**THE OSGOODE INTENSIVE PROGRAM IN WILLS & ESTATES**

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

**Incapacity Planning and Powers of Attorney**

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**Presented by:**

**Bryan Gilmartin**

**bryan@welpartners.com**

**www.welpartners.com**

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## *INTRODUCTION*

Incapacity planning is often ancillary to the preparation or update to an estate plan, notwithstanding that these are the plans that stand to significantly impact clients during their lifetimes. Decisions involving the future care and management of clients' assets warrant fully informed and careful consideration to assist clients in maintaining the best possible quality of life into old age and throughout any periods of incapacity.

While a client's options in respect of incapacity planning may seem straightforward, the failure to properly plan for the management of one's affairs during potential periods of incapacity can result in family conflict and potential disregard of his or her wishes and/or best interests.

The purpose of this paper is to provide an overview of incapacity planning in Ontario and to outline some of the options available to clients.

## *WHAT IS A POWER OF ATTORNEY?*

A Power of Attorney is a legal document that grants person B, known as the attorney, with the right to make decisions for person A, known as the grantor.[1]

There are two types of Powers of Attorney. A Power of Attorney for Personal Care grants an attorney with decision-making power over the grantor's health care, housing, and other aspects of their personal life.[2] A Power of Attorney for Property on the other hand, allows the attorney to make decisions about the grantor's financial affairs, including paying their bills, managing their investments, and collecting money owed to them.[3]

An attorney for personal care must be at least 16 years old, and an attorney for property must be at least 18 years old.[4] When appointed, an attorney must be mentally capable.[5]

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[1] Ontario Ministry of the Attorney General, "*How Powers of Attorney Work*," (March 17, 2017), at para 1.
[2] *Ibid*, para 2.
[3] *Ibid*.
[4] *Ibid*, para 8.
[5] *Ibid*, para 9.

*Power of Attorney for Property*

In theory, Powers of Attorney for Property can be very expansive and may authorize the attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a Will.[6] However, a grantor can limit the scope of their Power of Attorney for Property by inserting conditions and restrictions in the document, provided that these are consistent with the *Substitute Decisions Act*.

There are two types of Power of Attorney for Property: a Continuing Power of Attorney for Property ("**CPOA**") and a non-continuing Power of Attorney for Property.[7] A CPOA allows the attorney to make decisions for the grantor even after the grantor becomes mentally incapable. In contrast, a non-continuing Power of Attorney for Property ceases to be effective once the grantor becomes mentally incapable.[8] Non-continuing Powers of Attorney for Property can be used in instances when the grantor requires somebody to look after their financial affairs for a limited period of time, for example, while they are out of the country.[9]

*Power of Attorney for Personal Care*

As mentioned above, a Power of Attorney for Personal Care grants an attorney with decision-making power over the grantor's health care, housing, and other aspects of their personal life. As a result, attorneys for personal care may be required to make life and death decisions on the grantor's behalf.

A Power of Attorney for Personal Care also represents an opportunity for a grantor to outline their wishes regarding care and life sustaining treatment. Whether wishes are expressed by the grantor while capable or not and/or if his or her current wishes can be ascertained, the attorney is required to act in the best interests of the individual.[10] While many wishes expressed in a Power of Attorney for Personal Care may be precatory in nature, they are to be considered by attorneys for personal care in making decisions on

[6] *Substitute Decisions Act, 1992*, SO 1992, c 30, s 7(2) [SDA].
[7] Office of the Public Guardian and Trustee, "*Powers of Attorney – Questions and Answers*," at page 2.
[8] *Ibid.*
[9] *Ibid*.
[10] SDA, *supra* note 6, s 66(3).

the incapable's behalf. For example, a Power of Attorney for Personal Care could potentially include one or more of the following clauses:

- Without limiting the discretion of my attorney(s) hereunder, it is my desire that should I have an incurable injury, disease or illness regarded as a terminal condition by my physician and if my physician has determined that the application of life-sustaining procedures would serve only artificially to prolong the dying process, and that my death will occur whether or not life-sustaining procedures are utilized, I direct that such procedures be withheld and that I be permitted to die with only administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.
- With respect to any Life-Sustaining Treatment, I direct the following:
    - I do not want my life to be prolonged and I do not want life-sustaining treatment:
        - if I have a condition that is incurable or irreversible and, without the administration of life-sustaining treatment, expected to result in death within a relatively short time;
        - if I am in a coma or persistent vegetative state which is reasonably concluded to be irreversible; or
        - if I have brain damage or some brain disease that in the opinion of my physician and two (2) other medical consultants cannot be reversed and that makes me unable to recognize people or to speak understandably and whether or not I have a terminal illness.
- With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that I <u>intend</u> to include these procedures among the “life-sustaining procedures” that may be withheld or withdrawn under the conditions given above.
- I ask that medication be mercifully administered to me or medical or surgical procedures be taken to alleviate suffering even though this may shorten my remaining life.
- I authorize my attorney(s), to approve the donation on my demise of any of my body parts for the purpose of transplant (and medical research and education).

