



# Capacity Proceedings

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## AGENDA

1. Section 3 Counsel
  - a) Overview, role, and considerations for appointment
2. Guardianship Proceedings
  - a) Contentious and non-contentious
3. Power of Attorney Disputes
  - a) Removal for misuse/abuse
  - b) Removal for invalidity of the POA

## Section 3 Counsel

### *Substitute Decisions Act, 1992, S.O. 1992, c. 30*

#### **Counsel for person whose capacity is in issue**

**3** (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,

(a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.

#### **Responsibility for legal fees**

(2) If legal representation is provided for a person in accordance with clause (1) (a) and the person is not eligible to receive comparable legal aid services under the *Legal Aid Services Act, 2020* in connection with the proceeding, the person is responsible for the legal fees.

## Section 3 Counsel - Appointment

- i. When an appointment of section 3 counsel is advisable
- ii. Procedure for appointment
- iii. Role of the Office of the Public Guardian and Trustee
- iv. Facilitate the alleged incapable person's (the individual whose capacity is in question) ability to provide instructions

## Scope/Role of Section 3 Counsel

- It depends! But must have (deemed capable) instructions
- Put the alleged incapable person's views, preferences and wishes before the court, however limited or complex
- It is not:
  - advocating for best interests
  - providing evidence or providing an opinion on capacity
  - reviewing accounts
  - acting as a substitute-decision maker

## Alternatives to Consider

- **Litigation Guardian**

- If there is strong evidence of incapacity
- Litigation guardian appointment could be for individual issue such as financial/accounting, deal with real estate, misconduct claims etc.

- **Amicus**

- Where the alleged incapable person may be rejecting the appointed section 3 counsel, wants to represent themselves, but is struggling to do so, and/or there are no represented parties involved
- Could be appointed for a particular reason such as providing missing position on point of law or testing the evidence

## ***Kwok v Kwok*, 2019 ONSC 3549**

- Jiefu was in a MVA in 2011 and suffered a TBI
- Son seeking to terminate his guardianship appointment and have ex-wife appointed in his place
- PGT sought to have section 3 counsel appointed to ascertain Jiefu's wishes regarding the ex-wife's application
- Question was whether, "capacity was in issue" and therefore whether section 3 appointed was appropriate as Jiefu was already found capable on son's original guardianship application
- Judge held that section 3 appointed was permissible, even after a prior finding of incapacity, but that it was not appropriate in this case

# Guardianship

## Guardianship: Overview

- Two types: Guardian of the Property and Guardian of Personal Care
- Two types of property guardianship: (1) court appointed and (2) statutory
- Where there is no named (or alternately named) attorney for property, guardian of property is needed
- Definition of incapacity to manage property found in *Substitute Decisions Act, 1992*, section 6 – criteria includes unable to understand OR appreciate

## Guardianship Applications: LAWYER'S ROLE

- Advise of potential risks & personal/financial sacrifices
- Success depends on well-drafted application
- Review the procedure section in Part III of *SDA*
- “Tell a Story” of the person whose capacity is at issue
- Detailed and sufficient Management/Guardianship Plans
- Screen your client!
- Evidence that proposed guardian understands duties & requirements

## CONTENTIOUS GUARDIANSHIP APPLICATIONS

- **Best interests** of the incapable person
- Court: scrutinize competing applications, guardianship & management plans, suitability of proposed guardian
- *Substitute Decisions Act* (ss 24(5) & 57(3))
  - Continuing power of attorney?
  - Incapable person's wishes?
  - Closeness to incapable person?

## CONTENTIOUS GUARDIANSHIP APPLICATIONS

### Unsuccessful applications (examples from cases):

- Failed to keep incapable person's interests first
- Guardianship plan contrary to best interests
- Not filing a guardianship/management plan
- Not having the ability to manage assets
- Taking actions that are “extremely expensive”
- Ulterior motives
- Not aware of medical treatment/conditions
- Difficulty getting along with caregivers

## CONTENTIOUS GUARDIANSHIP APPLICATIONS

Change status quo:

- ***D'Urzo v D'Urzo***: Wife guardian for 5 years, presumptive right to preserve status quo. Brother/sister could not establish on balance of probabilities should be changed. But, what applicants really wanted was their guardianship plan which was implemented

Spouse not always appointed:

- ***Orens v Aleong***: Sister appointed guardian. Wife had “problematic” relationship with other family members.

