004] C.P.C.S.F. No. 23 (QL).
28. (2002), 3 E.T.R. (3d) 221, 289 W.A.C. 32, 9 B.C.L.R. (4th) 236 (C.A).
29. *Supra*, at para. 32.
30. R.S.B.C. 1996, c. 370.
31. (1998), 164 D.L.R. (4th) 176, 82 A.C.W.S. (3d) 400 (Ont. Ct. (Gen. Div.)), supp. reasons 164 D.L.R. (4th) 176 at p. 244, 83 A.C.W.S. (3d) 531 (Ont. Ct. (Gen. Div.)).

The attorney under a Continuing POA has the option at any time to request direction or assistance from the court on any question concerning the management of property, including perfecting the effectiveness of the POA if necessary.[33]

The attorney for property is required to keep a record of all transactions and an ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. All of the duties of the attorney for property are set out in ss. 32 through 38 of the *SDA*. An attorney for property must be prepared to keep accounts for the passing of such accounts if required.[34] The specific form of accounts and records is set out in s. 2 of O. Reg. 100/96.

(1) Passing of Accounts

While an attorney is required to keep accounts, an attorney is not required to pass the accounts maintained. The court may, however, order that all or a specified part of the accounts of an attorney be passed.[35] The accounts are filed in the court office and the same procedure as the passing of estate accounts is followed.[36] Although a passing of accounts may not be required, it may still be advisable to undertake a passing, because 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).

Prior to the enactment of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 , which came into force on April 3, 1995, an attorney could not be ordered by the court, under the provisions of the *Powers of Attorney Act*, R.S.O. 1990, c. P.20, to pass his or her accounts, except in the case where the grantor of the power had become incapable, in which case the attorney could be required to pass accounts for the period of the grantor's incapacity. In *Stickells Estate v. Fuller*,[37] Lack J. ordered an attorney to pass her accounts for the period commencing with the coming into force of the Act, namely, April 3, 1995. Valin J. in *Harris v. Rudolph (Attorney for)*,[38] citing Haley J. in

32. *SDA*, s. 37.
33. *SDA*, s. 39(1).
34. *SDA*, ss. 32(6), 38(1).
35. *SDA*, s. 42(1).
36. *SDA*, s. 42(6).
37. (1998), 24 E.T.R. (2d) 25, 81 A.C.W.S. (3d) 213 (Ont. Ct. (Gen. Div.)).
38. (2004), 10 E.T.R. (3d) 129, 132 A.C.W.S. (3d) 179 (Ont. S.C.J.).

Leung Estate v. Leung,[39] considered the nature of an attorney's duty to account as well as to whom this duty is owed:

> Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he undertakes for the grantor. The attorney is the one who has the information. An estate trustee stands in the shoes of the grantor for the enforcement of they duty owed by the attorney as agent to the deceased as principal. There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation and should not be considered an imposition on the attorney if he has failed in that duty over a long period of time.[40]

The issue of an attorney's duty to account was addressed most recently by the Ontario Superior Court in *Brooks Estate (Re)*.[41] The proceedings in that case were a contested passing of three sets of accounts pursuant to the order of a motions judge. In that case, Ross J. held that the accounts ordered were for a period that commenced and ended well before the coming into force of the *SDA*, such that the order was in conflict with the decision in *Stickells Estate*. However, since the motions judge had jurisdiction to hear the motion for the order and the order was not appealed, Ross J. held that the order compelling the attorney to account was protected by the rule against collateral attack.[42]

The duty to account was addressed most recently in March 2008 by Herman J. of the Ontario Superior Court. The issue in *De Zorzi Estate v. Read*[43] was whether there was an obligation for an attorney to account and disclose financial information to the beneficiaries of the estate before the death of a capable grantor of the Power of Attorney. Herman J. considered the case of *Stickells Estate v. Fuller*,[44] in which the court ordered the Attorney to pass her accounts as of the date when the *SDA* came into effect. In *Stickells*, emphasis was placed on the wording of s. 42(1) of the *SDA* and the absence of any requirement for incapacity before the court's discretion to order a passing is engaged. Accordingly, describing her decision as a "novel point of law",[45] Herman J. ordered disclosure of account statements