*THE IMPORTANCE OF INCAPACITY PLANS, GENERALLY*

*The Health Care Consent Act*

Absent a Power of Attorney for Personal Care, the terms of the *Health Care Consent Act, 1996*[11] (the "**HCCA**"), typically come into play in respect of decisions regarding an individual's personal care when he or she has been deemed by health care professionals to be incapable and medical decisions need to be made. The overriding objective of the HCCA is to balance the right of the individual to make health care decisions themselves with the need to provide treatment when an individual is incapable of making those decisions.[12]

Specifically, the HCCA provides that (unless someone has been authorized to make decisions on the incapable person's behalf) the following individuals will become a person's substitute decision maker(s) during incapacity, in order of priority:

1. the person's spouse (including a common law spouse);
2. the person's child or parent;
3. a parent without custody of the child;
4. the person's sibling; and
5. any other relative of the person.[13]

If no relatives of the individual can be located, are capable, available, and willing to assume the responsibility of giving or refusing consent, critical medical decisions may be made by the Public Guardian and Trustee.[14]

In a scenario where immediate decisions are straightforward and there is no disagreement amongst family members, who are available and willing to give or refuse consent to medical treatment, the provisions of the HCCA may satisfactorily address the issue of substitute decision making in respect of certain health care decisions in the absence of a Power of Attorney for Personal Care. If a client's wishes are inconsistent with the hierarchy set out in the HCCA, however, it is imperative that he or she executes

[11] SO 1996, c 2, Sched A.
[12] *C(T) v Hastings*, 2017 ONSC 374 at para 56, 2017 CarswellOnt 460.
[13] *Supra* note 12, s 20(1), (7).
[14] *Ibid,* s 20(2), (5).

a Power of Attorney for Personal Care that appoints someone else to make personal decisions on his or her behalf while incapable.

It is important to recognize that a Power of Attorney for Personal Care can also authorize an attorney for personal care to make decisions that fall outside of the HCCA[15]. These types of decisions may include those related to living arrangements, long-term care, and quality of life, generally, as opposed to being limited to decisions directly related to giving or refusing consent to medical treatment.

*Guardianship Applications*

Unlike personal care decisions, without a Power of Attorney for Property, no one will automatically be authorized to make decisions affecting an individual's property while he or she is incapable. This can lead to the necessity of a guardianship application. A guardianship application includes a Notice of Application, affidavit evidence from the proposed guardian, a capacity assessment, and a Management Plan.

A guardianship appointment has dramatic legal consequences for the incapable person. Due to the grave deprivation of liberty that a guardianship appointment imposes on the incapable, the standard of evidence required in an Application for Guardianship is very high. Capacity assessments are key evidence in a Guardianship Application of incapacity and should detail the necessity that a person is assisted by a Property Guardian. Courts place a great deal of reliance on these capacity assessments in deciding whether the thresholds have been met to satisfy the requirements necessary to make a guardianship appointment.

It is also possible to commence an application for the guardianship of an incapable person’s personal care. In that case, the Application Record would include a Notice of Application, affidavit evidence from the proposed guardian, a capacity assessment, and a Guardianship Plan relating to the incapable’s personal care.

[15] SDA, *supra* note 6, ss 49(1)(b), 66(3).

Guardianship applications should not be substitutes for comprehensive incapacity planning that reflects a client's wishes. These applications can be both costly and time consuming. Furthermore, unless the incapable's current wishes can be ascertained or prior wishes are known, his or her preference as to a guardian of property to be appointed may not be considered.

As a result, solicitors should consider discussing Powers of Attorney with their clients during their meetings about estate planning, rather than view them as an afterthought to the preparation and execution of a Will. Some considerations that should be addressed as part of these discussions are briefly reviewed below.

*APPOINTMENT OF PRIMARY AND ALTERNATE ATTORNEYS*

The selection of an attorney (or attorneys, as discussed below) to manage a client's personal care decisions and property should be carefully thought out.

It is important that the individuals appointed to make decisions on behalf of clients can be trusted. While fiduciaries like attorneys owe grantors a duty of utmost good faith, it is important that individuals who can comply with their fiduciary obligations are selected to act. In some circumstances, it may be appropriate to appoint a trust company or other professional, such as a lawyer or accountant, as an attorney for property rather than a family member.

It is also important that the selected attorney is both willing and able to act. Clients should discuss the proposed appointment with the individual(s) whom they wish to appoint as attorneys before documents are finalized, if possible.

Another consideration in selecting attorneys for property and personal care alike is where they reside. In particular, appointing an attorney for personal care that lives within close proximity to the grantor may reduce the risk that he or she will not be available when important health care decisions need to be made on short notice.

It is advisable to always appoint one or more alternate attorneys to act in the event that the primary attorney is unavailable or unwilling to act. Sometimes, clients will insist that

a selected attorney (especially if a younger relative such as a child) will be able to assist them and, unexpectedly, the younger relative experiences capacity issues before or predeceases the parent, leaving no one to assist the grantor and necessitating a guardianship application. Naming only a primary attorney without an alternate should be avoided.

*APPOINTING MULTIPLE ATTORNEYS*

Many clients wish to appoint two or more attorneys, who are all authorized to manage their affairs. The *Substitute Decisions Act* states that, unless the Power of Attorney provides otherwise, attorneys are appointed to act jointly.[16] Another option is to appoint multiple attorneys "jointly and severally", meaning that the attorneys can make decisions both together and separately. Alternatively, the document can provide that decisions can be made by any majority when more than two attorneys are appointed.

The appointment of attorneys jointly necessitates all decisions to be made together. This form of appointment presents the benefit of requiring consensus decision-making. If it is likely that the attorneys will have difficulty agreeing upon decisions or that one or the other may be unavailable to make joint decisions, the grantor may need to reconsider whether he or she wishes to appoint both attorneys or whether he or she is comfortable in permitting the attorneys to make unilateral decisions.

Delay may ensue if an attorney is not authorized to make decisions independently in a way that may be problematic, especially if a healthcare decision needs to be made immediately. Joint and several appointments of attorneys who may question the decisions made by one another is generally not advisable if it can be avoided and can lead to disputes, such as contested applications to pass accounts or applications seeking the removal of the other attorney, while the grantor remains living.

If an incapacity plan cannot function because the attorneys appointed in Powers of Attorney cannot work together, litigation, in which one attorney seeks the removal of

[16] *Ibid*, ss 7(4), 46(4).

another, may ensue. Typically, strong and compelling evidence of misconduct is required before a court is willing to override the stated wishes of the grantor in respect of the appointment of substitute decision makers.[17] Litigation can be expected to not only disrupt the management of the person's affairs, but may threaten to deplete the assets available to fund his or her ongoing care.

