THE OSGOODE INTENSIVE PROGRAM IN WILLS & ESTATES

Powers of Attorney and Guardianship: Non-Contentious and Contentious Matters

Contentious Guardianships

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1. INTRODUCTION[1]

Individuals who are under disability, and not capable of making their own financial or personal care decisions are vulnerable and may be susceptible to abuse or exploitation. Substitute decision makers, such as guardians or attorneys under a power of attorney, are a means of permitting management of the affairs of such individuals.

Attorneys under powers of attorney are appointed by the grantor of the power while the grantor is still capable. Guardianship is often a choice of last resort, where the incapable person did not appoint an attorney while capable.

While the substitute decision making regime in Ontario has the objective of assisting the incapable person, sometimes the opposite happens, and the incapable person becomes unintentionally involved in contentious guardianship litigation or falls victim to attorneys or guardians who take advantage of the individual's incapacity and vulnerability.

Examples of contentious guardianship applications, together with some guidance on how to navigate such applications will be explored in this paper. Procedure and case law on removal of fiduciaries' who have overstepped their powers or breached their duties will also be touched upon.

2. CONTENTIOUS GUARDIANSHIP APPLICATIONS

There are various guardianship regimes recognized under the *Substitute Decisions Act, 1992 ("**SDA**")*,[2] *The Children's Law Reform Act*,[3] and the *Rules of Civil Procedure*.[4] This paper will examine only those under the *SDA*.

[1] For more information see "Whaley Estate Litigation on Guardianships", http://welpartners.com/resources/WEL-on-guardianship.pdf and "Whaley Estate Litigation on Powers of Attorney", http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf
[2] SO 1992, c 30 [*SDA*].
[3] RSO 1990 c C 12.
[4] RRO 1990, Reg 194.

Guardians of property and of the person, are considered fiduciaries and their obligations are codified in the *SDA*.[5] The purpose of the *SDA* is to protect the vulnerable while at the same time, ensuring that the dignity, privacy and autonomy of the individual are "assiduously protected."[6]

There are different ways a guardian can be court-appointed under the *SDA*. The first is by way of summary disposition, while the second is through an open-court hearing by way of application.[7]

The summary method of appointment avoids the involved parties having to attend court, but, requires more by way of documentary evidence before the application can be considered by a judge. Generally, the summary method for the appointment is utilized where the guardianship appointment is unopposed.

Appointments under the second category, open-court applications, can become contentious with two or more individuals litigating over who should be appointed guardian. Discussed below are some examples of contested guardianship applications and lessons to be learned.

Key Issues and Takeaways from Contentious Cases

The paramount consideration for the court in deciding a guardianship application is the best interests of the incapable person.[8]

The court will also consider the provisions of the *SDA*, when coming to its conclusions on who should be appointed guardian and will examine:

- whether the proposed guardian is the attorney under a continuing power of attorney;

[5] *SDA*, ss 32(1) and 66(1).
[6] *Park v Park*, 2010 ONSC 2627 at para 47.
[7] *SDA*, ss 72,74 and 77.
[8] *Napper v Edwards* (1997), 16 ETR (2d) 309 (Ont Gen Div) at para 2; *Orens v Aleong*, 2013 ONSC 5286 at para 21; *Bennett v Gotlibowicz*, [2009] OJ No 1438 (SCJ) at para 19; *Chu v Chang*, [2009] OJ No 4989 (SCJ) at para 26; and, *Consiglio v Consiglio*, [2012] OJ No 3797 (SCJ) at para 37.

- the incapable person's current wishes, if they can be ascertained; and,
- the closeness of the applicant's relationship to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.[9]

In selecting an appropriate person or entity for appointment, the court may also consider the duties of a guardian of property and guardian of the person and indications of whether or not a suggested appointee is likely to fulfil such responsibilities. An applicant who demonstrates an inclination to act in a manner inconsistent with such duties (by "permitting ego or self-interest to take precedence over the welfare of the incapable person, by engaging in petty bickering or gamesmanship, and/or by making plain a determination to shun, or limit communication with other family members"), is unlikely to be a suitable guardian.[10]

Benefit to the incapable person should be at the heart of every application, contested or otherwise. D.M. Brown J., (as he then was) provided an appropriate warning in ***Fiacco v Lombardi,*** for those in contested guardianship applications:

> While *bona fide* disputes may exist amongst those interested in the well-being of the incapable person as to who should be appointed guardian, a significant risk exists that a **contested guardianship application may lose sight of its purpose – to benefit the incapable person** – and degenerate into a battle amongst siblings or other family members, some of whom may have only their best interests at heart.[11]

The facts of *Fiacco* provides example of some of the common issues and allegations that can arise in contentious guardianship litigation. In that case, a mother had appointed her four children as her attorneys to act jointly. However, after the mother became incapable to make certain decisions, the children engaged in competing guardianship applications. These applications involved allegations of siblings denying family members access to the

[9] *SDA*, ss 24(5) and 57(3).
[10] See *KR v YR*, 2015 ONSC 6874 at para 22; *Oberg v Presta*, [2004] OJ No 700 (SCJ) at paras 18-20; and, *Chu v Chang*, [2009] OJ No 4989 (SCJ), 2009 CanLII 64816 (ON SC) at paras 26 & 30.
[11] *Fiacco v Lombardi,* 2009 CarswellOnt 5188, 2009 CanLII 46170 (ON SC) at para 36.

mother, failing to provide documentation, and improper treatment of the mother's assets.[12]

The ability and suitability of a proposed guardian will be thoroughly assessed by the court in contested guardianship applications.

While ***Futerman v Futerman,***[13] was a costs decision respecting a guardianship dispute that settled, Justice Roberts provided some helpful observations on what would have amounted to an *unsuccessful* contested guardianship application. The wife of an incapable person brought an application to seek an order removing the Public Guardian and Trustee ("**PGT**") as guardian of property and having herself appointed instead. The application was vigorously opposed by the incapable husband's brother. Justice Roberts concluded that the wife should not receive full indemnity costs out of her husband's assets as it was "highly unlikely" that the wife would have been appointed as guardian of property if the application had proceeded based on the following considerations:

- there was no sworn evidence to raise any basis to remove the PGT as guardian for property;
- the principal focus of her application was to be appointed guardian so she could move her husband out of his care facility and back home with her. This proposal appeared "contrary to [the husband's] best interests and did not have a reasonable chance of success;"[14]
- there was evidence that the wife did not have the requisite abilities to manage her husband's estate; and,
- some of the wife's actions created "enormous and unnecessary expenses" (e.g. she unilaterally moved her husband from a suitable facility to one that was "extremely expensive" which "his estate could not afford").[15]

[12] *Fiacco v Lombardi*, 2009 CarswellOnt 5188, 2009 CanLII 46170 (ON SC).
[13] [2009] OJ No 1529 (SCJ).
[14] *Futerman v Futerman*, [2009] OJ No 1529 (SCJ), 2009 CarswellOnt 1982 (SCJ) at para 18.
[15] *Futerman v Futerman*, [2009] OJ No 1529 (SCJ), 2009 CarswellOnt 1982 (SCJ) at para 18.

If a court must decide between two (or more) competing guardianship applications, the wishes of the incapable person play an important role in deciding who should be appointed a guardian, as was recognized in ***Lazaroff v Lazaroff***.[16] The court held that the incapable person's wishes that her sister *not* be appointed guardian should be respected, even though on an objective basis the sister appeared to be the best choice for guardian. The incapable person's own autonomy needed to be recognized and her subjective judgement that she did not want her sister appointed was to be given "considerable weight."[17] The incapable person had suggested an employee of a financial institution be appointed as her guardian of property. However, this employee had only met with the incapable person twice, was named in person rather than his financial firm as the proposed guardian, and there was no evidence he was insured or that his duties as guardian of property would be covered by any policy of insurance carried by the financial firm. The PGT was appointed guardian of property instead.