39. (2001), 38 E.T.R. (2d) 226, 105 A.C.W.S. (3d) 1166, [2001] O.J. No. 2171 (QL) (S.C.J.), at para. 10.
40. *Harris*, *supra*, footnote 38, at para. 33.
41. (2007), 161 A.C.W.S. (3d) 176, [2007] O.J. No. 3758 (QL) (S.C.J.).
42. *Supra*, at paras. 45-6.
43. (2008), 38 E.T.R. (3d) 318, [2008] O.J. No. 944 (QL), 165 A.C.W.S. (3d) 962 (S.C.J.).
44. (1998), 24 E.T.R. (2d) 25, [1998] O.J. No. 2940 (QL), 81 A.C.W.S. (3d) 213 (Ct. (Gen. Div.)).
45. *De Zorzi Estate*, *supra*, footnote 43, at para. 16.

and records under a power of attorney prior to the grantor's death. Since in this case, the attorney and estate trustee were one and the same, Her Honour found that "[d]isclosure is an essential part of the obligation",[46] and that the attorney should be required to account to someone other than the estate trustee. Since the motion involved a novel point of law, Herman J. awarded the respondents their costs out of the estate.

Attorneys for property are statutorily entitled to compensation pursuant to the *SDA*.[47]

The compensation taken should be in accordance with the prescribed fee schedule. Section 40 of the *SDA* sets out the applicable guidelines for attorney compensation. Where the POA itself is silent on the question of attorney compensation, the Regulations to the *SDA* provide as follows:[48]

An attorney may take annual compensation from the property of:

- 3% on 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.

Notwithstanding this fee schedule, the attorney can have compensation increased or reduced by the court when passing his or her accounts.

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in circumstances, but accounts or records must be produced to the incapable person, the incapable person's other attorneys and the Public Guardian and Trustee if required.[49]

(2) Standard of Care of an Attorney under a Continuing Power of Attorney for Property

The standard of care that an attorney for property must exercise in managing the property to a certain extent has been said to depend on whether or not compensation is being taken. Where no compensation is taken the attorney is required to 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.[50] The standard of care

46. *De Zorzi Estate*, *supra*, footnote 43, at para. 13.
47. *SDA*, s. 40(1).
48. *SDA*, s. 40(3).
49. *SDA*, ss. 42(3), 42(4).
50. *SDA*, s. 32(7).

increases where the attorney receives compensation. An attorney in this case would be required to exercise a degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.[51]

(3) Liability

Generally speaking, an attorney for property is liable for damages resulting from a breach of duty.[52] The attorney for property may be relieved from all or part of this liability from breach of duty if the court is satisfied that the attorney nevertheless acted honestly, reasonably and diligently.[53]

The recent British Columbia case of *McMullen v. McMullen*[54] and the Ontario case of *Fareed v. Wood*[55] suggest that attorneys are not only liable for their actions as attorney to an incapable grantor, but also where there is a capable grantor who may still be involved in the management of his or her affairs. Caution should be exercised in advising attorneys on the discharge of their obligations.

In *McMullen*, the plaintiff's two daughters, who held a POA for property, transferred the title of the plaintiff's condominium. The plaintiff, George Edward McMullen, was 86 years old. The daughters were concerned about the plaintiff's ability to manage his financial affairs. In 2004, he was assessed by several doctors and was not found to be incompetent to manage his affairs. The evidence was that the daughters at all times acted in what they considered to be the best interests of their father. In 2002, Mr. McMullen told his family about his new friend, Ms. Spiritos. They noticed that he started to send money to this woman and that his approach to money began to change. He had incurred a debt and had increased his mortgage. In the summer of 2003, the family consulted a lawyer about the POA. On August 19, 2003, the daughters signed a document transferring interest in the plaintiff's condominium. However, they did not have the transfer document registered at that time, as they thought it would cause too much emotional upset.

Fisher J. found that while the daughters had attempted to act in the best interests of their father, in acting without his knowledge and consent, they breached their duties to account and to act in accordance with the plaintiff's intentions. This was so whether or

51. *SDA*, s. 32(8).
52. *SDA*, s. 33(1).
53. *SDA*, s. 33(2).
54. (2006), 27 E.T.R. (3d) 304, 49 R.P.R. (4th) 112, 153 A.C.W.S. (3d) 255 (B.C.S.C.).
55. (2005), 140 A.C.W.S. (3d) 225, [2005] O.J. No. 2610 (QL) (S.C.J.).

not the plaintiff was mentally infirm. Accordingly, Fisher J. ordered a declaration that the transfer in question was null and void, and that legal title should be transferred back to the plaintiff at the defendants' expense. In conclusion, Fisher J. remarked that:

