



CONTENTIOUS GUARDIANSHIP APPLICATIONS & REMOVAL OF ATTORNEYS/GUARDIANS

April 28, 2020

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Powers of Attorney & Guardianship: Contentious & Non-Contentious Matters, April 28, 2020



AGENDA

- Contentious guardianship applications: lessons from case law
- Cost consequences
- Guidance/Practice Tips
- Procedure and case law: Removal of attorneys/guardians

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

Fiacco v Lombardi:

“...contested guardianship applications 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 only have their best interests at heart.”

CONTENTIOUS GUARDIANSHIP APPLICATIONS

Unsuccessful applications (examples from cases):

- Guardianship plan contrary to best interests
- Not filing a guardianship/management plan
- Not having 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

Spouse not always appointed:

- ***Zhang v Wu***: Parents appointed guardians. Husband not in position to provide care required.
- ***Orens v Aleong***: Sister appointed guardian. Wife had “problematic” relationship with other family members.

CONTENTIOUS GUARDIANSHIP APPLICATIONS

Difficult to 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.
- ***KR v YR***: Incapable daughter lived with mother for 54 years. Devoted mother, acted in best interests. Brother showed little interest/involvement. Mother appointed.

CONTENTIOUS GUARDIANSHIP APPLICATIONS

Importance of wishes of incapable person:

- ***Lazaroff v Lazaroff***: Did not want sister appointed. Autonomy needs to be recognized. Subjective judgment given “considerable weight”.

LAWYER'S ROLE

- Advise of potential risks & personal/financial sacrifices
- Success depends on well-drafted application
- Procedure: Part III of *SDA*
- “Tell a Story” of the incapable person
- Detailed and sufficient Management/Guardianship Plans
- Evidence proposed guardian understands duties & requirements

LAWYER'S ROLE

- Remember professional obligations
- Avoid conflicts of interest
- ***DeMichino v DeMichino***:
 - conflict of interest, failure to serve family members with guardianship application, misleading PGT, etc.
 - Lawyer suspended for 6 months

COSTS

- Parties cannot assume costs will be paid by incapable person
- “Loser pays”: modified to fit particularities of guardianship applications
- “...scrutinize rigorously” ... “justified by reference to best interests of the incapable person” – *Fiacco v Lombardi*

COSTS

Howard v Howard, 2019 ONSC 4643

- Parties bear own legal costs
- Not appropriate for “blended costs award” where costs “topped up” by incapable mother’s assets
- Number of ancillary issues, failed to see how mother “derived any benefit from the battles that ensued amongst her family members in the context of the competing applications”

COSTS

Willet v McAdam 2016 ONSC 3463

- Increased costs for opposing application for “tactical purposes”
- Adding support issues to guardianship application “ill-advised & generated substantial unnecessary costs”.

COSTS

Lisowick v Alvestad 2015 ONSC 257

- Costs paid by incapable person's assets
- While guardianship application was “misguided”, brought in capacity as attorney and “scrupulous desire to ensure [father's] personal wellbeing and to protect his property”

COMMON SCENARIOS: MISCONDUCT

- Unauthorized, questionable or speculative investment decisions
- Failing to take into consideration tax effects
- Failing to seek professional advice where necessary
- Inappropriately dealing with jointly held assets
- Misappropriating assets
- Fraudulent procurement of POA document

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 Schaefers:

- 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

REMOVAL: ATTORNEY

Bellefeuille v Bellefeuille, 2018 ONSC 6802

- Attorney used funds to purchase appliances for her own home
- Co-mingled mother's money with her own
- Failed to comply with court order to provide accounting

REMOVAL: ATTORNEY

Aiello v Bleta 2020 ONSC 62

- Failed to approve reimbursement of expenses incurred by sister in caring for their mother
- Failed to pay preferred caregiver/companion
- Failed to sign required consent form for mother to have dental surgery
- Failed to foster regular contact

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

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

REMOVAL: GUARDIAN

Maharaj v Maharaj 2015 CarswellOnt 21287 (SCJ)

- Court did NOT remove guardian
- Guardian “pledged” to foster better communication with siblings
- Guardian had done “excellent job”, difficulty in communication with siblings though
- Best interests for guardian to remain

REMOVAL: GUARDIAN

Kwok v Kwok 2019 ONSC 3549

- Guardian sought to be removed
- Incapable father abusive, contradicted son's decisions, invoked "father" status - could not fulfil obligations
- Son removed; Wife appointed

REMOVAL: GUARDIAN

Mian v Akram 2019 ONSC 1882

- Trust company asked to be removed as guardian & have PGT replace - PGT did not consent
- Trust company asked court to use *parens patriae* jurisdiction; court disagreed, lacked authority to appoint PGT
- Trust company remained as guardian until alternative found

REMOVAL: GUARDIAN

Waffle (PGT) v Duggan, [1999] OJ No 2038 (SCJ)

- Sons applied to replace PGT as statutory guardian; husband & daughter brought competing application
- Sons appointed; husband & daughter appealed
- Court of Appeal: Lack of trust, PGT concerned & prepared to retain guardianship; *neither* set of applicants should replace PGT

CONCLUSION

- Contentious, emotional & stressful for all involved
- Put best interests of incapable person at forefront of application
- When inappropriate conduct, gather evidence and pursue removal
- Keep in mind guidance from case law

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

Guardianship Checklist: Personal Care

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

Duties of an Attorney for Personal Care Checklist

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