Similarly, in ***Public Guardian and Trustee v Martins*****,**[18] the court confirmed the PGT's refusal to issue a certificate of statutory guardianship to an incapable person's son and declared that the PGT would continue to act as the statutory guardian of the incapable person's property. The incapable person, who still was capable on instructing counsel, had consistently maintained that she did not want her son "to do anything with [her] life dealings," because he was "waiting to rip [her] off".[19] The court found that there was no need to determine whether her allegations were true, which in any case could not be done with the evidence available. What was important was that she had consistently expressed this wish, and the court believed that appointing her son would be "a recipe for long-term conflict".[20]

It may not always be clear as to which party carries the legal burden in competing guardianship applications. In ***D'Urzo v D'Urzo,***[21] the court had to decide who, as between the wife or the brother and sister of the incapable person, should be his guardian or

[16] 2005 CanLII 44834 (ON SC), 2005 CarswellOnt 7007 (SCJ) at para 19.
[17] 2005 CanLII 44834 (ON SC), 2005 CarswellOnt 7007 (SCJ) at para 19.
[18] 2021 ONSC 1623.
[19] 2021 ONSC 1623 at para 14.
[20] 2021 ONSC 1623, at para 21.
[21] 2006 CarswellOnt 8684, 2006 CanLII 46788 (ON SC).

guardians. Justice Hoilett concluded that the brother and sister carried the burden of adducing evidence since the wife had been the guardian of both the person and property since the near drowning that lead to her husband's incapacity. It was Justice Hoilett's view that the wife had the presumptive right to the preservation of the *status quo* and the brother and sister had to establish, on a balance of probabilities, that there should be a change in the *status quo*.

Citing the authority presented, Justice Hoilett also confirmed that the court should be guided by the best interests of the incapable person and it was "equally clear" that the court is not bound to make an order for guardianship in favor of a spouse in cases where a spouse is one of the contestants for guardianship. In this case though, considering all of the evidence, the submissions of counsel, and the governing legal principles, the incapable person's best interests were best served by ordering that the wife be appointed guardian.[22]

However, in ***Zhang v Wu***,[23] Justice Haley concluded that the guardianship of the person should be granted to the incapable person's parents, as opposed to her husband. Justice Haley stated the following conclusion:

> . . .Having considered all the evidence and having assigned weight to the affidavit material and considering the best interests of [the incapable person] as paramount I find there is no reason to remove [her mother] as either personal care guardian or guardian of property at this time. I am not persuaded that [the husband] is in a position to provide the care that [the incapable person] requires. I take into account that [the parents] have been providing this care for more than 2 years and that [the incapable person] is reported to be well cared for….[24]

When one applicant in a contested guardianship hearing has been the primary caregiver of the incapable person for some time (like in *D'Urzo* and *Zhang*), it may be difficult to convince the court to change the *status quo*. Though sometimes, as in D'Urzo, the process itself resolves the issues and the reasons that the guardianship application raised at first instance.

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[22] *D'Urzo v D'Urzo* 2006 CarswellOnt 8684 (SCJ), 2006 CanLII 46788 (ON SC) at para 33.
[23] (1999), 33 ETR (2d) 320 (Ont SCJ).
[24] *Zhang v Wu,* (1999), 33 ETR (2d) 320 (Ont SCJ), [1999] OJ No 5031 (SC) at para 19.

In ***KR v YR (Roelandt v Roelandt),***[25] the mother and sister of an incapable woman and the younger brother of the incapable woman brought competing guardianship applications. While not her official guardian, the mother had lived with and cared for the incapable woman for her entire life, of 54 years. Disagreement with the brother arose over the incapable woman's care. The extensive evidence on the applications showed conflicting narratives. To the extent that the incapable woman's wishes could be ascertained and expressed through the objective voice of her appointed lawyer, she favoured the appointment of her mother and sister rather than her brother. Ultimately, the court appointed the mother and sister as guardians since the mother was an entirely devoted mother, never neglected her daughter, and looked after her in a capable and admirable way. She always acted in her daughter's best interests. In contrast, the evidence demonstrated that her brother showed little interest or involvement in her life and there were indications that he was motivated by the dissatisfaction of his mother's estate arrangements. The son was unsuccessful on his appeal.[26]

In ***Orens v Aleong***,[27] a sister, as opposed to the wife, of the incapable person, was appointed guardian of person and of property. The original guardian, an uncle, wished to resign and the incapable person's sister and his wife brought competing applications to be appointed. For three years prior to the incident that left him incapacitated the husband was living in Nova Scotia, and the wife had been living in Ontario. He was then moved to a health care facility in Ontario. The wife had consented to the uncle becoming her husband's original guardian. The wife's evidence showed that she had not spoken to any of her husband's medical consultants or physicians and she was not particularly aware of what medical treatment he was receiving.

Justice Maddalena, taking into consideration that the husband and wife were living separate and apart at the time of the incident, and based on the evidence, found that the relationship had broken down between the wife and the uncle and was "problematic." Justice Maddalena concluded that the sister was best suited to act as the incapable person's guardian and that she would best promote contact between her brother and his

[25] 2015 ONSC 6874.
[26] *Roelandt v Roelandt*, 2016 ONCA 858.
[27] 2013 ONSC 5286.

family members and friends. However, Justice Maddalena also "emphatically state[d]" that the appointment of the sister was not meant to exclude the wife and children from visiting as personal contact should continue as it was in the incapable person's best interests.

In ***Maure v Maure et al,***[28] a father and mother brought competing guardianship applications to be appointed guardian of the person of their incapable adult son. The parents had been divorced for some time. The father was already the guardian of property. Justice Rasaiah was satisfied that the incapable son's wishes could not be ascertained, and, that he was close to both his mother and father. However, the mother and father's ability to communicate and interact with each other was "tension-filled and in a deteriorated state." Justice Rasaiah found that the father demonstrated a "greater ability to make decisions timely and effectively and to manage and promote [the son's] personal care, in [the son's] best interests."[29] The father also demonstrated a greater ability to work effectively with caregivers and that he exercised good judgment and filed a thorough and detailed guardianship plan.

The mother, on the other hand, while she clearly loved her son: did not file a guardianship plan; there was evidence of her leaving him on his own while she was gambling; was in an abusive relationship exposing the son to domestic violence; had a hard time adjusting to her son being moved into a group home; and, had difficulty with his caregivers. After reviewing the provisions of the *SDA*, the powers, duties and obligations of a guardian, and considering the evidence and history of the case, Justice Rasaiah concluded that the father should be appointed guardian. However, Justice Rasaiah did "not make this decision lightly."[30]

In ***Terefe v. Berouk***,[31] the mother and father of an incapable adult son brought competing guardianship applications. While not his guardian, the father had lived with and cared for the incapable son for the previous four years and was his "sole and primary caregiver". As his *de facto* guardian, the court found extensive evidence to demonstrate that the

[28] 2018 ONSC 1257.
[29] *Maure v Maure et al*, 2018 ONSC 1257 at para 58.
[30] *Maure v Maure et al*, 2018 ONSC 1257 at para 58.
[31] 2023 ONSC 5673 (CanLII)

father had failed in his duties to foster regular contact between the adult son and his mother and consult with his supportive family and friends. Moreover, the court took issue with the father's guardianship plan, which included simultaneously stated a commitment to foster a loving relationship between the mother and son, and also described the mother as 'manipulative, controlling and damaging'. In contrast, the guardianship plan of the mother provided in-depth detail on how she would foster a relationship between the son and the father, as well as other friends and family. The court found that the mother was more likely to fulfill the duties of a guardian, in particular the duties to foster regular contact and was appointed as the son's guardian for property and personal care.

The issues of determining the wishes of an incapable person, and of the closeness of the relationship between the incapable person and the proposed guardian, were explored in a recent case. ***Pettipas v. Pettipas***,[32] concerned a guardianship application regarding an incapable mother, Eileen Pettipas. Eileen had two daughters, Denise and Deborah and lived in a long-term care home. Deborah was Eileen's attorney for property and personal care. Denise brought an application seeking Deborah's removal as Eileen's attorney. Denise submitted evidence that in the 2 years Deborah acted as an attorney she had: used Eileen's property for personal gain, failed to provide her with adequate personal care or maintain her property and tried to limit Eileen's contact with Denise. For these reasons, the court removed Denise as Eileen's attorney for property and personal care.

The court then turned to the question of guardianship and determined that it was in the best interests of Eileen that Denise should appointed as her guardian for property and the person. The court found Denise appropriate given her close relationship with Eileen, her commitment to caring for Eileen, her training as a nurse and that the PGT consented to her management plan and guardianship plan.

In ***Rudin-Brown et al v. Brown*** **and** ***Brown v. Rudin Brown et al****,* [33] Carolyn Brown had been living with her son Gordon for more than 10 years. In 2009, she had granted a power

[32] 2024 ONSC 667 (CanLII)

[33] *Rudin-Brown et al v. Brown* AND *Brown v. Rudin-Brown et al,* 2021 ONSC 3366 [*Rudin-Brown*].

of attorney to her sister in law Jeanne Brown, naming Jeanne's son as her alternate. Around the same time, she had granted a power of attorney for personal care jointly to Gordon and her daughter, known as Missy. In 2016, Gordon had obtained new powers of attorney naming himself solely for both property and personal care. Carolyn had also signed a new will. Missy and Jeanne, on the one side, and Gordon, on the other, brought competing applications for guardianship of Carolyn. In the course of this litigation, Gordon began to surreptitiously record all of Carolyn's telephone conversations, and many of her conversations in person.