> Removing an individual's autonomy is extremely significant. Mr. McMullen is entitled to live his life as he wishes unless and until he is found to be incompetent to manage his own affairs.[56]

In *Fareed*, Ms. McLeod, when she was approximately 83, appointed her solicitor, Mr. Wood, as her attorney. Mr. Wood was also appointed executor and trustee in Ms. McLeod's Will. Ms. McLeod had no children, but had a stepdaughter, Ms. Fareed, to whom she left a bequest in her will. After Ms. McLeod's death, Mr. Wood did not apply for a certificate of appointment of estate trustee, nor did he proceed to administer the estate in any meaningful way. None of the beneficiaries received payment from the estate.
Gordon J. held that an attorney assumes full responsibility once he assumes some duties:

> It is not uncommon for a grantor to retain the ability to attend to some functions while directing the attorney to perform others. In some respects, it allows for a transition period as the grantor adjusts to changes in life resulting from age. The separation of responsibilities can co-exist, however, the attorney assumes full responsibility of all financial activities once he or she assumes some duties. In my view, the attorney cannot avoid liability by simply saying the grantor paid or transferred her own funds to another. The attorney is responsible for the accounts from the outset.[57]

Ultimately, Gordon J. found that Mr. Wood was clearly negligent and in breach of his fiduciary duty. His billing was excessive. He had a duty to account for all transactions during the period he had some involvement as attorney and yet he was unable to account. Gordon J. also found that Mr. Wood may be liable to the estate for payments made by the grantor to others although that issue was not being litigated. At the very least, it was held that Mr. Wood could not benefit in any manner whatsoever for his involvement since he did not meet the lowest standard of a solicitor, let alone as attorney.

The cases of *McMullen* and *Fareed* described above are somewhat difficult to reconcile with Valin J.'s decision in *Harris v. Rudolph (Attorney for)*.[58] That case involved an 86 year old woman incapable of managing her affairs. In 1994, Mrs. Rudolph appointed her two

56. *McMullen*, *supra*, footnote 54, at para. 76.
57. *Fareed*, *supra*, footnote 55, at para. 38.
58. (2004), 10 E.T.R. (3d) 129, 132 A.C.W.S. (3d) 179 (Ont. S.C.J.).

sons as attorneys under a joint and several general POA. In the following five years, the two sons assisted their mother with her investments. By October 1999, the sons realized that their mother was incapable of managing her affairs. Valin J. relied here on Langdon J.'s decision in *Fair v. Campbell Estate*[59] for the proposition that where the grantor is *sui juris*, the attorney does not necessarily have a duty to account:

> If the grantor is *sui juris*, he makes the decisions. He is not obliged to involve the attorney in all or any of them. He is not obliged to ask the attorney to help him to implement all or any of his decisions. Where the grantor is *sui juris*, imposition of a duty to account can cast an impossible burden on the attorney. He could be required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part . . .[60]

It is well to keep in mind, however, that *McMullen* and *Fareed* suggest that a more onerous burden may be applied where an attorney assumes some, even if not all, of his or her obligations.

(4) Costs

Where POA litigation arises, most litigants assume that costs of POA disputes are paid out of the funds of the grantor. This is not necessarily the case. If you represent the attorney, you should be aware of the possibility your client may not be awarded costs, and that costs could even be awarded against your client. In an effort to discourage perceived unnecessary litigation, the court may require the parties to bear their own costs.

In litigation, the usual rule of costs is that "costs follow the result". However, for decades, estate litigation has been viewed by the courts as distinct from other forms of litigation when dealing with the issue of costs, and the same applies to power of attorney litigation. The court may determine that the grantor contributed to, or caused, the litigation, and as such, the grantor should assume the costs of the litigation.

This position arose historically out of a desire to protect certain policy concerns such as that costs should not prohibit individuals from legitimately seeking guidance in the administration of estates. However, there must be a balanced approach so as to not encourage unfounded litigation.