If one joint attorney becomes incapable or dies, the remaining attorney is authorized to continue to act alone.[18] If the grantor does not wish for one of the named attorneys to be able to act alone, he or she should specify that the appointment of an alternate will then come into effect (either with or in the place of the remaining primary attorney).

In litigation, we often see the appointment of two or more siblings as attorneys, notwithstanding long-term relationship issues that inhibit their ability to work together for a parent's benefit. Such appointments are often based upon a sense of obligation rather than a consideration of who will be able to act (and, if necessary, act together) in the client's best interests.

It may be best to make the decision regarding appointment of one or more attorneys from a business standpoint rather than an emotional one. In some cases, family members may not be the most suitable candidates to act as attorneys for property and/or personal care.

*TRIGGERING CLAUSES*

The *Substitute Decisions Act* states that, unless a Power of Attorney for Property specifies otherwise, it will come into effect immediately upon its execution.[19] Many clients may instead wish that the authority of attorneys commences only after the onset of incapacity.

If a Power of Attorney for Property is to remain effective during the grantor's incapacity, this must be explicitly stated or the document must be identified as a *Continuing* Power

[17] *Ontario (Public Guardian & Trustee) v Harkins*, 216 ACWS (3d) 1039 at para 20, 2011 CarswellOnt 7097.
[18] SDA, *supra* note 6, ss 7(5), 46(5).
[19] *Ibid*, s 7(7).

of Attorney for Property, which *continues* to be effective following the onset of incapacity to manage property.[20] A clause such as follows may be suitable:

- It is my intention and I so authorize my attorney(s) that this authority shall be exercised during any incapacity on my part to manage my property, pursuant to the *Substitute Decisions Act, 1992.*

Powers of Attorney for Personal Care, on the other hand, only become effective once the grantor is incapable of making his or her own personal care decisions.[21]

If the grantor does not specify within the document how it is to be determined whether he or she remains capable of managing property and/or making personal care decisions, a capacity assessment may be required.[22] Unless the grantor wishes for this step to be taken, a formal assessment may represent an unnecessary expense and cause of delay.

It is for the client to decide which conditions must be met in order for the Power of Attorney to come into effect. It can be specified whether a formal assessment is necessary, whether the opinion of the grantor's family physician can be relied upon, or whether such an opinion must be confirmed by one or more additional health professionals. Some same triggering clauses that can be included in a Power of Attorney depending on the grantor's wishes appear below:

- I require my attorney to obtain in writing a statement signed by my medical doctor concurring in the conclusion that I am no longer competent to manage my property before acting under the authority given herein.
- I require my attorney to obtain a written opinion signed by (name of doctor) or whomever I have most recently been seeing as my general physician concurring in the conclusion that I am no longer competent to manage my property before acting under the authority given herein.
- This power of attorney is effective only in the event my family physician determines that I am incapable of managing my property. A letter from my family physician addressed to my attorney(s) and confirming that I am incapable of managing my property shall be sufficient evidence of the authority of my attorney(s) to act.
- I require my attorney(s) to obtain in writing a statement signed by my medical doctor, (name) or (his/her) successor in general practice or if none then a general physician

[20] *Ibid*, s 7.
[21] *Ibid*, s 49.
[22] *Ibid*, s 49(2).

chosen by my named attorney(s), concurring in the conclusion that I am no longer competent to manage my property before acting under the authority given herein.

- I hereby direct that my capacity for property shall be determined upon the assessment of one (1) physician or assessor who is selected by my said attorney(s) if (she/he/they) (is/are) able and willing to act hereunder, or if (she/he/they) (is/are) not able to or willing to act hereunder, who is selected by my said substitute attorney(s). The physician or assessor need only consider those factors which my attorney(s) or substitute attorney(s) hereunder have referred to him or her and any other factors which the physician or assessor is required by law to consider or believe to be relevant in his or her sole discretion.
- I hereby direct that my capacity for property shall be determined upon the assessment of any two (2) physicians or assessors who are selected by my said attorney(s) if (she/he/they) (is/are) able and willing to act hereunder, or if (she/he/they) (is/are) not able to or willing to act hereunder, who are selected by my said substitute attorney(s). The physicians or assessors need only consider those factors which my attorney(s) or substitute attorney(s) hereunder have referred to them and any other factors which the physicians or assessors are required by law to consider or believe to be relevant in their sole discretion.
- This power of attorney for property comes into effect once the condition(s) at paragraph above has/have been met.

*OTHER POWERS AND RESTRICTIONS*

Often, Powers of Attorney provide attorneys with general and unlimited authority, without any restrictions. Given the broad authority that an attorney will otherwise be granted, clients may wish to consider setting out certain restrictions in the documents themselves. While the attorney will be accountable to the grantor, issues involving an abuse of the attorney's authority are often not discovered until after his or her death and questions arise regarding the management of property by the attorney during the grantor's lifetime.

Furthermore, it may be helpful to explicitly grant attorneys with certain authority, such as the authority to administer digital assets, where such authority may not otherwise be recognized.

*Scope of Authority*

As noted above, an attorney for property is authorized to make any decision involving the grantor's property that he or she could have made while capable, except to make a will.[23] This authority is, however, subject to any restrictions outlined within the document.[24]

A Power of Attorney for Property can restrict the authority of the attorney or attorneys appointed under the document. Restrictions that a client may wish to consider might include the following among others:

- if multiple attorneys are appointed jointly and severally, that a certain type of decision must be made by a majority of the attorneys;
- that an attorney is not authorized to sell a certain type of asset, such as a family heirloom or real property; and
- that an attorney cannot appoint him or herself as a director or alter the structure of a corporation held by the grantor.

*Time Limitations*

As mentioned above, unless specified in the document, a Power of Attorney comes into effect immediately and it must be explicitly stated whether a Power of Attorney for Property will remain effective after the onset of incapacity. Clients also have the option of setting other end dates to the appointment of an attorney. For instance, the authority may be specified to take place only for a certain length of time while the client is on vacation or in hospital and unable to attend to payment of his or her bills until a specified date.

*Facilitating Access to Digital Assets*

As noted above, without restrictions set out in the Power of Attorney for Property, an attorney is authorized to manage all of the incapable's property during incapacity. However, the *Substitute Decisions Act* does not explicitly grant attorneys for property the authority to administer digital assets. As it currently stands, the rights of attorneys for

[23] *Ibid*, s 7(2).
[24] *Ibid*, s 7(6).

property and other fiduciaries may not always be recognized by service providers and other custodians of digital assets.

The Uniform Law Conference of Canada has proposed that the provinces implement legislation that clarifies the authority of fiduciaries to access and administer digital assets.[25] However, its recommendations have not yet been implemented in Ontario and most other Canadian provinces. Until amendments are made, it may be advisable to specify within a Continuing Power of Attorney for Property that the scope of the attorney's authority extends to digital assets by including a clause within the document along the following lines:

- My attorney(s) shall have the power and authorization to access, use, and control my hardware devices, including but not limited to, computers, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar hardware device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops ("digital assets"), and to access, modify, delete, control, and transfer my digital assets, and to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my hardware devices and digital assets described above.

*COMPENSATION OF ATTORNEYS*

Generally, an attorney for property will be entitled to compensation from the property that he or she has been authorized to manage.[26] The attorney's compensation is typically calculated in accordance with a prescribed fee scale referred to within the *Substitute*

[25] *Uniform Access to Digital Assets by Fiduciaries Act* (2016), Uniform Law Conference of Canada, available at: https://www.ulcc-chlc.ca/

[26] SDA, *supra* note 6, s 40(1).

*Decisions Act* and set out in its Regulations. They provide that the attorney for property's compensation will be calculated on the following basis:

(a) 3% on capital and income receipts;
(b) 3% on capital and income disbursements; and
(c) 0.6% on the annual average value of assets as a care and management fee.[27]

If the attorney seeks compensation greater than that provided under the fee scale, he or she will require the consent of the Public Guardian and Trustee and the guardians of person or attorneys of personal care or the approval of the Court.[28] Ultimately, on a passing of accounts, a court will consider whether the compensation claimed is fair and reasonable.[29]

The quantum of compensation payable to the attorney may, however, be fixed by the document appointing the attorney for property.[30] Depending on the extent of the grantor's property and the nature of ongoing administration, compensating an attorney for property on the basis of a specified hourly rate or a fixed sum on a monthly or annual basis may be more appropriate than the fee scale set out in the Regulations to the *Substitute Decisions Act*. If the document appointing the attorney specifies that compensation is not payable to the attorney, he or she may not be entitled to any compensation.[31]

While the *Substitute Decisions Act* may not address this issue, attorneys for personal care may also be entitled to reasonable compensation under certain circumstances.[32]

When advising clients who have been appointed to act under a Power of Attorney for Property, they should be informed that any statutory right to compensation is subject to the terms of the document. If the Power of Attorney specifies that the attorney will not receive compensation, the attorney should only begin acting if he or she is prepared to do so without compensation.

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[27] O Reg 26/95, s 1.
[28] SDA, *supra* note 6, s 40(3).
[29] *Bagnall v Bruckler,* [2009] OJ No 3559 at para 15, 2009 CarswellOnt 5062.
[30] SDA, *supra* note 6, s 40(4).
[31] *Ibid*.
[32] See *Brown (Re)*, 31 ETR (2d) 164, 1999 CarswellOnt 4628, for factors that courts may take into consideration when reviewing the compensation claim of an attorney for personal care.

Some sample clauses that may be included in a Power of Attorney to address the issue of compensation appear below:

- I have requested of my attorney(s) and my attorney(s) (has/have) agreed to accept no compensation for any work done by (him/her/them) pursuant to this power of attorney for property (or personal care).
- I authorize my attorney(s) to accept compensation out of my property for any work done by (him/her/them), pursuant to this Power of Attorney for Property, in the same manner as may be provided by regulation for the compensation of guardians of property made pursuant to the *Substitute Decisions Act*.
- I hereby declare that my attorney(s) shall be entitled to receive reasonable compensation from my estate for acting as my attorney(s) during any future incapacity on my part to manage property and I authorize my attorney(s) to take and transfer to (himself/herself) at reasonable intervals from the income and/or capital of my estate amounts on account of compensation which my attorney(s) reasonably anticipate(s) would be approved upon any audit of the estate accounts, (provided however that if the amount subsequently awarded on a Court audit is less than the amount so pretaken, the difference shall be repaid forthwith to my estate without interest.)
- I hereby declare that my attorney(s) shall be entitled to receive reasonable compensation from my estate for acting as my attorney(s) during any future incapacity on my part to manage property and I authorize my attorney(s) to take and transfer to themselves at reasonable intervals from the income and/or capital of my estate amounts on account of compensation which my attorney(s) reasonably anticipates will be requested upon an audit of the estate accounts, (provided however that if the amount subsequently awarded on a Court audit is less than the amount so pretaken, the difference shall be repaid forthwith to my estate without interest.)
- I hereby declare that my attorney(s) for property (or personal care) shall be compensated for reasonable costs of travel and accommodation disbursements, if any, necessarily incurred to fulfil the obligations of this assignment of authority.
- And for greater certainty if my brother (etc.), (name) is acting his/her reasonable costs of travel and accommodation, if any, necessarily incurred to fulfil the obligations of this assignment of authority are proper and compensable disbursements.
- Where at any time any of my Attorneys is a solicitor, he/she shall be entitled to charge and be paid all usual professional fees or other charges for business transacted, time

expended and acts done by his or her firm in connection with the administration of my estate and the trusts of this Power of Attorney, including acts which an Attorney not being in any profession or business could have done personally.