After setting aside the 2016 Powers of Attorney as the products of undue influence, the court turned to the question of guardianship, and determined that Jeanne should be appointed as the guardian for property, as she had been under the 2009 Power of Attorney for Property. Justice Williams had the following to say:

> I consider it significant that Carolyn had not named Gordon as her attorney or substitute attorney for property in 1996 or 2009 and conclude that she had reasons for not having done so. I also consider Gordon's financial dependency on Carolyn and his strong desire to continue living in her home preclude him from fulfilling this role due to conflict of interest.[34]

Regarding guardianship of the person, Justice Williams appointed Missy, as she had been the Attorney for Personal Care under the 2009 Power of Attorney, but, though Gordon had been joint with her on that document, refused to appoint him. The court's reasons cite Gordon's recording of Carolyn's conversations as being "highly intrusive and not in Carolyn's best interests."[35]

Gordon appealed the decision to the Ontario Court of Appeal but was unable to point to any reversible error by the trial judge.[36]

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[34] *Rudin-Brown*, *supra* note 31 at para 170.
[35] *Ibid*., para 172.
[36] *Rudin-Brown v. Brown*, 2023 ONCA 151 (CanLII)

In ***Abrams v Abrams,***[37] Brown D.M. J., (as he then was) had strong words regarding contested guardianship applications:

> Proceedings under the SDA are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only one focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the Legislature in the SDA, should not and will not tolerate family factions trying to twist SDA proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues.

These words of advice and guidance are deliberately relevant in all *SDA* proceedings.

The Lawyer's Role and Practice Tips

Before commencing guardianship proceedings that may be contentious, the client should be aware of the potential risks involved, as well as the personal and financial sacrifices that may have to be made. Contested guardianship applications can be incredibly stressful and very emotional for the applicant, the incapable person, and family members. Relationships are often damaged beyond repair, and the family's "dirty laundry" will likely be aired in public.

Success on a contentious guardianship application will require a well drafted application that follows the prescribed procedure under Part III of the *SDA*, "Procedure in Guardianship Applications."[38]

When drafting an application, it is important that the applicant concretely demonstrate the merits of the application. The applicant should "tell the story" of the incapable person: evidence of their lifestyle, past practices, activities, preferences and relationships with family and friends, as well as the suitability of the proposed guardian. Or, if the allegedly incapable person appears to be supporting themselves without a guardian, an explanation is likely required on why a guardianship is now being sought.

[37] *Abrams v Abrams*, 2010 ONSC 1254 at para 35.
[38] *SDA*, *supra* note 2 at ss 69-77.

In competing guardianship applications, the court will compare the proposed Guardianship and Management Plans. The Management Plan should be detailed and should demonstrate how the incapable person's funds are going to be used for his or her benefit.[39] Guardianship Plans should provide sufficient information to show that the applicant has considered what services an incapable adult requires and can afford so as to maximize quality of life. If insufficient information is provided, the court will be left wondering if the plan put forward will be in the incapable adult's best interests.[40]

The ability and suitability of a proposed guardian will be assessed by the court. Some questions the court may consider are: what is the applicant's motivation for seeking guardianship? Will they be able to undertake and devote the time and skill required to fulfill the significant duties and obligations of a guardian? The applicant who is a family member should provide fulsome information as to relationship closeness to the allegedly incapable person, qualifications to act as guardian, availability, etc. If it is an application to be a guardian of property, the application should demonstrate evidence of the applicant's accounting and business expertise, and the knowledge and willingness to act as litigation guardian should the need arise.

Counsel may also wish to include evidence in support of the application that the proposed guardian has reviewed and understood the duties of a guardian, has verified the information contained in the Management Plan or Guardianship Plan, that it is truthful and complete, and that the proposed guardian has reviewed and understood the requirements to keep accounts and records.

The application should also address any possible conflicts of interest, for example, where the applicant's own property or beneficial interests diverge from those of the incapable person.

Some indicators of unsuitability, which counsel should discuss with the client in relation to the application, and to keep in mind when opposing a contested application include:

[39] Jael Marques de Souza, "The Annotated Guardianship Application, The View of the Public Guardian and Trustee", The Law Society of Upper Canada, February 25, 2016 at 2-6.
[40] Jael Marques de Souza, "The Annotated Guardianship Application, The View of the Public Guardian and Trustee", The Law Society of Upper Canada, February 25, 2016 at 2-15.

- The incapable person does not trust the applicant;
- There has been very little contact between the incapable person and the applicant in past years;
- The applicant has a history of bankruptcy, or a criminal history relative to acting as a fiduciary;
- The applicant is a professional party, other than trust companies, with no connection to the incapable adult;
- Family members with a history of physical or emotional issues relating to the incapable adult; and
- Parents or other relatives of incapable people who have no legal immigration status in Canada, especially when the incapable person has or will come into significant assets needing to be managed.[41]

Finally, counsel should be reminded of their professional obligations during contested guardianship applications.

In the decision of ***DeMichino v DeMichino,***[42] the incapable person was represented by a personal injury lawyer in a negligence claim that settled. Sisters of the incapable person entered into a retainer agreement with the personal injury lawyer for him to represent them in guardianship proceedings. However, when court approval was sought for the settlement of the negligence claim, the personal injury lawyer brought an application on behalf of the incapable person's common law spouse and her niece to be appointed as guardian of property. Despite knowing that the incapable person had several other family members, the lawyer noted in the application that the incapable person was estranged from his family and failed to serve any of his family members with notice of the application.

[41] Jael Marques de Souza, "The Annotated Guardianship Application, The View of the Public Guardian and Trustee", The Law Society of Upper Canada, February 25, 2016 at 2-4.
[42] (2009) 94 OR (3d) 379 (SCJ).

Having no notice of the proceedings, the family members did not attend, and the common-law spouse and niece were appointed guardians.

A hearing was held to determine whether the PGT, in failing to bring the omission of notice to the court's attention, was liable for any part of the costs of the subsequent proceeding to replace the guardians. The court declined to make such an award but was critical of the lawyer:

> Despite the requirements of s.69(6) of the SDA, Mr. Neinstein did not serve any of Mr. Michele DeMichino's family members with notice of the guardianship application. (I pause to note that his actions in bringing the guardianship application on behalf of [the wife] and [the niece] exclusively, and without notice to other family members, would appear to be in direct conflict with the signed retainer agreement previously given to him in connection with guardianship issues).[43]

The lawyer was subsequently the subject of a professional misconduct hearing,[44] and had his license suspended for six months.[45] The Law Society of Ontario (then called the Law Society of Upper Canada) found, among other things, that the lawyer had committed professional misconduct by acting and taking various steps while the interests of his clients conflicted; failed to serve his clients by failing to follow their instructions to commence litigation; and commissioning, swearing and filing with the court an affidavit that contained false information and misleading the PGT. The Panel commented that the lawyer's "blatant disregard for the statutory requirement to serve [the family members] with the Notice of Application to appoint a Guardian of Property confirms that the breach was intentional, rather than inadvertent."[46]

Section 3 Counsel

In contentious guardianship applications, the alleged incapable person may not be represented by counsel or may not respond at all. However, section 3 of the SDA establishes an important statutory provision respecting legal representation for an unrepresented person whose capacity is in issue, otherwise known as "Section 3 Counsel." In appropriate circumstances, the appointment of Section 3 Counsel can be

[43] *DeMichino v DeMichino* (2009), 94 OR (3d) 379 (SCJ) at para 7.
[44] *LSUC v Neinstein*, 2013 ONLSHP 57 (CanLII).
[45] *LSUC v Neinstein* 2014 ONLSTH 92 (CanLII).
[46] *LSUC v Neinstein*, 2013 ONLSHP 57 (CanLII) at para 29.

beneficial to the alleged incapable person. The appointment of independent counsel for the alleged incapable person may also provide the general benefit of keeping the litigation focused on the purpose of the *SDA*, rather than on ulterior motives or issues which may exist among the parties in contested guardianship applications.[47] However, section 3 of the *SDA,* does not make the appointment of legal representation mandatory and the court must assess the specific facts and legal issues in deciding whether such appointment is appropriate in a specific case.[48] For more information on the role of Section 3 counsel see the article "Between a Rock and a Hard Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act, 1992*" by Kimberly Whaley and Ameena Sultan and "The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward", by Alexander Procope.[49]