On January 1, 2002, a new costs grid was introduced in Ontario,

59. (2002), 3 E.T.R. (3d) 67 (Ont. S.C.J.).
60. *Supra*, at para. 29.

but was promptly abolished in July 2005. Under the costs grid scheme, a judge fixed costs at the end of a hearing while retaining the right to order an assessment in exceptional cases. The judge's award of costs was based on a grid setting out hourly rates. This costs grid replaced Part A of the Tariff of Costs. The grid provided rates for both party and party costs, namely, "partial indemnity" costs, and solicitor and client costs, namely "substantial indemnity costs". Currently, costs are awarded according to the guidelines in Rule 57 of the Rules of Civil Procedure.[61]

A number of relatively recent cases provide examples of what may be a growing reluctance on the part of the courts to grant unsuccessful parties to estate litigation impunity with respect to cost consequences flowing from the proceedings. In two recent decisions involving Will challenges, the court refused to grant the unsuccessful party costs out of the estate and held them personally liable for costs of the successful parties. In *Prasada Estate (Re)*,[62] the court set aside a Will. The unsuccessful propounders were held not only responsible for their own costs but were ordered to pay the solicitor and client costs of the successful challenging parties. Furthermore, the executor who was not a beneficiary and who was the party propounding the Will was held liable for costs. In *Schweitzer v. Piasecki*,[63] the court ordered costs against the parties challenging the validity of the Will where they had abandoned their case on the eve of trial. In *Marshall Estate (Re)*,[64] an unsuccessful challenger to the validity of the Will was denied costs out of the estate and ordered to pay part of the executrix's costs.

Wilson v. Wilson[65] provides a comprehensive review of the issue of costs in the context of fiduciary disputes. In this case, an attorney was ordered to personally pay the costs of the Public Guardian and Trustee on a solicitor and client basis. The attorney in this case caused a loss of the grantor's assets and did everything possible to avoid providing an accounting. The court, therefore, also ordered that the attorney personally pay the costs of one of the respondents on a solicitor and client basis. Traditionally, when representing children of the grantor, it is important to warn such individuals of the risks as to costs.

The role of statutory guardian or the Public Guardian and Trustee as guardian has not been addressed in detail within this paper. While

61. R.R.O. 1990, Reg. 194.
62. (unreported, March 30, 1998, Ont. Ct. (Gen. Div.), docket no. 5116/93).
63. (1998), 20 E.T.R. (2d) 233, 76 A.C.W.S. (3d) 1233 (Ont. Ct. (Gen. Div.)).
64. (1998), 22 E.T.R. (2d) 255, 17 C.P.C. (4th) 46 (Ont. Ct. (Gen. Div.)).
65. (2000), 97 A.C.W.S. (3d) 561, [2000] O.J. No. 2068 (QL) (S.C.J.).

the duties and responsibilities are similar, some differences do exist, particularly where capacity is concerned. In this regard, the *SDA* also sets out requirements for management plans and other requirements particular to statutory guardians or court appointed guardians, including guardianship plans. Of particular note are ss. 24(2.1) and 57(2.2) which outline the conditions for the appointment of the Public Guardian and Trustee.

5. Resignations, Revocations and Other Remedies

Section 11 of the *SDA* deals with the resignation of an attorney for property.

Similarly, the resignation of an attorney for personal care is addressed in s. 52 of the *SDA*.

The *SDA* is silent as to the formalities required for the execution of resignations of attorneys for both property and personal care. The execution requirements of a Continuing POA for Property and a POA for Personal Care in accordance with s. 10[66] and s. 48[67] respectively, provide that they shall be executed in the presence of two witnesses, each of whom shall sign the POA.

There is no prescribed form in accordance with the *SDA* for resignations. However, it is our practice to have resignations executed in the presence of two witnesses.

The revocation of a POA for Property is governed by s. 12(2)[68] of the *SDA*. The revocation of a POA for Personal Care is governed by s. 53(2).[69] Revocations of POAs for both Property and Personal Care must be in writing and shall be executed in the same way as a POA for Property and Personal Care. The formalities for execution are as set out at ss. 10 and 48 respectively.

We have set out within this paper the requirements of s. 8 of the *SDA* concerning the capacity to give a Continuing POA for property. A person is capable of revoking a Continuing POA if he or she is capable of giving one.[70]

6. Capacity Assessments

If there is a suspicion that a POA has been obtained from an incapable person, a capacity assessment should be considered in accordance with ss. 22 and 55 of the *SDA*. It is important to consider

66. *SDA*, s. 10.
67. *SDA*, s. 48.
68. *SDA*, s. 12(2).
69. *SDA*, s. 53(2).
70. *SDA*, s. 8(2).

the date upon which the POA was executed in conjunction with the timing of the capacity assessment. If the two dates are close in time, the circumstances and facts may give rise to an increased probability that the grantor of the POA may not have had the capacity to grant the POA in accordance with the requirements of ss. 8 and 47 of the *SDA*. However, it should be noted that capacity and/or incapacity is not static and may fluctuate based on a particular individual's circumstances, the date, time, the facts and specific individual situation. The timing and place of assessment, and a number of other factors are to be considered. In order to challenge the validity of the POA, proceedings must be brought before the court.

