



ONTARIO BAR ASSOCIATION

**THE OTHER SIDE OF THE COIN:
PERSONAL CARE AND THE ESTATE LAWYER**

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Program Chairs: Ameena Sultan and Diane A. Vieira

Paper collaboratively prepared by Kimberly Whaley and Mark Handelman,
Whaley Estate Litigation

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**THE OTHER SIDE OF THE COIN:
PERSONAL CARE AND THE ESTATE LAWYER**

I. Duties of an Attorney for Personal Care and How to Assist Clients named as Attorneys for Personal Care

Introduction

An aging population combined with an increased life expectancy mean that cognitive disorders, reduced functional ability, impaired decisional capacity and the consequent vulnerability associated therewith, are now more than ever, a part of our world. These changing demographics render the law as it affects older adults increasingly important. Older adults can be and are particularly prone to legal abuses. Elder abuse, or the abuse of older adults, is often defined as any act or omission that harms a senior, or jeopardizes his/her health or welfare. The World Health Organization defines abuse of older adults as "a single or repeated act/action, or lack of appropriate action, occurring in any relationship where there is an expectation or obligation of trust that causes harm or distress to an older person." Legal abuse of older adults can take many forms where the abuse of trust involves a legal instrument and/or construct.

Generally speaking, the Power of Attorney document (the "POA") has long been viewed as one way in which a person can legally protect their health and their financial interests, by planning in advance for when they become ill, infirm or incapable of making decisions. The POA can also be seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. Often, however, it has the propensity to be used in a manner characterizes as the complete antithesis of this and can alternatively cause a great deal of family disharmony.

In our experience, 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 one needs. We have also seen it used as a means of protection against predators, of which there is a very real and increasing societal risk. Unfortunately too, we have seen these documents used abusively so as to subject the grantor to harm through fraud, neglect, depletion of wealth/financial abuse and attendant thereto negligence in the provision of necessary care requirements.

That POAs are generally a good planning vehicle is a widely shared view. This is evident from the fact that, since 1994 and to this day, 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. Unfortunately, however, if any study has been conducted with respect to the consequences or success of the use of such kits, it is not publicly available. Nor is there a known comprehensive study determining the extent to which attorneys appointed pursuant to such documents are actually aware of the statutory principles which are meant to guide them (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 be a dark side so to speak, 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, 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 is an extremely high risk that a vulnerable older adult or incapable person may still fall victim to abuse as a result of having a POA document. 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 society and 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 to be afforded certain protections.

What is a Power of Attorney?

Put summarily, a POA is an instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even incapacity. Proper, thoughtful, preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

- (1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;
- (2) the Continuing POA for Property (or "**CPOAP**"), pursuant to the provisions of the *SDA*; and
- (3) the POA for Personal Care (or "**POAPC**") pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;
- a general authority granting the power to do all that is permissible under the governing principles and legislation; and
- a continuing authority which survives subsequent incapacity.

A POA for Personal Care can be used to grant powers exercised during incapacity only.

Selecting the Right Attorney

In advance of drafting and ultimately granting a POA, the grantor must be made aware of the fact that there is a very real risk of fraud and abuse with respect to these documents. Indeed, the most important advice that we, as practitioners, can give to a potential grantor of a CPOAP or a POAPC is **to carefully choose their attorney(s)**. In addition, much emphasis should be placed on the fact that the most important characteristics that a grantor should look for in a would-be attorney are: **honesty, integrity and accountability**.

Power of Attorney for Personal Care

More specifically, a POAPC enables the (capable) grantor to appoint a person or persons to make personal care decisions on their behalf in the event that they are found to be incapable of being able to do so on their own. A person/grantor is considered incapable of their personal care if unable to understand information relevant to a decision concerning **health care, nutrition, shelter, clothing, hygiene, or safety**, or if unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same. As with the different legal criterion for assessing capacity for managing property and giving or revoking a CPOAP, the *SDA* also provides the criterion required for the capacity to make personal care decisions and to give or revoke a POAPC. Also, just because a person has capacity to make a decision concerning health care does not therefore mean a person does or does not have capacity to make a decision concerning for example, shelter. Because capacity is issue specific, each decision must be addressed on its own. Again, the *SDA* specifically provides that a person may be capable of giving or revoking a POAPC even if he or she is mentally incapable of making personal-care decisions.

There are limitations on who a grantor may appoint as their attorney pursuant to a POAPC. The *SDA* prohibits a person who provides health care, or residential, social, training or support services to the grantor *for compensation* from acting as an Attorney for Personal Care, unless the Attorney is the spouse, partner or relative of the grantor, in which case they are permitted to act.

When making decisions on an incapable person's behalf, the Attorney for Personal Care is required to make those decisions in accordance with the *SDA*. Further requirements respecting consent to treatment decisions is also found in the *HCCA*. In addition, an Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person (ascertained while capable) or otherwise act in the incapable person's best interests guided by the *HCCA*, *SDA* and common law. To act in the incapable person's best interests, the attorney as substitute decision maker,

must consider the values and beliefs of the grantor in question, their current incapable wishes, if ascertainable, whether the decision will improve the grantor's standard and quality of life or otherwise either prevent it from deteriorating or reduce the extent or rate at which the quality of the grantor's life is likely to deteriorate, and whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.

A POAPC is generally considered a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so. Indeed, it is increasingly viewed as a planning tool for the end of a person's life. Its drafting should be addressed carefully including all of its provisions which may be customized to suit the grantor.

One difficulty associated with the granting of a POAPC is that all too often the document does not contain detailed-enough instructions or, alternatively, the instructions provided are far too detailed, such to cause confusion. Attorneys for personal care should be informed that written wishes and oral wishes have equal weight, and that later capable wishes take precedence over earlier wishes. It is at this juncture that discussion with family members are beneficial if not mandatory, noting of course, that the attorney must ensure that the incapable person's independence is fostered. The attorney must also assist in choosing the least restrictive or intrusive courses of treatment or action. It is important to understand that an Attorney for Personal Care is not a care provider; rather, a decision maker.

Another difficulty associated with a POAPC is that sometimes the Attorney(s) cannot accept or act upon treatment or other wishes contained in the document. That is why conversations with prospective Attorneys are so important: to ensure the Attorney is comfortable with the instructions and "empowered" to carry them out. For example, a loved one may have difficulty consenting to discontinuance of active care when there is no prospect of recovery, in spite of a "no heroic measures" provision.

Another problem often faced by attorneys, concerns the appointment of too many attorneys. Often the attorneys cannot easily work together. The governing document may be drafted such that it makes the appointment joint and several, and one, or more of the appointed attorneys acts severally without keeping the other(s) informed, yet curiously the other(s) are still liable for the joint and several acts of the one attorney.

Guidance regarding the execution, revocation, resignation, and termination POAPCs can be found in the *SDA*.

Duties of Attorneys: Generally

An Attorney is a fiduciary who is in a special relationship of trust with the grantor—who, when the Attorney acts, is usually in a very vulnerable situation. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. Thus, in addition to any specific duties that may have been set out by the grantor in the POA document itself, the common law has also imposed the following duties upon an attorney:

- The attorney must stay within the scope of the authority delegated;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his or her own affairs; if being paid 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;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;

- 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;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

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. A CPOAP is effective from the moment it is signed absent a triggering provision. A POAPC is effective from the time of incapacity or one or more of the personal care caregivers under the *SDA*.

The Specific Duties of an Attorney for Personal Care

The Attorney for Personal Care must exercise powers diligently and in good faith. As with an attorneyship for property, attorneys for personal care are required by law to foster the incapable person's independence, to encourage the incapable person to participate in personal-care decisions to the best of his or her ability and to consult with the incapable person's supportive family and friends and with the persons who provide personal care to the incapable person. Attorneys are required to keep thorough and detailed records of any and all decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.

Unless the POAPC contains instructions or expresses wishes to the contrary an attorney is required to act in the grantor's best interests. The *SDA* guidelines on 'best interests' are:

Best interests:

(4) In deciding what the person's best interests are for the purpose of subsection (3), the guardian shall take into consideration,

(a) the values and beliefs that the guardian 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 guardian'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.¹

At common law there is also a 'best interests' consideration.²

Standard of Care and Liability of a Power of Attorney for Personal Care:

An Attorney for Personal Care is required to exercise and perform his or her powers and duties diligently and in good faith.

¹ S. 66(4) *SDA*.

² *Napper v. Edwards*, (1997), 16 E.T.R. (2d) 309 (O.C.G.D.); *Palin v. Elbrecht*, 1998 CarswellOnt 4780 (O.C.G.D.); *McGoey v. Wedd* (1999), 28 E.T.R. (2d) 236 (Ont. S.C.J.); *Re Fischer* (1999) 27 E.T.R. (2d) 303 (Sask Q.B.); *Re Pineo* [1985] B.C.J. No. 1171 (B.C.S.C.)

No proceedings for damages shall be commenced against an Attorney for Personal Care for anything done or admitted in good faith in connection with the Attorney for Personal Care's powers and duties under the *SDA*.³

The POA is governed by common law principles, agency law, contract law, the law of fiduciaries and statutes.

Common Law Duties:

An Attorney is a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. A fiduciary:

- (a) must use reasonable care in acting;
- (b) must not obtain secret profits;
- (c) must account;
- (d) must not allow personal interests to conflict with those of the principal;
- (e) cannot make, change or revoke a Will on behalf of the donor; and
- (f) cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.⁴

The POA can be tailored to the specific wants and needs of the grantor. In other words, it can be used to grant:

- (a) a specific, or limited authority;
- (b) general authority granting the power to do all that is permissible under the governing principles and legislation;
- (c) a continuing authority, meaning that it will survive subsequent incapacity; and
- (d) it can deal not only with property matters, but, also personal care matters as well.

In Ontario as summarized above, there are three types of Powers of Attorney:

³ *Immunity – s. 66(19) – No proceeding for damages shall be commenced against a guardian for anything done or omitted in good faith in connection with the guardian's powers and duties under this Act.*

⁴ Primarily from Theriault, Powers of Attorney, Some Fundamental Issues, [1999] 18 Estates, Trusts and Pensions Journal 229 at 230-231.

- (1) A POA made in accordance with the Powers of Attorney Act⁵, which sets out the general form of a POA;
- (2) A Continuing POA for Property under the *SDA*; and
- (3) A POA for Personal Care under the *SDA*.⁶

Power of Attorney for Personal Care: Background

A POA for Personal Care was introduced as a result of legislative reforms which were brought into effect in 1992, including the *SDA*, the *Consent to Treatment Act, 1992*, the *Advocacy Act, 1992*, and the *Consent and Capacity Statute Law Amendment Act, 1992*, all of which registration came into force in 1995. There were, however, subsequent amendments.

The POA for Personal Care requirements are set out at s. 46 of the *SDA*. It should be noted that this type of document is more of a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so, and is often referred to as a “Living Will” which can contain advance planning directives for care amongst other provisions customized to the grantor.

The *SDA* governs the form and requirements of making Powers of Attorney for Property, for Personal Care, the affairs of incapable persons, the appointment of statutory guardians, and court appointed guardians.

In 1996 the *Health Care Consent Act*⁷ replaced the *Consent to Treatment Act 1992*, and the *Consent Capacity Statute Law Amendment Act, 1992*. The *Health Care Consent Act, 1996* governs health care issues in the areas of consent to treatment, treatment, admission to a care facility, Consent and Capacity Board reviews, and intervention and personal assistance services⁸

⁵ *Powers of Attorney Act* R.S.O. 1990, c. P. 20.

⁶ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 46.

⁷ *Health Care Consent Act*, S.O. 1996, C.2, Schedule A.

⁸ *Health Care Consent Act*, S.O. 1996, C.2, Part 1 General, s. 1(a)-(f).

The *Health Care Consent Act, 1996* is concerned mainly with consent to specific treatment and other personal care decisions as well as the means for giving substitute consent where a patient is found to be incapable.

The *SDA* provides guidance regarding the execution of a personal care POA⁹, revocation¹⁰, resignation¹¹, and termination¹².

A POA for Personal Care is never used except in circumstances where the grantor is incapable of making a decision.¹³ The *SDA* prohibits people who provide health care for compensation or residential social or support services to a grantor for compensation from acting as an Attorney for Personal Care except insofar as the person is the spouse, partner or relative of the grantor.¹⁴ The POA for Personal Care can cover decisions concerning health care, nutrition, shelter, clothing, hygiene or safety. Some health care decisions are covered by the Health Care Consent Act 1996.

The following relevant checklist can be accessed on our WEL website:

<http://whaleyestatelitigation.com/blog/checklists-for-attorneys-and-guardians>

and in particular the Checklist: Duties of an Attorney under a Power of Attorney for Personal Care:

http://whaleyestatelitigation.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf

- **Undue Influence Checklist**

http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist_Sask_2013.pdf

- **Duties of an Attorney Under Power of Attorney For Property**

⁹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 48.

¹⁰ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 50.

¹¹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 52.

¹² *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 53.

¹³ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 49.

¹⁴ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 46(3).

http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_Property.pdf

- **Duties of an Attorney Under Power of Attorney for Personal Care**

http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_PersonalCare.pdf

- **Capacity Checklist Re: Estate Planning Context**

http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

- **Summary of Capacity Criteria**

http://whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf

- **Attorney/Guardian /Client Memorandum Re: Personal Care**

http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_PersonalCare.pdf

- **Attorney/Guardian/Client Memorandum Re: Property**

http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_Property.pdf

II. Compensation of an Attorney for Personal Care

Personal Care Guardian Compensation

This legislation in most Canadian jurisdictions does not specifically provide for compensation for person care attorneys. In Ontario, the legislation, the *SDA*, provides for the ability to provide for same by way of regulation. Yet, no such regulation has been passed. An attorney can in theory be compensated, but only if the grantor expressly provides for it.

It is the SDA S.90 (i)(i) in Ontario which contemplates the presiding of regulations of personal care guardianship compensation, but not of attorney for personal care compensation.

A court appointed guardian of the person may wish to apply to the court for compensation in respect of the person. The SDA does not regulate or prescribe compensation for a guardian of the person either, though the Court has also been known to make such awards on application.

The guardianship of the person appointment involves ethical implications concerning the payment of a person in carrying out life and death decisions being made on behalf of an individual with disability, and therefore compensation claimed remains in the jurisdiction and discretion of the court so as to prevent the obvious potential for abuse.

The case of *Re Brown*¹⁵ was a case where a trust company was appointed as the guardian of the property, and of the person. In the course of passing its accounts, an objection was raised by the OPGT to a claim for personal care services compensation. The Court made an award based on the following observations:

- (a) *there is no statutory prohibition against such compensation;*
- (b) *the fact that the legislature has not passed a statute, or regulation providing for the payment of compensation to a guardian of the person, or fixed in the manner in which it is to be calculated, does not prevent the court from awarding it and fixing it;*
- (c) *Section 32(12) of the SDA does not oust the application of Section 61(1) of the Trustee Act¹⁶, as the basis for awarding compensation to a guardian. However, the use of the word “estate” in*

¹⁵ *Re Brown*- 1999 CarswellOnt 4628, 31 E.T.R. (2d) 164, followed in *Cheney v Byrne* (Litigation Guardian of) 2004 CarswellOnt 2674, [2004] O.J. No. 2773, 9 E.T.R. (3d) 236 (Ont. S.C.J. Jun 23, 2004) (Judicially considered 3 times), followed in *Kiomall v Kiomall*, 2009 CarswellOnt 2246 (Ont. S.C.J. Apr 27, 2009); and *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (Ont S.C.J. Jun 16, 2006) (Judicially considered 5 times) followed in: *Giusti (Litigation Guardian of) v. Scarborough Hospital*, 2008 CarswellOnt 2769, 167 A.C.W.S. (3d) 887, [2008] W.D.F.L. 3403, [2008] O.J. No. 1899, 57 C.P.C. (6th) 275 (Ont. S.C.J. May 13, 2008) (Judicially considered 5 times); *Marcoccia (Litigation Guardian of) v Gill*, 2007 CarswellOnt 2087 (Ont. S.C.J. Apr 05, 2007); *Ward v Manufacturers Life Insurance Co.*, 2007 CarswellOnt 41, [2007] O.J. No. 37, 29 E.T.R. (3d) 233, 46 C.C.L.I (4th) 139, 25 B.L.R. (4th) 327 (Ont S.C.J. Jan 04, 2007) (Judicially considered 3 times) .

¹⁶ *The Trustee Act*, R.S.O. 1990.

the latter section, implies a guardian of a property rather than a guardian of the person;

- (d) The court does have jurisdiction to award compensation for legitimate services rendered by a committee of a person to an incapable person so found, provided there is sufficient evidence of the nature and extent of the services provided, and evidence from which a reasonable amount can be fixed for compensation;*
- (e) The court routinely deals with claims for compensation for work done or services rendered in a variety of situations, and there is no reason, in the absence of any statutory prohibition, for rejecting such a claim, simply because it is made by a committee of the person;*
- (f) Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property; in the latter case, traditionally, the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;*
- (g) The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;*
- (h) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided; the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question; and*
- (i) There must be some evidentiary foundation to support the claim for compensation.*

In *Re Brown*, the Court observed there is no statutory prohibition against such compensation and, though concluding that the committee had acted reasonably and appropriately in providing the personal care services it did, with no duplication in the

amounts claimed for compensation for acting as committee of the person, was however left without any evidentiary basis upon which to calculate the value of services and the reasonableness of the amount claimed, and therefore dismissed the claim for compensation for personal care services.

This issue was also before the Court in *Cheney v Byrne*.¹⁷ The Court found that there is no statutory prohibition against the making of an award of compensation to persons acting as attorneys for personal care, specifically referred to Section 46(3) of the *SDA*, providing that a person unrelated to the incapable person may not act as an attorney for personal care if the person also provides care for compensation.

The Court referred to the test in *Re Brown*, and opined that courts routinely dealt with claims for compensation for work performed or services rendered in a variety of circumstances, akin to a quantum meruit claim for services rendered, and made an award to the personal care attorney, although discounted the hourly rate claimed. The court commented that the applicants kept serious and accurate dockets for the time spent in managing the person's personal care in that case.

In the *Sandhu* case¹⁸ the court found in favour of a case for an award for compensation for a non-corporate guardian of the person in an amount of annual compensation.

In *Kiomall v Kiomall*¹⁹ which is a more recent decision of the Honourable Mr. Justice Brown in 2009, compensation was sought in respect of a guardian of the person in the amount of \$45,000.00 for a period spanning 3 to 4 years. The court made an analysis of the statutory provisions, referred to *Cheney v Byrne* and reviewed the hours spent providing care in the context of the value of the property of the incapable person. In this case, compensation was awarded to the guardian of the person. There was a reduction because the amount claimed was thought to be too high, with a degree of risk to the

¹⁷ *Cheney v Byrne* (Litigation Guardian of) 2004 CarswellOnt 2674, [2004] O.J. No. 2773, 9 E.T.R. (3d) 236 (Ont. S.C.J. Jun 23, 2004).

¹⁸ *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (Ont S.C.J. Jun 16, 2006)

¹⁹ *Kiomall v Kiomall*, 2009 CarswellOnt 2246 (Ont. S.C.J. Apr 27, 2009).

incapable person's property. Accordingly, the reasonableness of the amount of the compensation awarded had to be assessed in the context of the specific financial circumstances of the incapable person. In other words, the award had to be proportionate to the property.

Moreover, in the case of *Giusti*²⁰, an allocation was made for past attendant care to the parents.

III. The Power of Attorney and Prior Capable Wishes: Consulting with the Incapable Person, Balancing Autonomy with 'Best Interests'

As noted above, in addition to the Attorney's obligation to respect the incapable person's autonomy, the Attorney's discretion is limited by the statutory obligation to respect the grantor's prior capable wishes as well as values and beliefs. Regarding decisions for personal care, this obligation is set out in s. 66 of the *SDA*:²¹

Duties of guardian

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).

Decisions under *Health Care Consent Act, 1996*

(2.1) The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act, 1996* applies in accordance with that Act. 1996, c. 2, s. 43 (1).

Other decisions

(3) The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act, 1996* does not apply in accordance with the following principles:

1. If the guardian knows of a wish or instruction applicable to the circumstances that the incapable person expressed while

²⁰ *Giusti (Litigation Guardian of) v. Scarborough Hospital*, 2008 CarswellOnt 2769, 167 A.C.W.S. (3d) 887, [2008] W.D.F.L. 3403, [2008] O.J. No. 1899, 57 C.P.C. (6th) 275 (Ont. S.C.J. May 13, 2008).

²¹ *SDA*, S.O, 1992, c.30, s.66

capable, the guardian shall make the decision in accordance with the wish or instruction.

2. The guardian shall 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 guardian 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 guardian shall make the decision in the incapable person's best interests. 1992, c. 30, s. 66 (3); 1996, c. 2, s. 43 (2).

Best interests

(4) In deciding what the person's best interests are for the purpose of subsection (3), the guardian shall take into consideration,

(a) the values and beliefs that the guardian 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 guardian'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. 1996, c. 2, s. 43 (3).

Records of decisions

(4.1) The guardian shall, in accordance with the regulations, keep records of decisions made by the guardian on the incapable person's behalf. 1996, c. 2, s. 43 (3).

Participation

(5) The guardian shall encourage the person to participate, to the best of his or her abilities, in the guardian's decisions on his or her behalf. 1992, c. 30, s. 66 (5).

Family and friends

(6) 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. 66 (6).

Consultation

(7) 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. 66 (7).

Independence

(8) The guardian shall, as far as possible, seek to foster the person's independence. 1992, c. 30, s. 66 (8).

Least restrictive course of action

(9) The guardian shall choose the least restrictive and intrusive course of action that is available and is appropriate in the particular case. 1992, c. 30, s. 66 (9).

Confinement, restraint and monitoring devices

(10) The guardian shall not use confinement or monitoring devices or restrain the person physically or by means of drugs, and shall not give consent on the person's behalf to the use of confinement, monitoring devices or means of restraint, unless,

(a) the practice is essential to prevent serious bodily harm to the person or to others, or allows the person greater freedom or enjoyment.

(b) Repealed: 1996, c. 2, s. 43 (4).

Common law

(11) Nothing in this Act affects the common law duty of caregivers to restrain or confine persons when immediate action is necessary to prevent serious bodily harm to them or to others. 1992, c. 30, s. 66 (11).

Electric shock as aversive conditioning

(12) The guardian shall not use electric shock as aversive conditioning and shall not give consent on the person's behalf to the use of electric shock as aversive conditioning unless the consent is given to a treatment in accordance with the *Health Care Consent Act, 1996*. 1996, c. 2, s. 43 (5).

Research

(13) Nothing in this Act affects the law relating to giving or refusing consent on another person's behalf to a procedure whose primary purpose is research. 1992, c. 30, s. 66 (13).

Sterilization, transplants

(14) Nothing in this Act affects the law relating to giving or refusing consent on another person's behalf to one of the following procedures:

1. Sterilization that is not medically necessary for the protection of the person's health.
2. The removal of regenerative or non-regenerative tissue for implantation in another person's body. 1992, c. 30, s. 66 (14).

Guardianship plan

(15) A guardian shall act in accordance with the guardianship plan. 1992, c. 30, s. 66 (15).

Amendment of plan

(16) If there is a guardianship plan, it may be amended from time to time with the Public Guardian and Trustee's approval. 1992, c. 30, s. 66 (16).

(17) Repealed: 1996, c. 2, s. 43 (6).

(18) Repealed: 1996, c. 2, s. 43 (6).

Immunity

(19) No proceeding for damages shall be commenced against a guardian for anything done or omitted in good faith in connection with the guardian's powers and duties under this Act.

Duties of attorney

[67.](#) Section 66, except subsections 66(15) and (16), applies with necessary modifications to an attorney who acts under a power of attorney for personal care.

Regarding decisions to which the *HCCA* applies, these obligations are set out in s. 21 of the *HCCA*²²:

Principles for giving or refusing consent

21. (1) A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:

1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.
2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests. 1996, c. 2, Sched. A, s. 21 (1).

²² HCCA, 1996, S.O. Chapter 2, Schedule A, s. 21

Best interests

(2) In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,

- (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable;
- (b) any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and
- (c) the following factors:
 1. Whether the treatment is likely to,
 - i. improve the incapable person's condition or well-being,
 - ii. prevent the incapable person's condition or well-being from deteriorating, or
 - iii. reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate.
 2. Whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment.
 3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her.
 4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

In all cases, the essence of the statutory requirements is:

1. Make decisions according to the Grantor's previously expressed capable wishes applicable to the decision.
2. If respecting the wish is impossible, make the decision according to the Grantor's best interests.
3. "Best interests" includes consideration of the Grantor's values and beliefs as well as of incapable wishes expressed and the intent of a capable wish no longer possible to respect.
4. "Best Interests" also includes determining which decision or choice is the least restrictive.

Most of the litigation regarding decisions made by Attorneys for Personal Care involve the "end of life" decision-making process: when the treatment team recommends

palliative care and allowing the person to die [or from a different perspective, abbreviating the dying process and shortening the length of suffering that offers no benefit because the incapable person will never regain sentience]. The cases usually pit the treatment team against the Attorney(s), but occasionally disputes arise between Attorneys themselves,

In *Re I.A.*,²³ for example, the incapable patient had two children. Her Attorney for Personal Care had resigned, as she was unable to make a life and death decision in these circumstances. Consequently, as Mrs. I.A. was widowed, her two children became her substitute decision-makers because they were next in the hierarchy of decision-makers set out in s. 20 of the *HCCA*. Her son wanted her life continued, her daughter wanted to allow her to die. The Consent and Capacity Board heard competing applications from the son and daughter, each wanting to be sole decision-maker for Mother. The Board held neither could act in Mother's best interests declined to appoint either, consequently, the treatment decision devolved to Public Guardian and Trustee, SDM of last resort, as set out in *HCCA* s. 20(6).

It should be noted that health care practitioners do not always do a good job of determining their patients' end of life wishes. For example, in one case now before The Supreme Court of Canada,²⁴ the patient acquired meningitis following successful brain surgery, which left him in what was originally thought to be a persistent vegetative state, although he was later upgraded to "minimally conscious." The treatment team proposed palliative care which would have resulted in Mr. Rasouli's death. His wife, who is his SDM, would not consent and the issue became litigious. Surprisingly, at no point in his care did any health care professional suggest he should address what he would want if things went wrong—as they did. Mr. Rasouli had never expressed "end of life" wishes and his wife's decisions were based upon her perception of his religious beliefs.

²³ *I.A. (Re)*, 2004 CanLII 29268 (ON CCB)

²⁴ [Rasouli v. Sunnybrook Health Sciences Centre](#), 2011 ONCA 482 (CanLII) — 2011-06-29

The tension between autonomy and best interests is starkest regarding decisions about shelter and admission to a care facility [nursing home]. “Shelter” decisions are made pursuant to the *SDA*, admission decisions pursuant to the *HCCA*. Seniors value their independence, autonomy and own home. While it may be on Mother’s objective best interests to move to an assisted living facility of some sort, she may not wish to go. How much risk in the community is too much risk requires balancing best interests and autonomy. There is no formula; it all depends on the person and the risks.

Disputes over admission to care facilities are occasionally litigated before Ontario’s Consent and Capacity Board. As with treatment decisions, the Attorney’s obligation is to make decisions in accordance with the principles for substitute consent set out in sections 21 and 42 *HCCA*. The health care provider’s obligation regarding an incapable patient is to obtain informed consent from the correct SDM that accords to the principles for substitute consent set out in those sections. Health care providers who think the Attorney’s decision is not in accord with those provisions may make application to the Board. If they are successful, the Attorney or other SDM will be directed to consent to what the health provider proposed, failing which they cease to be Attorney for that decision. Regarding admission to a care facility, such a dispute occurred in *Re N D*²⁵

Personal care and treatment decisions deal directly with a person’s dignity and autonomy at all times. Occasionally they are literally life and death decisions. As fiduciaries, Attorneys for Personal Care have a positive obligation to understand the statutory requirements for their decisions. And, as these decisions are always subjective, the personal views of the Grantor must be factored in, whether prior capable wishes or current incapable expressions of preference. Therefore, as a best practice, lawyers drafting these documents should encourage their clients to express their late in life and end of life views to their designated Attorneys.

²⁵ [ND \(Re\)](#), 2012 CanLII 30419 (ON CCB)

IV. Working with Other Decision Makers: Joint Attorneys and Duty to Consult with the Attorney for Property

Joint Attorneys

When there is more than one Attorney for Personal Care appointed, the appointment may be “jointly,” “severally” or “jointly and severally.” “Jointly” requires that they must all consent to any decision and “severally” means any one of the named Attorneys may give consent.

However, care must be taken to consider the operation of s. 20(6) *HCCA*, which reads,

“If two or more persons who are described in the same paragraph of subsection (1) and who meet the requirements of subsection (2) disagree about whether to give or refuse consent, and if their claims rank ahead of all others, the Public Guardian and Trustee shall make the decision in their stead”.

In other words, while one Attorney may give consent according to the POA, if there is a dispute among them, the decision defaults to Public Guardian and Trustee. There are no cases to help decide if the POA overrides the statutory provision, or vice versa. However, on a few occasions, the Consent and Capacity Board has entertained competing applications by the conflicted [former] Attorneys pursuant to *HCCA* s. 33 or 51 to be appointed Representative. These applications are not available if there is a POAPC because the person appointed would rank below an Attorney in the s. 20 *HCCA* of SDMs. However, the Board has held that the dispute between SDMs of equal rank also applies to disputes between Attorneys, resulting in there no longer being a POAPC. *Quaere*, whether the Board would come to the same conclusion if, in addition to the disagreeing joint Attorneys, there were also alternates named, or what the Board would do if for example the POA provided for consent by majority vote of the Attorneys.

Dealing With Attorneys For Property

Not uncommonly, a person chooses different Attorneys for Personal Care than for Property. There are a variety of reasons for this but a common one is the assurance that the two Attorneys will counterbalance each other.

Whatever the reason, the two [or two sets of] Attorneys are obliged to work together in pursuit of following the Grantor's wishes and attending to his or her best interests. Both Attorneys are fiduciaries and the *SDA* sets out their obligations to the Grantor.

Section 68 of the *SDA* also provides a dispute resolution mechanism for Attorneys by Court Application for directions.

More directly, *SDA* s. 88(a) provides that Public Guardian and Trustee may mediate.

- (a) a dispute that arises between a person's guardian of property or attorney under a continuing power of attorney and the person's guardian of the person or attorney for personal care, if the dispute arises in the performance of their duties;
- (b) a dispute that arises between joint attorneys under a person's continuing power of attorney or power of attorney for personal care, if the dispute arises in the performance of their duties,
- (c) a dispute that arises between joint guardians of property or joint guardians of the person, if the dispute arises in the performance of their duties.

While the provision exists, our belief is that PGT is rarely sought for mediation and reluctant to conduct them.

V. Decision Making and Foreign Jurisdictions

Introduction²⁶

The world is shrinking. Improvements in communications technology and transportation efficiency have broadened the range of travel opportunities available to contemporary society. It is now fully conceivable that persons could own property in several countries, thousands of miles apart, and could split their time and residency between their properties. This trend is no less prevalent amongst the elderly in society.

Increasingly, retirees in Canada and the United States are engaging in cross-border travel for holiday or semi-permanent residency purposes. Faced with the dire prospect of harsh Canadian winters, many older persons in Canada choose a better option—winter in the balmy climate of the southern United States. In other parts of North America, retirees from the United States and Canada routinely cross the border to holiday, whether in Maine and New Brunswick, Ontario and New York State, or British Columbia and Washington State. Many of these persons may own real property in Canada and the United States.

While this current state of affairs raises legal issues concerning citizenship, tax, and healthcare, an often overlooked risk to the elderly engaged in cross-border travel is their welfare in the event of their sudden incapacity. If an incapable person owns property in Canada and in the United States, holds a Canadian passport, but becomes incapable or incapacitated while residing in the United States, which laws should govern the guardianship of this person? To further complicate this scenario, consider the hypothetical possibility that the incapable person validly executed a power of attorney in Ontario before leaving Canada for the winter. Will the Power of Attorney be enforceable in the United States?

²⁶ The following pages, with additions and amendments have largely been excerpted from an Article (prepared for the 2012 Annual National NAELA Conference, Seattle, April 26-28, 2012, '*Powers of Attorney for a Generation on the Move*', by Archie Rabinowitz with assistance of Lionel Tupman and Kimberly Whaley and co-presented by Kimberly Whaley and Ameena Sultan.

The answer to the foregoing questions is complicated. Inasmuch as the issue of inter-jurisdictional enforceability of Powers of Attorney is related to estate planning, the issue raises complex questions of conflicts of laws. The law relating to advanced directives and guardianship of the incapable varies between provinces and from state to state. Consequently, a validly executed Ontario Power of Attorney may not be accepted as valid in another jurisdiction with divergent technical requirements of execution.

There is no guarantee that a power of attorney made in one jurisdiction will be recognized in another jurisdiction and legislation expressly providing for recognition of foreign power of attorney documents, is different as between the provinces in Canada and amongst other jurisdictions. Revocation is also a concern as the making of a new power of attorney may automatically revoke all previous powers of attorney unless the existence of multiple powers of attorney is expressly contemplated.

These considerations are not merely academic. The following scenario actually occurred and will be used as an example of jurisdictional issues, legislation and conflict of law considerations. The example is meant to illustrate the complexity and, of course, is only relevant to the jurisdictions considered.

Illustration Case Study

The “Jones” Case²⁷

“Mr. Jones” is an elderly gentleman who lived in Ontario with his wife. After his wife passed away, Mr. Jones started spending a considerable amount of time holidaying in the United States. In 2008, while on holiday in Florida Mr. Jones met a woman from Michigan who was somewhat younger than he. Mr. Jones and the woman soon married, and lived for a while at the woman’s house in Michigan. Mr. Jones increasingly suffered from dementia and became incapable. Mr. Jones’ daughter travelled from Ontario to the United States, removed Mr. Jones from the nursing home in which his wife had put him, and brought him to Ontario.

²⁷ The names of the parties involved in this dispute have been changed to protect their confidentiality.

Mr. Jones' daughter then moved Mr. Jones to a nursing home in Ontario at a location known only to her. The daughter refused to tell anyone else where Mr. Jones was being kept, and expressed a concern that Mr. Jones' wife would take him back to the United States. Interestingly, Mr. Jones had, before becoming incapable, executed a valid Power of Attorney in Michigan naming his wife as attorney for personal care.

A legal battle ensued before courts in Michigan and in Ontario, through which Mr. Jones' daughter and wife attempted to assert their respective authority to act as attorney for his care. Throughout this period, Mr. Jones expressed continued sadness that his wife did not know where he was, or that she did not care to visit him.

This factual scenario is not so out of the ordinary. The element of kidnapping in this case is perhaps somewhat unusual though emerging slowly as an issue. The conflict between Canadian laws governing Powers of Attorney and the same laws in the United States is a legitimate and salient concern. Not every case in which cross-border power of attorney issues arise will end up before the courts. It is however prudent for practitioners to anticipate such conflicts in relation to the affairs of their clients. At the very least, taking proactive estate planning and advance directives measures with elderly clients who are engaged in cross-border travel will likely serve to decrease their financial and emotional hardship when such directives are needed.

Having situated this topic in relevance, the discussion of the law as it relates to Powers of Attorney in British Columbia and Ontario, and in the State of Washington will be referenced as an example and indication of multi-jurisdictional treatment. There will also be some discussion of the law which will govern Powers of Attorney and guardianship in the event of a conflict of laws such as the one described above.

Substitute Decisions and Advance Planning Directives in Canada

Canada is a federal country, and consequently the constitution of Canada delegates enumerated powers to each province in Canada. Among these powers is the power to regulate property and civil rights in the province and matters of a local or private nature.²⁸ Provinces are, therefore, solely responsible for enacting legislation governing estate planning, including Powers of Attorney. Each province has a unique set of laws which relate to these topics, and within Canada, differences between provincial legislation present challenges for travelers.

Power of Attorney for Personal Care:

Ontario

The requirements relating to a Power of Attorney for Personal Care in Ontario are equally as specific as those outlined above. The *Substitute Decisions Act* requires a Power of Attorney for Personal Care to be written, to contain the directions of the grantor, and to be signed by the grantor at the bottom of the document. The document must be signed by two additional persons who saw the grantor sign the document. Only particular persons are eligible to act as witnesses, and as Attorneys. Failure to execute the document in accordance with the formal requirements will render the document invalid. The *Substitute Decisions Act* provides in relevant part:

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.

[...]

(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

²⁸ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5 at s. 92 (13) and (16).

(b) provides residential, social, training or support services to the grantor for compensation.

[...]

(7) The power of attorney may contain instructions with respect to the decisions the attorney is authorized to make.

[...]

(8) The power of attorney need not be in any particular form.

[...]

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.

[...]

(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.

[...]

(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.

Execution

48. (1) A power of attorney for personal care shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.

Persons who shall not be witnesses

(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.*²⁹

Given the foregoing technical requirements, it is necessary to employ extreme care in drafting a Power of Attorney in accordance with Ontario law.

Recognition of Foreign Laws:

Ontario/British Columbia

In each of Ontario and B.C., as another provincial example, the respective statutes which deal with advance directives and care for incapable persons provide that Powers of Attorney validly granted in foreign jurisdictions will be recognized as enforceable in Ontario and B.C. The Ontario *Substitute Decisions Act* states:

85. (1) As regards the manner and formalities of executing a continuing power of attorney or power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where,

(a) the power of attorney was executed;

(b) the grantor was then domiciled; or

*(c) the grantor then had his or her habitual residence.*³⁰

The *Substitute Decisions Act* does not, however, afford complete reciprocal enforcement of foreign law relating to Powers of Attorney. The following provision limits the range of enforcement, and states:

²⁹ *Ibid.*, at ss. 46-48.

³⁰ SDA, at para. 85.

(4) If, under this section or otherwise, a law in force outside Ontario is to be applied in relation to a continuing power of attorney or a power of attorney for personal care, the following requirements of that law shall be treated, despite any rule of that law to the contrary, as formal requirements only:

1. Any requirement that special formalities be observed by grantors answering a particular description.

2. Any requirement that witnesses to the execution of the power of attorney possess certain qualifications.³¹

The *Substitute Decisions Act* also provides a mechanism by which orders of foreign courts, including the granting of certificates relating to Powers of Attorney by foreign courts, may be enforced in Ontario. The Act provides:

Foreign orders

86. (1) In this section,

“foreign order” means an order made by a court outside Ontario that appoints, for a person who is sixteen years of age or older, a person having duties comparable to those of a guardian of property or guardian of the person.

Resealing

(2) Any person may apply to the court for an order resealing a foreign order that was made in a province or territory of Canada or in a prescribed jurisdiction.

Certificate from foreign court

(3) An order resealing a foreign order shall not be made unless the applicant files with the court,

(a) a copy of the foreign order bearing the seal of the court that made it or a copy of the foreign order certified by the registrar, clerk or other officer of the court that made it; and

³¹ SDA, *supra* at s. 85(4).

(b) a certificate signed by the registrar, clerk or other officer of the court that made the foreign order stating that the order is unrevoked and of full effect.

Effect of resealing

(4) A foreign order that has been resealed,

(a) has the same effect in Ontario as if it were an order under this Act appointing a guardian of property or guardian of the person, as the case may be;

(b) is subject in Ontario to any condition imposed by the court that the court may impose under this Act on an order appointing a guardian of property or guardian of the person, as the case may be; and

(c) is subject in Ontario to the provisions of this Act respecting guardians of property or guardians of the person, as the case may be.³²

The effect of these provisions in the *Substitute Decisions Act* is that a validly executed Power of Attorney created under the laws of another jurisdiction will be, in large part, enforceable and valid in Ontario. Unfortunately, no case in Ontario has yet considered these provisions, and so it is impossible to say with certainty how a court will interpret this portion of the *Substitute Decisions Act*.

British Columbia

The B.C. *Power of Attorney Act* also contains provisions providing for the reciprocal enforcement of laws relating to Powers of Attorney. This *Act* states:

Extra jurisdictional powers of attorney

38. Subject to any limitation or condition set out in the regulations, a power of attorney that

(a) applies or continues to apply when an adult is incapable,

(b) was made in a jurisdiction outside British Columbia, and

(c) complies with any prescribed requirements

³² *Ibid.*, at s. 86.

*is deemed to be an enduring power of attorney made under this Act.*³³

Pursuant to this statutory authorization, the government of B.C. may enact regulations prescribing requirements relating to extra-jurisdictional Powers of Attorney, including those jurisdictions which will be granted reciprocity. The regulation states:

Extra-jurisdictional powers of attorney

4 (1) In this section, "deemed enduring power of attorney" means an instrument made in a jurisdiction outside British Columbia that is deemed under subsection (2) to be an enduring power of attorney made under the Act.

(2) Subject to subsection (3), an instrument is deemed to be an enduring power of attorney made under the Act if the instrument

(a) grants a power of attorney to a person that continues to have effect while, or comes into effect when, the adult is incapable of making decisions about the adult's financial affairs,

(b) was made by a person who was, at the time of its making, ordinarily resident

(i) outside British Columbia but within Canada, or

(ii) within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand,

(c) was validly made according to the laws of the jurisdiction in which

(i) the person was ordinarily resident, and

(ii) the instrument was made, and

(d) continues to be effective in the jurisdiction in which the instrument was made.

(3) To be effective in British Columbia, a deemed enduring power of attorney must be accompanied by a certificate, as

³³ BCPOAA, *supra* at s. 38.

set out in the Schedule, from a solicitor permitted to practise in the jurisdiction in which the deemed enduring power of attorney was made indicating that the deemed enduring power of attorney meets the requirements set out in subsection (2) (a) to (c).

(4) A person named as an attorney in a deemed enduring power of attorney must not, in British Columbia, exercise any powers or perform any duties as an attorney

(a) that could not lawfully be exercised or performed by an attorney

(i) under the Act, or

(ii) in the jurisdiction in which the deemed enduring power of attorney was made, and

(b) unless both the person who made the deemed enduring power of attorney and the attorney are at least 19 years of age.

(5) Unless the adult is ordinarily resident in British Columbia, sections 34 and 35 of the Act do not apply in relation to an adult who makes, or an attorney who acts for an adult under, a deemed enduring power of attorney.³⁴

Consequently, a Power of Attorney validly executed in the United States will be valid and enforceable in B.C., and in Ontario if, at a later date, the grantor of the Power of Attorney resides or holidays in B.C. or Ontario.

From the perspective of a practitioner in the United States, it is necessary to verify that a client's advance directive documents are valid under the laws of the jurisdiction in which the practitioner practices.

In Ontario and B.C., it is not necessary that a Power of Attorney be drawn in any particular form, notwithstanding the formal requirements relating to the execution of the document and those persons eligible to sign the document as witnesses. It would

³⁴ *Power of Attorney Regulation*, B.C. Reg. 20/2011 at s. 4.

appear, however, that a document which does not comply with the formal requirements of B.C. or Ontario law will not be prohibited from application in Ontario or B.C. so long as the document is valid at the time and in the place of its execution.

Powers of Attorney and Advance Directives in Washington State:

The law relating to guardianship and Powers of Attorney in Washington State, as another jurisdictional example is contained in the Revised Code of Washington ("RCW"), Title 11, "Probate and Trust Law". With respect to Powers of Attorney, RCW Chapter 11.94 prescribes the requirements for a valid "Durable Power of Attorney".³⁵ This Chapter states:

(1) Whenever a principal designates another as his or her attorney-in-fact or agent, by a power of attorney in writing, and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability, the authority of the attorney-in-fact or agent is exercisable on behalf of the principal as provided notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or the principal's guardian or heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. A principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in

³⁵ RCW title 11, c. 11.94, [RCW].

a durable power of attorney except for good cause or disqualification. If a guardian thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the guardian rather than the principal. The guardian has the same power the principal would have had if the principal were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency.

(2) Persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective.

(3)(a) A principal may authorize his or her attorney-in-fact to provide informed consent for health care decisions on the principal's behalf. If a principal has appointed more than one agent with authority to make mental health treatment decisions in accordance with a directive under chapter 71.32 RCW, to the extent of any conflict, the most recently appointed agent shall be treated as the principal's agent for mental health treatment decisions unless provided otherwise in either appointment.

(b) Unless he or she is the spouse, state registered domestic partner, or adult child or brother or sister of the principal, none of the following persons may act as the attorney-in-fact for the principal: Any of the principal's physicians, the physicians' employees, or the owners, administrators, or employees of the health care facility or long-term care facility as defined in RCW 43.190.020 where the principal resides or receives care. Except when the principal has consented in a mental health advance directive executed under chapter 71.32 RCW to inpatient admission or electroconvulsive therapy, this authorization is subject to the same limitations as those that apply to a guardian under RCW 11.92.043(5) (a) through (c).³⁶

³⁶ *Ibid.*, at § 11.94.010.

The RCW also provides a special procedure and requirements for the execution of an advance mental health directive. Chapter 71.32.050 indicates circumstances which must exist for the creation of a valid advance mental health directive. It states:

Execution of directive — Scope

(1) An adult with capacity may execute a mental health advance directive.

(2) A directive executed in accordance with this chapter is presumed to be valid. The inability to honor one or more provisions of a directive does not affect the validity of the remaining provisions.

(3) A directive may include any provision relating to mental health treatment or the care of the principal or the principal's personal affairs. Without limitation, a directive may include:

(a) The principal's preferences and instructions for mental health treatment;

(b) Consent to specific types of mental health treatment;

(c) Refusal to consent to specific types of mental health treatment;

(d) Consent to admission to and retention in a facility for mental health treatment for up to fourteen days;

(e) Descriptions of situations that may cause the principal to experience a mental health crisis;

(f) Suggested alternative responses that may supplement or be in lieu of direct mental health treatment, such as treatment approaches from other providers;

(g) Appointment of an agent pursuant to chapter 11.94 RCW to make mental health treatment decisions on the principal's behalf, including authorizing the agent to provide

consent on the principal's behalf to voluntary admission to inpatient mental health treatment; and

(h) The principal's nomination of a guardian or limited guardian as provided in RCW 11.94.010 for consideration by the court if guardianship proceedings are commenced.

(4) A directive may be combined with or be independent of a nomination of a guardian or other durable power of attorney under chapter 11.94 RCW, so long as the processes for each are executed in accordance with its own statutes.³⁷

The execution of this document must be in accordance with formalities similar to those required by the statutes in Ontario and B.C. relating to the same subject matter. This Chapter requires that:

1) A directive shall:

(a) Be in writing;

(b) Contain language that clearly indicates that the principal intends to create a directive;

(c) Be dated and signed by the principal or at the principal's direction in the principal's presence if the principal is unable to sign;

(d) Designate whether the principal wishes to be able to revoke the directive during any period of incapacity or wishes to be unable to revoke the directive during any period of incapacity; and

(e) Be witnessed in writing by at least two adults, each of whom shall declare that he or she personally knows the principal, was present when the principal dated and signed the directive, and that the principal did not appear to be incapacitated or acting under fraud, undue influence, or duress.

³⁷ RCW tit 11, c. 71.32.050 [RCW Mental Health].

(2) A directive that includes the appointment of an agent under chapter 11.94 RCW shall contain the words "This power of attorney shall not be affected by the incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the principal's intent that the authority conferred shall be exercisable notwithstanding the principal's incapacity.

(3) A directive is valid upon execution, but all or part of the directive may take effect at a later time as designated by the principal in the directive.

(4) A directive may:

(a) Be revoked, in whole or in part, pursuant to the provisions of RCW 71.32.080; or

(b) Expire under its own terms.³⁸

Interestingly, the RCW does not prescribe any specific form or formalities in the execution of a Durable Power of Attorney pursuant to Chapter 11.94. It is likely, however, that execution of such a document requires at least the signature of the grantor and the signatures of two persons having witnessed the execution of the document by the grantor in accordance with the requirements of Chapter 71.32 above.

Guardianship and Reciprocal Enforcement of Foreign Laws

RCW s. 11.88.010 prescribes a broad range of circumstances in which a person can be deemed to be "incapable", including mental incapacity. A guardian may be appointed by a County Court in Washington where such appointment is necessary for the benefit or protection of the incapable person, the incapable person's estate, or both.³⁹ Notably, the determination of a person's incapacity pursuant to the RCW is incongruent with the same determination under the laws of Ontario or B.C.

³⁸ *Ibid* at § 71.32.060.

³⁹ RCW 11.88.010(2).

In Ontario and B.C., the focus of the test to determine whether a person has capacity to grant Powers of Attorney for property or personal care is the ability of the individual to appreciate the consequences of their appointment of an attorney, and the scope of property in their control or possession. Notwithstanding that a person may not have capacity to administer their property or make decisions effectively for their own welfare, the person may have sufficient capacity to appoint an attorney, and to appreciate the consequences of failing to appoint an attorney.

The conflict which exists between these laws is significant, since the RCW may impose a lower threshold for the finding of incapacity than do the laws in Ontario or B.C.. The result of this inconsistency could mean that a person has capacity to grant Powers of Attorney in Ontario or B.C., because they have the ability to appreciate the consequences of their actions and the scope and nature of their property, but the same person may not be deemed to have the capacity to grant Powers of Attorney in Washington. The practical result of this conflict is, however mitigated by the reciprocal enforcement provisions contained in the RCW.

RCW Chapter 11.90 is the *Uniform adult guardianship and protective proceedings jurisdiction act*, which codifies the relationship of the State of Washington in adult guardianship proceedings with other foreign states. Subsection 14 of this Chapter defines foreign state to mean “a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.” However, subsection 15 provides, “[a] court of this state may treat a foreign country as if it were a state for the purpose of applying this chapter.”⁴⁰

This Chapter authorizes courts in the State of Washington to appoint guardians in a variety of circumstances.

Notably, a court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

⁴⁰ RCW c. 11.90 at § 11.90.020.

(1) This state is the respondent's home state;

(2) On the date the petition is filed, this state is a significant-connection state and:

(a) The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(b) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(i) A petition for an appointment or order is not filed in the respondent's home state;

(ii) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(iii) The court in this state concludes that it is an appropriate forum under the factors set forth in RCW 11.90.250;

(3) This state does not have jurisdiction under either subsection (1) or (2) of this section, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(4) The requirements for special jurisdiction under RCW 11.90.230 are met.⁴¹

In the event that a guardian has already been appointed by a court in a jurisdiction other than the State of Washington, this Chapter provides that the guardianship so granted may be sanctioned by the court in Washington. It states:

⁴¹ *Ibid.*, at § 11.90.220.

*If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.*⁴²

A guardian appointed in B.C. or Ontario could likely petition a court in Washington in order to secure the enforcement of his or her appointment as guardian. This reciprocal enforcement provision is similar in effect to those contemplated in the Ontario and B.C. statutes.

Significantly, however, Chapter 11.94, which specifically deals with Powers of Attorney, does not provide for any type of reciprocal enforcement of foreign Powers of Attorney. Given the broad application of Chapter 11.90 above, it is likely the appointment of an Attorney or guardian in Canada pursuant to a court order would be given effect by a court in Washington on the basis of this chapter. Some uncertainty does exist however, which may be a result of a divergence in terminology. Whereas the term “Power of Attorney” in Canada generally refers to a document granting authority to a person to act on behalf of the grantor in a wide array of situations of incapacity, the state of the law in Washington appears to consider different types of appointments depending on the nature of the incapacity at issue.

Conflict of Laws: Which Law Should Apply in Questionable Situations

Given the reciprocal enforcement provisions from B.C., Ontario, and Washington State for example as noted above, in most cases, it will be a relatively simple analysis to determine whether a Power of Attorney is valid and enforceable in a particular jurisdiction.

⁴² *Ibid.*, at § 11.90.420.

More difficult circumstances arise, however, where a person does not have a validly executed Power of Attorney in any jurisdiction, and owns property in more than one jurisdiction or travels to that jurisdiction regularly. Similarly, a difficult situation arises where a person lives in two jurisdictions periodically, and one of the two jurisdictions does not have reciprocal enforcement legislation. In such circumstances, which jurisdiction's law should apply?

The law as it relates to conflicts of laws is complicated and rife with uncertainty. Conflict of law issues are very complex and require legal advice from legal professionals relevant to the jurisdiction involved. No simple answer to the foregoing question exists. Ultimately, in the Canadian context, the law which applies to a person will be determined in consequence of a number of factors discussed below.

Domicile vs. Residence

Central to any discussion of conflicts of laws in respect of the law applicable to persons is the notion of "domicile". "Individuals are domiciled in that legal unit in which they have or are deemed by law to have, their permanent home." An individual must have a domicile, and may only have one domicile even if they own more than one home.⁴³

In Canada, courts determine a person's domicile with reference solely to *lex fori*. "Capacity to acquire a domicile of choice in a new legal unit is determined by the courts of that unit in accordance with the law of the individual's domicile at that time."⁴⁴ If a person owns several residences in different countries, it is sometimes "necessary to identify the 'chief' or 'principal' residence in order to determine the person's domicile." Castel and Walker identify relevant factors in the consideration of this issue, including whether the residence is used for business, holiday or vacation purposes, the relative amounts of time spent in each residence, the presence of family members including

⁴³ Janet Walker & Jean-Gabriel Castel, O.C., O.O., Q.C., L.S.M., *Canadian Conflict of Laws*, loose-leaf (consulted on 15 February, 2012), Markham: LexisNexis Canada Inc., 2005) [Castel] at p. 4-1.

⁴⁴ *Ibid.*, at p. 4-2.

spouses and dependants, legal relationships to the jurisdiction, official documentation and identification, and other factors.⁴⁵

If a person chooses to change their domicile, thus adopting a “domicile of choice”, they must display an *animus manendi*, meaning an intention to make the new location their principal permanent home.⁴⁶

Additionally, a legal presumption against a change of domicile exists, such that a person alleging a change of domicile bears the burden of proving the change.⁴⁷ “Residence in a country, especially if it is continued for a long period, can be evidence of an intention to remain there; in the absence of other evidence, residence alone may support the inference that a domicile has been acquired.”⁴⁸

In contrast to the somewhat permanent notion of domicile, a “residence” is a significantly more fluid and elastic concept. A person’s “residence” may change depending on their physical location at any given time. This concept is central to the law relating to Powers of Attorneys and guardianship, because the “residence” of a person will likely determine the law which applies in circumstances of their incapacity, and not their domicile. As Castel and Walker indicate,

*residence determines or plays a role in the determination of, inter alia, the situs of a debt [...] the proper law of a contract, the formal validity of a will, the court’s jurisdiction, the jurisdiction of a foreign court for the purpose of a recognition and enforcement of its judgments, the application of some social and political domestic legislation, some procedural matters such as security for costs, and fiscal liability.*⁴⁹

⁴⁵ *Ibid.*, at p. 4-5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at 4-10.

⁴⁸ *Ibid.*, at 4-13.

⁴⁹ *Ibid.*, at p. 4-18.

The determination of a person's residence will, therefore, directly impact the law which governs the person's incapacity. A person need not demonstrate a settled intention to remain in a jurisdiction to be "resident in the jurisdiction".

In circumstances where a person owns property in two jurisdictions and spends time periodically in each, the situation is further complicated. The determination of which residence is the person's "ordinary residence" requires a court to engage in a weighing process. "Of the factors that become determinative in this weighing process where there are two legal units in which the individual has a settled attachment, intention to return or to remain becomes paramount."⁵⁰ There is, consequently a degree of uncertainty that exists where an individual resides in two jurisdictions. Though a person may be permanently domiciled in one jurisdiction, there is no guarantee that the same jurisdiction's laws will govern in the event of his or her incapacity while resident in another jurisdiction.

Domiciles of Incapable Adults

In the event that an adult is incapable, the capacity to change their domicile will be vested in their guardian.⁵¹ An incapable person is likely not able to form the mental intention necessary to change their domicile of choice. This issue has been addressed infrequently by Canadian courts.⁵² Canadian courts may be required to decide whether they have jurisdiction to declare an adult mentally incompetent, and which or whether foreign law should be applied in the circumstance.⁵³ Generally speaking a person's ordinary residence or domicile will govern which court has authority to determine the person's incapacity. However, if a person is traveling outside of their domicile or jurisdiction or ordinary residency, another court may obtain jurisdiction to determine the person's incapacity:

[f]or practical reasons, such determinations may also be made by courts in the place where the person is present.

⁵⁰ *Ibid.*, at p. 4-21.

⁵¹ *Ibid.*, at p. 21-1.

⁵² Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law Inc., 2010) at 19.

⁵³ Castel., *supra* at p. 21-1.

The court will have jurisdiction even if the person's property is located elsewhere. Once jurisdiction has been exercised, it continues even after a change in the person's residence."⁵⁴

If a representative is appointed by a foreign court to represent the interests of a mentally incompetent person, the representative cannot remove the incompetent person "from the jurisdiction without the approval of the appropriate authorities." In the event that an incompetent person holds property locally, but they are domiciled or resident in a foreign jurisdiction, a local representative must, generally, be appointed to deal with the person's real or immovable property. Generally, a foreign representative may dispose of or deal with a person's movable property located in a jurisdiction other than the one in which the incapable person is domiciled or resident.⁵⁵ In all circumstances, the court in the jurisdiction in which the incapable person is resident, or in which their property is located, may intervene in the determination of their guardianship.

Practical Application

Because B.C., Ontario and Washington State all employ systems of reciprocal enforcement with respect to Powers of Attorney, it is unlikely any complicated proceedings regarding conflicts of laws analyses would arise in most circumstances. In the event that an adult was resident in Washington, and became incapable, an appointment of a guardian under Washington law would be recognized by a court in Ontario or B.C., and with respect to the rules of conflicts of laws, the person's assets in Ontario or B.C. would be dealt with either by the foreign guardian or one locally situated depending on the nature of the property in the jurisdiction. It is clear, however, that no "duplicate" appointment of guardians would be permissible, since the law relating to a *person* at any given time is the *lex fori*.

In the event that a person whose domicile was Washington State resided in B.C. or Ontario, and that person became incapable while resident in Canada, the laws governing the appointment of a guardian would be those of B.C. or Ontario. Pursuant to

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at pp. 21-2-21-3.

Chapter 11.90 of the RCW, a guardian appointed in B.C. or Ontario pursuant to the *lex fori* could apply to the court in Washington to receive reciprocal treatment.⁵⁶ The RCW states:

[i]f a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

The remainder of the RCW in respect of appointment of guardians yields to the prior appointment of a guardian in another jurisdiction. In the event an application for an appointment of a guardian in another jurisdiction is pending, a court in Washington will not grant a concurrent appointment in Washington.⁵⁷

Consequently, the law of whichever jurisdiction a person is resident in at the time of their incapacity will govern their incapacity, and will permit the guardian in the absence of a Power of Attorney, to deal with the assets of the incapable person existing in that jurisdiction at the time of their incapacity, as well as for their personal care.

Conclusions: Advice for a Generation on the Move

It may have come as a surprise to many that the legislative provisions relating to Powers of Attorney in B.C., Ontario, and Washington are so similar in granting reciprocal treatment to the Power of Attorney documents created in other jurisdictions. These legislative provisions are, perhaps, indicative of the growing trend towards recognition of a global community. No longer is it sufficient for domestic laws to consider only their domestic applicability. Legislation must reflect the commercial realities of the modern era: efficient international transportation and high speed electronic communication.

⁵⁶ RCW, *supra* at § 11.90.420.

⁵⁷ *Ibid.*, at § 11.90.220.

Lawyers, too, must keep up with modernity. No longer is it sufficient for us to ensure the validity of our clients' advance directive documents in our domestic forum. Rather, we must anticipate our clients' needs in accordance with their scope of activity, including travel.

Fortunately, legislation such as the RCW, the *Substitute Decisions Act* and the *Power of Attorney Act* simplify a lawyer's burden in this respect. It is, as will be apparent from the pages above, most important that persons who travel outside of their home jurisdiction for short or long periods of time ensure they have a validly executed Power of Attorney, (or corresponding document(s)) in their home jurisdiction before they travel.

In light of the foregoing, how could Mr. Jones have protected himself from the situation described above? Ultimately, Mr. Jones' Power of Attorney validly executed in Michigan would be valid in Ontario. His wife could have brought an application in a court on the basis of his valid Power of Attorney and compelled his daughter to release Mr. Jones' location. Without a validly executed Power of Attorney, however, the situation would have been significantly more complicated.

Indeed, the case of Mr. Jones did involve too, the question of the validity of certain Power of Attorney documents alleged to have been granted during a period of incapacity to grant same.

The question of this determination would need to be determined in accordance with the law of the governing document and corresponding statute. This is an oft raised issue and its determination difficult, lengthy and requiring retrospective evidence of the requisite decisional capacity.

Evidence rules of the particular jurisdiction are also relevant. The occurrence of this further issue is frequent.

Often multiple Powers of Attorney are compelled, or granted in a short period of time where capacity is in question and the practical considerations of determining validity, influence, and the wishes of the grantor are often difficult to reconcile.

The incidence of cross-border travel amongst the elderly is likely to continue to increase in the coming years. Fortunately, legislation is keeping pace with societal developments. For those who holiday or reside outside of their jurisdiction of domicile, drafting and executing valid advance directive documents before they embark on their travels is a key step in ensuring their safety.

Chart - Re: Power of Attorney Across the Country of Canada, by Jasmine Sweatman, of Sweatman Law⁵⁸

Chart attached as an appendix to this paper indicating the relevant POA legislation provincially.

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.

Kimberly A. Whaley, Whaley Estate Litigation

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⁵⁸ POA Across Country Chart, by Jasmine Sweatman, 2012 Annual National NAELA Conference, Seattle, April 26-28, 2012.