In the recent case of ***Opalinski v Dalamagas***,[50] the court clarified that section 3 counsel will only be made available in the context of a proceeding under the *Substitute Decisions Act*.[51] In ***Opalinski***, a motion was brought in the context of a proceeding in which the moving party is an estate trustee. The motion was not brought within a proceeding under the *SDA*. As a result, the responding parties opposed the motion on the basis the court had no jurisdiction to make an order appointing section 3 counsel. The court in *Opalinski* referred to *Bon Hillier v Milojevic* where Brown J. "implicitly makes clear that in order to appoint s. 3 counsel, the proceedings must be with respect to "proceedings under the *SDA*.""[52]

Costs of Contentious Proceedings

Contentious guardianship applications can be lengthy and complex and therefore costly. If costs are to be paid out of the property of the incapable person, the parties must satisfy

[47] *Abrams v Abrams*, 2010 ONSC 1254 at paras 6-9.
[48] *Kwok v Kwok*, 2019 ONSC 3549 at para 30.
[49] Kimberly Whaley and Ameena Sultan, "Between a Rock and a Hard Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act, 1992*" (2012) 40 Adv Q 40 408-469, and "The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward" by Alexander Procope for the LSO 22nd Estates and Trust Summit, October 16, 2019.
[50] 2022 ONSC 4842 [*Opalinski*].
[51] *SDA*, *supra* note 2.
[52] *Opalinski*, *supra* note 47 at para. 11.

a court that the litigation undertaken was strictly for the benefit of the incapable person. If not, the parties may be responsible for their own legal costs. Clients should be well-informed of this before embarking on such applications, and be advised of the potential to mediate or attempt to settle such disputes.

The *SDA* does not deal specifically with the costs of guardianship applications. Section 131 of the *Courts of Justice Act,*[53] and Rule 57 of the *Rules of Civil Procedure*[54] govern such costs. However, pursuant to section 3(2) of the *SDA* when counsel is appointed for an incapable person, the incapable person is responsible for the legal fees incurred by counsel acting on their behalf. Those legal fees should be reasonable and properly incurred on the incapable person's behalf.

Justice D.M. Brown, (as he then was) observed in ***Fiacco v Lombardi***, that the "loser pays" principle found in civil litigation, as well as estates litigation, applies with equal force to capacity litigation involving incapable persons, with some modification to fit the particularities of guardianship applications.[55] The costs should reflect the purpose of the *SDA*, to protect the incapable person's property:

> The exercise of the court's discretion in respect of costs claims in capacity litigation should reflect the basic purpose of the *SDA* – to protect the property of a person found to be incapable and to ensure that such property is managed wisely so that it provides a stream of income to support the needs of the incapable person: *SDA*, sections 32(1) and 37. To that end, when faced with a cost claim against the estate of an incapable person, a court must examine what, if any, benefit the incapable person derived from the legal work which generated those costs.[56]

In *Fiacco*, D.M. Brown J., also recognized that in contested guardianship applications where applicants have "only their best interests at heart" rather than the best interests of the incapable person, that:

[53] RSO 1990, c C 43.
[54] RRO 1990, O Reg 194.
[55] *Fiacco v Lombardi*, 2009 CarswellOnt 5188, 2009 CanLII 46170 (ON SC) at para 32.
[56] *Fiacco v Lombardi*, 2009 CarswellOnt 5188, 2009 CanLII 46170 (ON SC) at para 32-33

> . . .courts must scrutinize rigorously claims of costs made against the estate of the incapable person to ensure that they are justified by reference to the best interests of the incapable person.[57]

In ***Wercholoz v Tonelletto***[58] Justice Glithero commented that:

> In my opinion, this case represents a sad example of the hefty amounts that can be spent by siblings who choose to litigate rather than negotiate their differences in respect of a parent's wellbeing. In terms of an appropriate costs order, I must be concerned not only with the usual considerations as between the combatants, but also, most importantly, with what is fair from [the incapable person's] perspective.[59]

Further, parties should not be convinced that the costs will be paid by the incapable or vulnerable person. As noted by Justice Spies in ***Ziskos v Miksche***,

> the court has a responsibility to ensure that legal cost incurred on behalf of a vulnerable person are necessary and reasonable and for that person's benefit, before ordering that such costs be paid by the assets or estates of the vulnerable person.[60]

Justice Price in ***Arvanitis v Levers,***[61] provided a comprehensive summary of the case law and principles for determining costs in *SDA* proceedings and adopted the approach of Justice Spies in *Ziskos v Miksche*, noting:

> The parent who names his/her children as joint attorneys for property or personal care should not be required to pay unnecessary costs that result when one of the children fails to perform his/her duty, making the arrangement untenable.[62]

In the contested guardianship application case of ***Howard v Howard***,[63] Justice Bell required the parties to bear their own legal costs. In this case the parties had resolved their competing guardianship applications but could not agree on the applicable costs. A brother and sister sought costs against another brother, on a *full* indemnity basis for over $33,000.00, but, did not seek to recover any costs from the incapable person, their mother. The other brother sought to recover his costs on a *substantial* indemnity basis of

[57] *Fiacco v Lombardi*, 2009 CarswellOnt 5188, 2009 CanLII 46170 (ON SC) at para 36.
[58] 2013 ONSC 1106.
[59] *Wercholoz v Tonellotto*, 2013 ONSC 1106 at para 37.
[60] *Ziskos v Miksche*, [2007] OJ No 4276 (SC) at para 75.
[61] 2017 ONSC 3758.
[62] *Arvanitis v Levers*, 2017 ONSC 3758 at para 98.
[63] 2019 ONSC 4643.

$31,500 from the opposing parties, or in the alternative, from his incapable mother or for a blended award where part of the costs would be paid by his siblings, and the rest "topped-up" by his mother. He also wanted his mother to pay an outstanding legal bill for legal services provided to his mother by a previous lawyer.

The incapable mother had a new lawyer and was represented by Section 3 counsel. Her position was that she should not have to pay legal costs or the outstanding legal bill for the previous lawyer.

Justice Bell observed that there were "a number of ancillary issues" that were pursued by the parties in addition to the guardianship application and that she "fail[ed] to see how [the mother] derived any benefit from the battles that ensued amongst her family members in the context of the competing applications."[64]

Also, Justice Bell saw no basis to justify a "top up" or blended award in respect of the son's cost from the mother's estate:

> To make a 'blended' order of the nature requested by [the son] in this case would ignore the very purpose of a guardianship application – to benefit the incapable person – and would encourage family members to opt for litigation in contested guardianship cases, rather than to resolve their differences.[65]

Further, the son was ultimately responsible for the legal bill for legal services provided before Section 3 counsel was appointed. The fees related to an alleged joint retainer with the son and the mother. It was not clear what benefit there was to the mother in the services provided by the lawyer. Also, Justice Bell noted that the only evidence as to the mother's capacity to instruct the previous lawyer came from the son (who would be responsible for the bill if the mother did not have to pay it). Under these circumstances, Justice Bell declined to order the mother pay the outstanding balance. Each side had to bear their own costs.

[64] *Howard v Howard*, 2019 ONSC 4643 at para 13.
[65] *Howard v Howard*, 2019 ONSC 4643 at para 14.

In ***Donovan v MacKenzie,***[66] the incapable person had died during a lengthy guardianship dispute between two of his children. On the issue of costs, Justice Tranquilli noted that:

> I am satisfied that "success" is not a tenable approach in this matter for two reasons: 1. The nature of the issues between parties were hard fought, with no judicial fact finding or determination. Therefore, the court approaches the task of costs on the basis that neither party was successful; and 2. The trend in the authorities is that "success" is not a significant factor in these cases; rather, one examines the nature of the dispute and the conduct of the parties.[67]

Justice Tranquilli then focused on three issues: whether the applicant had been motivated by her father's best interests, whether the applicant had acted in an unreasonable manner that had led to unnecessary costs, and whether the applicant was entitled to her costs from the respondent.[68] Not finding that the applicant had behaved unreasonably, and in the absence of any judicial finding on the merits of the guardianship proceedings, Justice Tranquilli concluded that the parties would bear their own costs.