The *SDA* does not direct who should assess the capacity of a person to give a Continuing POA for Property. Section 9 of the *SDA* states that a Continuing POA for Property is valid if the grantor, at the time of executing it, was capable of giving it, even if he or she was not capable of managing property. A solicitor assisting the grantor in preparing a Continuing POA for Property should be satisfied that the grantor is mentally capable for this purpose.

The solicitor assisting the grantor in entering into the POA should keep detailed notes on file of questions asked, investigations made, and record questions and answers from the client interview. The notes should include references to who was present when the POA was executed and why the solicitor assisting believed that the grantor was mentally capable. The notes should follow the guidelines and definition of capacity to give a Continuing POA for Property as set out in the *SDA*.

If there is a belief that the capacity of the grantor may be challenged, it is advisable to consider an assessment either before, or commensurate with the execution of, the continuing POA. This can serve as a preventative and/or protective measure for your client, and be beneficial to satisfying your own discharge of duty of care owed. Assessments are not covered by OHIP; your client should be advised as to the costs of the assessment process and the legal implications including the potential loss of autonomy. Rights advice must be given. There is a great discrepancy in costs of assessing depending on the assessor whose services are engaged.

If the grantor of the Continuing POA was not capable at the time the document was executed, the POA, and everything done under it, is void *ab initio*. The responsibility then falls upon a third party dealing with the attorney to make enquiries and to be satisfied that the grantor of the power had the necessary capacity when the power was granted and that the appointment has not been subsequently terminated. It is important to give notice to all parties who may

rely upon the POA that a POA has been revoked or a resignation or termination effected.

If there is a POA in existence and questions are raised with respect to whether or not the POA is valid, an assessment under ss. 22 and 55 could be used in order to make application to the court for a guardianship order for property and personal care of the incapable person. Where no POA is in existence, a s. 16 assessment is also an option and can be requested regarding the capacity to manage property. A finding of incapacity would result in the automatic appointment of the Office of the Public Guardian and Trustee as the statutory guardian. Careful attention should be paid to ss. 16(1) and 16(2)[71] of the *SDA*. When a request for an assessment is made of an assessor it must be in the prescribed form and the formalities of the *SDA* followed. Otherwise, the assessment could be declared a nullity on the basis of procedural irregularity. The appointed capacity assessor should not conduct an assessment without completion of the requisite forms. An approved capacity assessor knows to follow the stringent requirements of the *SDA*. The lawyer must know what type of assessment is required of the assessor

The *SDA* sets out the procedure by which a person's capacity is assessed and the process for the Office of the Public Guardian and Trustee or some other person to become the person's guardian if the person is found to be incapable.

Pursuant to s. 16 of the *SDA*, any person can request an assessor to perform an assessment of another person's capacity to manage property under the Act.[72] Assessors are physicians, psychologists, social workers, occupational therapists, nurses or others who have successfully completed a training course for assessors which is given or approved by the Attorney General. The Capacity Assessment Office of the Ministry of the Attorney General publishes a list of capacity assessors who are available on a fee for service basis.

If the assessor concludes that the person is incapable, the Public Guardian and Trustee automatically becomes the person's statutory guardian of property.[73]

The *SDA* also provides for reports and investigations to be made by the Public Guardian and Trustee regarding allegations that a person is incapable of managing property or personal care. See ss. 27(2) and 27(3).

The Public Guardian and Trustee is required to investigate all allegations as appropriate and take steps if necessary to become the

71. *SDA*, s. 16.
72. O. Reg. 293/96.
73. *SDA*, s. 16(5).

court appointed guardian. This investigation could include having an assessment of the person's capacity performed.

Assessments are governed by s. 78 of the *SDA*. Section 78 clearly gives an individual the right to refuse to be assessed. A person being assessed must specifically be advised of this right, along with the purpose, significance and effect of the assessment before it takes place. Where a person refuses to be assessed, s. 79 of the *SDA* provides the court with the discretion to order an assessment where a person's capacity is in issue in a proceeding under the *SDA* and the court is satisfied that there are reasonable grounds to believe that the person is incapable. Section 81 provides for the enforcement of assessment orders and was added in 2006. Similarly, s. 105 of the *Courts of Justice Act*[74] gives the court authority and discretion to order an assessment.