## REMOVAL: GUARDIAN

- Not same test as attorney
- Overarching consideration: **best interests** of the incapable person
- Removed for breaching fiduciary/statutory duties, disregarding best interests, acting to benefit selves rather than incapable person
- Vary an order or substitute on a motion in proceeding in which guardian appointed

## REMOVAL: GUARDIAN EXAMPLE

### *Gray v Lyle*, 2014 ONSC 4886

- Must not benefit themselves, must benefit incapable person, if that cannot be accomplished “fiduciary must remove themselves from that position or be removed”
- Guardian not available to provide treatment & care decisions
- Failed to produce records
- Used money to pay own expenses

# Power of Attorney Disputes

## REMOVAL: ATTORNEY

- Not easy endeavour
- Court reluctant to interfere with wishes of incapable person while fully capable
- Application with affidavit and supporting evidence
- Unless alternative attorney, also guardianship application to replace attorney

## REMOVAL: ATTORNEY

### *Teffer v Schaefer:*

(1) Strong and compelling evidence of misconduct or neglect

**And**

(2) Best interests of incapable person are not being served by the attorney

## REMOVAL: ATTORNEY

### *Carey v Carey*, 2018 ONSC 4564

- Failed to explain how mother's \$42,000 was spent
- Failed to obey court orders
- Evidence mother's jewellery was pawned
- Little skill in using her funds in responsible manner
- Failed to foster regular contact

## VALIDITY OF POWERS OF ATTORNEY

- Validity of a CPOAP pursuant to the *SDA*:
  - At least 18 years old;
  - Capable of granting a CPOAP; and,
  - properly execute the CPOAP document with the requisite two witnesses and their signatures and clarity as to the document being "continuing"
- Issues commonly arise as to whether CPOAPs are valid in the presence of "suspicious circumstances" and/or lack of capacity

## ***Rudin-Brown et al v Brown, 2021 ONSC 3366***

- 91-year old Carolyn, her son, Gordon, her daughter, Missy, and her SIL, Jeanne
- In 2016, Carolyn signed POAs appointing Gordon. The 2016 POA replaced her 2009 POA which appointed Jeanne as attorney for property and Missy and Gordon for personal care
- The court held that the 2016 was invalid as it was executed under suspicious circumstances in respect of capacity and undue influence
- In summary, court found it was "...in Carolyn's best interests" for Missy and Jeanne to be appointed her guardians

## CONCLUDING COMMENTS

- Contentious, emotional & stressful for all involved
- Put best interests & dignity of incapable person at forefront
- Due diligence at the outset:
  - know your client, story/wishes of the incapable person, gather evidence of incapacity, prepare detailed guardianship plans, review Rule 7 of the *Rules of Civil Procedure* and the *Substitute Decisions Act, 1992*, in particular, Part III, for guardianship applications

Questions?

## ADDITIONAL RESOURCES

“Whaley Estate Litigation on Guardianships”

<http://welpartners.com/resources/WEL-on-guardianship.pdf>

“Whaley Estate Litigation on Powers of Attorney”

<http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

Guardianship Checklist: Property

[http://welpartners.com/resources/WEL\\_Guardians\\_for\\_property\\_checklist.pdf](http://welpartners.com/resources/WEL_Guardians_for_property_checklist.pdf)

Guardianship Checklist: Personal Care

[http://welpartners.com/resources/WEL\\_Guardians\\_for\\_personal\\_care\\_checklist.pdf](http://welpartners.com/resources/WEL_Guardians_for_personal_care_checklist.pdf)

Duties of an Attorney for Property Checklist

[http://welpartners.com/resources/WEL\\_Guardians\\_for\\_property\\_checklist.pdf](http://welpartners.com/resources/WEL_Guardians_for_property_checklist.pdf)

Duties of an Attorney for Personal Care Checklist

[http://welpartners.com/resources/WEL\\_CapacityCheckist\\_POA\\_PersonalCare.pdf](http://welpartners.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf)