WHALEY ESTATE LITIGATION PARTNERS

ANNOTATED CHECKLIST: MISUSES AND ABUSES UNDER A CONTINUING POWER OF ATTORNEY FOR PROPERTY ("CPOAP")

An Attorney managing property under a CPOAP misuses and/or abuses a grantor's property when the attorney/fiduciary…

- ❑ steals the grantor's money, pension cheques, or possessions
- ❑ commits fraud, forgery, or extortion
- ❑ makes unauthorized, questionable, or even speculative investment decisions, or those lacking diversity
- ❑ fails to consider the tax effects of actions or inactions
- ❑ inappropriately deals with jointly held assets or accounts
- ❑ misappropriates the grantor's assets
- ❑ shares the grantor's home without paying a fair share of the expenses
- ❑ withholds from the grantor bank statements/other financial documents
- ❑ denies the grantor access/control over finances (e.g., credit cards, cheques)
- ❑ unduly pressures the grantor to:
  - ▫ sell personal property
  - ▫ move from/sell grantor's home
  - ▫ invest/withdraw money
  - ▫ buy alcohol/drugs
  - ▫ make/change a Will
  - ▫ sign legal documents not understood including documents that transfer assets into joint names
  - ▫ give money to relatives, caregivers, or friends
  - ▫ engage in paid work to bring in extra money

SELECT CASE SUMMARIES

MISUSE / ABUSE	CASE
THEFT	***Dhillon v. Dhillon*** *Dhillon v. Dhillon*, 2006 CarswellBC 3200 (B.C.C.A.) ***Grewal v. Bral*** *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.) ***Sevello v. Sevello*** *Sevello v. Sevello,* 2014 ONSC 5035 **[***not a POA situation]** ***Valente v. Valente*** *Valente v. Valente*, 2014 ONSC 2438
FRAUD/FORGERY/EXTORTION	***Dhillon v. Dhillon*** *Dhillon v. Dhillon*, 2006 CarswellBC 3200 (B.C. C.A.) ***Grewal v. Bral*** *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.) ***Juzumas v. Baron*** *Juzumas v. Baron*, 2012 ONSC 7220 ***Sevello v. Sevello*** *Sevello v. Sevello,* 2014 ONSC 5035 **[***not a POA situation]**
INAPPROPRIATELY DEAL WITH JOINTLY HELD ASSETS/ACCOUNTS	***Burke Estate*** *Burke Estate v. Burke Estate*, 1994 CarswellOnt 442 ***Down Estate v. Racz-Down*** *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010) ***Johnson v. Huchkewich*** *Johnson v. Huchkewich*, 2010 CarswellOnt 8157 (Ont. S.C.J.) ***Sevello v. Sevello*** *Sevello v. Sevello,* 2014 ONSC 5035 **[***not a POA situation]**

MISAPPROPRIATES ASSETS	***Dhillon v. Dhillon*** *Dhillon v. Dhillon*, 2006 CarswellBC 3200 (B.C. C.A.) ***Grewal v. Bral*** *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.) ***Covello v. Sturino*** *Covello v. Sturino*, 2007 CarswellOnt 3726 ***Zimmerman v. McMichael Estate*** *Zimmerman v. McMichael Estate*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.) ***Valente v. Valente*** *Valente v. Valente*, 2014 ONSC 2438

ABUSE / MISUSE		**CASE**
UNDUE INFLUENCE	**NO ILA**	***Covello v. Sturino*** *Covello v. Sturino*, 2007 CarswellOnt 3726 ***Sevello v. Sevello*** *Sevello v. Sevello,* 2014 ONSC 5035 **[***not a POA situation]**
	LANGUAGE BARRIER	***Grewal v. Bral*** *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.) ***Johnson v. Huchkewich*** *Johnson v. Huchkewich*, 2010 CarswellOnt 8157 (Ont. S.C.J.) ***Juzumas v. Baron*** *Juzumas v. Baron*, 2012 ONSC 7220 ***Nguyen-Crawford v. Nguyen*** *Nguyen-Crawford v. Nguyen*, 2010 CarswellOnt 9492 (Ont. S.C.J.)
	FORCED EXECUTION	***Grewal v. Bral*** *Grewal v. Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.)

	Johnson v. Huchkewich *Johnson v. Huchkewich*, 2010 CarswellOnt 8157 (Ont. S.C.J.) ***Nguyen-Crawford v. Nguyen*** *Nguyen-Crawford v. Nguyen*, 2010 CarswellOnt 9492 (Ont. S.C.J.) ***Ziskos v. Miksche*** *Ziskos v. Miksche*, 2007 CarswellOnt 7162
CPOAP FRAUDULENTLY USED IN BREACH/SELF-INTEREST	***Burke Estate*** *Burke Estate v. Burke Estate*, 1994 CarswellOnt 442 ***Elford v. Elford*** *Elford v. Elford*, 1922 CarswellSask 162 (S.C.C.) ***Gironda v. Gironda*** *Gironda v. Gironda*, 2013 ONSC 4133; supplemental reasons 2013 ONSC ***Re Koch*** *Koch, Re,* 1997 CarswellOnt 824 (Ont. Gen. Div.); additional reasons in *Koch, Re* 1997 CarswellOnt 2230 (Ont. Gen. Div) **[***not a POA situation]**
CPOAP IMPRUDENTLY USED AND/OR USED IN A WAY THAT CONSTITUTES A BREACH OF FIDUCIARY DUTY	***Abrams v. Abrams*** *Abrams v. Abrams*, 2008 CarswellOnt 7786 (Ont. S.C.J. Dec 19, 2008); additional reasons in: Abrams v. Abrams, 2009 CarswellOnt 524 (Ont. S.C.J. Feb 03, 2009); affirmed by: *Abrams v. Abrams*, 2009 CarswellOnt 3618, 2009 ONCA 522 (Ont. C.A. Jun 25, 2009) ***Bosch v. Bosch*** *Bosch v. Bosch*, 2010 ONSC 1352 ***Chu v. Chang*** *Chu v. Chang*, 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010), 2010 CarswellOnt 4507 (Ont. S.C.J.), 2011 CarswellOnt 1840 (Ont. C.A.)

	Down Estate v. Racz-Down *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010) ***Fiacco v. Lombardi*** *Fiacco v. Lombardi*, 2009 CarswellOnt 5188 ***In The Estate of Irmgard Burgstaler (disability)*** *In the Estate of Irmgard Burgstaler (disability)*, 2018 ONSC 1187 ***Juzumas v. Baron*** *Juzumas v. Baron*, 2012 ONSC 7220 ***Re Eronen*** *Re Eronen*, 2010 CarswellBC 3777 ***Sutherland v. Dorland*** *Sutherland v. Dorland*, 2012 BCSC 615 ***Teffer v. Schaefers*** *Teffer v. Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009) ***Valente v. Valente*** *Valente v. Valente*, 2014 ONSC 2438 ***Woolner v. D'Abreau*** *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009) ***Zimmerman v. McMichael Estate*** *Zimmerman v. McMichael Estate*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.) ***Ziskos v. Miksche*** *Ziskos v. Miksche*, 2007 CarswellOnt 7162

1. Select Case Summaries

1.1 POA'S fraudulently procured, for the sole purpose of abuse

Covello v. Sturino

Covello v. Sturino, 2007 CarswellOnt 3726

A widow had 50% ownership in her house; her son owned the remaining half. She also owned property in Italy. In 2001, the widow made a Will which would divide her assets equally among her five children. Her doctor's notes indicate that she began experiencing memory loss in 2004 and began treatment for Alzheimer's in January of 2005. In the summer of 2005, her son took his mother to his own lawyer, and, on that same day, his mother executed a Continuing Power of Attorney appointing him as her attorney, which took effect on the date of execution, and transferred her ownership property in her home and in certain property in Italy to the attorney/son, for nominal consideration/as a gift. Almost a year later, and pursuant to a court order, the mother underwent a capacity assessment that found her incapable of managing her own affairs.

The Court applied *Bishop v. Bishop*, to state that, as a result of the grantor's diminished mental capacity, both the lawyer who drafted the new power of attorney document and the attorney appointed "*should have insisted that [the grantor] undergo a medical assessment prior to executing her Power of Attorney*."[1] The Court held that, where no such contemporaneous formal assessment exists, the court must rely on the evidence surrounding the execution of the power of attorney, such as doctors' consultation letters and a subsequent capacity assessment, and the facts and circumstances existing in the grantor's life as at the date of execution of the POA, such as evidence of financial mismanagement, lack of independent legal advice and the presence of undue influence from her the attorney appointed.

Although the Court found that the medical evidence strongly suggested that the grantor did not have sufficient legal capacity to execute the Continuing Power of Attorney at the time it was granted and it should, therefore, be declared invalid, it noted that, even if one were to find that the grantor did have sufficient legal capacity, the lack of independent legal advice and the presence of undue influence from her son Giovanni, still worked together to invalidate the document. In fact, it did more. The Court's finding that the son exercised undue influence and always acted in his own best interests, rather than the interests of his mother, sufficiently disentitled him to be appointed as guardian of her property.

Importantly, although there was no evidence in this case that the drafting solicitor was aware of the grantor's cognition issues, the case appears to place an onus on drafting solicitors to insist on capacity assessments in situations where it is known that the would-be grantor has diminished mental capacity, before taking instructions to draft a power of attorney. As stated by the Court, "[h]ad [the drafting solicitor] made sufficient inquiries into the state of [the grantor's] health and cognitive abilities, as reported by her physicians, he

[1] *Covello v Sturino*, 2007 CarswellOnt 3726 at 23.

would have been alerted to the fact that her ability to understand, think, remember and communicate had been affected."[2]

Dhillon v. Dhillon

Dhillon v. Dhillon, 2006 CarswellBC 3200 (B.C. C.A.)

While the husband/father was living in India, a wife and son used a forged POA to sell residential property that the husband owned, and used another forged POA to withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded a considerable amount in damages, including $5,000 in punitive damages and special costs at 80 percent of solicitor-client costs. The British Columbia Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son and substantially upheld the decision of the trial judge with respect to damages.

Grewal v. Bral

Grewal v. Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.)

A widow and her daughter, the plaintiffs, who had lived most of their lives in India and had moved to Canada around 2006. The plaintiffs had resided with the defendant and his family when they first arrived in Canada. The defendant claimed that he had provided for them financially while they lived with his family, while the plaintiffs denied this fact and claimed that the mother had provided the defendant with financial remuneration and had cared for his children during the work week without being financially compensated.

At issue in this case was the validity of two POA documents, one signed by each plaintiff, which had been used to sell two properties in India. The defendant had ultimately benefitted from the proceeds of the sale. The defendant asserted that the plaintiffs had agreed to the sale of the properties and that he be given their proceeds as compensation for the expenditures he had incurred when they lived with him upon moving to Canada. The plaintiffs denied having been aware of the sale of the properties and claimed damages for the value of the properties sold as well as punitive damages from the defendant.

Both the plaintiffs and the defendant agreed that the plaintiffs had each been given a document to sign while they were living with the defendant and that they had signed it. However, the opposing parties disagreed as to the circumstances under which the documents had been signed—for instance, whether the document had been signed at the lawyer's office and whether the nature and effect of the document they were signing had been explained. The plaintiffs claimed that they had been given the document by the defendant without the lawyer's presence or advice and that the defendant had said to them that the document pertained to a matter being litigated in India.

[2] *Ibid* at 33.

Justice Perlmutter stated that his analysis turned on credibility. He found that the plaintiffs' story was corroborated by third party evidence, while the defendant as well as the lawyer he had retained in respect of the POAs presented evidence which conflicted with the evidence presented at trial.[3] Consequently, Justice Perlmutter accepted the plaintiffs' evidence as to the circumstances under which they had signed the 2009 POAs.

In his opinion, Justice Perlmutter applied *Nguyen-Crawford v. Nguyen* in considering the mother's limited understanding of the English language and the fact that the POA had not been translated into her native tongue of Punjabi. This increased their reliance on the defendant's representation regarding the POAs. The judge found that the defendant had falsely induced the plaintiffs to sign the POA document and used it to benefit himself to their detriment. As such, the POAs were declared void *ab initio*.

In addition, Justice Perlmutter found that the defendant's conduct had given rise to "the independent actionable wrong of fraud and misrepresentation"[4] and, consequently, awarded punitive damages against the defendant in the amount of $30,000.

In The Estate of Irmgard Burgstaler (disability)

In The Estate of Irmgard Burgstaler (disability), 2018 ONSC 1187

Irmgard Burgstaler was an 88-year-old senior residing in Penticton, British Columbia. Irmgard had six children: Erwin, Peter, Barbara, Christine, Wilfred, and Edward. On November 17, 2008, Irmgard appointed her husband as her attorney for property with Erwin as substitute. On January 5, 2015, Irmgard's husband died. On March 24, 2015, Irmgard was assessed and found to be incapable of managing her property. Erwin is Irmgard's attorney for property.

There was a breakdown in the relationships of the six children, prompting an application/request for Erwin to pass his accounts as attorney for property. Erwin failed to pass his accounts resulting in an order for him to do so and bear the cost consequences of same. When Erwin did provide his accounts, the Objectors objected to, among other things, Erwin's claimed compensation as attorney for property and the purchase of the Florence Street house for $82,000 in Erwin's name that had been characterized as an asset of Irmgard.

The purchase price for the Florence Street house was $80,000. Erwin testified that it would be best to pay the $80,000 with Irmgard's assets and have title in his name alone because:

- he did not have access to Irmgard at the time to have her sign documents for the home;
- with title in his name alone he would be responsible for insurance and property taxes;
- with title in his name alone his siblings would be unable to put a "no trespass" notice against it and interfere with his access to his mother;

[3] *Grewal v Bral*, 2012 MBQB 214 at para 81.
[4] *Ibid* at para 88.

- he was looking for a home for himself at that time and did not want to move in the middle of a trial of the various court applications;
- pending a court order giving him guardianship of his mother, he would live in the home, renovate it and, on the assumption that he would be successful in obtaining guardianship of his mother, she would then move in;
- as the house was not large enough for him, it would only be his temporary residence until the spring of 2016; and
- he could not afford to buy a house for both himself and his mother.

The purchase of the Florence Street home closed on or about December 15, 2015, and title was placed in Erwin's name alone. On December 4, 2015, Erwin transferred $80,000 from Irmgard's savings account to fund the purchase. And, on December 15, 2015, he transferred a further $2,000 from Irmgard's account to fund the closing costs of the purchase. At the hearing of the passing of accounts, Erwin characterized the $82,000 as a "Loan to Erwin Burgstaler", however, there were no loan documents to evidence this loan.

In response to this purchase, RBC (Irmgard's bank) froze Irmgard's account for fear that her "funds may not have been used for [her] benefit when they were used to purchase the Florence Street home" (at para 33). Erwin insisted that he bought the house and held it "in trust for her"—RBC declined to lift its freeze. Erwin made Irmgard whole with respect to interest lost on the $82,000 but maintained the taking of the $82,000 was proper.

In rendering his decision, Justice Shaw relied on provisions of the *SDA* as they relate to an attorney's duty to manage property: "These provisions of the SDA exist to protect vulnerable persons. Irmagard, is a vulnerable person. She has been found to be incapable of making her own decisions regarding her property. As a fiduciary, Erwin was obligated to act only for Irmgard's benefit, putting his own interests aside" (at para 43). Accordingly, Justice Shaw found that:

- Erwin breached his fiduciary duty to act in Irmgard's interest when he took the $82,000 from her bank account, bought the Florence Street property and registered title in his name alone;
- Erwin's characterization of the $82,000 was inconsistent:
    - Erwin did not hold the Florence Street property in trust as there were no trust documents and the Registry Office did not show the property as held in trust;
    - in a letter to his sister, Erwin characterized the $82,000 as an investment by the estate that he would replace as soon as he was able; and,
    - at the hearing of his passing of accounts, Erwin described the $82,000 as a loan despite there being no loan documents, no prescribed interest rate, no terms of repayment, and no security for the loan;
- Erwin relied on the "loan" to purchase the Florence Street property, without which he would have been unable to finance the purchase;

- Irmgard's estate has been deprived the $82,000, plus any interest applicable thereon, and that her interest in that money is completely unprotected;
- Erwin is the only person who benefited from the purchase of the Florence Street property; and,
- "As a fiduciary, Erwin is not permitted to put himself in a position where his interests and his duty to Irmgard conflict."

Ultimately, Justice Shaw agreed with the Objectors and found that Erwin was to repay Irmgard the $82,000, plus interest.

Johnson v. Huchkewich

Johnson v. Huchkewich, 2010 CarswellOnt 8157 (Ont. S.C.J.)

One of a widows' two daughters invited her mother to stay with her while the mother's home was being painted. What ensued was described by the Court as a "a disgraceful tug-of-war over [the widow], clearly motivated by [the daughter's] desire to obtain some or all of [the widow's] assets. During this brief visit, the daughter took her mother to a lawyer and had her execute powers of attorney for personal care and for property in her favour. Not only did the daughter instruct the lawyer, with her mother present, but the daughter explained the document to her mother, in Polish; and no one else in the room understood Polish. Shortly after that and as stated by the Court "'before the ink had dried'?", the daughter used the power of attorney to transfer $200,000 from the joint account in her mother's and other sister's names into her own account. Fortunately, the justice system intervened, but not without the attendant cost associated therewith, and several orders were made against the attorney/daughter, including:

- An order that she return of the $200,000 to the joint bank account;
- An order that the other sister/daughter be appointed as guardian of the widow's property and personal care and that the widow would reside with that daughter and her family; and, among other things; and,
- an order restraining the attorney/daughter from harassing and annoying her sister/the appointed guardian.

Interestingly, and somewhat disappointingly, these facts and orders were brought to light in the context of a will challenge by the same sister who had misappropriated her mother's funds. This application, however, was dismissed as not even being a "close call" and costs submissions were requested.

Nguyen-Crawford v. Nguyen

Nguyen-Crawford v. Nguyen, 2010 CarswellOnt 9492 (Ont. S.C.J.)

A daughter accompanied her mother to her mother's lawyer's office where her mother executed powers of attorney appointing her daughter as her attorney. Before executing the documents, the daughter translated them to her mother, whose primary language was Vietnamese. The siblings later sought a declaration that the powers of attorney were invalid on the basis that the daughter, whom the mother lived with at the time, and on whom she was substantially dependent, exercised undue influence over her

and was the only person who translated both the documents and the lawyer's advice concerning them.

The Court found that the daughter did not meet the "high evidentiary burden" necessary to uphold the documents and demonstrate that her mother knew what she was signing or that the powers of attorney were clear expression of her wishes at the time the mother signed the documents, and, consequently, the powers of attorney were of no force and effect. In the Court's view, the presumption of capacity to execute the documents was rebutted by the evidence which showed that the attorney daughter exercised undue influence over her mother at the time. Interestingly, the evidence of undue influence was that (a) the mother was dependent upon her daughter, b) the daughter provided the only translation of the drafting solicitor's legal advice and the power of attorney documents themselves (which, in turn, conferred on the daughter extensive powers to act on her mother's behalf), and, somewhat perplexingly, c) the daughter and her husband used the mother's funds as if they were their own. This latter point is somewhat peculiar given that the misappropriation of the mother's funds was not contemporaneous with the execution of the power of attorney documents but took place two years later.

Importantly, in *obiter*, there was some discussion of the fact that since the drafting solicitor failed to obtain an independent translator for the grantor/mother before the documents were executed, the solicitor may have failed to discharge her duty of care, and could have been found negligent. The attorney daughter had attempted to argue that such a finding was a condition precedent, so to speak, to finding the powers of attorney documents invalid. The Court did not agree with the daughter's submission, but did suggest that the drafting solicitor's notes, records and testimony would have been useful had it provided positive evidence that the documents and advice were independently translated.

On the issue of solicitor negligence, the Court did refer to the similar case of *Barbulov v. Cirone* (2009),[5] and noted that "[t]here was no comment as to whether the solicitor had breached his duty to the donor/father by failing to have the power of attorney translated to him by an independent translator." Unfortunately, the Court did not delve further into the issue on the basis that there was no evidence to support any finding on that issue, since it lacked the drafting solicitor's notes, records and testimony.

The case of *Nguyen-Crawford v. Nguyen* sends a clear message to drafting solicitors who attempt to draft documents for grantors with little command of the languages spoken by the drafting solicitor. Care should be taken to ensure that proper independent translators are obtained—not those who do not stand to benefit from the document itself. Would-be attorneys ought to be equally vigilant, if they do not wish to have the document they later act pursuant to, to be challenged at a later date on the basis of grantor's lack of capacity to grant the power.

Re Koch

Koch, Re, 1997 CarswellOnt 824 (Ont. Gen. Div.); additional reasons in *Koch, Re* 1997 CarswellOnt 2230 (Ont. Gen. Div)

[5] *Barbulov v Cirone*, 2009 CarswellOnt 1877 (Ont. SCJ).

Although not a POA case *per se*, the case of ***Re Koch*** provides an example of a situation where one person may have an ulterior motive when seeking an assessment of a vulnerable person, particularly an assessment which results in a determination of incapacity.

In this case, Ms. Koch had suffered from multiple sclerosis for 15 years. She was confined to a wheelchair, although able to walk short distances with a walker. Ms. Koch and her husband separated in January 1996. Each retained lawyers and negotiations commenced with a view to resolving the usual property and support issues. On April 23rd, 1996, her lawyer forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In or about May 1996, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the formidable mechanisms of both the *SDA* and the *HCCA*. A hearing was held before the Consent and Capacity Board (the "**CCB**") and Ms. Koch was adjudged by the CCB to be:

1. incapable of managing her financial affairs and property; and
2. incapable of consenting to placement in a care facility.

Ms. Koch sought a reversal of the CCB's decision. And, as stated by the Court, her cry was essentially thus: "My husband had me committed." The Court agreed with Ms. Koch and found the CCB to have erred in law. Justice Quinn stated:

> The assessor/evaluator must be alive **to an informant harboring improper motives**. [The Assessor] should have done more than merely accept the complaint of the husband, coupled with the medical reports [...], before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.[6]

Sevello v. Sevello

Sevello v. Sevello, 2014 ONSC 5035

While not specifically a POA case, in this decision, a son took his recently widowed mother to what he told her was a "courthouse" and had her sign a "document which would give him the power to look after her as she grew older."[7] In reality, he took her to the registry office and with the assistance of a conveyancer transferred the title of his mother's residential property into his name as sole owner. A few weeks later he returned and transferred the property to himself and his mother as joint tenants.

---

[6] *Koch, Re*, 1997 CarswellOnt 824, at para 69.
[7] *Sevello v Sevello*, 2014 ONSC 5035 at para 6.

When the mother discovered the title transfer, she commenced an action against her son and requested an order from the court transferring the property back to her as sole owner. The son counterclaimed seeking a legal or equitable interest in the property, based on improvements he had made to the house. The Court set aside the son's transfer of the house and observed that:

> [47] At the time Antonio took his mother to the registry office, he was living in her house. She was recently widowed. English is not her first language, and the family had always used Mr. Sinicrope as their lawyer when they engaged in real estate transactions. Mr. Sinicrope knew the family and the family history, and he could speak Italian. However, Antonio chose not to take Rosina to Mr. Sinicrope's office, but instead he took Rosina directly to the registry office where he arranged for a conveyancer to arrange for the transfer of the home property to him. The conveyancer did not speak Italian, and she was a stranger to Rosina, who signed the deed without the benefit of independent legal advice. Antonio, who received the benefit of the transaction, was by her side throughout.
>
> [48] The law is clear that in the case of gifts or other transactions *inter vivos*, the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves is an undue influence.
>
> [49] This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. Rosina did not receive independent legal advice, and accordingly the two deeds which gave Antonio an interest in the land should be set aside on this basis as well.[8]

The Court dismissed the son's claim for a legal or equitable interest in the house as, among other reasons, he did not come to court with "clean hands".[9]

1.2 POA'S fraudulently used in breach for self-interest

Elford v. Elford

Elford v. Elford, 1922 CarswellSask 162 (S.C.C.)

A husband put certain property into his wife's name, with her knowledge and for the purpose of defeating his creditors. He had a general POA over his wife's property. A disagreement developed between them and the husband, using the POA, transferred the property into his own name. The wife sued to have the property re-transferred to her. The trial judge dismissed the action; the Court of Appeal reversed it and maintained the wife's action. The Supreme Court of Canada affirmed, finding that the transfer by the husband to himself "transgresses one of the most elementary principles of the law of agency."[10] It was *ex facie* void and should not have been registered.

[8] *Ibid* at paras 47- 49.
[9] *Ibid* at para 106.
[10] *Elford v Elford*, 1992 CarswellSask 162 (SCC).

Gironda v. Gironda

Gironda v. Gironda, 2013 ONSC 4133; supplemental reasons 2013 ONSC 6474

A grantor of a Power of Attorney for Property in 2005, Catarina, named one of her three sons, Vito, as her attorney for property.[11] Her other two sons brought an application seeking their appointment as guardian of property of Catarina and challenging, *inter alia*, the 2005 power of attorney documents and the validity of certain transfers of Catarina's property to Vito in 2008 and 2009. Vito lived in Catarina's house with her until she was hospitalized for a fall in 2011. In 2008, Vito transferred Catarina's residential property to himself for two dollars, and in 2009 he transferred $175,000 of Catarina's funds to himself and took $19,400 of that money for his own purposes.[12]

The Court found that both transfers were invalid by reason of Catarina's lack of requisite capacity as at the relevant times. Regarding the transfer of Catarina's real property, the court also found that Vito exercised undue influence on Catarina. The court found that the 2005 power of attorney for property was valid and that Caterina was incapable of managing her property; nevertheless, the Court prohibited Vito form acting in his capacity as attorney for property and granted the applicants' application for guardianship. The Court granted judgment against Vito in respect of the $19,400 and ordered him to pay Catarina market rent and back rent to the date of Catarina's incapacity to manage her property. This case is noteworthy respecting the court's treatment of undue influence, a factor that is often present in these types of proceedings.

1.3 POAs imprudently used/breach of fiduciary duty

Abrams v. Abrams

Abrams v. Abrams, 2008 CarswellOnt 7786 (Ont. S.C.J. Dec 19, 2008); additional reasons in: *Abrams v. Abrams*, 2009 CarswellOnt 524 (Ont. S.C.J. Feb 03, 2009); affirmed by: *Abrams v. Abrams*, 2009 CarswellOnt 3618, 2009 ONCA 522 (Ont. C.A. Jun 25, 2009)

The parties were Ida and Philip Abrams (respondents) and two of their three children — the applicant, Stephen, and the respondent, Judith Abrams. At the date of the endorsement, Ida was about 87 years old and Philip 92 years old. Philip had "accumulated a tidy fortune". Although the family had got along reasonably well, in the fall of 2005, a major dispute arose about what the parents should leave to their children. In January 2007, Ida executed a Continuing Power of Attorney for Property and Power of Attorney for Personal Care naming her husband, Philip, as her attorney, with her daughter, Judith, as an alternate attorney. Ida subsequently signed a number of other POAs. In January 2008, Stephen brought a guardianship application seeking his appointment as guardian for Ida and more than two years later, the proceedings had not been resolved. That failure led to this endorsement, which warned that a failure to abide by the timetable therein would lead to costs consequences not only for the parties but as against counsel, personally. The context of the endorsement is the fact situation of the *Abrams* guardianship application and also contested guardianship applications, in general, whereas Justice Brown put it, "the parties have lost sight of the key issue", which

[11] *Gironda v Gironda*, 2013 ONSC 4133.
[12] *Ibid* at para 178.

is always the best interests of the incapable person. The case shows that although the *Substitute Decisions Act* sets out a mechanism for addressing incapable persons' needs, it is clear that it is imperfect, and still allows for matters to be dragged out while family disputes continue.

Chu v. Chang

Chu v. Chang, 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010), 2010 CarswellOnt 4507 (Ont. S.C.J.), 2011 CarswellOnt 1840 (Ont. C.A.)

Mrs. Chang was a 98-year-old woman. In December 2008, her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang's sons) and Lily's son, Dr. Stephen Chu.

Any family peace dissipated shortly thereafter, and the parties went back and forth before the Court on countless occasions and in one endorsement the Court voiced concerns about Mr. Chang and Dr. Chu getting along and executing their duties appropriately. The Court warned all of Mrs. Chang's children that they should be guided by Mrs. Chang's wishes (found, in this case, in her affidavit) which were that she was happy when her children spent time with her and got along. The Court told the parties to "act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life."[13]

Unfortunately, further proceedings ensued, and Dr. Chu requested an urgent motion on the ground that he had been compelled to remove Mrs. Chang from her home on the basis of information he had received from Mrs. Chang's caregiver that she had been told "not to feed" Mrs. Chang. Notwithstanding the concerns about feeding (of which there was considerable debate), Justice Brown ordered Dr. Chu to return Mrs. Chang to her home the following day.[14]

Two competing motions were then heard within which each guardian sought to have the other removed. Considering all the evidence, Justice Brown terminated *both* guardianships on the basis that the two sides could not work together. As for Dr. Chu, Justice Brown wrote: "It is difficult to find words to describe adequately his misconduct. Suffice it to say, by, in effect, kidnapping his grandmother Dr. Chu demonstrated that he was not prepared to work within the legal framework of a guardianship."[15] Although Mr. Chang's misconduct was not found to be as serious as Dr. Chu's, he too had showed he was obstructive in the process and not a suitable candidate to act as a guardian of property (he had refused to sign a court-imposed management plan). The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company.

Mrs. Chang's youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang's personal care. However, Peggy was reminded of her duty to consult family members regarding her personal care decision-making, pursuant to the *SDA*, as well as

[13] *Chu v Chang*, 2009 CarswellOnt 7246 (Ont. SCJ) at para 35 [*Chu 2009*].
[14] *Chu v Chang*, 2010 CarswellOnt 246 [*Chu 2010*].
[15] *Ibid* at para. 5.

her statutory obligation to foster contact between Mrs. Chang and those family members considered "supportive family members"—of which Lily was not considered one.[16] The court held that given the history of high conflict in the family, restrictions on access by Lily and her son would be in Mrs. Chang's best interests, and stipulated both by the times and the conditions under which visits would occur. Peggy was, however, required to provide fresh information about Mrs. Chang's medical condition in the event of significant developments.

On January 6, 2010, Mr. Justice D. Brown ordered, among other things, that the Bank of Nova Scotia Trust Company be appointed guardian of the property of How Seem Chang; and, that Lily Man-Lee Chu, Dr. Stephen Chu, Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang prepare accounts, in the form prescribed by Rule 74.17 of the *Rules of Civil Procedure*, for their terms as attorneys or guardians of the property of How Seem Chang.

On the matter of costs of bringing their respective motions, on March 26, 2010, Justice D. Brown released his costs endorsement.[17] In their submissions, the respondents had sought full indemnity costs in the amount of $82,591.25 payable by Dr. Chu. It was their position that Dr. Chu's reprehensible conduct, including misleading the Public Guardian and Trustee, removing his grandmother from her home, surreptitiously filming his uncle in the courthouse, and filing affidavits that raised irrelevant attacks on the respondents warranted an award of full indemnity costs. The PGT also sought costs against Dr. Chu in the amount of $8,347.50 on the basis that it was required to file affidavits with the court to correct misleading information provided to the court by Dr. Chu. Dr. Chu took the position that as there was mixed success on the motion—the court removed both co-guardians, appointed an institutional guardian suggested by Dr. Chu and appointed another relative as Mrs. Chang's guardian of the person—this signaled that each party should bear its own costs or, alternatively, Dr. Chu should pay the respondents costs of $4,266.96. In reaching his decision on costs, Justice D. M. Brown gave little weight to the offers to settle that were made by both parties primarily on the basis that both guardians had requested that the other resign and both ended up being removed and replaced by his Honour. The Court did not accept Dr. Chu's submission that the success on the motions was mixed. Instead, his Honour focused his attention on the fiduciary duty owed by guardians of the property as set out in the *SDA*—that being to exercise their powers and duties diligently, with honesty and integrity and in good faith **for the incapable person's benefit**—and the consequences of a guardian of the property and/or person breaching his/her fiduciary duties [emphasis by his Honour].[18] His Honour opined that substantial indemnity costs may be awarded where a party has made serious allegations of misconduct against another which were unfounded and misused the court's process. And, according to Justice D. M. Brown, "that is what happened here." His Honour stated:

> Dr. Chu breached his fiduciary duties by misleading the court, making baseless allegations against his co-guardian and other relatives and then, incredibly, resorting to self-help by

[16] *Ibid* at para. 29.
[17] *Chu v Chang*, 2010 ONSC 1816.
[18] *Chu v Chang*, 2010 CarswellOnt 1765 at para 10.

> kidnapping his grandmother. At the same time as he was instructing his counsel to seek an urgent hearing from the court, Dr. Chu removed his grandmother from her home, took her to an undisclosed location, kept her sequestered from her children who had seen her virtually daily up until that point, and did not return his grandmother until ordered to do so by the court.[19]

In light of the forgoing, the Court concluded that at paragraph 15 that Dr. Chu was not motivated by an objectively-based concern for the welfare of his grandmother, but by a desire to improve the position within the family of the interests of his mother, the applicant, and himself, and, in the Court's view, to use SDA proceedings for such a purpose amounted to an attempt to subvert the whole purpose of the SDA. As, in the Court's view, Dr. Chu's misconduct stood at the extreme end of the scale, the Court concluded that it was appropriate in this case to award costs against him on a substantial indemnity scale. The Court fixed the PGT's substantial indemnity costs to $8,000.00, inclusive of disbursements and GST and fixed the respondents' costs at $35,000.00, inclusive of GST and ordered Dr. Chu to pay those costs personally. At paragraph 24, the Court noted that "while some might raise an eye-brow when they see an award of close to $45,000.00 in costs for a one-day motion," the following was worth repeating:

> Dr. Chu's initiation of the post-November 20, 2009, litigation was baseless, a breach of his fiduciary duties as a guardian, motivated by self-interest, and a misuse of the scheme of the SDA. When viewed in that light, I regard the resulting costs award as temperate in the circumstances.[20]

On June 7, 2010, the parties attended before Justice Lederer.[21] Among the motions heard was that successfully brought by Dr. Stephen Chu who, although not a named party, stated that Kin Kwok Chang, Kin Wah Cheung and Kin Keung Chang were in contempt of the order of Mr. Justice Brown, in that did not prepare the requisite accounts for their terms as attorneys or guardians of the property of How Seem Chang.

This decision was then appealed to the Court of Appeal,[22] which found no error on the part of the motion judge, and fixed costs to the respondents fixed at $5,000 inclusive of disbursements and applicable taxes.

Down Estate v. Racz-Down

Down Estate v. Racz-Down, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010)

In December of 2003 William and Marion, then in their late 70s, entered a marriage contract that established a regime of separate property. The couple had cohabited for some time before they married. William executed a will under which he made Marion his executor, along with children from a previous marriage. Under the will, the revenue from

[19] *Ibid* at para 14.
[20] *Ibid* at para. 24.
[21] *Chu v Chang*, 2010 CarswellOnt 4507 (Ont SCJ).
[22] *Chu v Chang*, 2011 CarswellOnt 1840 (ONCA).

William's estate was to be paid to Marion, while the children were beneficiaries of the estate on her death. In January of 2004, William began treatment for dementia. There was evidence to show that Marion was aware of this and that she had in fact attended with him at his various doctor appointments when the diagnosis was made. In July, William added Marion as a joint account holder on his primary bank account. The judge made a point of noting that Marion never reciprocated with any of her own bank accounts, by making them joint. The Court found that Marion made significant unexplained withdrawals on their shared account. It also noted that while in August and September of 2004, the account balance on the shared account was $739,224.36, on May 26, 2009 when William died, the account had dwindled away to $72,438.16. The Court found that most of the transactions could be traced to Marion's separate accounts. The plaintiffs in the action, William's children, brought an action against Marion for damages for conversion and breach of fiduciary duty, alleging misappropriation. Marion defended her actions based on joint ownership of the account.

The issue before Justice Gordon was whether to maintain a previous order which granted a Mareva injunction which restrained Marion from disposing of certain real and personal property, including the funds in her account. Justice Gordon found that the plaintiff children had met the test for the injunction. In the Court's view, not only had the plaintiffs shown a strong prima facie case, but, in his view, "the case is overwhelming." As stated by the Court at paragraphs 88 to 93:

> 88 The spousal relationship, William's vulnerable state and the circumstances pertaining to finances establish a fiduciary relationship. Marion owed William a duty of utmost good faith and trust. The power of attorney was required on the sale of the condominium. Marion had direct access to the joint bank account. Marion had a discretion, indeed a unilateral ability, in dealing with the funds.
>
> 89 In exercising her discretion, Marion was required to have regard for the provisions of the marriage contract and William's will.
>
> 90 The gratuitous transfers from the joint account to Marion's sole bank account are unexplained. There was no reason or purpose for the transfers that could be justified. A resulting trust results from the fiduciary relationship. No evidence was tendered in rebuttal.
>
> 91 The exclusion in Section 14, *Family Law Act*, at best, applies at the time of William's death. It does not justify gratuitous inter vivos transfers, nor does it negate the common law principles regarding fiduciaries and resulting trust in all circumstances involving spouses.
>
> 92 The marriage contract established a regime of separate property. The will granted Marion a life interest in William's estate. Marion's transfer of funds defeats the obvious intent of both documents.
>
> 93 The plaintiffs have established a prima facie case. Indeed, on the evidence presented, in my view, the case is overwhelming.[23]

[23] *Down Estate v Racz-Down*, 2009 CarswellOnt 8128 (Ont. SCJ).

The Court found that the remaining components of the test for Mareva injunction had been met there would irreparable harm to the plaintiffs if the injunction was not granted, and damage award would not suffice; there was a risk that Marion would remove/dissipate what minimal assets remained in her possession; and the balance of convenience favoured the plaintiffs. Justice Gordon ordered that the order granting the injunction would continue until trial or further order.

Fiacco v. Lombardi

Fiacco v. Lombardi, 2009 CarswellOnt 5188

An elderly woman, Maria Lombardi, suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

The children did not act jointly as their mother wished. Instead, in 2008 they engaged in contested guardianship litigation regarding their mother. By order dated January 23, 2009, Cameron J. declared Maria incapable of managing property and incapable of personal care, and he appointed Carmella Fiacco and Antonio Lombardi as her joint guardians of property and of the person. The Order contained several additional provisions which required, among other things, that Giovanni Lombardi and Guiseppina Lombardi account for their dealings with their mother's property and deliver the keys to her home to the applicants. Although the court noted that the Order should have been a simple one to implement, it found that the guardians encountered difficulties in obtaining information from their brother and sister about the assets of their mother they controlled.

The Court found the respondents' behavior unacceptable and in contravention of the Order and the *SDA*. As stated by the Court: "The Order could not have been clearer - the respondents were required to account for their dealings with Maria Lombardi's property. The SDA is equally clear- the property of an incapable person must be delivered to a guardian 'when required by the guardian.'"[24] The respondents were ordered to comply with the previous Order and had costs awarded against them. The Court made the further comment that the respondents may think the result harsh but added that to fix costs against them in a lesser amount would result in the incapable person having to pay for their misconduct and that would not be just. Paramount to the Court's decision was the view that the respondents could have avoided the motion had they cooperated with the guardians as required by law and by prior Order of the Court.

Juzumas v. Baron

Juzumas v. Baron, 2012 ONSC 7220

A man, the plaintiff, was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years. Once a "lovely and cheerful" gentleman, the plaintiff was later described as being

[24] *Fiacco v Lombardi*, 2009 CarswellOnt 5188.

downcast and "downtrodden.[25] The defendant's infiltration in the plaintiff's life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator.

The defendant "befriended" the respondent in 2006. She visited him at his home, suggested that she aid with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance. The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property. She promised to live in the home after they were married and to take better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared. The plaintiff agreed.

The defendant however, testified that the plaintiff had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, Justice Lang found otherwise. The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous "caretaking" experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable.

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff's house ($600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet with the plaintiff without the defendant being present.

After the wedding ceremony, which took place at the defendant's apartment, she dropped him off at a subway stop so that he would take public transit home alone. The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant's promise that she would provide better care to the plaintiff if they married, testimonies from the plaintiff's tenant and neighbor, which were both found to be credible, attested that the relationship degenerated progressively. The tenant

[25] *Juzumas v Baron*, 2012 ONSC 7220 at paras 39 and 56.

described the defendant, who had introduced herself as the plaintiff's niece, as "'abusive', 'controlling' and 'domineering'".[26]

With the help of a plan devised over the course of the defendant's consultation with the lawyer who had drafted the plaintiff's Will made in contemplation of marriage, the defendant's son drafted an agreement which transferred the plaintiff's home to himself, no this mother to financially protect her. The "agreement" acknowledged that the plaintiff did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.[27]

The plaintiff, the defendant and her son attended the lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that overall his evidence indicated that it had not been explained to the client with sufficient discussion, or understanding the consequences of the transfer of property and moreover, that he was in the court's words "virtually eviscerating the Will he had executed only one month earlier…"; that he did not meet with the plaintiff alone; and only met with the parties for a brief time.[28] Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[29]

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. In fact, it seems the lawyer was under the impression that the defendant, and not the plaintiff, was the vulnerable party.

The lawyer's notes likely read as a whole, but unknown on the reasons alone, indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.[30] In addition, Justice Lang found that the plaintiff had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on testimonial evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.[31]

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his

[26] *Ibid.* at para 54.
[27] *Ibid* at paras 68-69.
[28] *Ibid* at paras 79-84.
[29] *Ibid* at para 84.
[30] *Ibid* at para 91.
[31] *Ibid* at paras 63 and 92.

arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."[32]

When the plaintiff was injured with some severity, he was taken to the hospital. The hospital informed of the transfer of his house and release to a nursing home, instead, sent him home with two days a week of homecare.[33]

Notably, although the plaintiff initially sought a declaration that his marriage to the defendant was nullity and void ab initio, he did not pursue this claim, instead seeking a divorce/dissolution of the marriage, which was granted in its place.

In considering the transfer of property, Justice Lang applied and cited McCamus' Law of Contracts, which outlines a "cluster of remedies" that may be used "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[34] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "if any of these doctrines applies, the weaker party has the option of rescinding the agreement."[35]

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice, or some other opportunity given to the vulnerable party which allows him or her to provide "a fully-informed and considered consent to the proposed transaction."[36]

As for the doctrine of unconscionability, Justice Lang stated that the doctrine "gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power."[37] The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

In addressing the defendant's claim of quantum meruit for services rendered, Justice Lang found that the period during which services were rendered could be distinguished as two categories: pre-marriage and post-marriage.

During the pre-marriage period, the defendant undertook to care for the plaintiff without an expectation or promise of remuneration, and persuaded the plaintiff to compensate her with a monthly income. Justice Lang found that no additional remuneration could be claimed for that period.

---

[32] *Ibid* at para 97.
[33] *Ibid* at para 104.
[34] *Ibid* at para. 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[35] *Ibid.* at para 8.
[36] *Ibid* at para 11.
[37] *Ibid* at para 13.

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had agreed to do so.[38] For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.[39] Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle that restitutionary relief allows a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."[40] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behavior is such that it taints the entire relationship."[41] As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her quantum meruit claim.

Substantial costs were awarded in favour of the older adult plaintiff.[42]

Teffer v. Schaefers

Teffer v. Schaefers, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009)

The victim, Mrs. Schaefers, was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24-hour nursing care in her home. She had also been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed. Even though there was considerable evidence which supported the view that Mrs. Schaefers did not have capacity to assign a POA, Mr. Verbeek, a lawyer, had Mrs. Schaefers execute a POA on April 27, 2006, naming him as her attorney.

While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on April 27, 2006, and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for

---

[38] *Ibid* at para 129.
[39] *Ibid* at para 128.
[40] *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 661.
[41] *Ibid.* at para 142.
[42] 2012 ONSC 7332 (CanLII).

Property should be terminated. The Court found that Mrs. Schaefers' best interests were not being met and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as complying with disclosure requests or proceeding with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary, and the duties and responsibilities of an attorney are significant. Thus, if Mr. Verbeek was too busy as a sole practitioner to discharge his duties as an attorney for the property of Mrs. Schaefers then he should be relieved of those responsibilities.

Sutherland v. Dorland

Sutherland v. Dorland, 2012 BCSC 615

Eileen Fountain, a woman who died at the age of 90, had two daughters: Marilyn Dorland and Julie Sutherland. The latter was appointed her committee of the person and property (similar to Ontario's POAs) prior to her death, and initiated this action in that capacity. The action was to recover just over $150,000 from Ms. Dorland and just under $30,000 from her nephew, Donald Rendall.[43]

Between 1999 and 2003, Mrs. Fountain wrote a number of cheques to help her daughter, Ms. Dorland and her grandson, Ms. Dorland's son, Mr. Rendall. Ms. Dorland and her common law spouse had supported themselves mainly by having recourse to social assistance for most of their adult lives. Over the course of four and a half years, Mrs. Fountain wrote approximately 35 cheques ranging in amount from $500 to $25,000 for Ms. Dorland's benefit.[44]

At trial, Ms. Dorland was inconsistent in her description of why these cheques were given but insisted that her mother had written them out of her own free will.[45] Mrs. Sutherland argued that the cheques had been written when her mother lacked capacity or that, failing that, they had not been written out of her own free will; that they had been made under circumstances of undue influence.[46]

In his analysis, Barrow J. discussed the appropriate law that applies to gifts between family members:

> The first legal concept relevant to the analysis is that of the resulting trust. As explained by Rothstein J. in *Pecore v. Pecore*, 2007 SCC 17 (S.C.C.) at paragraph 20:
>
> > *A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner...*

[43] *Sutherland v Dorland,* 2012 BCSC 615 at para 1.
[44] *Ibid* at para 2.
[45] *Ibid* at para 12.
[46] *Ibid* at paras 2-3.

> The law presumes a resulting trust in certain situations. Again, as explained by Rothstein J. at paragraph 24 of Pecore: (…) where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended... To rebut the presumption, the transferee must show on a balance of probabilities that the transferor had an intention contrary to or inconsistent with the intention the law presumes in relation to gratuitous transfers (Pecore at paragraph 43).

To the extent that the cheques in question were given without consideration, the onus is on Ms. Dorland and Mr. Rendall to rebut the presumption of resulting trust. Ms. Dorland and Mr. Rendall argued that the cheques were gifts. In accordance with the law of resulting trusts, they must establish that Mrs. Fountain had the capacity to make a gift and that she exercised that capacity in writing the cheques currently in dispute.

Barrow J. went on to state:

> The court will set aside a gift if it is procured by undue influence (Goodman Estate v. Geffen, [1991] 2 S.C.R. 353 (S.C.C.) at paragraph 23). Undue influence may be established in one of two ways: it may be positively proven, or it may be presumed. **Whether it will be presumed depends on whether "the potential for domination inheres in the nature "of the relationship between the parties to the transfer (Geffen at paragraph 42). Once the presumption arises, the onus shifts to the recipient or donee of the property to rebut it by showing that the transaction was the product of the donor's "full, free and informed thought"** (Geffen at paragraph 45). Discharging this burden "may entail a showing that no actual influence was deployed in the particular transaction" (Geffen at paragraph 45). Finally, the size of the impugned gift may be "cogent evidence going to the issue of whether influence was exercised" (Geffen at paragraph 45).[47]

When considering the gifts made from Mrs. Fountain to Mr. Rendall, Barrow J., appears to have considered her actions through the lenses of a reasonable person: Mrs. Fountain provided Mr. Rendall with a number of cheques after he had recently been laid off from his work due to the closure of the plant which was his place of employment. Mr. Rendall has three children for whom he needed to provide during this period. Mr. Rendall faced financial hardship both because of his unemployment, and because he had recently become separated, which meant he had to furnish his mobile home after his wife took most of the furniture when she left him. For a brief time after losing his job, Mr. Rendall had a gambling problem. Part of the money given to him by his grandmother was used to repay his gambling debts.[48]

Barrow J. found that most of the money that had been given to Mr. Rendall was, in fact, used to buy furniture for his new home and to otherwise assist with living expenses

[47] *Ibid* at para 64 [emphasis added].
[48] *Ibid* at para 80.

for himself and his three children, who had returned to live with him after living with their mother for a short while. Although a portion of the gratuitous transfers that were given to him by his grandmother were used to assist with his gambling debt, Barrow J., found that Mrs. Fountain had been aware of this fact and had nevertheless chosen to help her grandson. As a result, Barrow J., chose not to interfere with these gratuitous transfers.[49]

As such, it seems courts will try to balance the need to protect older incapacitated adults' estates with a reasonable amount of deference to the older adults' wishes when these can be ascertained.

It is interesting to note the effect of credibility on Barrow's J., findings. The Justice found that Mr. Rendall's testimony matched the information presented in his affidavits, and a result relied on the evidence he gave. Barrow J., however, did not feel he could rely on Ms. Dorland's testimony, as he found it to be inconsistent both internally and in comparison, to her affidavit evidence.[50]

Valente v. Valente

Valente v. Valente, 2014 ONSC 2438

A daughter was removed as attorney for property for her elderly mother. The mother had been diagnosed with Alzheimer's disease and dementia. She also suffered from diabetes, congestive heart failure, hypertension, osteoporosis, and dyspepsia, among other ailments. Since her husband's death, the mother resided with her daughter and her family, including a teenage son. On an application brought by another of the elderly woman's five children for the removal of the daughter as attorney and an appointment of a guardian, video evidence was submitted of the grandson manipulating the elderly and vulnerable mother into "acting" for the camera including, manipulating her into: chugging or drinking a beer, getting her to repeat swear words, getting her to hit people or objects with a slipper and getting her to repeat derogatory and racist slurs.[51]

Evidence was also submitted that the daughter and her husband had made a number of unexplained financial transactions, using the mother's funds, including: taking vacations, purchasing a $50,000-$60,000 Escalade, a $20,000 diamond ring, an eight person trip to Jamaica, a $30,000 yellow diamond ring, a new bath tub, home renovations and a Harley Davidson motorcycle. The list was not exhaustive.[52]

Justice Barnes found that this was "strong evidence of misconduct, specifically financial misappropriation on the part of the [daughter and husband], to warrant the removal of [the daughter] as an attorney for [the mother's] personal care and property."[53] The Court went on to appoint another daughter and son as joint guardians of their mother for both personal care and property.

---

[49] *Ibid* at para 82.
[50] *Ibid* at para 37.
[51] *Valente v Valente*, 2014 ONSC 2438 at para 19.
[52] *Ibid* at para 28.
[53] *Ibid* at para 32.

Zimmerman v. McMichael Estate

Zimmerman v. McMichael Estate, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.)

The deceased were husband and wife and founders of extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executors of their estates. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made. The husband died in November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her will. The trust deed contained terms that differed from will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were a granted certificate of appointment of estate trustee with will.

The niece and her husband successfully brought an application for a declaration that the power of attorney and the trust were void and an order that required Mr. Zimmerman to account for his dealings with the trust property. Mr. Zimmerman was ordered to his pass accounts but failed to do so and was removed as trustee on March 9, 2009. The niece and her husband made many objections to his accounts and Mr. Zimmerman failed to respond and made an application to pass his accounts for the property and the trust. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit verifying the accounts were inadequate, incomplete and in many respects false. The accounts contained no statement of the compensation claimed by Mr. Zimmerman in connection with the discharge of his responsibilities under the Trusts. In fact, it was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners not while, but after visiting Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home.

There was a dearth of evidence and/or explanation as to how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the *SDA*. Although the trust deed impliedly permitted pre-taking, the court found that the authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: he failed to properly account; he made improper and unauthorized payments and loans to himself, or for his benefit out of the Trusts; he mingled Trust property with his own property and he used the two interchangeably for his own purposes; he paid himself compensation of almost $450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs. Mr. Zimmerman has since deceased.

Ziskos v. Miksche

Ziskos v. Miksche, 2007 CarswellOnt 7162

Johanna Miksche had no living relatives save an 87-year-old sister (Ursula Lill) and nephews who lived in Germany (Heinz, Johann, and Hannes). Until her death, she spent her later years living in a long-term care centre. She appointed her friends Perry and Teresa as her attorneys for personal care and property and, when it became apparent to them that she was no longer capable of living independently, they sold her house. Shortly thereafter, her nephews visited her in the company of a lawyer of the law firm of Polten & Hodder, where Mrs. Miksche signed powers of attorney for property and personal care in favour of one nephew and her sister. The nephews also had her sign a retainer, retaining the law firm to act on her behalf, as well as theirs. Mrs. Mikshche later retained an alternate solicitor, Mr. Silverberg, who served a notice of change of solicitors in late November 2005.

Competing applications for guardianship of Mrs. Miksche's personal care and property ensued. The proceedings were case managed, and the disputed matters were resolved on either consent or unopposed basis, save for the issue of costs. Applications for costs were brought by Mrs. Miksche's nephews and sister, her legal counsel (Mr. Silverberg), and the public guardian and trustee. The June 29, 2007, decision of *Ziskos v. Miksche* disposed of the claims and cross claims for costs, which claim for costs together totaled almost $1.175 million and exceeded the total value of Mrs. Miksche's estate. The court found astonishing the fact that the claim for costs of one group of parties (the nephews) was for more than $1 million—an amount that was almost 90% of the total costs claimed by all four sets of counsel, notwithstanding the fact that the within applications were never argued on the merits and, in fact, not a single motion was argued on the merits saved for the motions on costs. The court characterized the amount claimed by the nephews as "scandalous," particularly given the circumstances known to the nephews and their counsel early on in the litigation.

In the result, the nephews and sister were awarded $35,500 to be paid by the estate, Perry and Teresa were awarded $54,480 to be paid by the estate, Mrs. Miksche's lawyer was awarded $30,173 in costs, and the public guardian and trustee was awarded $11,034. However, the nephews were ordered to personally pay costs in the amount of $28,000 to Perry and Teresa, $10,000 to the deceased's lawyer (Mr. Silverberg), and $3,100 to the public guardian. According to the Court, most of the work done by the nephews' counsel could not be justified. Moreover, as noted by the Court, "there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance."[54]

In support of its cost award, the Court noted that the nephews conducted the litigation in an oppressive manner by making unreasonable demands on the other parties and that both the nephews and the law firm ignored credible medical evidence that the deceased lacked capacity. As well, they maintained the unreasonable position that the deceased remained in the care facility against her will, and, consequently, incurred unnecessary costs. Resultantly, the Court found that the nephews were to be responsible for the unnecessary costs incurred by Perry and Teresa, which costs were the result of the nephews' conduct. In addition, the court found that there was no basis on which to challenge the retainer of the deceased's solicitor (Mr. Silverberg), and it was accepted that deceased's solicitor spent at least 50 per cent of his time dealing with unreasonable claims and positions taken by the nephews. It was also found that the allegations made by the nephews against the public guardian and trustee were serious and required considerable response.

An additional hearing took place before Justice D. M. Brown on September 19, 2009.[55] The key issue to be determined on the application for directions brought by the Estate Trustee of the estate of the late Johanna Miksche was whether the law firm of

[54] *Ziskos v Miksche*, 2007 CarswellOnt 7162 at para 74.
[55] 2009 CarswellOnt 6770.

Polten & Hodder could, under the guise of seeking to enforce a facially-accepted offer to settle, obtain, in effect, a charging order against the interests of one of the beneficiaries, Ursula Lill, the deceased's sister and formerly their client. In his judgment of November 4, 2009, Justice Brown admonished the conduct of the law firm, Polten & Hodder, stating: "The conduct of the law firm, and of one of its principals, Eric Polten, has been scandalous and in breach of their duties as officers of this court."[56] Justice Brown described the costs of Polten & Hodder as "staggering" and made a costs order in the matter. However, since the costs were being sought pursuant to Rule 15.02 (4), as well as because of the conduct of the proceedings by Polten & Hodder for costs of the proceedings, including those before the Court of Appeal, Justice Brown adjourned the issue of costs to oral submissions and directed the law firm to engage independent counsel to represent them at the hearing.

This checklist is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Dated March 11, 2022.

[56] *Ibid*, at para 2.