*PLANNING CONSIDERATIONS ARISING OUT OF THE COVID-19 PANDEMIC*

The pandemic had a significant impact on the practices of lawyers who assist clients in the preparation of Powers of Attorney. A change in the legislation came about to facilitate the execution of Powers of Attorney during the pandemic and remains in effect. Section 3.1 of the *Substitute Decisions Act* allows for the virtual witnessing and execution of power of attorney documents through the use of audio-visual communication so long as at the time of execution at least one witness is a Law Society licensee pursuant to the *Law Society Act* and the signatures are contemporaneously made. Section 3.1 came into force on April 7, 2020 and was amended on May 20, 2021. It applies to Powers of Attorney entered into on or after April 7, 2020.

It is important to keep in mind the restrictions on who can witness these documents. Neither a Continuing Power of Attorney for Property nor a Power of Attorney for Personal Care can be executed by (1) the attorney or the attorney's spouse; (2) the grantor's spouse; (3) a child of the grantor; (4) a person whose property/personal care is under guardianship; or (5) an individual of less than eighteen years old.[33] If the lawyer him or herself is being appointed under the document, which is not an uncommon practice, the involvement of a second lawyer or a paralegal in the execution and witnessing of the document(s) will be necessary.

A copy of a video execution checklist that practitioners may wish to consider using when assisting clients in the virtual execution of incapacity planning documents in counterpart is available through Hull e-State Planner.[34]

[33] SDA, *supra* note 6, ss 10(2), 48(2).
[34] Link to checklist: https://kb.e-stateplanner.com/hubfs/Assets/POA%20execution%20by%20counterpart%20Checklist%20b%20200416.pdf.

In addition to considerations in terms of the execution of Powers of Attorney, COVID-19 also exposed logistical issues in the implementation of an incapacity plan due to social distancing measures. For example:

- It may be impractical to permit decisions regarding personal care or property to be made by only two or more attorneys acting jointly where the attorneys selected are not members of the same household;
- In light of ongoing travel restrictions, it may be increasingly important that the selected attorney(s) for property and/or personal care are local;
- It may be more difficult to access multiple medical professionals (or a specified medical professional) to confirm incapacity during a healthcare crisis. The provision regarding the circumstances in which a Power of Attorney is to become effective should accommodate limited access to a specified physician or more medical professionals than necessary;
- It may be more important than ever to ensure that the original Power of Attorney documents (and/or copies) are physically accessible to the named attorney(s).

Considering practical issues like these in the implementation of an incapacity plan is a worthwhile exercise and may expose potential problems with the plan before it is finalized.

## *RECENT CASE LAW*

Failing to properly plan for a client's needs once they become incapable can leave them vulnerable to predatory situations and costly litigation, both of which may put their assets, and thus their future care, at risk. Several recent court decisions dealing with this issue are briefly reviewed below.

### *Public Guardian and Trustee v. Snelgrove et al.,* 2024

This case involves the Public Guardian and Trustee (PGT) seeking reimbursement from Jason Snelgrove for misappropriated funds belonging to his mother, Loreen Snelgrove, who suffers from dementia and is deemed mentally incapable of managing her property.[35] Jason was appointed as Loreen's attorney for property in May 2017, but the court found that he failed to maintain proper records and provide a full accounting of the funds spent

[35] *Public Guardian and Trustee v. Snelgrove et al.,* 2024 ONSC 6892, paras 8 - 18

from Loreen's account.[36] The PGT's investigation revealed that Jason withdrew significant amounts of money from Loreen's accounts, including cash withdrawals and personal purchases, which were not substantiated with receipts or evidence of benefit to Loreen.

The court examined the issue of Loreen's incapacity, noting her cognitive decline since 2014 and her diagnosis of mixed dementia in 2018. Despite Jason's claims that Loreen was capable of providing instructions until 2023, the court found that she was mentally incapable of managing her property since at least January 2019.[37] The court determined that Jason owed a fiduciary duty to Loreen, given his position as her attorney and the vulnerability of Loreen due to her mental incapacity.[38]

Jason breached his fiduciary duty by failing to pay Loreen's long-term care fees and allowing her bank account to enter overdraft status. He also failed to provide material evidence to corroborate his expenditures, leading the court to order him to repay $247,284.22 to the PGT on behalf of Loreen.[39] The court acknowledged Jason's financial difficulties but emphasized his responsibility to account for the funds misappropriated from Loreen's property.

*Sanchez v Sanchez-Guevara, 2025*

More recently, as the litigation guardian of Mr. Sanchez, the PGT commenced an application for the recovery of $306,000 in misappropriated funds at the hands of a son, Mr. Sanchez-Guevara, who was appointed attorney for property.[40]

As of July 2021, Mr. Sanchez's Scotiabank account had a balance of $271,432.20 which as of October 2021 strikingly held a balance of just $0.84. In November 2021, a further $10,000 was withdrawn from a separate Scotiabank account resulting in a balance of

[36] *Ibid*, paras 1-7
[37] *Ibid*, paras 27 - 32
[38] *Ibid*, paras 39 - 52
[39] *Ibid*, paras 92 - 96
[40] *Sanchez v Sanchez-Guevara*, 2025 ONSC 7077, at para 1 & 13.

$0.00[41] and an additional $19,000 was alleged to have been spent on Mr. Sanchez's credit card.[42]

Upon discovering these transactions, Mr. Sanchez tried to revoke the power of attorney he granted appointing his son. In April 2022, the PGT was ultimately appointed Mr. Sanchez's guardian of property.

Mr. Sanchez-Guevara held a fiduciary role as attorney for property and by failing to fully participate in the proceedings, leaving the allegations of misappropriation uncontested, the court drew an adverse inference against him.[43] Despite the lack of evidence with regards to the credit card charges, the court nonetheless ordered Mr. Sanchez-Guevara to pay damages in the sum of $281,431.45 to his father.[44]

*R v Ehrhardt, 2025*

This case highlights how attorney misappropriation can move beyond the civil courts and enter the realm of criminal jurisdiction. *Ehrhardt* involved an attorney for property who was convicted of theft by a person holding a power of attorney pursuant to s.331 of the *Criminal Code* and theft over $5,000 pursuant to ss.334(a) of the *Criminal Code*.[45] Over the last two and a half years of Barbara Driscroll's life, a jury found beyond a reasonable doubt that as Barbara's attorney for property, John, had "intentionally contravened the power of attorney by fraudulently disposing her property or fraudulently converting it to your own use".[46]

John met Barbara in 2007, where shortly after, the two began a romantic relationship. In July 2014, Barbara granted John a continuing power of attorney for property, at which time, according to a mental health assessment, she had already began to exhibit changes

[41] *Ibid*, at para 41-42.
[42] *Ibid*, at para 1.
[43] *Ibid*, at para 34-36.
[44] *Ibid*, at paras 45 & 53.
[45] *R v Ehrhardt*, 2025 ONSC 6850, para 1.
[46] *Ibid*, para 7.

relating to her mood, memory, as well as possible elder abuse and social isolation. By the end of August 2014, Barbara was diagnosed with dementia.[47]

While John acted as attorney up until Barbara's passing in 2017, the court discovered several concerning transactions with respect to Barbara's bank accounts, such as, significant sums of money transferred to accounts held solely by John; withdrawals from Barbara's accounts with little or no explanation; and further funds transferred to John for his personal benefit (i.e. legal fees, dental and travel expenses).[48]

Accordingly, John was sentenced to one year imprisonment on each convicted charge to be served concurrently and was ordered to make a $82,489.22 restitution payment to Barbara's estate.

*Pettipas v Pettipas, 2024*

*Pettipas v Pettipas*,[49] a recent decision of Ontario Superior Court of Justice demonstrates how an applicant was able to successfully remove an attorney for personal care and property. The applicant, Denise, sought to remove her sister, Deborah, from acting as attorney of property and personal care for their mother, Eileen. She did so on the basis that she believed the Power of Attorney Documents appointing Deborah were invalid due to Eileen's incapacity when they were purportedly granted.

Moreover, Denise sought Deborah's removal due to her conduct, which included:

- Allowing Eileen's TD Bank line of credit to default to the extent that collection steps were commenced by the bank.
- Failing to pay for Eileen's Rent at her long-term Residence and allowing her Eileen to fall into arrears for rent payments for a total of $11,920.32.
- Using Eileen's funds for her personal benefit.
- Allowing Eileen's television and phone services at her long-term care home to be disconnected.[50]

[47] *Ibid*, at para 2-3.
[48] *Ibid* at para 9-11.
[49] *Pettipas v. Pettipas*, 2024 ONSC 667
[50] *Ibid* at para 3.

Twelve days after the death of her husband on September 22, 2020, Eileen had appointed Denise as her power of attorney for personal care and property. After tensions between the siblings grew, on October 13, 2021 Deborah "brought Eileen" to see a different lawyer than her usual one.[51] Deborah was then appointed as her new attorney for personal care and property. [52]

Denise was able to provide the court with proof that two months before appointing Deborah as her attorney, Eileen demonstrated increased signs of cognitive decline. This included Eileen's reports from an officer from the Ontario Provincial Police MCRT (Mobile Crisis Response Team) and a Montreal Capacity Assessment ("MoCA").[53] Eileen's MoAC test demonstrated Eileen may "indicate cognitive impairment" and the assessment officer reported that Eileen "appears to be in advanced stage dementia/Alzheimer".[54] Additionally, Eileen's day to day behavior was an indication of incapacity such as her inability to recall if she had already taken her medication or whether she had eaten a meal. Additionally, Deborah was unable to challenge such evidence.

The court held that Deborah failed to satisfy adequate disclosure documents, such as receipts of tax and property bills, as well as medical records and that she constantly undermined her own credibility in her materials and arguments.

Based on such factors, as well as Eileen's clear incapacity, the court found that there were suspicious circumstances present when the 2021 power of attorney documents were executed.[55] The court stated;

> [65] There is no evidence before the court which explains why Eileen would want to change attorneys so soon after confirming Denise as her attorney. There had been no breakdown in their relationship. There is no evidence that Denise had failed in any responsibility towards Eileen. From the uncontested evidence, Deborah had just recently returned to Eileen's life after a lengthy absence.[56]

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[51] *Ibid* at para 22.
[52] *Ibid* at para 22.
[53] *Ibid* at para 26-31.
[54] *Ibid* at para 26-31.
[55] *Ibid* at para 58.
[56] *Ibid* at para 65.

For these reasons, the court ruled that the Power of Attorney Documents in favour of Deborah were invalid. Additionally, the court also held that Deborah should be removed as Eileen's attorney is because of her failure to prioritize Eileen's best interest. Deborah was unable to carry out the basic tasks regarding her duties as an attorney for Eileen.[57]

*Vrantsidis v Vrantsidis, 2023*

The 2023 Ontario Superior Court of Justice decision in *Vrantsidis v Vrantsidis*[58] dealt with an acrimonious dispute between co-attorneys. The dispute arose out of the management of the property and personal of Alpida Vrantsidis ("**Mrs. Vrantsidis**"). Mrs. Vrantsidis is the 92-year-old mother of the applicants/respondents, Bill ("**Bill**") and Mary Vrantsidis ("**Mary**") and the respondent/applicant John Vrantsidis ("**John**").

On April 12, 1995 Mrs. Vrantsidis appointed her husband ("**Mr. Vrantsidis**") as her attorney for property and her attorney for personal care. In the event he was unable or unwilling to act, Mrs. Vrantsidis appointed Bill, Mary, and John, jointly and severally, on the condition that at least two of them agreed to any decision. In 2012, Mr. Vrantsidis predeceased Mrs. Vrantsidis.

Mrs. Vrantsidis owns her residence and a rental property in Toronto. She leads a simple life and has enough income to cover her expenses. John has been living with her since 2000, however, since the early 2000's, his brother Bill has managed the maintenance and financial aspects of the rental property and has been a joint owner of her bank accounts.

As early as 2018, Mrs. Vrantsidis began to experience cognitive decline. Her driver's license was revoked that year following an incident where she became lost and confused while driving. Unfortunately, Bill, Mary, and John did not agree on whether Mrs. Vrantsidis needed to have decisions regarding her property and her personal care made on her behalf. John asserted that Mrs. Vrantsidis was capable of making such decisions for herself. Mary and Bill believed that she was not, and that the alternative attorneys named

[57] *Ibid* at para 89.
[58] 2023 ONSC 321 [*Vrantsidis*]

under the 1995 Powers of Attorney should rely on the 1995 Powers of Attorney to make decisions on her behalf.[59]

Despite the objections of John,[60] Mrs. Vrantsidis consented to a capacity assessment. The written report of Dr. Fiona Menzies[61], dated October 4, 2022, concluded that Mrs. Vrantsidis was incapable of managing her property and making decisions about her personal care.

As the court noted, "[t]he differences of opinion as between John, on one hand, and Mary and Bill, on the other, have led to practical difficulties in decision making regarding Mrs. Vrantsidis' finances and her medical care. This conflict is compromising Mrs. Vrantsidis' care."[62] As a result of John openly questioning the validity of the 1995 Powers of Attorney, banks and medical professionals have declined to rely on it.

Bill and Mary, therefore, brought the within application seeking, amongst other relief, a declaration that the 1995 Powers of Attorney are operative, Bill, Mary, and John are co-attorneys for property and personal care, and thus Mrs. Vrantsidis' substitute decision makers, and in the event of disagreement, two of the co-attorneys are authorized to make a decision.

John did not formally respond to Bill and Mary's Application directly and sought an adjournment of it. The court declined to grant such an adjournment and found that the 1995 Powers of Attorney were valid and operative.

The court in *Vrantsidis* rejected John's arguments that the 1995 Powers of Attorney are defective or that they were procured through undue influence. The court, looking at ss. 39 and 68 of the *Substitute Decisions Act*, held that "the court may give directions on any question in connection with the exercise of powers of attorney for property and personal care, and the court may give such directions as it considers to be for the benefit of the

[59] *Ibid*., para. 4.
[60] John did not accept Dr. Menzies' report and submitted that another capacity assessment ought to be undertaken in Mrs. Vrantsidis' native language, which is Greek or, at a minimum, undertaken with the benefit of an interpreter
[61] Head geriatrician at St. Joseph's Health Centre in Toronto, and a qualified capacity assessor.
[62] *Vrantsidis*, *supra* at para. 6.

person whose property or personal care is being managed by the attorney(s)."[63] As such, the 1995 Powers of Attorney were declared valid.

The court was also satisfied that, based on the evidentiary record, Mrs. Vrantsidis is incapable of managing her property because she is not able to understand information that is relevant to making a decision in the management of her property nor is she able to understand information that is relevant to making a decision concerning her own health care, nutrition, shelter, clothing, hygiene or safety. John's Application was subsequently dismissed.

*McKenzie v Morgan, 2023*

The 2023 Ontario Superior Court of Justice decision in *McKenzie v Morgan*[64] concerned an Application regarding whether the Attorney for Property could sell one of the grantor's three properties, located in Barrie, Ontario (the "**Springdale Property**"). The Attorney stated that the sale is necessary to support her father, the grantor.

While this would normally be within the Attorney's power under the *Substitute Decisions Act, 1992*,[65] the grantor gave a life leasehold interest in the property in question, in favour of the Respondent, in his Last Will and Testament.

The grantor is 85 years old and diagnosed with dementia, having been found incapable with respect to placement in a long-term care facility. The Attorney is one of his five children. At one point she held a power of attorney for personal care and property jointly with her twin sister, however, they became embroiled in a rancorous, protracted, and expensive legal dispute which ultimately settled. Pursuant to the settlement, the twin sister resigned as co-Attorney.

The Respondent is 82 years old and was previously married to the grantor's brother. After her husband died, she became romantic partners with the grantor. She claims to be the grantor's common law spouse, stating that she has shared 18 years together with the grantor. She also claims to have a tenancy agreement in addition to the life interest in the

[63] *Ibid*., para. 44.
[64] 2023 ONSC 1457 [*McKenzie*].
[65] S.O. 1992, c. 30 [*SDA*].

property. The Attorney is critical of the Respondent, stating that she is “sadly, entirely opportunistic, callous and a downright liar.”[66]

In late May of 2022, the Attorney arranged for the property to be listed for sale. She provided no notice to the Respondent and did not consult any other family members. The Respondent refused to allow the realtor to show the property or cooperate with the sale. On June 2, 2022, the Attorney commenced the within Application.

The court in *McKenzie* looked at ss. 36 and 35.1 of the *SDA* which prohibits a guardian of property and an attorney for property from disposing of property that is the subject of a specific testamentary gift in the person’s will unless it is necessary to comply with the guardian’s duties or unless it is a gift of the property to the person entitled to receive it under the will and the gift is permitted under s. 37 of the *SDA*.

The court found that the grantor’s Will contemplates a specific testamentary gift in the form of a life leasehold interest to the Respondent. In order to determine whether an attorney for property can dispose of property that is the subject of a testamentary gift, the court had to first look to the duties generally and then examine the anti-ademption provisions of the *SDA*:

> [73] Section 38 of the SDA provides that s. 32 (except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property. This provision is disjunctive. These provisions apply where there is actual incapacity or reasonable grounds to believe that the grantor is incapable with respect to property (see *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ONCA), at para. 49).
>
> [75] Where a Will contains a bequest that is not among the testator’s assets when he dies, the gift is said to have adeemed and it fails (*McDougald Estate v. Gooderham*, *supra,* at para. 1).
>
> [76] Section 36 of the SDA changes that rule. It sets out consequences if a guardian of property disposes of property that is subject to a specific testamentary gift. It provides:

[66] *Ibid*., para. 10.

> 36 (1) The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property disposes of under this Act, and anyone who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest.
>
> (2) If the residue of the incapable person's estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection (1) shall share the residue in amounts proportional to the amounts to which they would otherwise have been entitled.
>
> (3) Subsections (1) and (2) are subject to a contrary intention in the incapable person's will.

[77] Section 35.1 permits the disposable of when it is necessary to comply with the duties of the guardian. It provides:

> 35.1 (1) A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.
>
> (2) Subsection (1) does not apply in respect of a specific testamentary gift of money.
>
> (3) Despite subsection (1),
>
> > (a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or
> >
> > (b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37.

The court in *McKenzie* determined that the sale of the Springdale Property was not necessary to support the grantor. This determination was reached based on the fact that the Attorney provided information relating to the grantor's expenses which were estimates and appear inflated or exaggerated, and not support by the documentation. The court concluded her figures regarding the grantor's assets were not reliable. What's more, the court found that the Attorney refused to discuss with her sibling's other means by which

to free up funds from the grantor's assets. The court concluded that she has a duty to consult pursuant to ss. 32(4) and (5) of the *SDA*.

The Attorney also refused to waive solicitor-client privilege on the grantor's behalf, depriving the court of the opportunity to see if his solicitor made any notes about his intentions regarding the Respondent. What's more, the court held that the Attorney had failed to explore other reasonable options for the care of the grantor.[67] As a result, the court could not conclude that the sale of the Springdale Property was necessary for the Attorney to fulfill her duties.

The court ordered that should this matter return, it may be necessary for the grantor to be represented by a litigation guardian, however, that given the nature of his impairment, section 3 counsel would be unnecessary.

The Application to sell the property was dismissed without prejudice to the Applicant to renew it with further and better evidence. The Applicant was also required to serve this decision upon the PGT.

*Public Guardian and Trustee v Cherneyko et al., 2021*

Another recent case that best summarizes these risks is *Public Guardian and Trustee v Cherneyko et al.*[68] This case involved a 90-year-old woman living in Thunder Bay, Ontario. Jean did not have any children of her own and her closest known relative was a niece in the United States. In the summer of 2019, Jean was living alone at her place of residence since 1969. Jean had a close friend named Tina, whom she had known for about five years.[69]

On August 15, 2019, Jean and Tina went to a lawyer's office, and Jean named Tina as her attorney for property and personal care. Jean also made a new Will naming Tina as the estate trustee and sole beneficiary of her estate. On August 27, 2019, Jean and Tina

[67] While the Attorney felt the grantor required 24/7 care at home, the court concluded that if he required 24-hour care, he would be eligible for placement in a long-term care home where he could be visited by all his family members, friends, and neighbours without there being a conflict. The Attorney could also sell one of the other properties.
[68] 2021 ONSC 107 [*Cherneyko*].
[69] *Ibid,* paras 4-13.

went to Jean's bank where $250,000.00 was transferred to Tina, and $195,329.50 was transferred to Jean's niece.[70]

A few days later, Jean was hospitalized for acute delirium and progressive cognitive decline. During Jean's admission, Tina noted that Jean had become increasingly confused over the prior few months and that Jean exhibited lethargic behaviour and complained of bodily soreness. On September 1, 2019, Jean was diagnosed as being cognitively impaired. A month later, Jean was transferred to long term care based on Tina's authorization as Jean's attorney. A short time after that, Tina's son moved into Jean's home.[71]

In March of 2020, Jean's bank froze her accounts and the PGT started to investigate. As a result of their investigation, the PGT brought an application to remove and replace Tina as Jean's attorney for property. The PGT also sought to set aside the $250,000.00 transfer to Tina and the return of various other sums that were received by Tina, which totalled approximately $350,000.00.[72]

The PGT was ultimately successful in having Tina removed as Jean's attorney for property, and the PGT was appointed as Jean's guardian of property.[73]

The Court found that Jean was a person who was very careful with her money during her lifetime.[74] However, her failure to prepare a Power of Attorney for Property while she was still capable almost cost her $350,000.00.

This case should serve as a warning sign to clients and solicitors alike about the perils of ignoring incapacity planning.

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[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*, para 1.
[74] *Ibid*, para 20.

*Kumra v Kumra, 2020*

This case provides an example of the risks that can arise when a client names their children as joint attorneys, regardless of any long-term relationship issues that may impact their ability to work together in the best interests of their incapable parent.

In 2006, Asha executed a power of attorney for property and a power of attorney for personal care. She appointed both of her sons, Sanjiv and Rajiv, as her attorneys, jointly. Subsequently, however, Asha executed a series of powers of attorney appointing one or both of her sons.[75]

Due in part to the high level of distrust between Sanjiv and Rajiv, Sanjiv brought an application in 2017 seeking, among other things, to terminate all of his mother's powers of attorneys and to have a trust company appointed as guardian of Asha's property.[76]

Ultimately, Asha's lack of foresight as to whether her sons would be able to work together and trust each other in their role as her attorneys resulted in over two years of costly litigation, much of which was paid for out of Asha's property.

Moreover, the difficult relationship between the siblings ultimately resulted in Asha's wishes to have her sons act as her attorneys for property being overlooked with the Court's ultimate appointment of a trust company as her guardian of property.

*CONCLUSION*

While steps can be taken in an attempt to fix deficiencies in planning, there is simply no substitute for comprehensive incapacity planning that reflects a client's wishes. Clients should be encouraged to take the time to properly consider their options in this regard, well before any capacity concerns may arise and again following any change in family circumstances.

[75] *Kumra v Kumra*, 2020 ONSC 1425 at paras 1-2.
[76] *Ibid*, para 4.