POWERS OF ATTORNEY

By

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INTRODUCTORY REMARKS[1]

This paper was initially written from both the perspective of the lawyer drafting the Power of Attorney document ("POA"), and, the litigator dealing with issues and disputes when matters have gone wrong.

The ability to recognize future litigious issues and concerns arising from the POA assists the lawyer from the outset in advising clients on the purpose, rights, duties, liabilities, and limitations of the POA insofar as both the attorney and the grantor are concerned.

The POA is an extremely powerful document, and while it serves as a useful estate-planning tool, particularly at a time where, as a society, we are facing an ageing demographic, increased life expectancy and longevity, and ever-increasing situations of incapacity, it however must be used cautiously. As professional advisors, the advice we give to our clients is important, and it is prudent, given the propensity for abuse by an attorney operating under a POA, that we make every effort to ensure there is an understanding of the risks associated with the granting of a POA, as well as the potential liability, criticism and onerous duties placed upon the chosen attorney.

An anticipatory and reasoned approach to the choice of the attorney, as well as a consideration of the family dynamics, together with careful, considered and creative planning, will, to an extent, permit the lawyer to employ a preventative edge to the preparation of the POA

Anticipating from the outset the possibility of conflict and addressing that conflict may, in turn, avoid later costly and senseless litigation. Planning and remedial considerations are canvassed within this paper, yet, it is not a comprehensive address of all issues concerning POA's, rather, it addresses and highlights six major areas of concern.

[1] This paper was originally drafted in 2003 and updated, Summer 2019.

PART I – THE NATURE OF THE POWER OF ATTORNEY DOCUMENT

(1) The Power of Attorney Document

The POA is an instrument that facilitates the maintaining of control over one's affairs by planning before incapacity. Being prepared allows the grantor of a POA to require an attorney to take legal steps to protect the grantor's interests and wishes. The POA is by no means the only vehicle for the management of an incapable person's affairs. More sophisticated estate plans can be considered and there is always the option of guardianship orders for the person and property, either through statutory appointment or court appointment.

The POA conveys authority on the grantee (as agent) by a grantor (as principal) giving the grantee general, and possibly specific, powers to act on the grantor's behalf.[2] The giving of a POA is a unilateral act and its validity is not dependent upon acceptance by the attorney for it to be valid.[3]

At common law, the so-called power is not really a power but is merely a manifestation of the authority given by the principal to the agent.

A POA confers authority to act on the agent. It is not a direction to act. The agent must pay regard to the subsequent orders of the principal (the grantor) after the POA has been given.

The POA is governed by common law principles, agency law, contract law, the law of fiduciaries, and statutes.

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[2] As a side-note, it is important to use the correct terminology when distinguishing between a Power of Attorney and an attorney. A Power of Attorney is a **document** that appoints **a person** as an attorney and endows that person with certain powers. A Power of Attorney is not a person. Often the public (and even lawyers and judges) will refer to the individual attorney as "the Power of Attorney". This is incorrect. For more on this topic see Prof. Albert Ooosterhoff, "The Power of Attorney and Attorney: Correct Usage," February 2019, online: http://welpartners.com/blog/2019/02/power-of-attorney-and-attorney-correct-usage/

[3] See G H L Fridman, Agency, Canadian Encyclopedic Digest, 4th Edition, Ontario Vol 2 Title V, updated 2016; *Leung Estate v. Leung* 2001 CarswellOnt 1972 at para. 7.

(2) Common Law Duties

An attorney is a fiduciary who is in a special relationship of trust with the grantor.[4] A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. A fiduciary:

(a) must use reasonable care in acting;

(b) must not obtain secret profits;

(c) must account;

(d) must not allow personal interests to conflict with those of the principal;

(e) cannot make, change or revoke a Will on behalf of the donor; and

(f) cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

The POA can be tailored to the specific wants and needs of the grantor. In other words, it can be used to grant:

(a) a specific, or limited authority;

(b) general authority granting the power to do all that is permissible under the governing principles and legislation;

(c) a continuing authority, meaning that it will survive subsequent incapacity; and

[4] For a discussion on when a fiduciary relationship will arise, see *Frame v. Smith*, [1987] 2 SCR 99; 1987 CarswellOnt 347 (SCC) at para. 39.

(d) it can deal not only with property matters, but, also personal care matters as well.

(3) The Power of Attorney Document and the Law of Agency

It is said that a POA at common law is merely a form of agency. There appear to be differences, however, between the actual POA and the agency relationship. An agent may be appointed in writing or by parol. However, the appointment of an attorney must be in writing. In Fridman's, Law of Agency,[5] Fridman discusses agency when created by contract and states:

> Where an agent is appointed to execute a deed, his authority must itself be created by a deed. Except where the agent executes the deed in the presence, and with the authority of the principal (*Ball v. Dunsterville* (1791) 4 T.E.R.M. Rep. 313), the traditional name for a document containing the agent's authority, when the principal is giving the agent wide general powers to act on his behalf, is " power of attorney". Such documents no longer have to be sealed, as long as the instrument is clear on its face that it is intended to be a deed and is validly executed as a deed. This means that it is signed by him in the presence of a witness attesting to his signature, or is signed at his direction, in his presence and the presence of two witnesses who attest to his signature; and that the document is delivered by him or someone authorized to do so on his behalf.

A POA must be in writing and, therefore, the courts have construed the authority conveyed by the power strictly. There is a wealth of English and Canadian common law on the strict construction of Powers of Attorney.[6]

Agency is a relationship arising from consent, usually expressed in the form of a contract.

Although agency is a consensual relationship, resulting from agreement between the parties that one should act as agent for the other, it does not follow that all such agreements are strictly contractual, manifesting all the features of common law contract. An agency may be gratuitous. If so, it is not truly contractual. Admittedly, the main difference between purely consensual and contractual agency lies in the absence or

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[5] Fridman's Law of Agency, 7th Edition, Butterworths 1996, ch. 4, p 57, and *Berkeley v. Hardy* (1926) 5 B&C 355.

[6] See, for example, *Taylor v. Wallbridge* (1879) 2 SCR 616; *British North American Mining Company v. Pigeon River Lumber Company* (1912) 3 OWN 701 (CA).

presence of consideration, in the form of remuneration of the agent for what the agent undertakes to do. The other obligation which arises between principal and agent arises by operation of law, irrespective of whether the agent is remunerated by the payment of commission.[7]

(4) Statutory Construction

In Ontario, there are three types of Powers of Attorney:

1. A Power of Attorney made in accordance with the ***Powers of Attorney Act,***[8] which sets out the general form of a Power of Attorney;

2. A Continuing Power of Attorney for Property under the ***Substitute Decisions Act***, ***1992***[9] (the "***SDA***"); and

3. A Power of Attorney for Personal Care under the ***SDA.*** [10]

(5) General Power of Attorney: Powers of Attorney Act

The ***Powers of Attorney Act*** has only three sections. This Act governs general POA's but without imposing formality on the document. The general POA contemplated by this Act does not survive the incapacity of the grantor. The language of the ***Powers of Attorney Act*** refers to the "donor" which is different from that of the ***SDA*** which refers to the giver of the POA as the "grantor." This Act does not set out any of the formalities dealing with a prescribed form, validity or execution requirements, as does the ***SDA.***[11]

A general POA, if coupled with an interest, in other words, if adequate consideration is given, and if the POA was given for the purposes of securing a benefit to the done/grantee, is not revoked by death, incapacity or bankruptcy. This topic is beyond the scope of this paper but, as with the construction, or drafting of any document, certainty with respect to the revocability is best achieved within the document itself, wherein it can

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[7] Fridman's Law of Agency, 7th Edition, Butterworths 1996, ch. 4, p 55.
[8] *Powers of Attorney Act* R.S.O. 1990, c. P. 20.
[9] *Substitute Decisions Act,1992,* S.O. 1992, c. 30, as amended, s. 7.
[10] *Ibid* at s. 46.
[11] *Ibid.*

states the extent of the power being given. There appears to be a great deal of English case law on this subject and there are evidentiary rules with respect to the irrevocability on death, incapacity or bankruptcy, and some Canadian case law which too, should be considered.[12]

(6) A Continuing Power of Attorney for Property under the Substitute Decisions Act

A Continuing Power of Attorney for Property ("CPOAP") is defined under the ***Substitute Decisions Act (the "SDA")*** as a "…continuing power of attorney if,

(a) it states that it is a Continuing Power of Attorney; or,

(b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property."[13]

A CPOAP drafted in accordance with the ***SDA*** may survive the mental incapacity of the grantor,[14] and this is why the terminology "continuing" is used.

The CPOAP is effective immediately upon its being signed unless there is a provision, or triggering event in the document directing that it will come into effect in accordance with a specified date or event. For instance, incapacity may be the specifying event. If the POA specifies that the power does not become effective until incapacity, there should be a determining event, failing which the ***SDA*** offers guidance.[15]

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[12] *Spooner v. Sandilands* (1842) 1 Y & C Ch Cas 390; *Wilkinson v. Young* [1972] 2 OR (HCJ) 239-241 (cited by Justice Farley in, Clarica Trust Co. v. Yoo 2002 CanLII 10474 (ON SC)); *Smith v. Humchitt Estate* 1990 BCJ No 298 SC, are useful cases to refer to in determining the degree of certainty with respect to irrevocability on death and irrevocability generally. Fridman's Law of Agency, 7th Edition, Butterworths 1996 appears to indicate that irrevocable powers do not terminate on the bankruptcy of the principal.

[13] *Substitute Decisions Act, supra* note 9, at s. 7(1).

[14] *Ibid* at s. 7(1) and s. 14. Note: Powers of Attorney for Property made under the *Power of Attorney Act* prior to April 3, 1995, may survive the grantor's incapacity if specifically provided.

[15] *Ibid* at s. 9.

The ***SDA*** provides guidelines for resignation,[16] revocation,[17] and termination of a POA.[18] The execution requirements of a CPOAP include that it be executed in the presence of two witnesses, each of whom shall sign the POA as a witness and cannot be: the attorney or attorney's spouse, the grantor's spouse or partner, a child of the grantor, or a person whom the grantor has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship or who has a guardian of the person, a person who is less than eighteen years of age.[19]

(7) The Attorney for Property under CPOAP

An individual who manages the property of an incapable person is either an attorney under a CPOAP,[20] or a guardian of property,[21] either court appointed,[22] or a statutory guardian for property, for example, the Ontario Public Guardian and Trustee ("PGT"), or a person who applies to take over from the PGT.[23]

The CPOAP is commonly used to ensure that the financial affairs of a person are managed for any number of reasons, including during a period of incapacity.

A person is considered incapable of managing property if, "unable to understand information that is relevant to making a decision in the management of one's own property or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision."[24]

The validity of a CPOAP is dependent on the grantor having the requisite decisional capacity to grant a CPOAP. The validity, or operation of a CPOAP can also be restricted to specific dates or contingencies.

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[16] *Ibid* at s. 11.
[17] *Ibid* at s. 12(2).
[18] *Ibid* at s. 12(1).
[19] *Ibid* at s. 10.
[20] *Ibid* at s. 38(1).
[21] *Ibid* at s. 31(1).
[22] *Ibid* at s. 22(1).
[23] *Ibid* at s. 15, 16.
[24] *Ibid* at s. 6.

To have a valid CPOAP, the attorney needs to be appointed before the grantor becomes incapable of giving one.

The powers granted to an attorney acting on behalf of an incapable person are extensive. An attorney operating under a CPOAP has the power to do anything on behalf of the grantor, that the grantor could do if capable, except make a Will.[25] These powers are subject to the provisions of the ***SDA*** and any court-imposed conditions.[26]

An attorney is a fiduciary, and, in that regard, it is expected of an attorney that the duties entrusted to the attorney be exercised diligently, with honesty, integrity, in good faith, and in the best interests or benefits to the incapable person and the incapable person's dependants if applicable.[27]

The scope of an attorney's powers has been examined by the courts to determine whether an attorney has the power to change a beneficiary designation. The discussion centres around the question of whether a beneficiary designation is, or is akin to, a testamentary disposition and therefore outside the scope of the attorney's powers.

The case of ***Desharnais v. Toronto Dominion Bank***[28] dealt with an RRSP beneficiary designation. The British Columbia Supreme Court ruled that such a designation was testamentary and an attorney under the B.C. ***Power of Attorney Act*** was not permitted to exercise a testamentary power. The beneficiary designation was declared invalid. Portions of the case were overturned on appeal, however, the British Columbia Court of Appeal expressly noted there was no challenge to the finding that the designation was testamentary.[29]

Strathy J., as he then was, also compared beneficiary designations to testamentary disposition in the Ontario case of ***Richardson (Estate Trustee of) v. Mew,***[30] ***stating***: "I agree with the submission . . .that the designation of a beneficiary under a life insurance

[25] *Ibid* at s. 7(2), 31(1) & 38(1).
[26] *Ibid* at s. 31(3), 38(1).
[27] *Ibid* s. 32(1) see also s. 38(1).
[28] *Descharnais v. Toronto Dominion Bank*, 2001 BCSC 1695, rev'd in part 2002 BCCA 640.
[29] *Descharnais v. Toronto Dominion Bank*, 2002 BCCA 640.
[30] *Richardson Estate v. Mew*, 2008 CanIII 63218 (ONSC).

policy is akin to a testamentary disposition. . .Counsel. . .could point to no authority to the effect that an attorney can change the designation."[31]

On appeal, the Ontario Court of Appeal upheld the lower court decision but also addressed the authority of an attorney with respect to changing beneficiary designations:

> After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancelling of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.[32]

In ***Hanson Estate,***[33] the Ontario Superior Court of Justice concluded that the owner of a life insurance policy who was mentally competent but physically disabled could validly instruct another person (who was also the policy-holder's attorney under a POA) to change a beneficiary designation on his policy. However, as the policyholder was still "mentally competent," the individual signing the document was doing so as agent and not in his role as attorney. The Court noted that the insurer in this case was asking the wrong question, instead of asking whether the beneficiary designation could be altered by an attorney as a testamentary disposition, they should have asked whether the beneficiary designation was a valid declaration pursuant to the requirements of the *Insurance Act*[34]. The Court concluded that this was a valid change in the beneficiary designation as contemplated by the terms of the *Insurance Act*.

While the British Columbia Court of Appeal in ***Easingwood v. Cockroft,***[35] concluded that an attorney could create an *inter vivos* trust for an incapable adult that would contain post-death distribution provisions, it also confirmed that an attorney may not make a

[31] *Ibid* at para. 66.
[32] *Richardson Estate v. Mew*, 2009 ONCA 403 at para. 51.
[33] *Hanson Estate,* 2016 ONSC 2382.
[34] *Insurance Act*, R.S.O. 1990, c I.8
[35] *Easingwood v. Cockroft*, 2013 BCCA 182.

testamentary disposition, and referred to the ruling in *Desharnais* that the change of a designated beneficiary of an RRSP account was testamentary in nature.[36]

Since 2011, and post *Desharnais*, British Columbia's ***Power of Attorney Act*** allows an attorney, in an instrument other than a Will, to change a beneficiary designation made by the adult, "if the court authorizes the change." The attorney may also create a new beneficiary designation, if the designation is made in:

> (i) an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the same beneficiary that was designated in the similar instrument, or
>
> (ii) a new instrument that is not renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the adult's estate.[37]

There are several scholarly articles on the potential for legislative changes regarding beneficiary designations by substitute decision makers that are available for further comment on this confusing area.[38]

The ***Trustee Act,***[39] does not apply to the exercise or performance of an attorney's duties, although similar fiduciary obligations apply equally to attorneys. Some of the common law principals governing fiduciary conduct have been codified under the *Trustee Act*, but have not been similarly been codified in the ***Powers of Attorney Act***, nor, in the ***SDA***, including issues such as prudent investment obligations and indemnification of attorneys. It is arguable that because a principal is always under a duty to indemnify his agent, there is an implied promise to indemnify the agent.

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[36] *Ib*id at paras. 48-49.
[37] *Power of Attorney Act*, R.S.B.C. 1996 c. 370 at s. 20(5).
[38] See Alberta Law Reform Institute, Beneficiary Designation by Substitute Decision Makers, Alberta Law Reform Institute, 2014 CanLIIDocs 353, <http://www.canlii.org/t/2cwc>, retrieved on 2019-05-29; Aoife Quinn, Jason M Chin and Archie Rabinowitz, The Presumption of Resulting Trust and Beneficiary Designations: What's Intention Got to Do with It?, 2016 54-1 *Alberta Law Review* 41, 2016 CanLIIDocs 29, <https://commentary.canlii.org/w/canlii/2016CanLIIDocs29>, retrieved on 2019-05-29.
[39] *Trustee Act*, R.S.O. 1990 c. T. 23.

An attorney for an incapable grantor is an agent of that person who carries out the instructions of the grantor and is considered as the principal. An attorney in this position is a fiduciary owing a duty only to the grantor, and should therefore keep written documentation of instructions.

The Judgment of the Honourable Mr. Justice Cullity (as he then was) in ***Banton v. Banton,***[40] discusses many of the principles regarding an attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an attorney and a trustee. The Honourable Justice Cullity discussed the authority of an attorney and stated that there were differences concerning such authority when a donor had mental capacity, and when the donor lost mental capacity. Some of the specific duties and obligations of an attorney for Property include the following:

(1) Manage a person's property in a manner consistent with decisions for the person's personal care;[41]

(2) Explain to the incapable person the attorney's powers and duties;[42]

(3) Encourage the incapable person's participation in decisions;[43]

(4) Consult with the incapable person from time to time as well as family members, friends and other attorneys;[44]

(5) Determine whether the incapable person has a Will and preserve to the best of the attorney's ability the property bequeathed in the Will;[45] and,

(6) Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking

[40] *Banton v. Banton*, [1998] 164 DLR (4th) 176, 1998 CanLII 14926 (ONSC).
[41] *Substitute Decisions Act, supra* note *9,* at s. 31(1.2).
[42] *Ibid* at s. 32(2).
[43] *Ibid* at s. 32(3).
[44] *Ibid* at s. 32(4), 32(5).
[45] *Ibid* at, s. 33, 35.1(1), 35.1(2), 35.1(3).

into consideration the value of the property of the incapable person, including standard of living, and other legal obligations.[46]

The attorney must exercise discretion in dealing with the incapable person's property as to whether, or not, the best interests of the person warrant such action, transaction or dealings. The Attorney for Property also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines under the ***SDA***.[47]

The attorney under a CPOAP has the option at any time to request directions or assistance from the court on any question arising as to the management of property, including perfecting the effectiveness of the POA document if necessary.[48]

The Attorney for Property is required to keep a record of all transactions and an ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. The duties of an Attorney under the POA for Property are set out at sections 32 through 38 of the ***SDA***.