If a person is found to be incapable by virtue of a s. 16 assessment, such person can request a further assessment under s. 20.1 and can apply to the Consent and Capacity Board for a review of the finding of incapacity under s. 20.2. The court is also given supervisory jurisdiction over a guardian's actions under the *SDA*, s. 20.2(5).

Both the *Health Care Consent Act*[75] and the *SDA* give a person found to be incapable the right to request a review of the assessment by the Consent and Capacity Board. The Consent and Capacity Board, however, does not have jurisdiction to hear a s. 22 assessment since the purposes of a s. 22 assessment are to apply to the court to obtain a guardianship order.

Koch (Re)[76] is a decision which considers rights advice under both the *Health Care Consent Act* and the *SDA*. The *Health Care Consent Act* does not require a warning before a capacity assessment is conducted; however, s. 17 of the *Health Care Consent Act* requires the health practitioner to provide information to the individual concerned regarding the consequences of the findings.

The *Health Care Consent Act* also provides for an assessment by an "evaluator" to determine whether the person is capable of consenting to admission to a care facility[77] and of consenting to personal assistance services.[78] There is no statutory requirement that any advice must be given to an individual about the evaluation either before it is conducted or afterwards.

Approaching the subject of capacity assessments with a client is almost always difficult. The suggestion of a capacity assessment

74. R.S.O. 1990, c. C.43.
75. S.O. 1996, c. 2, Sch. A.
76. (1997), 33 O.R. (3d) 485, 70 A.C.W.S. (3d) 712 (Ont. Ct. (Gen. Div.)).
77. *Health Care Consent Act*, s. 40.
78. *Health Care Consent Act*, s. 57.

should be approached with sensitivity and regard to your client's specific circumstances. Often it is prudent to recommend that your client consider a capacity assessment in order to prevent the further escalation of already contentious issues, or to prevent the precipitation of litigation. A capacity assessment proving capacity will often support action that you may have taken in respect of the drafting of a new POA, and the revocation of a prior POA. The effects of a capacity assessment should be discussed in depth with your client who is considering submitting to a capacity assessment in that the finding of incapacity takes away considerable rights and freedoms of an individual.

When giving instructions to a capacity assessor, consider the prospective individual's entire estate situation. Consider asking the assessor for, depending on the circumstances of your client and the particular situation, an assessment regarding the following:

(a) a finding of capacity to manage property;
(b) a finding of capacity to manage personal care;
(c) a finding of capacity to give instructions or directions to a lawyer;
(d) a finding of capacity to make admission to long-term care facility decisions;
(e) a finding of capacity to grant a POA for property;
(f) a finding of capacity to grant a POA for personal care;
(g) a finding of capacity to submit to personal assistance services; and
(h) a finding of testamentary capacity.

Assessments under the *Mental Health Act*[79] should also be considered, as well as the corresponding forms under the *Mental Health Act* respecting capacity assessments.

In many situations, a capacity assessment assists in the prevention of future litigation.

7. The POA Dispute: Know Your Professional Duties

Sometimes in POA disputes you will be contacted by a friend or family member of what is likely to be a prospective client. In cases such as this it is essential to determine whether it is appropriate for you as a lawyer to meet with the person calling you or the prospective client. Be aware that a conflict situation is likely and make it clear to the person that you will take instructions and act on behalf of the client, which may not be the person contacting you. In my experience,

79. R.S.O. 1990, c. M.7. Also see *Health Care Consent Act*, s. 57.

I have not always refused to meet with a client simply because they have not personally contacted me, or were not the first point of contact. It will all depend on the specific circumstances with which I am confronted. Often an elderly or incapable person who requires assistance may be unable to make appointments themselves. In situations such as these, though I may agree to meet with a friend or relative either alone or together with the prospective client initially, thereafter my view is that it is prudent and essential to meet with the prospective client alone to get instructions. Quite often you will discover that what the friend or relative has expressed as the "wants or needs" of the prospective client are not his or her actual "wants or needs". Use caution. Be alert to potential abuse.

Quite often the lawyer will be called by one of many siblings of the grantor of a POA who may explain that the grantor is having problems with the particular attorney. In these circumstances you must consider whether or not it is appropriate to meet with the sibling, or whether or not you should more appropriately be meeting with the grantor of the POA. Rule 2.02(6) of the *Rules of Professional Conduct* states as follows:

> When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

The Rule requires that we presuppose a client has the requisite mental ability to make decisions about his or her legal affairs and to give us instructions.

With POAs as with all other matters, lawyers should also be constantly vigilant as to their professional duties with respect to client confidentiality and the avoidance of conflicts of interest. The lawyer must be alert to issues of capacity, undue influence and must be probing of their clients where suspicion is raised and investigation warranted.

8. Fraud and Powers of Attorney

The use of fraudulently obtained POAs is an increasing concern. Elderly individuals in particular are highly susceptible to such fraud. The most common forms of title fraud involve fraudsters using stolen identities or forged documents to transfer a registered owner's title to himself or herself without the registered owner's knowledge. The fraudster then obtains a mortgage on this property and once the funds are advanced on the mortgage, he or she disappears.

Fraud can also be the product of validly executed powers of attorney. You should always ensure that your client knows the powers, duties and responsibilities of an attorney under a POA. That is, once a POA is signed, the chosen attorney has the immediate ability to sign the grantor's name and make financial decisions for him or her.

(1) Relevant Recent Case Law

In the recent case of *Dhillon v. Dhillon*[80] the British Columbia Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son. In that case, while a husband was living in India, his wife and son used a forged POA to sell residential property that the husband owned, and used another forged POA to withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded damages in the amount of $75,324.91 for the sale of house A payable jointly and severally by the wife and son, $15,226.78 for the sale of house B payable jointly by wife and son, a constructive trust in house C, and $12,540.77 for RRSP withdrawals. The husband was further awarded $5,000 in punitive damages, and special costs at 80 percent of solicitor-client costs. The Court of Appeal found that the trial judge did not overcompensate the husband by failing to limit his award to the extent of his loss. They found that the trial judge did not err in ordering punitive damages against the wife and son nor in exercising his discretion to make an order for special costs in addition to an award of punitive damages. However, the court did find that a stay of execution on remedies granted for unjust enrichment was appropriate given that the trial judge did not consider the division of family assets and debts pursuant to the *Family Relations Act*.[81]

Most recently, in *Alcombrack Estate v. Alcombrack*,[82] a claim was made on behalf of the estate for fraud and, in the alternative, for damages for breach of fiduciary duty. In the further alternative, damages for unjust enrichment were sought. The estate alleged that the deceased's son, Barry Alcombrack, fraudulently used a power of attorney for property given to him by his mother to sell two parcels of land owned by her without her instructions, knowledge, or consent.

80. (2006), 385 W.A.C. 249, 153 A.C.W.S. (3d) 97, 2006 BCCA 524.
81. R.S.B.C. 1996, c. 128.
82. (2008), 40 E.T.R. (3d) 31, [2008] O.J. No. 1602 (QL) (S.C.J.).

Parcel A was sold in September 2002; Parcel B was sold in January 2004. The estate action was commenced in January 2006 in Mrs. Alcombrack's lifetime. Barry Alcombrack failed to appear at the Examinations for Discovery and at the pretrial. He also did not attend at the trial nor did anyone on his behalf. DiTomaso J., of the Ontario Superior Court of Justice, found on the evidence that Barry Alcombrack had used his power of attorney to sell both properties without his mother's instructions or authorization. In so finding, His Honour relied on the evidence of other family members to the effect that Mrs. Alcombrack had expressed surprise and upset upon learning of the sale, and had responded to the news by saying, "[t]hen give me my money".[83] According to their evidence it had been her intention for all of her children to have the properties as an inheritance. Accordingly, it was found that Barry Alcombrack had committed a fraudulent breach of his fiduciary duty. Damages in this case were measured as equal to the value of the properties at the time of the sale. DiTomaso J. found that there should be no deduction for costs such as legal fees, real estate commission and disbursements related to the sale, since Mrs. Alcombrack never intended the sale to occur.

In *Bishop v. Bishop*[84] O'Neill J. of the Superior Court found a POA granted to an elderly woman's son void *ab initio* based on medical evidence that she did not have capacity to grant a continuing POA to her son at the time that she did. Alma Bishop gave her son a continuing POA in 2005. The medical evidence included a score of 22/30 on the mini-mental health status test administered by her family physician and a diagnosis of mild Alzheimer disease. Allegations of fraud and abuse however were held to be unfounded.