Opposing a guardianship application for tactical purposes may also result in increased legal costs against a party. In the case of ***Willet v McAdam,***[69] Justice Hackland found that the responding party's opposition to the application was "tactical, ill considered, and without merit."[70] Justice Hackland's view was that the respondent party should be prepared to pay substantial indemnity costs as the applicants were forced to address the issues on a contested basis.[71]

However, the applicants also took an approach of transferring support issues into the guardianship application which was, in Justice Hackland's opinion, ill-advised and generated substantial unnecessary costs. Further, there were several "lengthy, abusive and disrespectful affidavits" from both sides.[72] Ultimately, Justice Hackland concluded

[66] 2021 ONSC 1865.
[67] 2021 ONSC 1865 at para 17.
[68] 2021 ONSC 1865 at para 19.
[69] 2016 ONSC 3463.
[70] *Willett v McAdam*, 2016 ONSC 3463 at para 2.
[71] *Willet v McAdam*, 2016 ONSC 3463 at para 2.
[72] *Willet v McAdam*, 2016 ONSC 3463 at para 4.

that one-third of the claimed substantial indemnity costs related to the guardianship application and awarded that sum to the applicants.

Lisowick v Alvestad,[73] is an example of when costs will be paid out of the incapable person's property. Two sisters settled competing guardianship applications regarding their father who suffered from dementia, however they were "hopelessly deadlocked" on the issue of costs. In applying the costs factors enumerated in Rule 57.01(1) of the *Rules of Civil Procedure*, Justice Andre made several observations, including that the care of the father "was undoubtedly serious but as the parties themselves have illustrated, the vexing problem of guardianship of [the father] and the protection of his property could easily have been resolved without the necessity of the litigation."[74] Further, with respect to the quantum of the costs, Justice Andre noted that:

> The quantum of costs awarded must not be tantamount to a judicial licence for siblings to opt for litigation in contested guardianship cases rather than resolving their differences in a manner that reflects the best interests of the incapable relative. The fact that apparent or relative has a sizeable estate, therefore increasing the chances of costs recovery, should not be construed as an incentive to commence litigation in these types of cases.[75]

Ultimately, Justice Andre ordered the "successful" sister's costs to be paid out of the father's assets. Justice Andre noted that while the opposing sister may have been "misguided' in initiating her guardianship application, she did so on behalf of her father and her "scrupulous desire to ensure his personal wellbeing and to protect his property."[76] She also brought the application in her capacity as her father's attorney for personal care and for property. Accordingly, the cost should be paid out of the father's property, rather than by the unsuccessful sister.

In ***Dawson et al v Dawson et al,***[77] the court ordered the PGT to pay a portion of the applicant's costs. The PGT had been the only party to oppose a motion to appoint a litigation guardian for the incapable person, and had unsuccessfully argued that this

[73] 2015 ONSC 257.
[74] *Lisowick v Alvestad*, 2015 ONSC 257 at para 26.
[75] *Lisowick v Alvestad*, 2015 ONSC 257 at para 29.
[76] *Lisowick v Alvestad*, 2015 ONSC 257 at para 30.
[77] 2020 ONSC 6861.

appointment would be redundant when Section 3 counsel was available. On the issue of costs, the PGT took the position that, being a statutory agency tasked with protecting vulnerable citizens, it could not be liable for costs unless it "behaved improperly or unfairly or adopted an untenable position".[78] Justice Gomery did not find that any such rule exists, and instead concluded that a statutory agency, which has more resources available to it than many other litigants, should be liable for costs when it has taken "positions that are clearly inconsistent with legislation or established legal principles".[79]

In ***Public Guardian and Trustee v Friesen***,[80] an application was brought by the PGT to be appointed as guardian for the property of Ana Friesen (the "Respondent"). The Order was made on consent. The PGT sought costs, which were opposed by the Respondent. The Respondent was diagnosed with schizophrenia, paranoia and depression. She was hospitalized on a number of occasions as a result. She also held significant assets of approximately $1.6 million, "however, she had been going through her assets quickly and is unable to manage her own property." The Respondent's family members were all unwilling to take on the role as guardian or to assist in the management of her property. A full Guardianship Order was made on consent. As a result of the proceeding, the PGT sought costs of $21,173.37. The Respondent disagreed with a finding of incapacity against her and argued there should be no costs order or in the alternative, that the order is too excessive. The Respondent argued "that it is fundamentally unfair to permit the PGT to recover its costs from the respondent due to the significant power imbalance between the parties and asks the court to dismiss the request of the PGT for costs."

The PGT in *Friesen* relied on s. 8 of the *Public Guardian and Trustee Act* and the decision in *The Public Guardian and Trustee v MacFarlane*, which held that "in summary, the PGT has the statutory authority to charge and deduct its legal fees and expenses, in respect of this application, from the funds it holds for Ms. MacFarlane." As a result, the court concluded there was no evidence the PGT took interest in the Respondent because she is a person of high net worth and cited evidence that her family refused to participate.

[78] 2020 ONSC 6861 at para 21.
[79] 2020 ONSC 6861 at para 41.
[80] 2022 ONSC 2904 [*Friesen*] recently cited with approval in *Public Guardian v. Deforest et al*, 2023 ONSC 6607.

What's more, evidence demonstrated that the PGT waived approximately 34 percent of its fee. The court held that this was a reasonable quantum of fees and that the PGT was entitled to deduct its fees and expenses from money held on behalf of the Respondent.

These cases are demonstrative of the potential costs awards to be expected in contested guardianship applications. Counsel should advise their clients to focus on putting relevant information in the application and in a respectful manner that is sensitive to cost consequences, and avoids irrelevant argument or accusations or family squabbles that have little to do with the benefit of the incapable person and leads to unnecessary costs.

Notably, the court have found public policy reasons to permit section 3 counsel to recover their full costs from the property of the incapable person. In *Gadula v. Leroux*,[81] Justice A.J. Goodman stated that ""in order that lawyers willingly accept and discharge their obligations under a s. 3 appointment, it is good public policy to permit s. 3 counsel to recover their full costs, as they generally have no other recourse for such reimbursement". Accordingly, if section 3 counsel's costs are fair and reasonable, they will usually be paid from the assets of the incapable person.

3. COMMON ABUSES BY GUARDIANS AND ATTORNEYS

While guardianships and power of attorney documents aid vulnerable and incapacitated individuals, there are a number of ways a guardian or an attorney under a power of attorney may act in a manner detrimental to the very person they are supposed to protect.

Common Scenarios

Some common scenarios in which we see a substitute decision maker act to the detriment of an older adult who is vulnerable or dependent include:

- The attorney or guardian makes unauthorized, questionable or even speculative investment decisions, or investment decisions lacking in diversity;

[81] 2016 ONSC 6990 (CanLII); recently cited with approval in *Adam v. Adam*, 2023 ONSC 3093.

- The attorney or guardian fails to take into consideration the tax effects of their actions or inactions;
- The attorney or guardian fails to seek professional advice where necessary or appropriate;
- The attorney or guardian inappropriately deals with jointly held assets or accounts;
- The attorney or guardian misappropriates the incapable person's assets;
- If more than one attorney or guardian acts without the knowledge, approval, or acquiescence of the other(s) either under a joint or joint and several POA or co-guardianship order;
- The grantor grants a power of attorney while incapable of doing so;
- The POA document has been fraudulently procured from a vulnerable or physically dependent grantor by an individual with improper motives, as a result of undue influence, or in a situation of suspicious circumstances, for the sole purpose of abuse, exploitation, and personal gain;
- Disputes and accounting discrepancies arise concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and, the extent of the attorney's involvement;
- The POA is fraudulently or imprudently used, for the sole purpose of the self-interest of the attorney and/or used in a way that constitutes a breach of fiduciary duty, etc.

There are several remedies available to seek redress for wrongs committed by an attorney or guardian, including bringing an application for the attorney or guardian to pass accounts, commencing a claim to have any monies improperly taken returned (restitution), or to have any improper transfer of title set aside, etc. Or, a party can bring an application or motion for directions, and request a corresponding order requiring that an attorney or guardian take certain actions, such as consulting with supportive family

members.[82] This next section will address another remedy, commencing an application or motion for the removal of an attorney or guardian.

4. REMOVAL OF GUARDIANS AND ATTORNEYS

Removal of a substitute decision maker is not an easy endeavor, especially removing an attorney since courts are reluctant to interfere with the wishes of an incapable person while fully capable. The *SDA* is designed not only to protect individuals while they are incapable, but, also to protect a person's autonomy and right to choose who they wish to look after their property and personal care decisions.

A person may seek to bring an application to remove an attorney and have themselves or another, such as a trust company or as a last resort, the PGT appointed as guardian. Or in a guardianship situation, they may seek to have a guardian removed and have themselves or another, replace the previous guardian.

Removal of an Attorney

An application with affidavit and supporting evidence must be brought to have an attorney under a power of attorney for property or personal care removed. At the same time, a guardianship application (with the required supporting documents, including a Management Plan or a Guardianship Plan, etc.)[83] will be brought to replace the attorney (unless the incapable person has a named alternative attorney), so the incapable person will not be left without a substitute decision maker. The Court will have to consider two legal issues: whether the attorney should be removed, and whether the proposed guardian should be appointed.

One of the leading cases in removing an attorney is, ***Teffer v Schaefers Estate.***[84] Fragomeni J., of the Ontario Superior Court of Justice reviewed the applicable

[82] *SDA*, ss 39 and 68.
[83] *SDA*, s 70(1)(c).
[84] 2008 CanLII 46929 (ON SC), 2008 CarswellOnt 5447 (SCJ).

authorities[85] regarding the removal of an attorney appointed under a valid power of attorney and concluded that a two-part test must be met before the attorney would be removed:

> The jurisprudence establishes that two issues require consideration. First, there must be **strong and compelling evidence of misconduct or neglect on the part of the attorney** before a court should ignore the clear wishes of the donor. With respect to this issue, the evidence has to establish that the donor was capable of granting a proper power of attorney.
>
> The second issue relates to whether the court is of the opinion **that the best interest of an incapable person are being served by the attorney**.[86]

A review of attorney removal cases provides guidance on behaviour that could amount to "misconduct or neglect" considered serious enough, to remove an attorney.

The case of ***Carey v Carey,***[87] involved seven siblings fighting over the care of their mother and what was in her "bests interests" including where she should live. She was being shuttled between the two homes of her attorneys under a Power of Attorney for Property and Power of Attorney for Personal Care. There were also disputes on when the mother could have contact with her other five children. One of the main questions for the court was whether the two sons should be removed as attorneys. The court concluded that there was strong and compelling evidence of misconduct and / or neglect by the sons. Some of that misconduct included:

- Failure to adequately explain how the mother's $42,000 per year pension income was spent when she had no independent housing costs, no car, etc;

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[85] *Glen v Brennan*, [2006] OJ No 79, [2006] OTC 18 (SCJ) at para 9; *Re Hammond Estate* (1998), 25 ETR (2d) 188 at para 31; *Hammond Re*, [1999] NO No 28, 173 Nfld & PEIR 240 (SC(TD)) at paras 25, 31 and 33; and *Marienhoff v Edwards*, [2003] SJ NO 277, 2003 SKQB 157 at paras 22-23, citing *Axler v Axler* (1993), 50 ETR 93, *O'Connor v Mulville* (1997), 42 OTC 360; (1997), 20 ETR (2d) 171 (Ont), and *McGoey v Wedd* (1999), 28 ETR (2d) 236 (Ont SC).

[86] *Teffer v Schaefers Estate,* 2008 CanLII 46929 (ON SC),2008 CarswellOnt 5447 (SCJ) at paras 24 & 25. See also *Crane v Metzger*, 2018 ONSC 5382 at para 9*; Carey v Carey* 2018 ONSC 4564 at para 52; *Abel v Abel et al*, 2017 ONSC 7637 at para 31; *Berkelhammer v Berkelhammer Estate*, 2012 ONSC 6242 at para 21; *Grohl v Steele*, 2017 ONSC 3625 at para 54.

[87] 2018 ONSC 4564, costs 2019 ONSC 7214.

- Failure to adequately account for how increased mortgage funds were utilized;
- Failure to obey a number of court orders requiring disclosure;
- There was credible evidence regarding the mother's missing jewelry and that it had been pawned;
- At the very least, the attorneys had "shown little skill in using her funds in a responsible manner to secure her financial best interests";
- Whatever one son may have done or neglected to have done, the other son failed to step in; and,
- Failure to fulfill duty to foster regular contact between the mother and her other children.

Justice Kurz found that the two-part test set out in the case of *Re Schaefers Estate* had been met and removed the sons as attorneys.

In another sad case, ***McMaster v McMaster***,[88] a mother appointed her two sons as attorneys under a continuing power of attorney for property. However, the mother decided not to tell one of her sons that he was appointed as her attorney (or forgot to do so). The son who knew he was an attorney, and had access to all of his mother's assets, used her life savings to invest in rather dubious business ventures including a go-kart business. By the time the second son figured it out, the mother's assets were depleted by almost $2 million.

The Court removed the first son as the attorney and ordered that he provide an accounting for the money. The Court found that the he "did not demonstrate the transparency required of him as a co-attorney."[89] He did not advise his co-attorney about the go-kart investment until after the fact and was not forthcoming with a passing of accounts. Ultimately, the Court concluded that the "fiscal stewardship of [the son] has been a

[88] *McMaster v McMaster*, 2013 ONSC 1115, costs decision 2014 ONSC 2545.
[89] *McMaster v McMaster*, 2013 ONSC 1115 at para 62.

disaster for his mother. He has literally blown through at least $2,000,000. If there was ever a case for removal of an attorney this is it. It will prevent the further haemorrhaging of his mother's assets."[90]

In ***Valente v Valente***,[91] Justice Barnes found "strong evidence of misconduct" that the attorney for personal care and property had misappropriated her incapable mother's property warranting removal as attorney. There were a number of unexplained financial transactions, including the attorney using her mother's money to take vacations, purchase a $50,000 vehicle, a $20,000 ring, a Harley Davidson motorcycle and make renovations to her house. The attorney had no credible response. Further, video evidence showed that the incapable mother blindly followed her grandson's (the attorney's son's) instructions (such as suggesting she swear and say racist slurs) which were clearly intended to ridicule and mock her for the entertainment of others and himself. The daughter was removed as attorney and the incapable person's son and his wife were appointed as joint guardians of property and personal care.

Financial mismanagement was one of the reasons a daughter of an incapable woman was removed as an attorney for property and of the person in ***Bellefeuille v Bellefeuille***.[92] The "strong and compelling evidence of misconduct" in this case included the daughter using her mother's funds to purchase appliances for herself, co-mingling her mother's money with her own rather than keeping her funds separate, and failing to comply with a court order to provide an accounting. A son of the incapable mother brought a corresponding application to be appointed guardian. Justice Vallee, based on the filed Management Plan and Guardianship Plan, and the evidence before her, was satisfied that it was in the mother's best interests to have the son appointed as her guardian of the person and property.

In ***Moore v McLean***[93], the court removed Donald Moore's son, Gregory Maclean, as attorney for property, even though the court was satisfied that Donald's financial needs

[90] *McMaster v McMaster*, 2013 ONSC 1115 at para 60 & 62.
[91] 2014 ONSC 2438, related proceeding and costs decision, 2017 ONSC 6701.
[92] 2018 ONSC 6802.
[93] *Moore v. McLean*, 2022 ONSC295.

were being met. The grounds of "strong and compelling evidence of misconduct" was applied to Gregory Maclean's failure to comply with court orders for the production of the documentation for his accounts. Kathleen Moore, Donald's daughter and attorney for personal care, was given responsibility for his property as well, but the requirement that Donald not be moved out of his long-term care home without further direction from the court, and she was also required to pass her accounts after a six-month period.

If there is an alternative attorney named in the power of attorney document, the court will consider appointing the alternative when removing an attorney.

In ***Aiello v Bleta***,[94] the mother had appointed her son as her attorney for personal care and her daughter as the alternative. The court found that the son had not been acting in good faith. He refused to approve reimbursement of expenses incurred by the daughter in caring for the mother at her home, failed to pay her preferred caregiver/companion, failed to sign a required consent form for the mother's dental surgery (despite having been told twice that it was necessary for him to do so) and, he failed to seek to foster regular contact between the mother and her supportive family members and friends. Justice Dietrich noted that while the son made some personal care decisions for his mother, it was the daughter who was making personal care decisions for her mother every day as they had lived together for eleven years. Justice Dietrich found it was appropriate to remove the son and have the daughter replace him as the attorney, noting that in naming the son as her attorney and her daughter as the alternate attorney, the mother had confidence in both of them. The brother and sister were required to bear their own costs.[95]

In the recent decision of ***Adam v. Adam***,[96] two attorneys for personal care were removed and a guardian of the person was appointed for an incapable person. In 2019, a father granted a power of attorney for personal care which appointed his common-law spouse as his attorney and their daughter as alternate. The son commenced an application

[94] 2020 ONSC 62.
[95] 2020 ONSC 62 at para 62.
[96] 2023 ONSC 3093

seeking the removal of the appointed attorneys and sought his appointment as his father's guardian of the person.

On the issue of capacity, the court found that the father was incapable of managing his personal care. The son submitted a capacity assessment confirming the father's incapacity, and submissions of incapacity were unopposed by the common-law spouse or daughter. Moreover, the father was being represented in the application by section 3 counsel.

The son submitted evidence that demonstrated that the spouse had neglected her duties as attorney for personal care. Notably, the spouse actively enabled the father's serious alcohol addiction, and breached a court order requiring her to notify the son when important care decisions needed to be made. Submissions from the father's section 3 counsel were that he would prefer the son to act as his substitute decision-maker. The court accepted this evidence and ordered that the spouse and daughter be removed as attorneys, reasoning that it was no longer in the father's best interests for them to act.

The court approved of the son's guardianship plan, and made an order appointing him as the father's guardian of the person.

Removal of a Court-Appointed Guardian

It appears that the stringent test to remove an attorney under a power of attorney is not applicable to motions to remove a court-appointed guardian.[97] The rationale for this may be that a court appointed guardian is not someone chosen by the incapable person, while capable, but is rather someone who volunteered on their own initiative to take on this role.

In cases removing or replacing guardians, the overarching consideration appears to be what is in the best interests of the incapable person.[98] Guardians have been removed for several reasons, including where a guardian has breached their fiduciary or statutory

[97] See *Maharaj v Maharaj*, 2015 ONSC 5775, 2015 CarswellOnt 21287 at para 21.
[98] *KR v YR*, 2015 ONSC 6874, *Bennett v Gotlibowics*, [2009] OJ No 1438 (SCJ) at para 19, *Chu v Chang*, [2009] OJ No 4989 (SCJ) at para 26; *Consiglio v Consiglio*, 2012 ONSC 4629 at para 37.

duties, or has disregarded the best interests of the incapable person, or acted in a way so as to benefit themselves rather than the incapable person.

Or, if the person who is subject to the guardianship order becomes capable of managing their own property, or to make personal care decisions, they or others may apply to terminate the guardianship order.

The court may terminate a court appointed guardianship on a motion in the proceeding in which the guardian was appointed.[99] Such a motion may be made by the guardian, the applicant in the proceeding in which the guardian was appointed, or, any person who was entitled to be served with notice of that proceeding.[100] In a motion to terminate a guardianship or temporary guardianship, the court may suspend the powers of the guardian or temporary guardian.[101] Further, in an application for the passing of the accounts of a guardian of property, the court may, on motion or on its own initiative, order that the guardianship be terminated.[102]

The *SDA* also permits the court to vary an order appointing a guardian, or substitute another person as guardian, on a motion in the proceeding in which the guardian was appointed, and such a motion may be made by the guardian, the applicant in the proceeding in which the guardian was appointed, or any person who was entitled under the *SDA* to be served with notice of that proceeding.[103]

The procedure for a motion to terminate or vary or substitute a guardianship of property, or, of the person, is found in Part III of the *SDA,* "Procedure in Guardianship Applications." A Notice of Motion as well as accompanying statements must be served on the prescribed persons in the *SDA* as well as family members.[104]

[99] *SDA,* s 28(1) and 63(1).
[100] *SDA*, s 28(2) and 63(2).
[101] *SDA*, s 29.
[102] *SDA*, s 42(8).
[103] *SDA*, ss 26(1) and (2), 61(1) and (2), *Mian v Akram*, 2019 ONSC 1882 at para 52.
[104] *SDA,* ss 69-77.

A review of the case law provides some guidance on when a court-appointed guardian will be removed or replaced.

Guardians will often be removed if they have breached their fiduciary duty or have taken actions that benefit themselves and not the incapable person, or actions not in the incapable person's best interests.[105] As stated by Justice Harper in ***Gray v Lyle***:

> As someone's guardian, a person must not benefit themselves in any way. All actions and conduct taken by the person who owes the duty to someone who is incapable must be for the benefit of the incapable person even to the detriment of the fiduciary. If that cannot be accomplished, then the fiduciary must remove themselves from that position or be removed.[106]

In *Gray*, the daughter of an incapable woman had been appointed her guardian of property and of the person. The incapable woman's sister brought a motion to have the daughter removed as guardian and for the sister to replace her. Justice Harper agreed that the daughter should be removed because of the following considerations: the daughter had not been available on numerous occasions to provide treatment and care decisions in a timely manner; would not provide her mother's monthly personal needs allowance on time or at all; failed to produce records of her mother's assets and how she spent her mother's money (claiming that two floods destroyed the records); and, there was evidence the daughter used her mother's money to pay for her own auto insurance premiums, gas for her car, and her own cell phone bills. Justice Harper determined that it was in the incapable person's best interest that the sister, who demonstrated an ability to manage finances and who visited the incapable woman regularly, be appointed guardian of property and of the person.

In ***Maharaj v Maharaj***,[107] a brother brought a motion requesting an order varying an order appointing his brother as guardian for property and personal care for their mother and appointing himself instead. The moving brother alleged that the guardian had not fostered any relationship between the mother and her other children, had not consulted his siblings on her care and finances, and on one occasion did not inform his siblings when he was

[105] *Gray v Lyle*, 2014 ONSC 4886 at paras 20-21.
[106] *Gray v Lyle*, 2014 ONSC 4886 at para 20.
[107] 2015 ONSC 5775, 2015 CarswellOnt 21287 (SCJ).

out of town and there was a minor flood at the mother's house (which was remedied by the guardian when he returned). In his affidavit for the proceedings, the guardian made a "pledge to his siblings" that he would, among other things, provide notice of any absence and provide contact details where he could be reached and encouraged his siblings to contact him with any concerns they may have. Justice Hebner found that it was clear from the evidence that the guardian arranged for all of the mother's personal needs to be met, he took his obligations seriously, had taken care of all of her financial needs and had not taken a fee for any of his services. The difficulty lay in the communication between the siblings. Based on the evidence, Justice Hebner concluded that it was in the mother's best interests that the son continues to act as her guardian. He had "done an excellent job caring for [the mother] to date, and there is every reason to believe that he will continue to do so. I make that finding in reliance on [the guardian's] pledge."[108] Justice Hebner however also noted:

> [The mother] is vulnerable. It is in her best interests to see all of her children regularly and to have all of them fully informed of her care and her finances. If [the guardian] does not honour the promises he made to his siblings, as set out herein, then any of the three of them are at liberty to bring the matter back before the court for review.[109]

In ***Palin v Elbrecht***,[110] the son of an incapable woman brought a motion to remove his sister and brother as his mother's permanent guardians of the person. The alleged grounds for removal was that the guardians had violated their personal care plan filed by them dealing with the medical treatment being provided to their mother and that they failed to employ a German-speaking caregiver for their mother, since German is her first language. He also alleged that the guardians breached their duties as they did not consult with supportive family members. However, the court found that it would be "useless to suggest to the guardians that they should go through the exercise of attempting to consult with their brother."[111] There was obvious animosity between the siblings, and the applicant brother:

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[108] *Maharaj v Maharaj*, 2015 ONSC 5775, 2015 CarswellOnt 21287 (SCJ) at para 24.
[109] *Maharaj v Maharaj*, 2015 ONSC 5775, 2015 CarswellOnt 21287 (SCJ) at para 25.
[110] 2000 CarswellOnt 344, 31 ETR (2d) 237.
[111] *Palin v Elbrecht*, 2000 CarswellOnt 344 at para 11.

> made no attempt to moderate that animosity on the hearing in the court, refusing to refer to his sister by name. It is clear that there is at best a complete difference of opinion between the guardians and [the applicant] and that consultation the sense required under s 66 (7) is now impossible and would not produce any agreement.[112]

There was no breach of the *SDA* found, that would go to support the removal of the applicants as guardians of the person. Further, not hiring a German speaking companion was also not grounds to remove the guardians.[113]

In ***Chu v Chang***,[114] D.M. Brown J., (as he then was) had "no hesitation" in terminating a co-guardianship where it was concluded, that the "two sides of the family simply cannot work together."[115] Their relationship was "poisonous" and continuing the co-guardianship was not in the best interests of the incapable person.[116] Justice Brown varied the orders appointing the co-guardians and removed both guardians. A trust company was appointed guardian of property and the incapable person's daughter was appointed guardian of personal care.