In *CIBC Mortgages Inc. v. Chan*,[85] Herman J. of the Ontario Superior Court ruled that "once registered" the two mortgages were "effective and can be relied on", that is, they are enforceable where the lender was unaware of the fraud. In that case, the defendants were a husband and wife who were joint tenants of the home. The wife forged the husband's signature on a POA while the husband was out of the country and used the POA to obtain lines of credit from the plaintiff lenders secured by mortgages on the home. The mortgages were registered pursuant to the *Land Titles Act*.[86] When the mortgages

83. *Alcombrack Estate*, *supra*, at para. 54.
84. (2006), 151 A.C.W.S. (3d) 338, [2006] O.J. No. 3540 (QL) (S.C.J.), vard 155 A.C.W.S. (3d) 743, 2007 ONCA 170.
85. (2004), 6 R.F.L. (6th) 73, 20 R.P.R. (4th) 151 (Ont. S.C.J.), affd 261 D.L.R. (4th) 679, 205 O.A.C. 141 *sub nom. Household Realty Corp. v. Liu*, 26 R.F.L. (6th) 278 (C.A.).

went into default, the lenders brought action against the husband and wife for principal and interest due, as well as possession of the home. The husband and wife brought a counterclaim on the basis that mortgages based on a forged POA were void. Herman J. granted the lenders' motion for summary judgment and the husband and wife's motion for summary judgment was dismissed. It was held that, once registered, mortgages were effective and could be relied on as they were given for valuable consideration and without notice of fraud. This decision was based on Herman J.'s interpretation of the application of ss. 155 and 78(4) of the *Land Titles Act*. The Ontario Court of Appeal affirmed her decision in *Household Realty Corp. v. Liu*.[87]

However, in the recent decision of *Wright v. Lawrence*,[88] Gillese J.A. speaking for the court found that the result in *Household Realty*, at least in respect of the husband's interest in the property, was inconsistent with the theory of deferred indefeasibility preferred by the court. It was further held that the language in *Household Realty* failed to recognize that the *Land Titles Act* gives statutory effect to the theory of deferred indefeasibility. For these reasons, the court found both the reasoning and the result in *Household Realty* to be incorrect.

Instead, the Ontario Court of Appeal in that case held as follows:

> The theory of deferred indefeasibility accords with the Act and must be taken into consideration in an analysis of s. 155 and its relationship with other provisions in the Act. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world.[89]

Considered together, these recent decisions suggest that where a POA is fraudulently or otherwise improperly obtained (for example, where the grantor is found incapable at the time that the POA is given), the innocent individual is not without recourse. The Ontario Court of Appeal's decision in *Wright* supports the deferred indefeasibility doctrine and affords protection to the claim of the true owner of property even in the face of an innocent intermediate owner. Where the true owner has been wronged by the operation of a

86. R.S.O. 1990, c. L.5.
87. *Supra*, footnote 85, *sub nom. CIBC Mortgages Inc. v. Chan.*
88. (2007), 278 D.L.R. (4th) 698, 84 O.R. (3d) 94, 220 O.A.C. 19 (C.A.).
89. *Wright*, *supra*, at para. 67.

fraudulent or improperly obtained POA , the law may provide some protection. Of course anyone alleging this would still face the burden of proving the initial fraudulent or improper POA.

9. Concluding Remarks

Coping properly with your professional duties is often difficult when POA disputes arise. Use caution. Keep thorough notes to pretect yourself and your client.

If you draft POAs, it is advisable to prepare a stock information package summarizing the legislation and the nature of the POA. Include template reporting letters and checklists that you can routinely distribute to clients each and every time you prepare a POA. In this way, your clients will always be apprised of any risks. Keep careful notes. Consider educating the attorney, not just the grantor.

We should all also be vigilant about the fraudulent possibilities that attach to POAs. If there is any reason to suspect that a certain individual may be an inappropriate attorney, this should be discussed with your client. In the case of fraudulently obtained POAs, the police should be notified and involved once you have evidence of such fraud.

POA disasters are all too prevalent today. As advisors, we must ensure our own familiarity with the case law and the legislation, and be aware of the potential minefield of things that can go wrong. These concerns apply to us whether we are solicitors addressing a client's concerns at first instance, or barristers litigating after the fact.