Sometimes being a guardian can take its toll on an individual, and, it is the guardian who seeks to be removed from their position.

In the case of ***Kwok v Kwok***[117] the only child of the incapable person agreed to take responsibility as his father's guardian for property and personal care after his father was seriously and permanently injured in a motor vehicle accident. A few years later, the son sought to terminate his appointment since his relationship with his father became strained due to his father's mental health, and the son was having difficulty trying to manage his father's affairs. The son was worried the father may become violent and attack him as he became abusive when he did not get his way and would invoke his status as father when disagreeing with his guardian son's choices. The son was having difficulty carrying out his obligations. The wife, and the son's mother, brought a related application to be

[112] *Palin v Elbrecht*, 2000 CarswellOnt 344 at para 11.
[113] *Palin v Elbrecht*, 2000 CarswellOnt 344 at para 12.
[114] 2010 ONSC 294.
[115] *Chu v Chang*, 2010 ONSC 294 at para 4.
[116] *Chu v Chang*, 2010 ONSC 294 at para 4.
[117] 2019 ONSC 3549.

appointed guardian of property and of the person. While the husband and wife separated before his accident, they never divorced and remained close. The wife was retired and had more time to devote to her guardian obligations. She filed a Management Plan and a Guardianship Plan and consulted with her husband, who expressed his wishes in court that the wife "is OK with me. She takes care of me." Based on the affidavit evidence and the guardianship application put forward by the wife, the son was removed as guardian and the wife appointed in his stead.

Notably, however, sometimes, a guardian will not receive a removal order despite such a request being made of a court.

In ***Mian v Akram***,[118] a trust company brought a motion seeking its removal as interim guardian of property and the appointment of the PGT in its stead. In support of its motion the trust company cited lack of co-operation and support from the incapable person's family and the risk of incurring liability. The incapable person had several residential and commercial properties with a net worth estimated more than $10 million. His family, however, refused to co-operate with the trust company, and the trust company was unable to obtain necessary information respecting assets and liabilities; could not determine who the shareholders of the incapable person's company were; could not effectively manage the properties; and, could not take necessary steps to create liquidity. Further, one of the rooming houses owned by the incapable person had evidence of drug activity which presented a reputational risk to the trust company. The PGT however, did not consent to being appointed guardian. The trust company argued that the court should rely on its *parens patriae* jurisdiction to appoint the PGT. The court disagreed that the court's *parens patriae* jurisdiction was engaged under the circumstances of the case and found that the court lacked authority to appoint the PGT without his consent. Until an alternative guardian could be found, the court refused to remove the trust company as guardian.

[118] 2019 ONSC 1882.

In ***Tanti v Tanti***,[119] a Guardianship Order was set aside, removing an older adult's son from the role of guardian of property and person. In *Tanti*, what began as a challenge to the marriage of an older adult to his live-in companion ended in a contested Guardianship Order. On September 12, 2019, a Guardianship Order which appointed the son as guardian of property and person was made on the basis of materials filed by the son, submissions made by his counsel, and a letter from the Office of the Public Guardian and Trustee. The son had provided facts which indicated that $600,000 the son had control of while Attorney for Property had gone missing. The accusation was that the father's spouse had misappropriate funds and taken it with her overseas. Counsel for the spouse argued that the Guardianship Order should be set aside because it was improperly before the Justice on an unconfirmed matter and that it was based on false, misleading, and incomplete information. The son had admitted that the missing $600,000 was an error and that no misappropriation had occurred. The court also noted that the September 12, 2019 Guardianship Order was supposed to be temporary but was in place for three years. As a result, the Guardianship Order was set aside.

Removal of a Statutory Guardian

Contentious guardianship litigation can also arise when a statutory guardian has been appointed and others wish to replace the statutory guardian.[120] An application must be brought to terminate a statutory guardianship of property and the procedure for such an application can be found in Part III of the *SDA*. If the PGT has been appointed as statutory guardian, the following persons may apply to the PGT to replace the PGT:

1. the incapable person's spouse or partner;
2. a relative of the incapable person;
3. the incapable person's attorney under a continuing power of attorney; or,

[119] 2022 ONSC 4419 [*Tanti*].

[120] The PGT becomes an incapable person's statutory guardian in one of two ways. First, if a person is a patient in a psychiatric facility and a certificate is issues under the *Mental Health Act* RSO 1990, c M 7 certifying that the patient is incapable of managing property the PGT de-facto becomes the person's statutory guardian. Second, if a capacity assessor issues a certificate of incapacity stating that the person is incapable of managing property, the PGT becomes the person's statutory guardian of property.

4. a trust corporation, if the incapable person has a spouse or partner who consents in writing to the application.[121]

If the PGT refuses to issue a certificate, and the applicant disputes the refusal, the PGT must apply to the court to decide the matter. When deciding the application, the criteria for the court to consider are set out in the *SDA* which provides:

> The court shall take into consideration an incapable person's current wishes, if they can be ascertained, and the closeness of the applicant's relationship to the person.[122]

However, it must be remembered that a person can always bring a guardianship application to unseat a statutory guardian and is not restricted to applying to the PGT as a replacement.

In ***Waffle (Public Guardian and Trustee of) v Duggan,***[123] the PGT became the statutory guardian for property of the incapable person, Mrs. Waffle, after she suffered an aneurysm and became incapacitated. Subsequently, Mrs. Waffle's sons brought an application to replace the PGT and Mrs. Waffle's husband and his daughter (from a previous marriage) brought a competing application. The application judge rejected the suggestion that the *SDA* mandates a priority order in which competing applicants must be considered. He assessed the merits of the two applications before him. He considered the issue of closeness and then turned to the relative abilities of the parties to carry out the duties and functions of the guardian of property, including their business experience and ability to manage property and the obligations under the SDA. The application judge ultimately concluded that the sons met the onus of establishing that they should replace the PGT as guardians of their mother's property.

The husband and stepdaughter appealed.[124] The Court of Appeal noted that there was an apparent lack of trust and animosity which had developed between the parties. One option that the application judge did not appear to have considered was to decline to order

[121] *SDA*, s 17(1).
[122] *SDA*, s 18(4).
[123] [1999] OJ No 2038 (SCJ).
[124] 1999 CanLII 1388 (ON CA), 175 DLR (4th) 466 (Ont CA).

that *either* applicant replace the PGT.[125] The PGT expressed concern over the entire situation and indicated that the PGT was prepared to retain guardianship. In the circumstances, it was the Court of Appeal's view that neither applicant should replace the PGT. The application judge's order was set aside and the PGT remained statutory guardian.

In ***Public Guardian and Trustee v Dodson***,[126] the incapable person's sister applied to replace the PGT as statutory guardian of property. The PGT rejected her as a suitable guardian, which the sister disputed, and the PGT applied to the court for confirmation. One of the reasons the PGT refused the sister's application was that she could not objectively manage her sister's property because she "was fixated on attacking" her incapable sister's husband's Will. His Will provided that he specifically chose not to name his wife's sister as a residual beneficiary as his "enjoyment of life" had been diminished by her "manipulative ways, interference and negative comments." The sister contested the Will arguing that the husband, her brother-in-law, lacked testamentary capacity and was unduly influenced.

Justice Taylor agreed with the PGT and declined to appoint the sister as guardian, finding that the sister's obsession about the execution of her brother-in-law's Will and the subsequent administration of his estate would prevent her from objectively managing the property of the incapable person. Justice Taylor also found that the sister would not be able to foster regular personal contact between the incapable person and her nephew by marriage who was the executor of the husband's estate, because of her irrational belief that he stole, or was attempting to steal assets and money. The sister failed to satisfy the court that she had the qualities that would enable her to discharge the duties and powers of a guardian of property in order to be appointed to replace the PGT.

[125] *SDA*, s 18(3).
[126] 2015 ONSC 1927.

5. CONCLUDING COMMENTS

Guardianship applications and litigation involving attorneys under powers of attorney can become contentious, emotional, and stressful disputes for those involved. Keeping in mind the purpose of the *SDA* and putting the bests interests of the incapable person at the forefront of these applications can help to resolve the disputes in a more efficient and cost-effective manner for all involved. However, where an attorney or guardian's conduct is inappropriate, or, disregards the best interests of the incapable person, counsel should gather the appropriate evidence and seek the available remedy of removing or replacing the guardian or attorney, keeping in mind the guidance gleaned from the court decisions which inform us to agree on outcome.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance, is not intended to be relied upon as the giving of legal advice, and does not purport to be exhaustive on the topic.

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