An attorney for Property must be prepared to keep accounts for the passing of such accounts if required.[49] The specific form of accounts and records is set out in section 2 of Regulation 100/96.

(8) Obligation to Account & Applications to Pass Accounts

While an attorney is required to keep accounts, an attorney is not required to pass accounts before a court. A court may, however, order that all, or a specified part of the accounts of an attorney be passed.[50] The accounts are filed in the court office and follow the same procedure as the passing of estate accounts.[51] Although a passing of accounts application may not be required, it may still be advisable to formally account, since once the accounts have been passed, they have received court approval and cannot be

[46] *Ibid* at s. 37(1), 38(1).
[47] *Ibid* at s. 37(2)(3)(4)(5) & (6).
[48] *Ibid* at s. 39(1).
[49] *Ibid* at s. 32(6), 38(1).
[50] *Ibid* at s. 42(1). Note: This would be done by way of Notice of Application
[51] *Ibid* at s. 42(6).

questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Attorneys for Property are statutorily entitled to compensation pursuant to the ***SDA***.[52] The compensation taken should be in accordance with the prescribed fee schedule. Section 40 of the ***SDA*** sets out the guidelines to follow when an attorney is taking compensation. Often the POA document itself will provide guidance as to compensation to be taken; however, in cases where the document is silent, s. 40(1) and O. Reg 26/95, section 1, provide that compensation can be taken as follows:

> An attorney may take annual compensation from the property of,
>
> 3% of capital and income receipts;
>
> 3% on capital and income disbursements; and,
>
> 3/5 of 1% on the annual average value of the assets as a care and management fee.[53]

Notwithstanding such provision within this Act, the attorney can have compensation increased or reduced by the court when passing accounts.

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in certain circumstances, but accounts or records must be produced to the incapable person, the incapable person's other attorneys, and the PGT if required.

The **SDA** provides a list of individuals who may apply to have accounts passed, including the guardian, or attorney of the incapable person, a dependant of the grantor or incapable person, the PGT, the Children's Lawyer, a judgment creditor of the incapable person and anyone else, with leave of the court.[54]

A CPOAP terminates upon a new one being executed unless the document provides for multiple Powers of Attorney to exist. Care should be taken in drafting a CPOAP where

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[52] *Ibid* at s. 40(1).
[53] O. Reg 26/95 at s. 1.
[54] *Substitute Decisions Act, supra* note 9, at s. 42(4).

one already exists for property in another jurisdiction, since the new document may unintentionally revoke the existing document in other jurisdictions. Similarly, the problem is not overcome by providing for the new POA document to simply cover "worldwide assets" since such assets may not be covered by the Ontario POA, and therefore, when drafting the new CPOAP, care should be taken so that it co-exists with the POA in the foreign jurisdiction.

(9) Standard of Care of an Attorney under a CPOAP

The standard of care that an Attorney, under a POA for Property must exercise in managing property, in part, depends on whether, or not, compensation is being taken or received. Where no compensation is taken, the attorney is required to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.[55] The standard of care increases where the attorney receives compensation. An attorney in this case would be required to exercise a degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.[56]

(10) Liability

An Attorney for Property is liable for damages resulting from a breach of duty.[57] The Attorney for Property may be relieved from all, or part of this liability, if the court is satisfied that the attorney nevertheless acted honestly, reasonably and diligently.[58]

(11) Power of Attorney for Personal Care under the SDA

An Attorney under a POA for Personal Care only came into effect as a result of legislative reforms which were brought into effect in 1992, and included the ***SDA***, the ***Consent to Treatment Act***, *1992*, the ***Advocacy Act***, *1992,* and the ***Consent and Capacity Statute Law Amendment Act***, 1992, all of which legislation came into force in 1995, with subsequent amendments.

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[55] *Ibid* at, s. 32(7), s. 38(1).
[56] *Ibid*.
[57] *Ibid* at s. 33(1), s. 38(1).
[58] *Ibid* at s. 33(2), s. 38(1).

In 1996, the ***Health Care Consent Act***[59] replaced both the ***Consent to Treatment Act*** 1992, and the ***Consent Capacity Statute Law Amendment Act***, *1992.* The ***Health Care Consent Act***, governs health care issues in the areas of consent to treatment, treatment, admission to a care facility, Consent and Capacity Board reviews, and intervention and personal assistance services.[60]

The ***Health Care Consent Act*** is concerned with consent to specific treatment and other personal care decisions as well as the means for giving substitute consent where a patient is found to be incapable.

The ***SDA*** also provides guidance regarding the execution of a POA for Personal Care,[61] revocation,[62] resignation,[63] and termination.[64]

The POA for Personal Care requirements are set out at s. 46 of the ***SDA***. Notably, this type of document is a more flexible vehicle for assisting the grantor with personal care decisions when, and if it becomes necessary to do so, and is sometimes informally, referred to as a "Living Will" which may contain advance directives for care.

A POA for Personal Care is never used except in circumstances where the grantor is incapable of making a decision either because the grantor is generally unable to make decisions, or is not able to make specific decisions.[65] The ***SDA*** prohibits the persons who provide health care for compensation, or residential social or support services to a grantor for compensation from acting as an Attorney under a POA for Personal Care except insofar as the person is the spouse, partner or relative of the grantor.[66] An Attorney, under a POA for Personal Care can make decisions concerning health care, nutrition, shelter, clothing, hygiene or safety. Some health care decisions made by the substitute decision maker are also covered by the ***Health Care Consent Act***.

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[59] *Health Care Consent Act*, *1996,* SO 1996, C.2, Schedule A.
[60] *Ibid* at Part 1 General, s. 1(a)-(f).
[61] *Substitute Decisions Act*, *supra* note 9, at s. 48.
[62] *Ibid* at s. 50.
[63] *Ibid* at s. 52.
[64] *Ibid* at s. 53.
[65] *Ibid* at s. 49.
[66] *Ibid* at s. 46(3).

(12) The Attorney for Personal Care under a POAPC

The authority for both an Attorney for Personal Care, and a guardian of the person is found in Part II of the ***SDA***.

A person is considered to be incapable of personal care if he/she is "not able to understand information that is relevant to making a decision concerning his/her own health care, nutrition, shelter, clothing, hygiene, safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision".[67]

A person may therefore have personal care decisions made on his/her behalf by one or more attorneys acting under a POA for Personal Care which, like the attorney for Property, is executed at a time when such person has the requisite decisional capacity to give such a POA, or alternatively, under a court appointed guardianship of the person. The Public Guardian and Trustee, who is normally only a guardian of last resort. The Public Guardian and Trustee may be an attorney if consent is obtained in writing before the Power of Attorney is executed. [68]

The attorney under a POA for Personal Care is required to make decisions on the incapable person's behalf in accordance with the ***SDA***, and decisions on the incapable person's behalf to which the ***Health Care Consent Act*** applies.[69] Where the ***Health Care Consent Act*** does not apply, the attorney must make decisions on the incapable persons behalf with the following principles as guidelines:

1. If the attorney/guardian knows of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, the guardian shall make the decision in accordance with the wish or instruction.

2. The attorney/guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.

[67] *Ibid* at s. 45.
[68] *Ibid* at s. 45(2).
[69] *Ibid* at s. 66(2.1).

3. A later wish or instruction expressed while capable prevails over an earlier wish or instruction.

4. If the attorney/guardian does not know of a wish or instruction applicable to the circumstances that the incapable person expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, the guardian shall make the decision in the incapable person's best interests.[70]

Where neither the ***SDA,*** nor, the ***HCCA*** applies, the attorney acting under a POA must also have regard to the known wishes, or instructions of the incapable person, expressed at a time when the person had the requisite capacity. Similarly, such an attorney must use reasonable efforts to ascertain and then to act in accordance with the **wishes or instructions** of the incapable person, or otherwise to act in the **best interests** of the incapable person. In order to act in accordance with the best interests, the attorney must consider the **values and beliefs** of the individual in question, current wishes, if ascertainable, and general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.[71]

The attorney under a POA for Personal Care document is increasingly viewed as a planning tool for the end of life, which arguably would be beneficial if the grantor includes the involvement of family and\or close friends. While the POA assists the grantor of the POA in being able to set out extensively the grantor's wishes with respect to personal care if so desired, quite often the document does not contain detailed instructions. As such, discussion with family members or proposed attorneys could benefit the grantor by facilitating a forum within which can be discussed the grantor's wishes and instructions. This is particularly important when considering the subject is not only sensitive to the proposed attorney or family members, but also to the grantor of such a power.

A lawyer does not necessarily have to be involved in such planning, but at the very least could inform an attorney or the grantor of an attorney as to the benefits of advanced care

[70] *Ibid* at, s. 66(3) & s. 67.
[71] *Ibid* at s. 66(4) & s. 67.

planning within the family context, or as appropriate if the grantor does not have family, which will facilitate matters for everyone involved.

It is crucial for attorneys' to understand that an attorney under a POA for Personal Care is not a care provider, but rather a **substitute decision maker**.

As with the duties of an attorney under a POA for Property, an attorney for Personal Care must also explain the attorney's powers and duties to the incapable person and encourage participation in decisions.[72]

The attorney must facilitate the incapable person's contact with family members and\or relatives and friends as well as consult with such persons from time to time.[73]

The attorney must also facilitate the incapable person's independence and assist in choosing the least restrictive and intrusive courses of treatment or action.[74]

Specifically, the attorney under a POA for Personal Care must not use any means of confinement, monitoring devices, restraint, detention of the incapable person physically, or through the use of drugs, and shall not consent on the incapable person's behalf to the use of such measures, unless specifically used to prevent personal harm, or harm to another. Additionally, the use of electric shock treatments should not be given or consented to on the incapable person's behalf unless in accordance with the ***Health Care Consent Act***.[75]

Where an attorney is not able to make a decision on behalf of an incapable person, perhaps because to provide the proper care would be to go against the wishes of the grantor of the POA, then there is a provision within the legislation to go before the Consent and Capacity Board to obtain a decision on the attorney's behalf.

[72] *Ibid* at s. 66(2).
[73] *Ibid* at s. 66(6).
[74] *Ibid* at s. 66(8) & 66(9).
[75] *Ibid* at s. 66(10).

Similarly, an attorney for personal care again may request the direction or assistance of the court on any issue arising under a POA either on behalf of the incapable person, or that person's dependants.[76]

An attorney for Personal Care is required to keep extensive records of decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, including the names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.[77]

An attorney under a POAPC also must exercise powers diligently and in good faith.[78]

(13) Compensation

The ***SDA*** does not contain any provision for the compensation of an attorney for Personal Care. No Regulations exist to date under the ***SDA*** that are applicable to compensation for personal care. It is likely that the reason for such an absence of regulation stems from the premise that personal care decisions are ethical decisions and arguably, compensation should not be taken. Additionally, personal care decisions are not easily quantifiable, whereas property decisions lend themselves more easily to calculation. Drafting considerations may include recovery for expenses and disbursements of the attorney.

While there is no statutory framework for compensation for providing personal care *services*, case law supports the general proposition that a court can fix and award such compensation when presented with an adequate record.[79] In fixing and awarding compensation, the court is guided by the overarching principles of reasonableness and proportionality.

[76] *Ibid* at s. 68(1).2
[77] *Ibid* at s. 66(4.1), O. Reg. 100/96.
[78] *Ibid* at s. 66(1).
[79] See *Re Brown* (1999) 31 ETR (2d) 164, 1999 CarswellOnt 4629 at para. 3; *Childs v. Childs*, 2015 ONSC 4036 at paras. 30-32, upheld on appeal 2017 ONCA 516; and *Cheney v. Byrne (Litigation Guardian of),* 2004 CarswellOnt 2674 (SCJ).

The case of ***Re Brown,***[80] addressed the issue of payment for the provision of personal care services. The outcome of the court deliberations on the issue of compensation concluded that while compensation for personal care is sound in principle, the court could not award compensation since no evidentiary basis upon which to calculate the value of services and the reasonableness of the amount of the claim were put forward.[81]

Most recently, in ***Daniel Estate (Re)***[82] the Ontario Superior Court awarded compensation of over $135,000.00 to two attorneys under a POA for Personal Care for providing personal care services to an elderly couple for over six years. The attorneys presented affidavit evidence with an estimate of the hours and frequency of care provided and hired a Certified Canadian Life Care Planner to quantify the compensation sought. Justice Di Luca concluded:

> When I assess the range of services provided over the number of years indicated, in the context of the Daniels' financial means and the impact that those services had in terms of the Daniels' independence and dignity, I have no hesitation concluding that the amount sought is reasonable and proportionate in the circumstances.[83]

Practically speaking, if compensation is to be awarded it is prudent to provide for such compensation in the POA itself.

(14) Standard of Care and Liability of an Attorney for Personal Care:

An attorney for personal care is required to exercise and perform powers and duties diligently and in good faith.

No proceedings for damages shall be commenced against an attorney for personal care for anything done or admitted in good faith in connection with the attorneys' powers and duties under the ***SDA***.[84]

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[80] *Re Brown* (1999) 31 ETR (2d) 164.
[81] See *Re Brown* otherwise for *quantum meruit* argument.
[82] *Daniel Estate (Re),* 2019 ONSC 2790.
[83] *Ibid* at para. 29.
[84] *Substitute Decisions Act, supra* note 9, at s. 66(19) & s. 67.

PART II – DRAFTING LAWYER'S OBLIGATIONS & LIABILITY

Often, the drafting lawyer presented with a client who is giving instructions in respect of a POA has no opportunity to meet with the prospective attorney, nor, to discuss the powers given to the attorney. For the most part, attorneys who may be appointed under a POA are not experienced in the role, nor, normally would they have any legal knowledge of the scope of their obligations. This often creates problems that lead to findings of abuse and misuse of the powers granted and sometimes negligence, or even fraudulent conduct.

(1) Lawyer's Obligation to the Grantor of a Power of Attorney

The granting and drafting of a POA must be carefully considered. A CPOAP is a powerful document that permits an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will.[85] In other words, an attorney could mortgage or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the power granted.

A grantor should consider carefully the choice of attorney, whether there should be more than one attorney, and should be cognizant of any predisposition to a relationship of undue influence.

In avoiding POA conflicts and litigation, it is critical to carefully consider unique family dynamics and implement safeguards to prevent abuse based on the financial and life circumstances of the grantor. Tailoring the POA to the grantor's needs necessarily includes discussion regarding the family's circumstances, the age of the proposed attorney, a possible substitute attorney, whether it is appropriate that there be more than one attorney, what are the grantor's needs and wants should the grantor become incapable? Who can be trusted to act as the grantor's attorney? What compensation will the attorney receive? How is the compensation to be calculated? Is the grantor familiar with the ***SDA*** legislation? Is the attorney sufficiently familiar with the ***SDA*** legislation?

[85] *Ibid* at s. 7(2).

A great deal of POA litigation, particularly amongst siblings, could be avoided if proper advice is given to attorneys so that they are made aware of their very strict fiduciary duties, obligations and limitations. Quite often attorneys are not aware of their statutory obligations in acting in accordance with the guidelines provided by the ***SDA***.

Accountability may, in certain situations, be better achieved where there are two or more jointly appointed attorneys. Of course, this is dependent on the circumstances of the grantor, but would ultimately provide a "checks and balances" system, so to speak, to help to prevent abuse where there might be vulnerability to abuse. Having more than one attorney also alleviates suspicions by other family members and makes the actions of the attorneys more transparent.

Similarly, the prudent drafting lawyer, when taking instructions from a grantor giving a POA takes the time to assess whether or not there are any family members who might be more appropriately suited to assuming the role of an attorney, particularly where there is a friend, neighbour or caregiver that has taken steps to obtain the POA of a particular person – advice should be given to the grantor and careful, detailed notes taken.

Consideration should be given as to whether a capacity assessment should be recommended and ultimately conducted. The issue of incapacity necessarily raises the issue of exploitation of vulnerable persons. Many older adults can be predisposed to being vulnerable, if for example, dependent on another for certain necessities of life. Such dependencies may be for reasons of physical or mental disability, or simply that one is suddenly faced with having to look after their own affairs. Where a fiduciary relationship between two persons exists in the legal sense, there exists a relationship of trust or confidence which gives rise to an equitable duty of faithfulness, fidelity and loyalty.

In a British Columbia Supreme Court of Canada case, ***Hodgkinson v. Simms,***[86] the dissenting Judges, Sopinka and McLachlin, considered the notion of "vulnerability" in the context of fiduciary relationships. This very lengthy case raises issues concerning whether a fiduciary duty arises and what is a fiduciary duty. According to Sopinka and

[86] *Hodgkinson v. Simms*, [1994] 3 SCR 377.

McLachlin JJ, who refer to the judgment of Wilson J, in ***Frame v. Smith,***[87] at page 136 concerning the meaning of vulnerability, the court said:

> …the scope for the exercise of…discretion or power" in the fiduciary and to the power of the fiduciary to "unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

Wilson J., also referred to the beneficiaries as being;

> …at the mercy" of the fiduciary…Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith (set out below)*. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other…vulnerability does not mean merely "weak" or "weaker" it connotes a relationship of dependency, and "implicit dependency" by the beneficiary on the fiduciary.

Wilson J., in ***Frame v. Smith*** identified the following characteristics of a fiduciary relationship:

(1) The fiduciary has scope for the exercise of some discretion or power;

(2) The fiduciary can unilaterally exercise that power or discretion so, as, to affect the beneficiary's legal or practical interests; and,

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary power.

The decision in ***Re Koch,***[88] is a clear illustration of how "vulnerability" may arise in respect of physical circumstances rather than mental. This decision also demonstrates that "vulnerability" can exist whether or not, there is a fiduciary relationship. ***Re Koch*** is an appeal case from the Consent and Capacity Board. An excerpt from Justice Quinn's decision:

> The assessor\evaluator must be alive to an informant harbouring improper motives. Higgins should have done more than merely accept the complaint of the husband, coupled with the medical reports (the shortcomings of which are chronicled above), before charging ahead with his interview of the appellant. Since

[87] *Frame v. Smith*, [1987] 2 SCR 99 at para.136.
[88] *Re Koch* 33 O.R. (3d) 485.

> the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.

The physical impairment suffered by Ms. Koch in these proceedings was Multiple Sclerosis. Vulnerability is not necessarily limited to the elderly or those with physical or mental impairments, but can also arise as a result of other circumstances.

Justice D. Brown noted the impact of POA litigation on vulnerable grantors in the case of ***Baranek Estate***:

> The so-called "battle of competing powers of attorney" is emerging as a growing area of litigation. This is a most unhealthy development. I suspect that when the Legislature passed the *Substitute Decisions Act* back in 1992 it intended to put in place a legal framework which would protect the affairs of the vulnerable elderly, not spawn a new breed of litigation which would see the hard-earned money of the vulnerable being exposed to claims for the payment of legal fees incurred by those whom they had appointed to protect their interests. . . . I am signaling that the inter-attorney litigation which erupted in this case is symptomatic of a much larger problem which, as Ontario's population ages, risks turning into a very serious social issue. Indeed, I think the time may have arrived for the Legislature of this province to look into this problem of litigation involving competing powers of attorney, especially involving subsequent powers of attorney made during the latter periods of a person's life when they are vulnerable to pressure, in order to see whether new protections are required to ensure that the assets of the vulnerable are used for one purpose only – the satisfaction of the needs of the vulnerable elderly while they are alive.[89]

(2) The Drafting Lawyer's Obligation to Assess Mental Capacity

The ***SDA*** sets out stringent guidelines regarding the requirements for capacity to grant POA's. "Capacity" is defined or determined upon factors of mixed law, fact and medicine and by applying the evidence available to the applicable factors for determining requisite capacity. Notably, when colloquially referring to " a capacity test," it is important to understand that there is no "test" so to speak, as much as there is a standard to be

[89] *Baranek Estate* 2010 ONSC 6375 at para. 6.

applied, or factors to be considered in an assessment of requisite mental capacity to make a certain decision at a particular time.

There is no single legal definition for capacity. Each task, or decision undertaken has its own corresponding capacity characteristics and determining criteria.

It is important to remember that, in general, all persons are presumed or deemed capable of making decisions at law.

Notably, a person is not globally "capable," or "incapable". Rather, capacity is determined on a case-by-case basis in relation to a specific task/decision and at a moment in time. Capacity is decision, time and situation-specific and can fluctuate.

There are different standards and requirements for capacity depending on the required task. For example, a different analysis is required for determining the requisite capacity to grant a continuing POA for Property, or determining the capacity to grant a POA for Personal Care, or the requisite capacity to execute a Will, all of which is different still from the determination of requisite capacity to marry, or make an *inter vivos* gift.

Section 8 of the ***SDA*** sets out the factors used to assess capacity to grant a CPOAP:

> 8(1) **Capacity to give continuing power of attorney.** – A person is capable of giving a continuing power of attorney if he or she,
>
> (a) knows what kind of property he or she has and its approximate value;
>
> (b) is aware of obligations owed to his or her dependants;
>
> (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
>
> (d) knows that the attorney must account for his or her dealings with the person's property;

(e) knows that he or she may, if capable, revoke the continuing power of attorney;

(f) appreciates that unless the attorney manages the property prudently its value may decline; and,

(g) appreciates the possibility that the attorney could misuse the authority given to him or her."[90]

Similarly, a person is capable of **revoking** a CPOAP if capable of giving one.[91]

Section 47 of the ***SDA*** sets out the criteria to be applied to determine whether the grantor has the requisite capacity to grant or revoke a POA for Personal Care. A person is capable of giving a POA for Personal Care, if the person has:

a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and,

b) The appreciation that the person may need to have the proposed attorney make decisions or the person.[92]

The factors to be applied to determine requisite capacity to grant or revoke a POA for Personal Care are noticeably different than those for granting or revoking a CPOAP. While the criteria to be applied for assessing capacity to grant a CPOAP incorporates a significant amount of information that the grantor must be able to comprehend, for a POA for Personal Care, the grantor is only required to be able to understand whether the proposed attorney for personal care has the grantor's best interests in mind, and that the POA for Personal Care means the proposed attorney may be authorized to make such personal care decisions for the grantor.

[90] *Substitute Decisions Act*, *supra* note 9, at s. 8(1).
[91] *Ibid* at s. 8(2).
[92] *Ibid* at s. 47.

Notably, there is a distinction between the capacity to *grant or revoke* a POA (either for property or personal care) and determining the requisite capacity to *manage* property or to manage personal care.

The lawyer drafting a POA document (or Will or testamentary document), has a legal obligation to assess the client's mental capacity to make the decision to execute the document. Lawyers, however, for the most part are not trained to undertake such assessment, and this is particularly so in cases where incapacity is not obvious. The case of ***Hall v. Bennett Estate,***[93] is one where Justice Manton found the defendant lawyer negligent in not drafting a Will where the lawyer felt capacity was lacking, for reasons that are reflected in the following passage:

> …if the defendant was not sure or had a doubt with respect to Bennett's capacity, he should then have prepared the Will and signed it in accordance with s. 4(1) of the *Succession Law Reform Act* and let the court decide on capacity if necessary to do so at a later time. I, therefore, conclude that the defendant was negligent in failing to prepare a Will thereby depriving the plaintiff of a property Bennett intended him to have upon his death.

However, note that *Hall v. Bennett*[94] went to the Ontario Court of Appeal. The Court of Appeal, on the issue of liability concluded that the approach of the trial Judge was flawed:

> …that the relevant question with respect to testamentary capacity was not whether Bennett (the deceased) in fact was capable of making a Will, but <u>whether a reasonable</u> and prudent solicitor in Frederick's (solicitor) position could have concluded that he did not…this question was never addressed by the trial Judge…which led him into error.[95]

The Appellant submitted that the lawyer on preparation of a Will in death bed circumstances places a lawyer in an untenable situation:

> To impose a duty of care in favour of third party prospective beneficiaries in death bed circumstances where there is a risk that the testator lacks capacity makes solicitors in these circumstances the guarantors of third party beneficiary inheritances. If the solicitor determines that the testator lacks capacity and declines to draw the will, the solicitor exposed to a suit by third party prospective beneficiaries. If, on the other hand, the solicitor in the same situation draws the will

[93] *Hall v. Bennett Estate*, 40 E.T.R. (2d) 65.
[94] *Hall v. Bennett Estate,* 2003 CanLII 7157 (ONCA)
[95] *Ibid* at para. 12.

> and attends to its execution, the solicitor is exposed to a suit by the personal representatives of the estate for the costs incurred by the estate in determining that the testator lack capacity. The result is a no-win situation for solicitors.[96]

Insofar as the question of duty of care, the Court of Appeal agreed with the Appellant:

> …that the existence of a retainer is fundamental to the question of duty of care…insofar as the client is concerned, the absence of a retainer will usually be determinative, and no duty of care will arise in respect to the preparation of a Will…there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform…insofar as [tortious liability] is concerned, in the absence of a retainer there would have to be other circumstances that gave rise to a duty of care…there is no suggestion of the reliance [being] foreseeable and reasonable…insofar as potential liability and negligence to a third party is concerned, the existence of a duty of care, will depend on the presence of both foreseeability and proximity…absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care…it is my view that the evidence in support of Frederick's opinion that he did not have sufficient instructions to prepare a will and that Bennett lacked testamentary capacity was overwhelming. Indeed, in the circumstances, it is my view that his duty was to decline the retainer…hence, on all circumstances, I conclude that Frederick fulfilled any obligation that owed to Bennett and in the absence of any retainer to prepare a will he owed no duty of care to Hall.[97]

Note that the Court of Appeal briefly addressed the question of whether it was even open to the court to found liability of Frederick's decision to decline the retainer to prepare a Will. The appeal was allowed, and the trial judgment set aside.

There are many cases which deal with decisional capacity in the estates context which set out the applicable principles, and too, set out the considerations for the potential of undue influence which applies equally to POA situations as well as Will drafting preparation and execution.[98]

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[96] *Ibid* at para. 54.
[97] *Ibid* at paras. 56-59.
[98] See *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549; *Scott v. Cousins*, [2001] 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (SCJ); *Ostrander v. Black* [1996] O.J.; *Vout v. Hay* [1995] 2 SCR; *Banton v. Banton* (1998), 164 DLR, *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz*, 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A.; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); Key v. Key [2010] EWHC 408 (ch.) (BailII); *Laszlo v. Lawton*, 2013 BCSC 305, Dmyterko Estate v. Kulikovsky (1992), CarswellOnt 543, Wingrove v. Wingrove (1885) 11 PD 81 at 82; *Shrader v. Shrader*, [2013] EWHC 466 (ch); *Gironda v. Gironda*, 2013 CarswellOnt 8612; *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.).

There have also been many cases dealing with the relevant criteria set out in the ***SDA*** regarding requisite capacity to grant a POA, including a Continuing POA for Property.

For example, in ***Nguyen-Crawford v. Nguyen,***[99] the Ontario Superior Court of Justice found that as the grantor did not speak English and there was an absence of evidence that the POA and legal advice relating to it were translated for the grantor by someone other than the person being granted the power, there was no basis for concluding that the grantor had the specific capacity, that being the understanding of the nature of the document and the authority conferred, to execute it.[100]

In ***Abrams v. Abrams,***[101] an application was brought for an order that the applicant's mother and father be assessed regarding capacity to grant a POA. Several affidavits and medical reports were field on behalf of the mother alleging she had capacity as well as opposing affidavits and testimony that she did not. Justice Brown, with respect to the issue of capacity to grant a POA, clarified that while the person may be incapable with respect to some decisions, they still may have capacity to grant or revoke a POA.[102]

Often when a POA document is attacked on grounds of incapacity, an alternative allegation is made that the grantor was unduly influenced to execute the POA, and therefore, the POA should be set aside. In general, to establish undue influence, the burden of proof rests with the party alleging it. Simple influence is not enough; the grantor's free will must be overborne. Notably however, where a relationship is not one of equals and there is an abuse of power undue influence may be established.[103]

A drafting lawyer should take extensive and detailed notes on the assessment of a client's capacity and document any potential for undue influence. Where a drafting lawyer has any doubts as to whether the client possesses requisite capacity to grant a POA, a formal capacity assessment may be considered under the ***SDA***. A formal assessment, done by

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[99] *Nguyen-Crawford v. Nguyen* 2010 ONSC 6836.
[100] *Ibid* at paras. 73-74.
[101] 2009 CanLII 12798 (ON SCDC).
[102] *Abrams v. Abrams* 2009 CanLII 12798 (ON SCDC) at para. 34.
[103] *Seguin v. Pearson*, 2018 CanLII 355 (ONCA) at para. 11. For more information on undue influence see "**Undue Influence Checklist: Estates and Related Matters**" online at: http://welpartners.com/resources/WEL_Undue_Influence_Checklist.pdf

a designated capacity assessor may give the drafting lawyer and client, better certainty, and may also form persuasive evidence if needed by a court in the event of litigation.[104]

(3) The Substitute Decisions Act: The Attorney's Obligations

As already noted, the ***SDA*** sets out the framework within which decisions regarding the management of property, and personal care are made. The ***SDA*** is a collection of statutory duties and obligations for attorneys, and is codified in such a form so as to prescribe the rules, so to speak, for the attorneys.[105]

The ***SDA*** applies not only to attorneys under a POA, but also to statutory guardians and to court appointed guardians. The ***SDA*** sets out separately the types of duties applicable to attorneys for property, and for personal care.

The duties and responsibilities are similar as regards property and personal care, but differences do exist. The ***SDA*** divided the provisions into decisions involving property, and personal care.

The many duties and responsibilities for attorneys, either for property or personal care, make it essential that an attorney/grantor of such power is educated such that each role assumed may be fulfilled to the best of one's ability while understanding the extent of the authority, and scope of duties and liabilities granted, or received.

A POA is viewed as a beneficial planning tool because of its flexibility, the power terminating on death and active from the date it is executed. Notably, the POA for Personal Care only becomes active when a person is incapable of making the relevant care or treatment decision. Customization is optional, and therefore POA'S are useful

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[104] For more on capacity in an estates practice see "**Capacity Checklist: The Estate Planning Context**" and "**Summary of Capacity Criteria**" online at:
http://www.welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf and
http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf

[105] "Checklist: Duties of an Attorney Under Power of Attorney for Property" online at:
http://www.welpartners.com/resources/WEL_CapacityChecklist_POA_Property.pdf and "Checklist: Duties of an Attorney Under Power of Attorney for Personal Care"
http://www.welpartners.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf

tools. In certain circumstances, trusts may be better suited for the management of assets in the event of incapacity. There are many advantages to a trust document, including the benefit of continuity on death. This is only an aside for consideration as an alternative, either way, careful and considered planning should prevail.

(4) Power of Attorney Disasters & Litigation Costs

The POA inherently creates suspicion, which frequently and inevitably brings the attorney's actions, motives and conduct into question.

There is an ever-increasing number of POA disputes concerning misuses and abuses of the document, powers and the office of attorney.

An overview of the sorts of issues arising in practice include:

(1) Disputes and accounting discrepancies concerning the specific dates upon which the Power of Attorney document became effective; the date of incapacity of the grantor; and, the extent of the attorney's involvement;

(2) Disputes regarding whether it was the grantor, or the attorney, who was acting at any given stage;

(3) Whether the attorney has made unauthorized, questionable or even speculative investment decisions, or decisions lacking in diversity;

(4) Whether the attorney has taken into consideration the tax effects of the attorney's action or inaction;

(5) Whether the attorney has acted in a timely fashion in attending to financial matters which may have attributed to unnecessary expenses, or damages from inaction;

(6) Whether the attorney has sought professional advice where deemed necessary, or appropriate;

(7) The attorney's treatment of, and dealings under jointly held assets or accounts;[106]

(8) Attorney disputes between siblings regarding the capacity\incapacity, action\inactions, of a parent\grantor;[107]

(9) Attorney disputes amongst blended families,' including children, step-children, children of prior and/or subsequent relationships, and later-life spouse\partner relationships;

(10) Attorney misappropriation of grantor's assets,[108] including fraud or theft in the criminal context;[109]

(11) Forged Power of Attorney documents;[110]

(12) Incapacity of a grantor to grant a Power of Attorney;[111]

(13) Power of Attorney obtained from incapable or vulnerable grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances;[112] and,

(14) Disputes where one or several attorneys have acted without the knowledge or approval of the others either under a joint, or joint and several, power of attorney.[113]

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[106] See *Covello v. Sturino* 2007 CarswellOnt 3726 (SC); *Burke Estate v. Burke Estate* 1994 CarswellOnt 442 (SC).
[107] See *Johnson v. Huchkewich* 2010 ONSC 6002; *Chu v. Chang* 2009 CanLII 68182 (ON SC), 2010 ONSC 294, 2010 ONSC 1816, 2010 ONSC 3550, 2011 ONCA 223, 2011 ONCA 389; *Fiacco v. Lombardi* 2009 CarswellOnt 5188 (SCJ).
[108] See *Fareed v. Wood* 2005 CarswellOnt 2572 (SC); *Zimmerman v. McMichael Estate*, 2010 ONSC 2947; *Valente v. Valente* 2014 ONSC 2438.
[109] See s 331 of the *Criminal Code of Canada* "Theft by a Person Holding a Power of Attorney"; see also *R v. Hooyer* 2016 ONCA 44, *R v. Kaziuk* 2013 ONCA 217, aff'd 2011 ONCJ 851 (conviction), rev'g 2012 ONCJ 34 (sentencing), leave to appeal to SCC refused 2013 CanLII64666 (SCC).
[110] *Dhillon v. Dhillon* 2006 BCCA 524.
[111] See *Covello v. Sturino* 2007 CarswellOnt 3726 (SC); *Teffer v. Schaefers* 2008 CarswellOnt 5447, additional reasons 2009 CarswellOnt 2283 (SCJ).
[112] See *Abrams v. Abrams* 2008 CanLII 67882 (ONSC*); Nguyen-Crawford v. Nguyen* 2010 ONSC 6836 at para. 85; *Gironda v. Gironda* 2013 ONSC 4133; *Johnson v. Huchkewich* 2010 ONSC 6002.
[113] See *Barberi v. Triassi* 2010 ONSC 3734, *McMaster v. McMaster* 2013 ONSC 1115.

An attorney's inattention to the sorts of duties and responsibilities expected can cause a multitude of problems later on, particularly since family emotions often run high.

Where POA litigation arises, often, litigants assume that the associated costs of the disputes are paid out of the funds of the grantor. This is not the case. Costs may not be awarded in a party's favor, regardless of how or why the dispute arises, and costs may be awarded *against* any party in the discretion of the court.

The indemnification of legal costs in contested POA, and similarly, guardianship litigation, in the overview, is governed by the following principles enunciated by Brown J. in ***Fiacco v. Lombardi:***[114]

> The exercise of the court's decision in respect of cost 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.
>
> . . .
>
> Contested guardianship applications are more problematic. While bona fide disputes may exist amongst those interested in the well-being of the incapable person as to who should be appointed her 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 own interests at heart. In such circumstances 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.

Additionally, Spies J., noted in ***Ziskos v. Miksche,***[115] that: "The court has a responsibility to ensure that legal costs incurred on behalf of a vulnerable person are necessary and reasonable and for that person's benefit, before ordering that such cost be paid by the assets or estates of the vulnerable person."[116]

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[114] *Fiacco v. Lombardi*, 2009 CanLII 46170 (ON SC).
[115] *Ziskos v. Miksche*, 2007 CanLII 46711.
[116] *Ibid* at para. 75.

In ***Wercholoz v. Tonelloto,***[117] Glithero J., was asked to determine costs in a POA dispute in which the litigants eventually settled all of the substantive issues. A son and daughter were joint attorneys for property for their mother; however, the daughter took the mom to execute a new POA appointing she, and her son (grandson of the grantor) as joint attorneys. A capacity assessment revealed that the mother did not have requisite capacity to grant the second POA. The parties settled the litigation by agreeing to continue to act as joint attorneys pursuant to the original POA. They also agreed on arrangements for her care. The only outstanding issue was costs. The son sought his own costs on a full indemnity and proposed that his costs, as well as those of his sister and her son, be paid from the mother's assets. The daughter and grandson asked that the son pay their costs and his own. The total costs represented 1/3 of the mother's entire estate. Glithero J. found that only 25 hours of the time spent in the litigation had actually benefitted the mother and on that basis he made a "blended cost order" for approximately $8,000 to be paid to each of the parties out of the mother's assets. Glithero J., stated:

> 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 mother's] perspective**.
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> …
>
> In my opinion the factor of the amount claimed compared to the amount recovered is relevant here. The respondent, [mother], has the right to enjoy her capital, and to distribute as she wishes the portion thereof not required to maintaining her standard of living while she is alive. **Squabbling between two of her children which puts at risk approximately one-third of her capital is simply unreasonable**.
>
> …
>
> **In terms of the complexity of the proceeding, in my opinion it is not very complex. These kinds of disputes are not unique as amongst families.** There is no family business or family trust or such complicating features here. It was simply a battle of wills between siblings. **Any level of reasonable compromise ought to have sorted these issues out quite quickly**.

[117] *Wercholoz v. Tonelloto*, 2013 ONSC 1106.

…

> **While much of the costs here were incurred as a result of the litigious stance adopted by both sides, some of the time spent by both sides was legitimately in [the mother's] best interests**. Obtaining and considering the capacity assessments was a worthwhile step. So too were the development and consideration of the management plan in respect of property and the terms of the personal care plan as developed and incorporated into the minutes of settlement.[118]

(5) Privilege and Confidentiality

It is important for grantors to understand that a CPOAP becomes operative *upon signing*, not upon future incapacity. Clients sometimes keep their POA documents with their lawyers. The practice among practitioners in this regard varies, and, it is not clear what the best practice in fact is. The circumstances under which a solicitor can release a POA are often difficult to determine in light of rules respecting privilege and confidentiality. Arthur Fish, in his article, "The Use and Abuse of Powers of Attorney for Personal Care,"[119] although dealing specifically with POA for Personal Care, gives practitioners food for thought in terms of drafting techniques for contingent effectiveness, in other words, where the POA is contingent upon a finding of incapacity (contingencies and triggering events addressed within). Arthur Fish also helpfully addresses written instructions on the release of powers of attorney for personal care and sets out precedent clauses and letters of instruction on release.[120]

Where the attorney is retained by the lawyer, perhaps a letter could be provided by the client with release instructions to be followed by the lawyer upon the client becoming incapable. The lawyer in that way would be indemnified of any claims or losses resulting from reliance on the instructions. The instructions would refer to release conditions that may include a doctor's certificate, a capacity assessment, or any number of conditions for release. Notably, there still may be a question as to whether or not the instructions

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[118] *Wercholoz v. Tonelloto*, 2013 ONSC 110637 at paras. 50-51, & 55. See also *Lisowick v. Alvestad*, 2015 ONSC 257.
[119] Arthur Fish, "The Use and Abuse of Powers of Attorney for Personal Care", (1997), 17 ETPJ 67.
[120] This can be found at pages 80 through 84 of Arthur Fish's article, and is well worth referring to for the purposes of addressing concerns of confidentiality and drafting issues.

are still valid upon the client becoming incapable. In other words, do the instructions survive incapacity? In many respects, it may be advisable for lawyers to avoid holding POA documents for safekeeping at all. The difficulty is the question – on what basis does the solicitor have the authority to release the POA if the client is unable to give instructions and\or the client is deemed to be incapable and not able to give instructions.

Issues of solicitor and client privilege, evidentiary rules, ethical rules and client rights to confidentiality, are all difficult issues that the lawyer must consider in determining what is to happen with POA documents and\or what to do when the solicitor gets the call from anyone but the client with respect to inquiries about the POA. Similarly, to what extent is the lawyer permitted to communicate with the attorney when it was the grantor of the POA that was the client?

Sometimes in power of attorney disputes, the drafting lawyer will be contacted by a friend, or family member of someone who is likely to be a prospective client (i.e. grantor of the POA). In such cases, it is essential to determine whether it is appropriate for the lawyer to meet with the person calling, or rather, with the prospective client. Awareness concerning potential conflict situations is critical.

It is not always proper to refuse to meet with a client simply because the client has not personally contacted lawyer since situations concerning POA disputes are unique. Often, an elderly or even incapable person who requires assistance may be personally unable to make appointments. In situations such as this, though one may agree to meet with the friend or relative who made the initial contact, either alone or together with the prospective client initially, it is prudent thereafter to consider meeting with the prospective client alone and to ascertain instructions. Quite often, it is discovered that what the friend or relative has expressed as the “wants or needs” of the prospective client are not exactly what the “wants and needs” of the prospective client in fact are.

Confidentiality provisions under Rule 3.3 of the ***Rules of Professional Conduct***,[121] particularly, **Rule 3.3-1,** provides:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless:
>
> a) expressly or impliedly authorized by the client;
>
> b) required by law or by order of a tribunal of competent jurisdiction to do so;
>
> c) required to provide the information to the Law Society; or
>
> d) otherwise permitted by rules 3.3-2-3.3-6.

This Rule is an ethical Rule and applies without regard to the nature or source of information or the facts that others may share as knowledge.

The commentary to Rule 3.3-1 provides:

> A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of solicitor and client privilege concerning oral, or documentary communications passing between the client and the solicitor. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception, and, whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether, or not, differences have arisen between them.

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[121] The Law Society of Ontario, *Rules of Professional Conduct*, effective October 1, 2014, amendments current to April 2018, online: https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct

Generally, a solicitor should not disclose having been consulted, or retained by a person about a matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure of confidential information concerning or received from one client, to another client and should decline retainers that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with a lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will likely be lessened by such conduct.

Although this rule may not apply to facts that are within public knowledge, nevertheless, a lawyer should guard against participating in speculation concerning a client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. It is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, as necessary, to non-legal staff, such as assistants and clerks. Implied authority to disclose, also places a lawyer under a duty to impress upon employees, the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent disclosing any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under Rules 5.5-2, 5.5-3 and 5.6-3 (Security of Court Facilities). If client information is involved in such situations, a lawyer should be guided by the provisions of Rule 3.3-1.

The Rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client, and legal advice cannot be given, and, justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. There are some exceptional situations identified in the following sub-rules where disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified, is imminent and cannot otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

Rule 3.3-3 provides:

> A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

A lawyer must hold in confidence all information that is expressed during the course of the relationship. There are, however, several exceptions to this rule, including express or implied release by the client, court order, the prevention of a crime and the rebuttal of allegations of fraud or malpractice. The law of privilege is much narrower than the ethical rules to consider.

By its very nature the POA is not privileged since it is intended for a third party. That said, however, communications surrounding the drafting of the POA are privileged unless waived by court order.

In Will drafting situations, privilege survives the death of the client, and ensures to the benefit of the estate trustee of the estate. The POA ceases to have effect on the death of the grantor.

(6) Avoidance of Conflicts of Interest & Client Capacity

"Conflict of Interest" is defined in the *Rules of Professional Conduct* as meaning:

> the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.[122]

Rule 3.4 deals with a duty to avoid conflicts of interest and 3.4-1 states "a lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section".

Rule 3.4-2 provides that a "lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client."

Rule 3.2-9 of the ***Rules of Professional Conduct,*** "Client with Diminished Capacity" provides:

> When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

The commentary that accompanies this Rule states as follows:

> A lawyer and client relationship presuppose that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make such decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.
>
> When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[122] *Rules of Professional Conduct*, Rule 1.1.

> A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, then the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

The Rule requires that we presuppose a client has the requisite mental ability to make decisions about his or her legal affairs and to give us instructions.

Notably, legal representation of an incapable person under Section 3(1) of the ***SDA (referred to as, "Section 3 Counsel")*** provides:

> **3**(1) **Counsel for person whose capacity is in issue** – 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.

Another very difficult issue is keeping focused on who the client is, and what the client wants in POA retainers. Often family and\or friends become involved in an attempt to assist an individual\grantor of a POA, and may attempt to persuade a lawyer to act in a way which is not actually in accordance with a client's wishes.

Quite often, a lawyer will be called by one of many siblings of the grantor of a POA who may explain that the grantor is having problems with the particular attorney. In these circumstances you must consider whether, or, not, it is appropriate to meet with the sibling, or whether or not the meeting is with the grantor of the POA.

(7) Narrowing the Communication Gap Between Grantor and Attorney

It is important to recognize that the grantor of a POA may not appreciate the extent to which the attorney may be liable at law for actions taken on the grantor's behalf. It is important that the grantor recognize the standard of accountability expected of an

attorney. It is prudent to advise a client that having a discussion with the proposed attorney about the appointment is wise.

Failing receipt of a client's instructions in this regard, and your recommendations that the grantor discuss such issues with the attorney, it is not permissible for a lawyer to communicate with the attorney in respect of the POA document for reasons of privilege and confidentiality.

Potential negligence issues which may arise out of drafting POA documents will be minimized if a lawyer takes into consideration some of the suggestions made with respect to issues of capacity, and by ensuring the client is informed and understands the nature of the POA document itself. Often a lawyer is limited in the amount of information that can be conveyed to a client by reasons that importantly include the cost of drafting, preparing and advising on the scope of the POA regime. If, as a lawyer, you are placed in the position of not being able to fully advise, and it is anticipated that problems may occur in the future, it may be prudent to do a reporting letter to the client accompanying the documents which states the extent to which the lawyer was retained, or engaged and specifically speaks to the items which were not discussed for which the lawyer is prepared to advise on if the client wishes to proceed.

PART III DRAFTING AROUND INCAPACITY & COMMENCEMENT OF AUTHORITY TO ACT

(1) Triggering Events

There are various ways that powers of attorney come into effect; that is, when the named attorney's authority to act commences.

The POAPC becomes effective only when the donor of the power is not capable of making decisions, either generally or specifically.

The CPOAP is effective immediately except that section 7 of the ***SDA*** provides that the document may direct that it comes into effect on a "specified date," or when a "specified contingency" happens, sometimes referred to as a "triggering event".

Examples of such contingencies include:

(a) The language of the power of attorney provides that the authority only begins when the donor is incapacitated;

(b) The language of the power of attorney creates an "Ulysses" contract;[123]

(c) On an event which is specified, so that incapacity is deemed to have occurred;

(d) On the presentation of doctor's letters;

(e) Where there is a third-party protection clause in the power of attorney; and,

(f) When the donor has directed his or her lawyer not to release the power of attorney unless the donor asks for it or the donor, in the opinion of the lawyer, is incapable.

An important consideration is the potential difficulty in using "specified contingencies" in determining the time of activation of the CPOAP. Third party financial institutions, and others will need to rely on the terms of the triggering event in order to permit the attorney to direct the financial affairs of the grantor/donor. Accordingly, in drafting for specified contingencies, consideration must be given to potential third parties who will need some reliable indicator that the specific contingency of, for example, 'incapacity' has in fact occurred, and, that it has continued to occur, and that the grantor/donor has not recovered because of medication or other medical change.

One possibility is to consider the inclusion of the following type of clause in the POA. Notably, unless one has absolute trust in the appointed attorney, this clause could well be a recipe for disaster:

[123] A "Ulysses Clause" is one where the grantor executes a POA for Personal Care waiving their right to apply for a review of the finding of incapacity and may not apply to the **CCB** for a review of the finding of incapacity. POA's for personal care containing Ulysses' clauses are relatively uncommon and are only effective if they comply with specific requirements in the ***SDA***.

> For the sake of certainty, any document that is an original or notarial certified document signed by [*named attorney or some other person*] stating that I am not capable of financial decision-making shall be sufficient proof to all persons dealing with [*named attorney]* of the truth of the statement in the said document, and no third party shall be obliged to make any inquiry into the truth of such statement.

Another possibility, is to instruct the lawyer in writing that the power of attorney for property is to be delivered to the attorney if in the lawyer's opinion, the donor is unwilling or unable make decisions.

A requirement that there be, for example, two letters from qualified capacity assessors under the ***SDA*** certifying the incapacity of the donor is also a possibility. It is very difficult to have continuous letters obtained from assessors/doctors, unless of course, the letters state that the donor will not recover.

The most efficient or preferable form of CPOAP, is one which does not contain triggering events. Rather, the donor and the lawyer have reviewed the trustworthiness of the attorney, the possibility that the power granted to the attorney can be abused, and the likelihood that other family members will be suspicious of the use of the power of attorney.

Similar difficulties occur with the POAPC. The authority to act arises when the donor is not capable of personal care decisions, and in providing for specified contingencies for illnesses such as schizophrenia, bipolar disorder, obsessive compulsive disorder and clinical depression, these are diseases of the brain that affect a person's reasoning and some individuals do not recognize that while they are ill, the symptoms of their condition will respond to medication. Therefore, they do not seek treatment. If hospitalized, they may be unwilling or unable to comply with treatment plans after discharge. When this occurs, the individual may require involuntary treatment to protect his or her life and avoid tragic social and personal consequences. How the lawyer drafts around the need for involuntary treatment is an on-going and complicated issue.

(2) Jurisdictional Issues

The ***SDA*** addresses potential jurisdictional issues in sections 85 and 86. The requirements for formal validity of powers of attorney are similar to the formal requirements for the validity of a Will, where the donor resides in another jurisdiction.

Every jurisdiction has different requirements, and so a power of attorney made in Ontario may not be adequate to deal with personally, or, more importantly, real property, in another jurisdiction.

It is of utmost importance that the lawyer is informed and knows whether the donor has property in other jurisdictions. The discussion with the donor must be that the donor should have the POA, whether for personal care or property, reviewed in the jurisdiction where property is owned, or where he might spend sufficient time that a POA for Personal Care would be wise. Lastly, one may have multiple powers of attorney for various jurisdictions, as long as all of the lawyers take very great care to ensure that the documents do not revoke the document of other jurisdictions.

Ontario Continuing Powers' of Attorney for Property would not be adequate for example, to deal with real property in Florida. Since many clients do own real property in Florida, a recommendation to these clients that they have a Florida POA which survives incapacity and which is adequate to deal with Florida real and personal property, and which does not revoke the Ontario POA would be prudent.

An example: Elaine, who is spending a year in Australia is contemplating power of attorney planning. Since her health is not good, it was recommended that she see a lawyer in Australia and have a document prepared which is the Australian equivalent of a POAPC, and which names her son in Australia as the attorney. She was reminded to ensure that this does not revoke her Ontario POAPC which names her son in Ontario as her attorney for personal care.

The following are sections 85 and 86 of the Ontario ***SDA*** which provide for formalities of execution, and section 86 provides that foreign orders for guardianship can be "resealed" in Ontario, provided that the foreign jurisdiction was a province or territory of Canada or a "prescribed" jurisdiction:

> **85. (1) Conflict of laws, formalities** – As regards the manner and formalities of executing a continuing power of attorney or power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where,

(a) the power of attorney was executed;

(b) the grantor was then domiciled; or

(c) the grantor then had his or her habitual residence.

(2) **Internal Law** – For the purpose of subsection (1), "internal law", in relation to any place, excludes the choice of law rules of that place.

[. . .]

(5) **Alteration in law** – In determining for the purposes of this section whether or not the execution of a continuing power of attorney or power of attorney for personal care conforms to a particular law, regard shall be had to the formal requirements of that law at the time the power of attorney was executed, but account shall be taken of an alteration of law affecting powers of attorney executed at that time if the alteration enables the power of attorney to be treated as properly executed.

(6) **Application** – This section applies to a continuing power of attorney or power of attorney for personal care executed either in or outside Ontario.

86. (1) **Foreign orders** – In this section, "foreign order" means an order made by a court outside Ontario that appoints, for a person who is sixteen years of age or older, a person having duties comparable to those of a guardian of property or guardian of the person.

(2) **Resealing** – Any person may apply to the court for an order resealing a foreign order that was made in a province or territory of Canada or in a prescribed jurisdiction.

(3) **Certificate from foreign court** – An order resealing a foreign order shall not be made unless the applicant files with the court,

(a) a copy of the foreign order bearing the seal of the court that made it or a copy of the foreign order certified by the registrar, clerk or other officer of the court that made it; and

(b) a certificate signed by the registrar, clerk or other officer of the court that made the foreign order stating that the order is unrevoked and of full effect.

(4) **Effect of resealing** – A foreign order that has been resealed,

(a) has the same effect in Ontario as if it were an order under this Act appointing a guardian of property or guardian of the person, as the case may be;

(b) is subject in Ontario to any condition imposed by the court that the court may impose under this Act on an order appointing a guardian of property or guardian of the person, as the case may be; and

(c) is subject in Ontario to the provisions of this Act respecting guardians of property or guardians of the person, as the case may be.

The term "resealing" is an antiquated term that essentially means "confirmation" of an order issued in a foreign jurisdiction. Under section 86 of the ***SDA,*** the Ontario court will confirm a foreign guardianship order of any Canadian province or territory and will also "reseal" any foreign guardianship order of any "prescribed jurisdiction".

The case of ***Cariello v. Father Michele Perrella,***[124] examined section 86 of the ***SDA.*** The case raised the question of which jurisdiction had guardianship authority over a retired Roman Catholic Priest who maintained both Italian and Canadian connections. The applicant argued Italian courts had jurisdiction to deal with the priest's incapacity and argued that the Ontario court should decline jurisdiction on the basis of section 86 of the **SDA**. However, the legislation had yet to prescribe any other country, including Italy, as a "prescribed jurisdiction". The court concluded that it seemed that "unless and until Ontario creates a list of prescribed jurisdictions" there is simply no legislative basis on which the court could apply section 86.[125]

PART IV - INDEMNIFICATION FOR ATTORNEYS

The question for the lawyer drafting powers of attorney for his/her clients is whether it is safe to rely on the indemnification provisions of the ***SDA,*** or whether we should build into the POA a clause which protects the attorney.

In respect of CPOAP'S, the standard applicable for an attorney who is being compensated, differs from the standard for an attorney who is not being compensated. The compensated attorneys must exercise, "the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise." An attorney who is not being compensated, is only required to exercise "degree of care,

[124] *Cariello v. Father Michele Perrella*, 2013 ONSC 7605.
[125] *Ibid* at para. 48.

diligence and skill that a person of ordinary prudence would exercise in the conduct of their own affairs."

Attorneys who have acted in good faith, managed affairs prudently, kept good records and who have as much as possible involved the grantor in the decision-making will be protected in carrying out required fiduciary duties and obligations.

Indemnification clauses within POA documents may be of assistance, for example clauses such as:

> I indemnify my attorney for any responsibility for loss or damage to my estate through an exercise by my attorney, in good faith, of any of the powers conferred by this Power of Attorney and by law.

PART V - JOINT & SEVERAL POWERS OF ATTORNEY VS. JOINT POWERS OF ATTORNEY

One or more persons may be appointed under a POA. If the POA directs that more than one person acts, then such persons must act jointly (as in the need to agree on all decisions), and are jointly liable for each other's actions, unless a "joint and several" POA permits each of the appointed persons to act alone. This is stated in the ***SDA***. s. 7(4).

Quite often joint and several POA'S are drafted to give the grantor the flexibility or the added security of having more than one attorney appointed, but giving one or more of those jointly appointed attorneys the ability to act unilaterally. This sort of construction may be particularly relevant to circumstances where one or more of the attorneys is likely to be in a different jurisdiction than that of the grantor of the POA for periods of time, or for other reasons particular to the circumstances of the grantor.

POA litigation files where one or several attorneys have acted without the knowledge or approval of the others is not an uncommon issue.

The type of power granted, and to whom the power of appointment is granted, is a matter for consideration by the client and the lawyer at the time of drafting the document. This issue has been touched on briefly above when considering who the most appropriate person is for the appointment.

In every situation there are circumstances that must be addressed with a client to ascertain what the best arrangement is for the appointment of attorneys. By requiring that the attorneys act jointly, the grantor benefits from a further safeguard against the abuse of the power granted. The joint appointment is akin to a "checks and balances" system, which is beneficial where abuse is on the rise and litigation stemming from such abuse is increasing.

A joint appointment forces accountability between the attorneys appointed. Another benefit of making a joint appointment is the flexibility of appointing persons who may offer different perspective, and which may in turn benefit the grantor. The appointment of a relative or close friend, perhaps coupled with a professional may bring added comfort to the grantor.

Issues to be addressed with a client will also necessarily be the replacement of any of the attorneys in circumstances of death, incapability of acting, or resignation.

In one rather sad case, ***McMaster v. McMaster***,[126] a mother appointed her two sons as attorneys under a POA. The Court noted:

> It is interesting to note pursuant to subsection 7(4) of [the *SDA*] that if there are two persons named as attorneys (as in this case) "the attorneys shall act jointly", unless the power of attorney otherwise provides. Although the power of attorney provides that the attorneys are appointed both "jointly and severally" there is no limiting phraseology with respect to either of their roles. This mandatory language would presuppose that there would be transparency between the brothers as to the steps either one takes on behalf of their mother.[127]

Unfortunately, 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 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.

[126] *McMaster v. McMaster*, 2013 ONSC 1115.
[127] *Ibid* at para. 7.

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". 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 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."[128]

The type of appointment decided upon by the grantor of the POA, for the most part, is dictated by the particular personal circumstances of the grantor. In every instance it may not be possible to appoint joint attorneys. That said, the merits of a joint appointment should be considered with the client grantor since it is a means of putting in place a measure of security for the prevention of abuse. The preventative measures of the lawyer from the outset will go a long way to avoiding costly litigation in the future.

PART VI - REDRESS FOR ABUSE & CAPACITY ASSESSMENTS

(1) What Options are Available for Redress: Abuse of the Power of Attorney

Several considerations are set out below for a client to consider in dealing with issues concerning the abuse of a POA by an attorney.

(2) Resignations & Revocations

What do you do when you want to challenge an attorney under a CPOAP, or a POAPC, and you want to challenge the power granted?

One option is to compel a resignation of the attorney. Section 11 of the ***SDA*** deals with the resignations attorneys under CPOAP'S:

> **11**.(1) **Resignation of attorney.** – An attorney under a continuing power of attorney may resign but, if the attorney has acted under the power of attorney, the resignation is not effective until the attorney delivers a copy of the resignation to,
>
> (a) the grantor;
>
> (b) any other attorneys under the power of attorney;

[128] *Ibid* at paras. 60-62.

(c) the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person; and

(d) unless the power of attorney provides otherwise, the grantor's spouse or partner and the relatives of the grantor who are known to the attorney and reside in Ontario, if,

i. the attorney is of the opinion that the grantor is incapable of managing property, and,

ii. the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.

(1.1) **Exception** – Clause (1)(d) does not require a copy of the resignation to be delivered to,

(a) the grantor's spouse, if the grantor and the spouse are living separate and apart within the meaning of the ***Divorce Act*** (Canada); or

(b) a relative of the grantor, if the grantor and the relative are related only by marriage and the grantor and his or her spouse are living separate and apart within the meaning of the ***Divorce Act*** (Canada).

(2) **Notice to other persons.** – An attorney who resigns shall make reasonable efforts to give notice of the resignation to persons with whom the attorney previously dealt on behalf of the grantor and with whom further dealings are likely to be required on behalf of the grantor.

Similarly, the resignation of an attorney for personal care is addressed in section 52 of the ***SDA***:

52.(1) **Resignation of attorney.** – An attorney under a power of attorney for personal care may resign but, if the attorney has acted under the power of attorney, the resignation is not effective until the attorney delivers a copy of the resignation to,

(a) the grantor;

(b) any other attorneys under the power of attorney;

(c) the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person; and,

(d) unless the power of attorney provides otherwise, the grantor's spouse or partner and the relatives of the grantor who are known to the attorney and

reside in Ontario, if the power of attorney does not provide for the substitution of another person or the substitute is not able and willing to act.

(1.1) **Exception** – Clause (1)(d) does not require a copy of the resignation to be delivered to,

(a) the grantor's spouse, if the grantor and the spouse are living separate and apart within the meaning of the ***Divorce Act*** (Canada); or

(b) a relative of the grantor, if the grantor and the relative are related only by marriage and the grantor and his or her spouse are living separate and apart within the meaning of the ***Divorce Act*** (Canada).

(2) **Notice to other persons.** – An attorney who resigns shall make reasonable efforts to give notice of the resignation to persons with whom the attorney previously dealt on behalf of the grantor and with whom further dealings are likely to be required on behalf of the grantor.

The ***SDA*** is silent as to the formalities required for the execution of resignations of attorneys' under POA'S. Although there is no prescribed form in accordance with the ***SDA*** for resignations, and since it is the attorney resigning as opposed to the grantor granting or revoking a POA, it makes perfect sense that there is no need to have the same formalities of execution, but it is my practice to always obtain two witnesses and to have the resignations executed in the presence of two witnesses, each of whom signs the form of resignation as witness.

A **revocation** of the POA document is another option.

The revocation of a CPOAP is governed by s. 12(2)[129] of the ***SDA***. The revocation of a POAPC is governed by s. 53(2)[130].

Revocations must be in writing and executed in the same way as the POA. The formalities for execution are as set out at sections 10 and 48.

A person is capable of revoking a Continuing Power of Attorney if he or she is capable of giving one pursuant to s. 8 ***SDA***.

[129] *Substitute Decisions Act, supra* note 9, at s. 12(2): "The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney."
[130] *Ibid* at s. 53(2): "The revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care."

A CPOAP is valid if the grantor, at the time of executing it, is capable of giving it, even if incapable of managing property.[131]

The CPOAP remains valid even if after executing it, the grantor becomes incapable of giving a CPOAP.[132]

If the CPOAP provides that it comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the POA comes into effect when,

(a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

(b) the Attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*."[133]

The CPOAP may be revoked, if the grantor has the capacity to do so. The capacity to revoke is the same as the capacity to give the CPOAP.

The revocation must be in writing and must be executed in the same way as a CPOAP with the grantor who is revoking/signing the revocation in the presence of two witnesses who also signs the revocation in the presence of the grantor and each of the others.

The revocation process respecting a POAPC is similar. It must be in writing and must be executed in the same way as the POAPC, with the grantor who is revoking signing the revocation in the presence of two witnesses who also sign the revocation in the presence of the grantor and each of the others.

Keep in mind if as a lawyer you are attempting to effect a resignation, or revocation from someone other than your client, it is prudent to consider recommending independent legal advice to protect your client.

[131] *Ibid* at s. 9(1).
[132] *Ibid* at s. 9(2).
[133] *Ibid* at s. 9(3)

If the objective is to challenge the granting of a POA to a particular person, your options are to seek the willing resignation of the attorney and have proper resignations effected ensuring independent legal advice for the resigning attorney; or, assuming that the grantor is capable, obtain a revocation in accordance with the applicable sections of the ***SDA***, again ensuring that independent legal advice is obtained; or, again assuming that the grantor is capable of arranging for a new POA to be executed.

(3) Setting Aside the Power of Attorney Document

If the suspicion is that a POA has been obtained from an incapable person, it is recommended that a capacity assessment be considered in accordance with sections 22 and 55 of the ***SDA***.

It is important to consider the date upon which the POA was executed in conjunction with the timing of the capacity assessment. If the two dates are close in time, it may be that the grantor did not have capacity to grant the POA in accordance with the requirements of sections 8 and 47 of the ***SDA***. However, it should be noted that capacity and\or incapacity is not static and may fluctuate based on individual circumstance. In order to challenge the validity of the POA, proceedings must be brought before the court to challenge the validity of the document.

There is no statutory reference in the ***SDA*** as to who assesses the capacity of a person to give a CPOAP. Section 9 of the ***SDA*** states that a CPOAP for property is valid if the grantor, at the time of executing it, was capable of giving it, even if not capable of managing property. A lawyer assisting the grantor in preparing a CPOAP should be satisfied that the grantor is mentally capable for this purpose.

Detailed notes of the lawyer assisting the grantor in entering into the POA should be maintained on file. The notes should include references to who was present when the POA was executed, and why the lawyer believed that the grantor was mentally capable. As guidelines to the inclusion in lawyers' notes, reference should be made to the definition of capacity to give a CPOAP as set out in the ***SDA***.

If your situation is one where it is likely that the capacity of the grantor may be challenged, it is advisable to consider an assessment before the CPOAP is executed as a preventative and/or protective measure.

Assessments are not covered by the Ministry of Health and Long-Term Care or by the Ontario Health Insurance Plan. Therefore advice must be given to the client respecting the costs of the assessment process and the legal consequences to the assessed person.

If the grantor of the CPAOP is not capable at the time of execution of the document, the POA, and everything done under it, is void *ab initio*. The responsibility then falls upon a third party dealing with the attorney to make enquiries and to be satisfied that the grantor of the power had the requisite capacity when the power was granted and that the appointment has not been subsequently terminated. It is important to give notice to all parties who may rely upon the POA that there has been a revocation, resignation or termination.

If there is a POA in existence and questions are raised with respect to whether or not it is valid, as noted, an assessment may be conducted under sections 22 and 55 or the ***SDA***, and the assessment could then be used in order to make application to the court for a guardianship order for property, or if appropriate, personal care in respect of the incapable person. Where no POA is in existence, a s. 16 assessment is also an option and can be requested regarding the capacity to manage property whereupon a finding of incapacity would result in the PGT being automatically appointed as statutory guardian.

Careful attention should be paid to sections 16(1) and 16(2) that set out the prescribed form of the request for an assessor to perform an assessment to determine whether the PGT should become the statutory guardian of property.[134] When a request is made of an assessor, it must be in the prescribed form. Otherwise, the assessment could be declared a nullity on grounds of procedural irregularity. The appointed capacity assessor should not conduct an assessment without completion of this form. An approved capacity assessor knows to follow the stringent requirements of the ***SDA*** procedure.

[134] *Ibid* at s. 16(1),16(2).

Under the ***SDA***, it is specifically stated that a capacity assessment cannot be carried out if the existence of a POA is known.[135] Only if the POA is drafted so as to become operable by way of a springing POA, or triggering event of incapacity, is there a provision in the statute for an assessment giving effect to the POA. Questions of validity can be problematic since it logically makes sense as a first step to establish with some degree of certainty whether or not the person in question in fact lacks capacity.

If a guardianship application is contemplated in lieu of the POA, for reasons which might include, it was executed in contravention of the ***SDA,*** at a time when the grantor did not have capacity, then procedurally it may be necessary to bring an application for guardianship and in the application before the court, request an order requiring the alleged incapable person to be assessed.

(5) Capacity, Capacity Assessments, and Assessors

The ***SDA*** sets out the procedure by which a person's capacity is assessed and the process for the office of the PGT or some other person to become the person's guardian if the person is found to be incapable.

Pursuant to s.16 of the ***SDA***, any person can request an assessment of another person's capacity to manage property, such request being made to an "assessor" under the Act.[136] Assessors are physicians, psychologists, social workers, occupational therapists, nurses or someone who has successfully completed a training course for assessors that is given or approved by the Attorney General.

[135] *Ibid* at s. 16(2)(b).
[136] *Ibid* at, s. 16 and O. Reg 460/05.

If the assessor concludes that the person is incapable, the PGT automatically becomes the person's statutory guardian of property.[137] If a person is found to be incapable by virtue of a s. 16 assessment, such person can request a further assessment under section 20.1, and can apply to the **CCB** for a review of the finding of incapacity under section 20.2.

The Statutory Guardianship of the Public Guardian and Trustee is terminated if:

(a) the incapable person gave a continuing power of attorney before the certificate of incapacity was issued;

(b) the power of attorney gives the attorney authority over all of the incapable person's property;

(c) the Public Guardian and Trustee receives a copy of the power of attorney and a written undertaking signed by the attorney to act in accordance with the power of attorney; and

(d) if someone has replaced the Public Guardian and Trustee as the statutory guardian under section 17, the statutory guardian receives a copy of the power of attorney and a written undertaking signed by the attorney to act in accordance with the power of attorney.[138]

Alternatively, the Public Guardian and Trustee may be replaced in accordance with the provisions of s. 17:

> **17. (1) Application to replace P.G.T.** – Any of the following persons may apply to the Public Guardian and Trustee to replace the Public Guardian and Trustee as an incapable person's statutory guardian of property:
>
> 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, if the power of attorney was made before the certificate of incapacity was issued and does not give the attorney authority over all of the incapable person's property.

[137] *Ibid* at s. 16(5): "As soon as he or she receives the copy of the certificate, the Public Guardian and Trustee is the person's statutory guardian of property."
[138] *Ibid* at s. 16.1(a)-(d).

4. A trust corporation within the meaning of the *Loan and Trust Corporations Act*, if the incapable person's spouse or partner consents in writing to the application.

(2) Form of application – The application shall be in the prescribed form.

(3) Management plan – The application shall be accompanied by a management plan for the property in the prescribed form.

(4) Appointment – Subject to subsection (6), the Public Guardian and Trustee shall appoint the applicant as the incapable person's statutory guardian of property if the Public Guardian and Trustee is satisfied that the applicant is suitable to manage the property and that the management plan is appropriate.

(5)Considerations – The Public Guardian and Trustee shall consider the incapable person's current wishes, if they can be ascertained, and the closeness of the applicant's relationship to the person.

(6) Security – The Public Guardian and Trustee may refuse to appoint the applicant unless the applicant provides security, in a manner approved by the Public Guardian and Trustee, for an amount fixed by the Public Guardian and Trustee.

(7)Same – If security is required under subsection (6), the court may, on application, order that security be dispensed with, that security be provided in a manner not approved by the Public Guardian and Trustee, or that the amount of security be reduced, and may make its order subject to conditions.

(8)Certificate – The Public Guardian and Trustee shall give the person appointed as statutory guardian of property a certificate certifying the appointment.

(9)Effect of certificate – The certificate is proof of the guardian's authority.

(10)Conditions – The Public Guardian and Trustee may make an appointment under this section subject to conditions specified in the certificate.

(11)Two or more guardians – The Public Guardian and Trustee may certify that two or more applicants are joint statutory guardians of property, or that each of them is guardian for a specified part of the property.

(12)Duty of Guardian – A person who replaces the Public Guardian and Trustee as statutory guardian of property shall, subject to any conditions imposed by the Public Guardian and Trustee or the court, manage the property in accordance with the management plan.

The ***SDA*** also provides for reports and investigations to be made with the PGT regarding allegations that a person is incapable of managing property or personal care.

The PGT is required to investigate all allegations as appropriate and take steps if necessary, to become the court appointed guardian. This investigation could include having an assessment of the person's capacity performed.

The actions of assessors are governed by s. 78 of the ***SDA***:

> **78**. (1) **Right to refuse assessment**. – an assessor shall not perform an assessment of a person's capacity if the person refuses to be assessed.
>
> (2) **Information to be provided**. – Before performing an assessment of capacity, the assessor shall explain to the person to be assessed,
>
> (a) the purpose of the assessment;
>
> (b) the significance and effect of a finding of capacity or incapacity; and
>
> (c) the person's right to refuse to be assessed.
>
> (3) **Application**. – Subsections (1) and (2) do not apply to an assessment if,
>
> (a) the assessment was ordered by the court under section 79; or
>
> (b) a power of attorney for personal care contains a provision that authorizes the use of force to permit the assessment and the provision is effective under subsection 50(1).
>
> (4) **Use of prescribed form.** – An assessor who performs an assessment of a person's capacity shall use the prescribed form in performing the assessment.
>
> (5) **Notice of findings**. – An assessor who performs an assessment of a person's capacity shall give the person written notice of the assessor's findings.

Clearly section 78 gives an individual the right to refuse to be assessed. A person being assessed must specifically be advised of this right, along with being told the purpose, significance and effect of the assessment before it takes place.

Where a person refuses to be assessed, section 79 of the ***SDA*** provides the court the discretion to order an assessment where a person's capacity is in issue in a proceeding under the ***SDA*** and the court is satisfied that there are reasonable grounds to believe that the person is incapable. In order to obtain a court order for a capacity assessment in

situations where it is refused, there must be a proceeding initiated under the *SDA* pursuant to the Act.[139]

The principles to be applied when considering whether to direct a capacity assessment under s. 79(1) were set out by Strathy J. (as he then was) in ***Abrams v. Abrams***[140]:

a) The purpose of the SDA;

b) The terms of Section 79, namely:

    i. The person's capacity must be in issue; and

    ii. There are reasonable grounds to believe that the person is incapable;

c) The nature and circumstances of the proceedings in which the issue is raises;

d) The nature and quality of the evidence before the court as to the person's capacity and vulnerability to exploitation;

e) If there has been a previous assessment, the qualifications of the assessor, the comprehensiveness of the report and the conclusions reached;

f) Whether there are flaws on the previous report, evidence of bias or lack of objectivity, a failure to consider relevant evidence, the consideration of irrelevant evidence and the application of the proper criteria;

g) Whether the assessment will be necessary in order to decide the issue before the court;

h) Whether any harm will be done if an assessment does not take place;

i) Whether there is any urgency to the assessment; and

[139] *Neill v. Pellolio*, [2001] 43 E.T.R. (2d) 99 (Ont. C.A.).
[140] *Abrams v. Abrams*, *supra* note 102.

j) The wishes of the person sought to be examined, taking into account his or her capacity.[141]

Similarly, s. 105 of the ***Courts of Justice Act***[142] gives the court authority and discretion to order an assessment.[143] In ***626381 Ontario Ltd v. Kagan, Shastri, Barristers & Solicitors***[144] Stinson J. made it clear that an order under s. 105 is an exception:

> A s.105 order to obtain the required evidence should be the rare exception and not the rule. Moreover, such an order is discretionary and should not be granted lightly or without good reason. Due consideration must be given to the autonomy of the individual, having regard to the intrusive nature of a mental examination.[145]

Both the ***Health Care Consent Act*** and the ***SDA*** give a person found to be incapable the right to request a review of the assessment by the Consent and Capacity Board (the "CCB"). The CCB, however, does not have jurisdiction to hear a section 22 assessment since the purposes of a section 22 assessment are to apply to the court to obtain a guardianship order.

Re Koch,[146] is a decision that considers rights advice under both the ***Health Care Consent Act*** (the "**HCCA**") and the ***SDA***. The ***HCCA*** does not require a warning before a capacity assessment is conducted; however, section 17 of the ***HCCA*** requires the health practitioner to provide information to the individual concerned regarding the consequences of the findings.

The ***HCCA*** also provides for an assessment by an "evaluator" to determine whether the person is capable of consenting to admission to a care facility[147] and of consent to personal assistance services[148]. There is no statutory requirement that any advice must be given to an individual about the evaluation either before it is conducted or afterwards.

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[141] *Abrams v. Abrams* 2008 CanLII 67884 (ON SC) at para. 53; see also Sadhu v. Kaul 2019 ONSC 140 at paras. 26-28.
[142] *Courts of Justice Act*, R.S.O. 1990 c. C.43.
[143] *Ibid*.
[144] *626381 Ontario Ltd v. Kagan, Shastri, Barristers & Solicitors*, 2013 ONSC 4114.
[145] *Ibid* at para. 40.
[146] *Koch (Re)* 1997 CanLII 12138 (ON SCT).
[147] *Health Care Consent Act*, *supra* note 59, at s. 40(1).
[148] *Ibid* at s. 57(1).

The incapable person has, again, the right to request a review of the finding of incapacity by the **CCB**.

"Evaluator" is defined by section 2(1) of the ***HCCA***,[149] as a member of the Colleges of Audiologists and Speech-Language Pathologists, nurses, occupational therapists, physicians, physiotherapists, psychologists and social workers.

The definition under the ***SDA*** of "assessor" means a member of a class of persons who are designated by the Regulations as being qualified to do assessments of capacity.[150] In accordance with the Regulations[151] an assessor is required to be a member of:

- the College of Physicians and Surgeons of Ontario;
- the College of Psychologists of Ontario;
- the Ontario College of Social Workers and Social Service Workers, and holding a certificate of registration for social work;
- the College of Occupational Therapists of Ontario;
- the College of Nurses of Ontario and holding a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse.[152]

The Regulations refer to the "**Guidelines for Conducting Assessments of Capacity**" as established by the Attorney General, dated May 2005 which are available on the website of the Ministry of the Attorney General.[153]

The Regulation also requires an assessor to complete a training course approved by the Attorney General or as administered by the Attorney General pursuant to the Regulations.[154]The "Qualifying Course" includes:

(a) instruction in the ***SDA*** 1992;

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[149] *Ibid* at s. 2(1).
[150] *Substitute Decisions Act,supra* note 9, at s. 1.
[151] O. Reg. 460/05, "Capacity Assessment".
[152] *Ibid* at s.2(2).
[153] Ministry of the Attorney General, "Guidelines For Conducting Assessments of Capacity" online: https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf
[154] O. Reg. 460/05 at s. 2(1)(b).

(b) instruction in the best practices in completing forms and reports under the Act,

(c) instruction in standards for the performance of assessments of capacity as set out in the guidelines;

(d) instruction in the procedures for determining if a person needs decisions to be made on his or her behalf by a person authorized to do so, as set out in the guidelines; and

(e) an evaluation of the trainee's mastery of the training at the conclusion of the course.[155]

Further, to remain qualified to do assessments of capacity, an assessor is required to successfully complete a continuing education course given or approved by the Attorney General on or before the second anniversary of his or her qualification date; and thereafter, at intervals of two years or less.[156]

The Capacity Assessment Office of the Ministry of the Attorney General publishes a list of capacity assessors who are available on a fee for service basis.

Court Appointed Guardians

In respect of court-appointed guardians of property a section 22 ***SDA*** assessment should be requested, and the procedure and guidelines as set out at sections 22 through 30 of the ***SDA***. Notably, there is a provision for the appointment of a temporary guardian, such application to be made by the PGT.[157]

The equivalent of the court appointed guardian of the person is s. 55[158] and the requirements and procedures are set out at sections 55 through 65 of the ***SDA***.

In the case of ***Re Koch,***[159] there is a good analysis to consider when ascertaining what is expected of an assessor or evaluator. It is recommended that all lawyers review this

[155] *Ibid* at s. 4.
[156] *Ibid* at s. 5.
[157] *Substitute Decisions Act, supra* note 9, at s. 27(3.1), 27 (6).
[158] *Ibid* at s. 55(1).
[159] See comprehensive list to be undertaken by the assessor at pages 518-522 of the Judgment.

decision in order to request and receive the assessment you are looking for from your appointed assessor. The Honourable Justice Quinn stated that:

1. The assessor\evaluator must maintain meticulous files;

2. The assessor\evaluator must be alive to an informant harbouring improper motives;

3. The assessor\evaluator must ensure the person being examined is made aware of the significance and effect of a finding of incapacity. Furthermore, that this "warning" is a requirement of section 78(2)(b) of the ***SDA***, for the notes of the assessor must refer to the fact that the person being assessed was made aware of the significance and effect of the finding of incapacity and that person was informed of the right to refuse to be interviewed."

4. Section 78 of the ***SDA*** represents the minimum requirements for an assessment and that the person being assessed should be advised that she has the right to have a lawyer, friend, relative, present for the interview.

5. The assessor must do more than merely record information provided by the person being assessed and then form an opinion.

6. The assessor must probe and determine the process by which the person being assessed arrived at an answer or statement.

7. Clarification of the information received should be sought.

8. The assessor must establish whether, or not, the person being assessed is able to understand the information relevant to making a decision in the management of property.

9. The assessor should be sure that the person being assessed understands the information relevant to making a decision about admission to a long-term care facility.

10. The assessor should make a distinction between failing to understand and appreciate risk and consequences as opposed to being unable to understand and appreciate risks and consequences.

11. The assessor is not to interject personal values, judgments, priorities into the process as such the reasonableness of the person's words, deeds and choices is not the test.

12. The test for incapacity is an objective test.

13. Some real effort must be undertaken to determine which evidence to rely on from other witnesses when assessing capacity.

14. Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the ***SDA***.

Approaching the subject of capacity assessments with a person is almost always difficult. The suggestion of a capacity assessment should be approached with sensitivity and regard to your client. It may be prudent to recommend that your client consider a capacity assessment in order to prevent the further escalation of already contentious issues or prevent the precipitation of litigation. A capacity assessment proving capacity will often support action that you may have taken in respect of the drafting of a new POA, and the revocation of a prior POA. The effects of a capacity assessment should be discussed in depth with clients who is considering submitting to a capacity assessment in that the finding of incapacity takes away considerable rights and freedoms of an individual.

When giving instructions to a capacity assessor, the lawyer should consider the prospective individual's entire estate situation. Consider asking the assessor for, depending on the circumstances of your client, and the particular situation, an assessment regarding the following:

(a) a finding of capacity of manage property;

(b) a finding of capacity to manage personal care;

(c) a finding of capacity to give instructions or directions to a lawyer;

(d) a finding of capacity to make admission to long-term care facility decisions;

(e) a finding of capacity to grant a Power of Attorney for Property;

(f) a finding of capacity to grant a Power of Attorney for Personal Care, a finding of capacity to submit to personal assistance services; and

(g) testamentary capacity.

In many situations the obtaining of a capacity assessment constitutes a means to prevent or stop litigation or may be obtained to set aside a POA wrongly procured.

However, the capacity assessment must not be used as a "weapon" in litigation, as confirmed by the Court in ***Adler v. Gregor***.[160] In that case, two sisters were at odds over who should act as their mother's attorney under a POA for Personal Care and Property. The mother had executed Powers of Attorney in 2015 appointing one sister as the sole attorney with directions that the documents were only to be released upon the finding of incapacity of the mother by a physician or a licensed capacity assessor.

After significant conflict between the sisters, in August 2017 a capacity assessor completed an assessment of the mother and concluded she was incapable of managing property and incapable of granting a POA for Property. In September 2017 the non-attorney sister took the mother to a new lawyer and the mother executed new POA's appointing both sisters jointly as the mother's attorneys. After retaining estate litigation counsel, the same sister obtained a capacity assessment of her mother in October 2017, which concluded that the mother was capable of granting POA's Attorney for Property and Personal Care.

An application was commenced to determine which POA (the 2015 or 2017 documents) were valid and whether the mother had capacity to grant either POA documents. Justice

[160] *Adler v. Gregor* 2019 ONSC 3037.

Penny referred to the "**Guidelines for Conducting Assessments of Capacity"** (discussed above):

> It is abundantly clear from a review of the Guidelines and the relevant provisions of the SDA itself **that capacity assessments were not designed, nor were they ever contemplated, to be used as weapons in high conflict litigation such as this**. Yet, this is exactly what both assessments regarding capacity to grant powers of attorney were obtained for in this case.[161]
>
> [. . .]
>
> Both parties sought capacity assessments of Mrs. Adler for the purpose of attacking or defending powers of attorney the obtaining of which they were each involved in as well. **Both parties prevailed upon their mother to submit to these assessments for the purpose of obtaining ammunition to use in their fight with one another, not for their mother's benefit.** Both parties were guilty of providing biased or incomplete histories and background to the assessors. Neither assessor undertook any material investigation of other sources of information. Both parties interfered with, and had a hand in drafting, the final assessment reports. **This kind of use of capacity assessments by parties or their lawyers is improper and should be discouraged in the strongest possible terms by counsel and the Court**.[emphasis added][162]

Penny J. rejected both capacity assessments as unreliable and had to turn to other factors to determine the grantor's capacity to grant the POA's, including clinical notes by her doctor, a Community Care Access Centre status review, a Regional Nursing Services report, and anecdotal evidence from friends and other family members. Penny J. also noted that the lawyer who drafted the 2017 POA's was unknown to the grantor, and there was no indication the lawyer explained the consequences of having two people who were in open conflict with one another appointed as her joint attorneys or that the grantor had any appreciation of the consequences of doing so. The Court found that the 2017 POA's were invalid due to lack of capacity.

(6) Rights Advice

An assessor is required to provide "rights advice" **before** commencing an assessment in accordance with s. 78(2)[163] of the ***SDA***.

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[161] *Ibid* at para. 47.
[162] *Ibid* at para. 52.
[163] *Substitute Decisions Act,* supra note 9, at s. 78.

Rights advice is important since the failure to give adequate warning with respect to the significance and effect of a finding of incapacity may render the finding of incapacity a nullity. As Low J. wrote in ***Abrams v. Abrams***:

> An application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgement *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.[164]

(7) Do Capacity Assessments Have a Meaningful Role?

The answer to this question is essentially dependent on the circumstances of the client. If at the time of drafting and granting a POA it becomes apparent that a dispute in the future is likely as to the grantor's capacity for any number of reasons, it may be that a capacity assessment should be considered by the grantor as a means of protection from litigation, or at the very least, as a means of supporting the validity of the POA at the time granted.

A lawyer drafting a POA, if at the time of drafting there is a suspicion of incapacity, arguably should recommend some sort of capacity assessment to the client. The client must understand the inherent risks in agreeing to submit to a capacity assessment. A finding of incapacity negates a person's independence. If such assessment is refused then the lawyer has the obligation of taking and keeping comprehensive and detailed notes. It is not always wise for a lawyer to quickly conclude that an assessment needs to be completed by a capacity assessor. The lawyer should not assume that a health professional or capacity assessor is more knowledgeable about the specific legal criteria for capacity for the particular purpose for which the lawyer was retained, i.e., requisite capacity to grant or revoke a POA. Decisional capacity is time, situation and task specific.

Lawyers, for their part, are obligated to ensure in any retainer that their client has the requisite capacity to: 1) retain counsel, and 2) give instructions to counsel and execute any documents necessary to resolve the specific matter for which counsel is retained.

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[164] *Abrams v. Abrams*, *supra* note 102, at para. 56.

Unfortunately, lawyers sometimes fail to adequately address issues of capacity and undue influence in a retainer. While not all mistakes amount to negligence, there are many instances where the conduct of a lawyer falls below the standard required by law. In these instances, the appropriate party is likely to make a claim against the lawyer in negligence.

It is the lawyer's obligation to interview the client for the purpose of determining if the requisite legal or decisional capacity exists for the client to understand the task at hand, i.e. executing a POA (the criteria or factors to consider under the ***SDA***).

A lawyer's duties and obligations to clients are diverse in any retainer, but are especially relevant in cases where vulnerability, capacity and undue influence are at issue. Justice Cullity, in the Ontario Superior Court of Justice case of ***Banton v. Banton***[165] stated:

> A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.[166]

If a lawyer is uncertain about the capacity of his or her client to make the decision to execute a POA, then the lawyer may wish to advise a client that they will not act until the client undergoes a capacity assessment that demonstrates that the client is capable with respect to that decision. However, a lawyer should be careful that such an assessment is required in order to take on, or fulfill, a given retainer as a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider and requiring a capacity assessment must be reasonable in the circumstances. The Court in a Nova Scotia case of ***Weldon McInnis v. McGuire,***[167] held that lawyers are allowed a reasonable degree of deference in making such a decision of whether to have a capacity assessment completed or not:

> In this particular case, [the lawyer] was facing a client who had, comparatively speaking, some complicated issues. The issue of his competence to effect a new Power of Attorney was, in my view, a predictable concern which a competent lawyer would have in mind. Whereas all persons are presumed to be competent,

[165] *Banton v. Banton* 1998 CanLII 14926 (ON SC).
[166] *Ibid* at para. 121.
[167] *Weldon McInnis v. McGuire*, 2014 NSSC 437.

> the circumstances of [the client] certainly created, at the very least, a doubt. Whether every lawyer would have undertaken the retaining of an expert [capacity assessor] at that particular time, is not the test. Allowance must be made for the individual opinions of solicitors who are ultimately responsible for their legal work.[168]

Furthermore, a formal assessment to determine whether a person has the requisite decisional capacity is only required if a statute so specifies for a particular purpose, or a person has drafted this requirement into a POA as a triggering event. If the POA does not specify a requirement for a formal assessment, then the named attorney makes the determination of incapacity which would require management of the grantor's property. Further, capacity assessors should not be used to determine capacity for treatment because that responsibility is that of the health professional proposing the treatment.

There are certain instances when a formal capacity assessment as opposed to an informal determination by someone not qualified to assess under the ***SDA***, is necessary. For example, as mentioned above, and in circumstances where a statutory guardianship is being sought.

Other considerations for a lawyer in Ontario when seeking out a capacity assessment, is determining which type of capacity assessor to use. If the lawyer wishes to simply have a record in the client's file regarding whether or not the client has the requisite capacity, most lawyers will go to the list of capacity assessors provided on the Ontario government's website. However, if a lawyer is in the middle of litigation, most lawyers will likely seek out a private medical expert to support their client's case.

(8) The Role of the Capacity Assessors

The evaluation process of the capacity assessor is derived from the ***SDA***, and primarily, the guidelines, and the requirements in the Court decision of ***Re Koch***. The information gathered and questions asked in the evaluation process are not legislated which adds to the degree of inconsistency between assessments and assessors. The capacity assessors or evaluators are required to base their decision of incapacity or capacity on the legal test for capacity, which is not a medical test. The capacity assessor, as set out

[168] *Ibid* at para. 42.

above, is required to give the person being assessed rights information and obtain the person's consent to conduct the assessment.

In situations where litigation has commenced and there are competing allegations of capacity and incapacity, often it is suggested that more than one, possibly even more than two, assessments be obtained, either on consent or through court order. Often the requests for numerous assessments are met with a degree of resistance since it must always be ever present in the minds of those requesting an assessment the degree to which the individual being assessed is suffering from duress as a result of the tests themselves. When a situation arises that a capacity assessment is called into question or legitimately criticized, often another assessment is ordered or recommended – but to what end?

(9) The Standard of Assessment

The standard of assessment is unfortunately not consistent as has been suggested above. Certainly, with the increasing court decisions in this practice area, the meaning of capacity, the requirements for assessment and assessors, are becoming clearer. The ***SDA*** is not an all-encompassing Act. There, of course, are the considerations when looking at capacity, which also fall under the ***Mental Health Act***, and the ***Health Care Consent Act***. However, the standard of assessment is by no means static or consistent and can cause a great deal of "extra steps" where situations are litigious. In light of developing case law in this area, and the uncertainty concerning quality and consistency of assessments, it may be time to rethink the assessment criteria and perhaps a more uniform and consistent approach to assessments will be possible in the future.

In an era where litigation is on the rise due to issues directly related to capacity, somewhat unfortunately, capacity assessments can play a meaningful role. However, the quality of the capacity assessment varies and in many cases is inconsistent. A finding of incapacity by an assessor does not automatically mean that the court will therefore find an individual incapable. Determining the quality of the assessment obtained is a very difficult task. Often it means having extensive knowledge of the case law in the area, and a thorough

knowledge of the requirements of the ***SDA*** and, even then, the assessment may be criticized and called into question.

Further the different tools and methods used by medical experts can create difficulties for a court when comparing conflicting expert opinions. The use of a **standardized assessment tool** could assist courts by ensuring that medical experts employ the same criteria. Such a standardized assessment would provide greater clarity to the court in comparing competing medical opinions.

A standardized assessment tool could also assist both a lawyer and an attending physician in providing a contemporaneous determination of the grantor's (or testator's) capacity. While the presence of an attending physician may help protect an estate plan in the event of litigation, a standardized tool employed by a competent professional would likely further protect an estate plan. Capacity as a legal determination rendered by the courts is often informed by clinical opinion. Sometime with input from more than one expert, as well as evidence from lay witnesses and the influence of precedent, statute and / or other equitable principles.

The complicated medico-legal nature of judicial opinion regarding capacity calls for a collaborative approach between medical and legal professional. Assessments have remained inconsistent both in terms of procedure and interpretation. That it is further confused by the interplay of medicine and the law is trite.

Some scholars have suggested that it is time for a standardized approach to the assessment of testamentary capacity, which could lead to a standardized approach to other assessments of capacity including capacity to grant or revoke a POA. In a paper called "A Case for the Standardized Assessment of Testamentary Capacity", I, along with my co-authors,[169] propose a standardized assessment of testamentary capacity referred to as a **Contemporaneous Assessment Instrument** (the "CAI").

[169] M. Brenkel, N. Herrmann, K. Crawford, E. Hazan, A. Owen, K. Shulman, and K. Whaley, "A Case for the Standardized Assessment of Testamentary Capacity" Can Geriatr J 2018 Mar, 21(1).

The CAI is a combination of a legal test and a validated cognitive screening tool of sorts that tests executive functioning and working memory. It is a semi-structured interview that provides specific and direct answers to clinical and legal questions.

Using a model developed by P.S. Appelbaum and T. Grisso (widely hailed as the gold standard for the development of CAI) we concluded that a capacity assessment should address the following hierarchical standards for capacity:

1. The ability to communicate a choice
2. The ability to understand relevant information
3. The ability to appreciate his or her situation and its likely consequences; and
4. The ability to manipulate information rationally (i.e. reasoning).

A simple CAI that addresses an updated legal test for testamentary capacity may encourage individuals to seek this type of assessment, thus helping to prevent the anticipated dramatic rise in Will Challenges in the coming years. However, a CAI that includes only legal criteria without the inclusion of cognitive screening component is a potentially misguided approach that will leave a testator's capacity open to potential scrutiny. Indeed, researchers have noted that CAI without a cognitive screening component may not be capable of withstanding legal challenges. Also, importantly, any test developed for the assessment of testamentary capacity must be interpreted through the lens of a given testator's unique circumstances, since cognitive impairment may affect testamentary capacity in some contexts but not others.

The neuropsychological component of a CAI must be validated in a representative sample of older adults to ensure that it is practical, acceptable and accurately reflects the relevant cognitive functions such as judgment, planning and reasoning.

One of the authors of the paper which proposed the standardized assessment tool is the renowned neuroscientist Dr. Adrian Owen of Cambridge Brain Sciences an online cognitive assessment company.

Dr. Adrian Owen is a British Neuroscientist and is the Canada Excellence Research Chair in Cognitive Neuroscience and Imaging at The Brain and Mind Institute at the University of Western Ontario.

Cambridge Brain Sciences has recently introduced an indicative tool that provides a scientifically-validated quantitative measure of a client's executive functioning that lawyers and professionals alike may choose to use for their clients and their retainer for future reference and to facilitate discussions when drafting amending estate documents, or indeed litigating.[170]

PART VII – THE UNITED KINGDOM'S APPROACH

Notably, in the United Kingdom, POA must be registered with the relevant Office of the Public Guardian, either in England and Wales, Scotland or Northern Ireland.

As of October 1, 2007, Enduring Powers of Attorney ("EPA") in England and Wales were replaced by Lasting Powers of Attorney ("LPA"). However, if an individual made and signed an EPA prior to October 1, 2007 it would still be valid. Scotland uses the terms "Continuing Power of Attorney" for financial decisions and "Welfare Power of Attorney" for health decisions. In Northern Ireland the term used is still "Enduring Power of Attorney".

LPAs in England and Wales are governed by the ***Mental Capacity Act*** *2005,* 2005 c 9 ("**MCA**"), regulations made under it and the MCA Code of Practice.[171] An LPA enables any individual over the age of 18 and who has mental capacity (the donor) to choose another individual or individuals (the attorneys) to make decisions on their behalf. The two types of LPAs are: property and financial affairs, and health and welfare.

Unlike an EPA, as noted, before an LPA can be used, it must be registered with the Office of the Public Guardian. Either the donor or an attorney may register the LPA. All of the

[170] A link to the indicative tool website, online at: http://www.cambridgebrainsciences.com/

[171] Available online at: https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

LPA forms and guidance on how to complete the forms can be found on the government's website.[172]

The LPA must also be signed by a "certificate provider". The "certificate provider" signs to confirm they've discussed the LPA with the donor, that the donor understands what they're doing and that nobody is forcing them to do it. The certificate provider should be either: someone who has known the donor personally for at least 2 years, such as a friend, neighbour, colleague, or former colleague; someone with relevant professional skills, such as the donor's GP, a healthcare professional or a lawyer. A certificate provider cannot be one of the attorneys.

Further all of the attorney or replacement attorneys need to sign the LPA as well, confirming that they understand their duty to act based on the principles set out in the MCA, that they must make decisions and act in the best interests of the donor and must take into account any instructions or preferences set out in the LPA and can only make decisions when the LPA has been registered and at the time indicated in the LPA (i.e. only on incapacity or as soon as LPA is registered, but with donor's consent while they have capacity).

Before a donor registers his or her LPA, they must send a form to notify any person listed in the LPA. A 'person to notify' is someone the donor chooses to inform about the registration of their LPA. They don't have to choose anyone to notify, so if that section of the LPA is blank, they do not need to fill in this form. However, the LPA form states: "'*People to notify' add security. They can raise concerns about your LPA before it's registered – for example, if they think you are under pressure to make the LPA*."

There are three different forms that can be submitted in order to object to the registration of an LPA.

[172] Available online at: https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney

The first form is submitted by the donor and gives the donor the opportunity to provide their reasons for the objection to the registration of the LPA by the attorney or attorneys.[173]

The second form of objection to registration can only be completed by the attorney or a named person in the LPA who has been notified. This form allows for objection against the registration of the LPA based on "factual grounds" as follows:

1. The donor is bankrupt or interim bankrupt
2. The attorney is bankrupt or interim bankrupt
3. The attorney is a trust corporation that has been wound up or dissolved;
4. The donor is dead;
5. The attorney is dead;
6. There has been a dissolution or annulment of a marriage or civil partnership between the donor and attorney;
7. The attorney lacks capacity to act;
8. The attorney has disclaimed appointment.[174]

The third form can be completed by the attorney or a named person who has been notified of the registration. This form allows the person making the application to object to the registration of the LPA based on "prescribed grounds":

1. The LPA isn't legally correct (for example, the objector does not believe the donor had the mental capacity to decide to make an LPA);

[173] See from LP0006 online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604125/LPA006-Objection-by-the-donor-to-the-registration-of-a-lasting-power-of-attorney.pdf

[174] See form LP007 online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566046/LPA007-Object-to-registration-of-LPA-factual-grounds_.pdf

2. The donor cancelled their LPA when they had capacity;

3. The donor was pressured in to making the LPA;

4. The objector suspects fraud;

5. An attorney is acting against the donor's best interests.[175]

When submitting this form to the Office of the Public Guardian, the person applying (if they are the intended attorney or a named person who has been notified), will also be required to submit an application to object to the registration of an LPA to the Court of Protection.

PART VIII – POWERS OF ATTORNEY, ADVANCE DIRECTIVES, MEDICAL ASSISTANCE IN DYING & CONSENT

Several years ago, our newspapers, magazines and television sets had numerous stories about a 39-year-old Florida woman named Terri Schiavo who had been in a persistent vegetative state for 13 years and had to be fed through a tube. Her husband did not have a POA for Personal Care that allowed the withdrawal of life-support, which in this case was the feeding tube. He obtained a court order, but Governor Jeb Bush, brother of President George W. Bush, intervened in the dispute and the Florida State Congress voted to give him the power to order the replacement of the tube. The husband was devastated. It was clear that Ms. Schiavo had never given any written instructions about the kind of care or withdrawal of treatment, by way of POA for Personal Care, advance directive, otherwise.

We are also familiar with the case of Sue Rodriguez, who was a 42-year-old mother suffering from ALS (amyotrophic lateral sclerosis), who went to the Supreme Court of Canada to ask that she be permitted an assisted suicide. She said that she did not wish to die as long as she still has the capacity to enjoy life, but wanted a qualified physician

[175] See form LP008 online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566048/LPA008-Object-to-registration-of-LPA-notify-OPG_.pdf

to be allowed to set up technological means by which she might, when no longer able to enjoy life, by her own hand, at the time of her choosing, end her life. The Supreme Court decision was a 4:3 split against Ms. Rodriguez in ***Rodriguez v. British Columbia (Attorney General)***.[176]

Almost 23 years later, however, on June 7, 2016, physician-assisted suicide became legal in Canada as the result of a similar Supreme Court of Canada case, of ***Carter v. Canada (AG).***[177] The Court unanimously struck down parts of section 241(b) and section 14 of the *Criminal Code* which the justices ruled unjustifiably infringed on section 7 of the *Charter of Rights and Freedoms.* The changes to the *Criminal Code* made medical assistance in dying available to competent adults with a serious and incurable illness or disability, in an advanced state of irreversible decline, with a reasonably foreseeable death.

This next section will review the role of advance directives and end-of-life decisions in the context of POA documents. An advance directive or what some people refer to as a "living will" is a legal document that stipulates a person's preferences or wishes regarding end-of-life treatment decisions, if he or she becomes incapable, either requesting or refusing certain procedures. There is no reference to "advance directives" or "living wills" in the ***SDA*** or in the ***HCCA)***.

Both a POAPC and an advance directive are intended to create a legal record of an individual's opinions on personal care decisions, including end of life treatment, at a time when the individual is capable, enabling others to honour those wishes even if the individual is no longer physically or mentally able to express them.

It is useful to review the history of advance directives, in both Canada and the United States, because it casts a different view for lawyers who are drafting powers of attorney for personal care for their clients. Should we be including end-of-life decision-making clauses when we are drafting powers of attorney for personal care? Often younger clients prefer to keep the powers of attorney "short and sweet", but older clients are more concerned with quality care at the end-of-life and will often want more in powers of

[176] *Rodriguez v. British Columbia (Attorney General)* [1993] SCR 519.
[177] *Carter v. Canada (AG)* 2015 SCC 5.

attorney for personal-care, and will often want to draft those care provisions and treatment provisions themselves.

(1) The Problem - Powers of Attorney, Advance Directives, and Consent

(a) History

Advance directives are only recently allowable in law. There are two kinds. First, the "instructive directive" or “living Will”, which recites preferences for or against life-sustaining treatments, and secondly, an appointment of a substitute decision maker, often called a proxy directive.

Because of leaps in technology, we are now preventing, managing, and curing patients who would have died, and in consequence, lives are being prolonged. Often, however, the survivor and his or her family have questioned the quality of that prolonged life. On the other hand, certain patients and their families have been demanding life-prolonging measures which the medical world sees as futile. In the context of advance directives, it is useful to review very briefly the history of such documents.

In 1967, the Euthanasia Society of America invented the term, the "Living Will" and over the following years state legislatures heard proposed legislation seeking the legalization of some version of the advance directive. Such proposals consistently failed, until the 1976 New Jersey Supreme Court considered the case of Karen Ann Quinlan, and decided that the hospital where Ms. Quinlan lay in a vegetative state was required to accede to the previously expressed wish of Ms. Quinlan that life support would be withdrawn in such circumstances.

This case was the turning point. California quickly followed with legislation allowing people to write their wishes in advance for terminal conditions. Nova Scotia was the first Canadian jurisdiction to provide for advance directives in 1988, and Quebec followed the next year.

The tide really turned in 1990 with the Missouri case of ***Cruzan v. Director, Missouri Department of Health***. As a result of a motor vehicle accident, Nancy Cruzan was in a persistent vegetative state. Cruzan’s parents sought a declaratory judgment seeking

judicial sanction of their wish to terminate artificial hydration and nutrition. The United States Constitution did not forbid Missouri from requiring clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment. The State Supreme Court did not commit a constitutional error in concluding that evidence adduced at trial did not amount to clear and convincing evidence of the patient's desire to cease hydration and nutrition. (Ms. Cruzan had said to a friend in a very intense conversation before the accident that she did not want to be a "vegetable".) Due process did not require the state to accept substituted judgment of close family members absent substantial proof that their views reflected those of the patient.

The most notable Ontario decisions at that time were ***Malette v. Shulman,***[178] and ***Fleming v. Reid.***[179]

In ***Malette***, the emergency doctor treated Ms. Malette by giving her blood products when he knew that she was a Jehovah's Witness and carried a card in her purse to direct that such procedures were forbidden, and when her daughter and a church elder reinforced this view. The doctor saved her life and she recovered completely.

The Court of Appeal held that the physician had committed a battery against Ms. Malette. It was beside the point that he saved her life and that she fully recovered from her injuries. As the Court explained its decision: "to deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life." The Court went on to extol "the freedom of the patient as an individual to exercise her right to refuse treatment and to accept the consequences of her own decision."

But the Court went on to say that it was not deciding about the use of directives for terminally ill patients, it was not concerned with patients in an irreversible vegetative state, and it was not commenting on patients who are healthy but who wish to terminate life.

In ***Fleming***, the appellants were involuntary psychiatric patients who suffered from schizophrenia. The attending physician determined that they were not competent to

[178] *Malette v. Shulman*, 1990 CanLII 6868 (ONCA).
[179] *Fleming v. Reid,* 1991 CanLII 2728 (ONCA).

consent to psychiatric treatment and proposed to treat them with drugs to control or minimize psychotic episodes or symptoms associated with schizophrenia for many, but not all, patients and which have apparently significant and unpredictable harmful side effects. While competent, the patients expressed the desire not to take the drugs. The then Official Guardian, the incompetent patient's substitute decision-maker, refused consent to the proposed treatment in accordance with the expressed wishes of the patient when the patient was competent. The physician applied to the review board for an order authorizing the treatment. The order was granted on the basis that the treatment was in the patient's best interest.

The orders were affirmed on appeal. Although the statutory scheme was found to deprive the appellants of their security of the person contrary to s. 7 of the ***Canadian Charter of Rights and Freedoms***, the deprivation was held not to violate the principles of the fundamental justice since the scheme was in accord with the common law principles that underlie the *parens patriae* jurisdiction of the court. The patients appealed to the Supreme Court.

The Court held that at common law, every competent adult has the right to be free from unwanted medical treatment. A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to treatment.

The common law right to determine what should be done with one's own body and the constitutional right to security of the person can be treated as co-extensive.

The impugned provisions of the then Ontario ***Mental Health Act***, from which the review board authorized the treatment, manifestly operated so as to deprive the appellants of their right to security of the person as guaranteed by s.7 of the ***Charter***. Few medical procedures are more intrusive than the forcible injection of powerful mind-altering drugs that are often accompanied by severe and sometimes irreversible adverse side effects.

The *parens patriae* jurisdiction cannot be invoked to deprive competent mentally ill patients of rights expressly granted by statute or to abrogate their ***Charter*** rights.

A legislative scheme which permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, violates the basic tenets of our legal system and is not in accordance with the principles of fundamental justice.

The impugned legislative scheme was not saved by s.1 of the ***Charter***. The violation of the principles of fundamental justice worked by the scheme could be neither "reasonable" nor "demonstrably justified in a free and democratic society". The fundamental right to personal security should not be infringed any more than is clearly necessary. Although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state had not demonstrated any compelling reason for entirely eliminating the right, without any hearing or review, in order to further the best interests of involuntary incompetent psychiatric patients in contravention of their competent wishes. To completely strip those patients of the freedom to determine for themselves what shall be done with their bodies could not be considered a minimal impairment of their ***Charter*** right.

Legislation in the provinces followed quickly. We will discuss whether the legislation is effective or if more problems are being created, and finally, we will look at possible solutions.

(b) The Problem for the Estate Lawyer

The Estates Bar is, historically, made up of those lawyers who diagnose their clients' personal and financial needs, create order and balance in their affairs, and add stability to the transfers of wealth between the generations. The task at hand has been to make orderly and appropriate plans for their clients' **property**. Note the heavy emphasis on the word "property".

Before the advent of substitute decision-making, if the estates practitioner dealt with the client's mental and physical health, he or she did so traditionally in two situations.

The first situation enjoyed 1000 years of common law and equity to provide for the disposition of property in the event of incapacity and death. We prepared Wills, POA's and *inter vivos* Trusts. We considered joint asset arrangements and other methods of holding property. None of this has substantially changed as the result of substitute decisions legislation.

Where we ventured into the mental and physical health of our clients, we have traditionally relied on the medical profession to take responsibility for determining our client's capacity or incapacity, and we would create appropriate legal structures to plan for the incapacity or to cope with it after the event. However, the emphasis has always been on **property**.

In more recent years, the estates practitioner has ventured beyond the client's property interests at the planning stage, but always in the context of "documents". We are all familiar with the broad statements of intention found in the typical Living Will, and some of the more particular provisions of health care directives, and provisions for dying with dignity.

It is fair to say that the arrival of substitute decisions legislation, with a stroke, changed forever the practice of the Estates Bar, and its old notions that a client's property and the state of his or her health are separate disciplines.

The estates practitioner has assumed the obligations for advising clients about POA's for Personal Care and other mental health issues. The role is no longer confined to property protection. It is now time for the Estates Bar to plan for incapacity in the context of management of personal care, in addition to the management and distribution of a person's property.

Advance directives are becoming more common in Ontario, and it is possible to include in the POA specific instructions to reflect the grantor's wishes. Specific instructions to be canvassed with the client can include:

- "End-of-Life" or "no heroic measures" clauses;
- Specific cultural or religious requirements in medical treatment; and
- Requirement for written evidence of incapacity.

However, a wish may be made in a POAPC but if it would be illegal to fulfil that wish it will not be acted on.

"No heroic measures" provisions are common in POA'S. Such a provision tells the attorneys that the person does not wish to be kept alive beyond when there is a prospect of recovery, but would rather prefer to be allowed to die with whatever dignity remains in the person's circumstances.

The first problem with expressing wishes in a POAPC is that a person's wishes, values or beliefs may change, but often the POA does not get updated accordingly. That is why the ***HCCA*** recognizes that later wishes prevail over prior ones – even when the prior wishes were in writing and the later ones were not.[180]

The second problem is convincing health care professionals that the POAPC is *not* consent to treatment: it is no more than a guide to the named attorneys as to what the person's wishes, values and beliefs are relevant to the treatment decision. Some other jurisdictions consider an advance directive to be consent to treatment, and health practitioners trained there, or trained in jurisdictions that do not address the issue legally at all, continue to believe that the wish expressed in a POA authorizes them to treat the person without consent.

The third, and most common problem is the failure of the grantor to convey sufficient information to named attorneys regarding expressions of wishes. Attorneys for personal care occasionally reject the wish expressed in the POAPC because it is contrary to their own religious beliefs (withdrawing treatment, for example, with the intent of allowing

[180] *Health Care Consent Act, supra* note 59, at s. 5.

death) or because they believe it contrary to the religious beliefs of the grantor. Or they simply refuse to accept it.

It is therefore vital that a person contemplating a POA have discussions with proposed attorneys to ensure they have an understanding of the person's treatment wishes, the religious and cultural beliefs the person would want respected at end of life, and to ensure that the proposed attorney is willing to respect the grantor's expressed wishes.

In ***Friedberg et al. v. Korn,***[181] the named attorneys, children of the grantor, refused to follow a "no heroic measures" provision. They said there was no way their mother would have agreed to such a provision because it was contrary to her religious beliefs. The lawyer who drew the POA for Personal Care, together with a Will and a POA for Property, did not have a specific recollection of bringing the provision to the client's attention, but thought she must have. At the Consent and Capacity Board, the wish was held valid and the attorneys were directed to consent to withdrawal of life support, as proposed by the attending physician and in accordance with the "no heroic measures" provisions. However, this decision was reversed on appeal to the Ontario Superior Court of Justice.

(c) Views of Health Care Practitioners

What follows is a very random poll sampling of doctors, nurses, home care givers, nursing home owner/operators, lawyers and their clients, and many others who are affected by POAPC'S and related issues which was conducted on an informal basis several years ago in preparation for a paper on the role of lawyers in the process.

The view which was expressed most frequently by health practitioners and others is that, although lawyers and their clients are putting their POAPC'S in place, these documents are not helpful to their on-going use by the makers of those documents and the attorneys appointed by those documents. Home Care employees tell us that as more and more elderly patients are opting to stay at home to receive their on-going care, there is no coherent arrangement among the attorneys for personal care and property management, other family members, the lawyer, the physician, and Home Care. This does not mean

[181] *Friedberg at al v. Korn* 2013 ONSC 960.

that there should be a specific plan in place, but rather that the personal care being given to people be organized by "the group".

The home care workers felt that care is too fragmented and in consequence, the attorneys appointed under POAPC'S have no idea how to cope with the decision-making that is required. Often, the attorney is as elderly and frail as the patient, and is unable to understand the decisions that have to be made, and the consequences of making those decisions. Again, this does not mean that more specific directions need to be made. However, the attorney needs to be healthy, informed, and able to deal with the system, and the home care worker's view was that often the attorney is none or few of those things, and is left more confused.

Several family physicians and some specialists with whom I spoke have had extensive discussions with their patients, have participated with their patients in making health care documents, and many hold a copy of their patient's POAPC's in their files. Some doctors expressed the fact that they themselves do not understand the legalities of these documents, and are concerned about their liability in taking instructions from a named attorney. One family physician that is very much involved in the care of the elderly said that she did not know that in Ontario the patient had to be incapacitated with respect to a decision before instructions could be taken from the attorney for personal care.

Many of the physicians also expressed the view that the attorneys were not making appropriate decisions with respect to treatment because they were unable to separate their emotional reactions from the need for clear decision-making.

Discussing the use of POA'S with nursing home owners/operators, and their responses were more often in the context of property management rather than personal care. Owners/operators were also concerned with liability, and felt that they do not have the legal knowledge to protect themselves from liability.

In speaking with health organizations which deal with people who cannot communicate verbally by reason of illness or other incapacity. Often, stroke victims have a very limited and unusual means of communicating and, so, the issue for these health practitioners is

to ensure that where consent to a treatment is to be given, the patient's wishes are ascertainable and are properly carried out. The obtaining of such consent is often by non-verbal methods such as the use of pictures, symbols, and mechanical devices. Accordingly, their concern is not capacity versus incapacity, but consent versus the inability to communicate a consent.

A mentally and physically capacitated adult is entitled to make POA'S and the role of the estates practitioner is to introduce such clients to the nature and consequences of such documents. This obligation to inform and serve does not change for people with mental and physical disabilities, and the estates practitioner must determine whether people with impaired ability nevertheless understand the nature and the consequences of the documents to which they are putting their signatures.

Nothing in substitute decision legislation avoids the primary obligation of ensuring that the client is knowledgeable and understanding.

However, the estates practitioner is faced with a much harder task in determining the substantive provisions of the POA'S because under the ***SDA***, we are now moving away from those areas of the law in which we have been trained to operate; that is, the disposition of property.

(2) Provincial Legislation

(a) Substitute-Decision Making and Powers of Attorney for Personal Care

The Ontario ***SDA*** provides for POAPC'S, for court-appointed guardians of the person, and for duties of the guardian and the attorney for personal care.

The attorney has no authority to act under a POAPC **unless** the grantor is incapable. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

A person, provided he or she is capable, may give a POAPC which authorizes an attorney to make decisions with respect to health care, nutrition, shelter, clothing, hygiene or safety, and the person will be considered capable if he or she has the ability to understand whether the proposed attorney has a genuine concern for his or her welfare and appreciates that the grantor may need to have the attorney make decisions.

The attorney for personal care is authorized:

(a) to make a decision where the ***Health Care Consent Act***, 1996 applies to the decision and the grantor is not sound and capable under that legislation;

(b) for decisions to which that Act does not apply, where the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, unless there is a condition in the Power of Attorney which prevents the attorney from making such a decision until incapacity is confirmed.

The Court will, on application, appoint a Guardian of the Person, and the order of the court will:

(a) appoint the guardian;

(b) have a finding that a person is incapable because he or she is not able to understand information relevant to making a decision concerning health care, nutrition, shelter, clothing, hygiene or safety;

(c) is not able to appreciate the reasonably foreseeable consequences of the decision or lack of a decision, and in consequence, needs to have decisions made for him or her;

(d) may be limited to a particular period and may impose any other conditions the court considers appropriate.

Under the order, the guardian often has the following powers and the guardian may:

(a) exercise custodial power including determining living arrangements and providing for safety and shelter;

(b) be the person's litigation guardian except with respect to litigation that relates to a person's property or the guardian's status or powers;

(c) settle claims and commence and settle proceedings on the incapable person's behalf except relating to property or the guardian's status or powers;

(d) have access to personal information, including health information and records, except for the purposes of litigation relating to property or the guardian's status or powers;

(e) make any decision to which the ***Health Care Consent Act****, 1996* applies;

(e.1) make decisions about health care, nutrition and hygiene;

(f) make decisions about the person's employment, education, training, clothing and recreation and about social services for the person;

(g) exercise the other powers and perform the other duties that are specified in the order.

For decisions under the ***Health Care Consent Act***, (see below) the guardian is to make those decisions. For decisions to which the ***Health Care Consent Act***, does not apply, the following are guiding principles:

(a) if the guardian/attorney knows of a wish or instruction applicable to the circumstances of the incapable person made while a person was capable, the guardian shall make the decision in accordance with the wish or instruction;

(b) the guardian/attorney shall use reasonable diligence in ascertaining whether there are such wishes or instructions;

(c) a later wish or instruction expressed while capable prevails over an earlier wish or instruction;

(d) if the guardian/attorney does not know of a wish or instruction, or if it is impossible to make the decision in accordance with the wish or instruction, the guardian shall make the decision in the incapable person's "best interest".

The legislation sets out the things which the attorney is to take into consideration in determining "best interests", such as the value and beliefs that the attorney knows of, the person's current wishes if ascertainable, and whether the decision will improve the quality of the person's life, prevent the quality of a person's life from deteriorating, or reduce the extent to which, or the rate at which, the quality of a person's life is likely to deteriorate. It is also important to determine whether the benefit to a person will outweigh the harm from any other decision.

An attorney for personal care and a guardian of a person may always have resort to the court for directions on any question arising in the guardianship or under the POA, made on application, or in the context of a proceeding already commenced.

(b) Health Care Consent Act

The **Health Care Consent Act** (*"**HCCA**")* is relevant to substitute decision making for people who are not capable of deciding about "treatment". Treatment is defined by section 2(1) of the Act to mean anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purposes, and includes a course or plan of treatment. There are several exceptions which should be referred to.

A person is presumed to be capable with respect to treatment, admission to a care facility, and personal assistant services, and by section 4(3), we are entitled to rely on the presumption of capacity with respect to another person unless we have reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission, or the personal assistant service. Accordingly, no treatment is to be provided without the consent of a capable person, or if the person is not capable, by the person's substitute decision maker.

You are able, while capable, to express wishes about treatment, admission to a care facility, or a personal assistant service. This may be done in a POA as previously discussed, in a prescribed form, orally, or other manner.

The ***HCCA*** greatly assists where an incapable person should be receiving treatment. The ***HCCA*** creates a rank of people who can make substitute decisions about treatment. In keeping with the intent of this Act and the ***SDA***, the guardian of the person is ranked first. The attorney for personal care is ranked second. Thereafter, the ranking is as follows:

(a) the person's personal representative who is appointed by the Consent and Capacity Board;

(b) the person's spouse or partner (unless separated);

(c) a child or parent (not including a parent who only has a right of access), or the Children's Aid Society, or other person lawfully entitled to deal with consent instead of a parent;

(d) a parent who has only a right of access, a brother or a sister, or any other relative.

Not surprisingly, the substitute in the above ranking must be available, must be willing to give consent, must be capable to make a decision with respect to treatment for himself or herself, must be at least sixteen, and not prohibited by the Court or by a separation agreement from having access or giving consent. The ***HCCA*** creates principles for giving or refusing consent, as follows:

(a) if the person knows of a wish expressed by the person while capable and after age sixteen, the person shall give or refuse consent in accordance with that wish;

(b) if the person does not know of such wish, or it is impossible to comply with the wish, the person shall act in the best interests of the incapable person.

Like the ***SDA*** with respect to personal care, "best interests" are defined, so that the decision maker who is giving or refusing treatment shall take into consideration the values and benefits that the person knows incapable person held when capable and believes he or she would act upon if still capable, and take into consideration any wishes expressed by the incapable person with respect to the treatment that are not required to be followed, and the following factors:

(a) whether the treatment is likely to improve the condition or well-being, prevent the condition or well-being from deteriorating, or reduce the extent to which, or the rate at, the incapable person's condition or well-being is likely to deteriorate,

(b) whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment,

(c) whether the benefit outweighs the risk of harm,

(d) whether a less restrictive or less intrusive treatment would be as beneficial.

It is useful to quote Section 1 of the ***HCCA***, which is a sort of mission statement for the Act.

The purposes of this Act are,

(a) to provide rules with respect to consent to treatment that apply consistently in all settings;

(b) to facilitate treatment, admission to care facilities, and personal assistance services in care facilities, for persons lacking the capacity to make decisions about such matters;

(c) to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who reside in care facilities by,

(i) allowing those who have been found to be incapable to appeal the finding to a tribunal,

(ii) allowing incapable persons to request that a representative of their choice be appointed by the tribunal for the purpose of making decisions on their behalf concerning treatment, admission to a care facility or a personal assistance plan, and,

(iii) requiring that wishes with respect to treatment, admission to a care facility or personal assistance services, expressed by persons while capable and after attaining 16 years of age, be adhered to;

(d) to promote communication and understanding between health practitioners and their patients or clients;

(e) to ensure a significant role for supportive family members when a person lacks the capacity to make a decision about a treatment, admission to a care facility or a personal assistance plan; and

(f) to permit intervention by the Public Guardian and Trustee only as a last resort in decisions on behalf of incapable persons concerning treatment, admission to a care facility or a personal assistance plan.

In the context of these purposes, is there a role for the estates' lawyer beyond documentation? There is no positive obligation on the practitioner created by the legislation, but as people giving legal advice to our clients, we do have a positive obligation to ensure that our clients' best interests are being met when we create documents which purport to be executed pursuant to legislation such as the HCCA. The objective requirements of the ***SDA*** are easily met by our documents, but the more subjective provisions of that legislation and of the ***HCCA*** require a much better educated approach than we generally have been bringing to the process.

In the end, the real solutions to complex decision-making situations, whether by the patient who is competent or by advance directive where the patient is no longer competent, will occur when there is a better understanding between the lawyers and the doctors about the use of directives, when conflicting federal and provincial laws are harmonized, and when all citizens understand the need for and the effectiveness of such directions.

(3) Medical Assistance in Dying

As discussed above, amendments to the *Criminal Code* with respect to assisted suicide were made pursuant to Federal Bill C-14 *An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)* which received Royal Assent on June 17, 2016.

The corresponding Ontario legislation, the *Medical Assistance in Dying Statute Law Amendment Act* received Royal Assent on May 10, 2017. This Act amended several provincial laws including the *Coroners Act*, *Excellent Care for All Act, 2010*, *Freedom of Information and Protection of Privacy Act*, the *Vital Statistics Act* and the *Workplace Safety and Insurance Act*.

A person qualifies for **MAID** if:

a) The person is an adult;

b) The person's death is "reasonably foreseeable";

c) The person is capable when the request is made and capable when the "treatment" is administered;

d) Except in unusual cases, there is a 10 day wait between the time of the request and the time death is caused; and

e) The person's condition is such that continued pain and suffering is intolerable to him or her in the circumstances.[182]

Legislation in Canada requires that medical and nurse practitioners who provide medical assistance in dying ("**MAID**") must *"*immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying". Those who are unable to provide express consent or who do not possess decision-making capacity are ineligible for **MAID**. Any person may make a **MAID** request at any point in time; however, if they do not meet the eligibility criteria, the request will be denied.

Therefore, advance requests for **MAID** are not legal and a substitute decision maker cannot provide consent for **MAID**. Further, if based on a patient's prior directive, a

[182] Ontario Government website online on Medical Assistance in dying and end-of-life decisions: https://www.ontario.ca/page/medical-assistance-dying-and-end-life-decisions [accessed on 10.11.19]

healthcare practitioner provides **MAID** when that patient lacks capacity to consent, the healthcare practitioner will be in violation of the *Criminal Code*.[183]

In order for advance requests for **MAID** to be permitted in Canada, the requirement for express, informed consent immediately prior to the procedure would need to be removed.

A recently released report from the Expert Panel on Medical Assistance in Dying, Council of Canadian Academies, addresses the issue of advance requests for **MAID**.[184] Two of the many questions addressed regarding **MAID** and the potential of allowing advance requests were: "How is an advance request for **MAID** similar to or different from advance directives for healthcare under existing provincial / territorial regimes?" and "What are the unique considerations to be taken in to account depending on when an advance request is made?" The report examines how advance requests for **MAID** might be situated within the wider context of Canadian healthcare policy, end-of-life decision-making, and societal perspectives, and it sets out the main moral dimensions of advance requests for **MAID**.

(4) The Consent and Capacity Board

The Consent and Capacity Board ("**CCB**") is an independent provincial tribunal that has been established to provide "fair and accessible adjudication of consent and capacity issues, balancing the rights of vulnerable individuals with public safety."[185]

The **CCB** holds hearings under the ***SDA***, the ***HCCA***, the *Mental Health Act*, as well as the *Personal Health Information Protection Act* (***PHIPA***) and the *Mandatory Blood Testing Act*. Parties to hearings before the **CCB** have a right to appeal **CCB** decisions to the Ontario Superior Court of Justice.

The **CCB's** key areas of activity are the adjudication of matters of capacity, consent, civil committal and substitute decision-making. Over 80 percent of applications to the **CCB** involve a review of a person's involuntary status in a psychiatric facility under the *Mental*

[183] "State of Knowledge on Advance Requests for Medical Assistance in Dying", December 2018, page 35.
[184] See online at: https://cca-reports.ca/wp-content/uploads/2019/02/The-State-of-Knowledge-on-Advance-Requests-for-Medical-Assistance-in-Dying.pdf
[185] Consent and Capacity Board, online: http://www.ccboard.on.ca/

Health Act, or a review under the ***Health Care Consent Act*** of a person's capacity to consent to or refuse treatment.

Typically, the **CCB** deals with issues of involuntary detention in psychiatric facilities, community treatment orders, and capacity to consent to treatment, capacity to manage property and capacity to consent to admission to a care facility. The **CCB** also hears applications from health care providers and substitute decision makers in respect of decision-making for incapable persons, including applications to address the appointment and removal of substitute decision makers for incapable persons.

In overview, the **CCB** has the authority to hold hearings to deal with the following matters:

***Health Care Consent Act, 1996,* SO 1996, c 2 Sch A**

- Review of capacity to consent to treatment, admission to a care facility or personal assistance service.
- Consideration of the appointment of a representative to make decisions for an incapable person with respect to treatment, admission to a care facility or a personal assistance service.
- Consideration of a request to amend or terminate the appointment of a representative.
- Review of a decision to admit an incapable person to a hospital, psychiatric facility, nursing home or home for the aged for the purpose of treatment.
- Consideration of a request from a substitute decision maker for directions regarding wishes.
- Consideration of a request from a substitute decision maker for authority to depart from prior capable wishes.
- Review of a substitute decision maker’s compliance with the rules for substitute decision making.

***Mental Health Act,* R.S.O. 1990, c. M. 7**

- Review of involuntary status (civil committal).
- Review of a Community Treatment Order.
- Review as to whether a young person (aged 12 to 15) requires observation, care and treatment in a psychiatric facility.
- Review of a finding of incapacity to manage property.

***Personal Health Information Protection Act, 2004* S.O. 2004 c. 3 SCH A**

- Review of a finding of incapacity to consent to the collection, use or disclosure of personal health information.
- Consideration of the appointment of a representative for a person incapable of consenting to the collection, use or disclosure of personal health information.
- Review of a substitute decision maker's compliance with the rules for substitute decision-making.

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

- Review of statutory guardianship for property.

***Mandatory Blood Testing Act, 2006* S.O. 2006 c. 26**

- Order a person to provide a blood sample for analysis

(5) The Canadian Charter of Rights and Freedoms

The ***Canadian Charter of Rights and Freedoms*** is significant with respect to the right to refuse treatment, and consequently, with respect to the role of substitute decision making. It provides for freedom of conscience, freedom of religion, for life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

In addition, the ***Charter*** provides that every individual is equal before and under the law, and has the right to equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on...age or mental or physical disability. We are to be mindful, however, of section 1 of the ***Charter***, since this section makes it clear that the guaranteed rights and freedoms of individuals are not absolute, but rather, are subject to such reasonable limits prescribed by law in a free and democratic society.

See the discussion starting at paragraph 57 of the **MAID** case of ***Carter v. Canada (AG)*** which addresses the Charter and the decision to strike down parts of section 241(b) and section 14 of the *Criminal Code* as they unjustifiably infringed on section 7 of the *Charter.* The ***Carter*** case involved two patients. Kay Carter's children took her to Switzerland for an assisted death before the Court heard the case, but her condition, spinal stenosis, though painful was not terminal, so her death would not have been "reasonably foreseeable". [186]

Few people are satisfied with this compromise legislation, Federal Bill C-14 *An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)*. People who oppose causing death are obviously unhappy. People who say the legislation is too limiting are also unhappy and some have gone to court to challenge the limits to assisted death.

One challenge has already been successful. A Superior Court judge in Quebec has held the requirement that death be "reasonably foreseeable" is unconstitutional.[187] The court gave the federal and Québec governments until March 2020 to amend their legislation.

In British Columbia, plaintiffs launched a court challenge to the requirement in the *Criminal Code* that death be reasonably foreseeable. However, the plaintiffs

[186] *Carter, supra* note 17.

[187] *Truchon c. Procureur général du Canada*, 2019 QCCS 3792 (CanLII); also see British Columbia Civil Liberties Association (BCCLA) presentaion on "Constitutional Issues in Medical Assistance in Dying" by Grace Pastine at the 2019 Isaac Pitblado Lectures, and what the BCCLA is doing in respect of the future of MAiD online: https://bccla.org/

discontinued the challenge, and the court did not make a determination about the constitutionality of the reasonably foreseeable death criteria.[188]

There have also been challenges by minors since **MAID** is limited to adults, by persons suffering major mental conditions since the victims' deaths are not reasonably foreseeable and by persons who object to having to be capable at the time the treatment is to be administered.

On the other side of the coin, some health practitioners conscientiously object to their involvement in having to cause the death of their patients. The workaround, that their obligation is to make an "effective referral" of the patient to health practitioners prepared to cause death, remains unsatisfactory to many health practitioners. [189]

Even though **MAID** is legal in Canada, the law governing who may avail of it remains in flux.

(6) Survey of Historical and Recent Case law

***In the Matter of Shirley Dinnerstein* 1978 Mass. App., 380 N.E. 2d 134**

A 67-year-old patient suffered from advanced stages of Alzheimer's disease and in an essentially vegetative state. She was irreversibly and terminally ill. There was no lifesaving or life-prolonging treatment. The Court was asked to address whether a physician attending an incompetent, terminally ill patient may lawfully direct that resuscitation measures be withheld in the event of cardiac or respiratory arrest where such a direction has not been approved in advance by a Probate Court.

[188] British Columbia Civil Liberties Association, [Internet]. RELEASE: B.C. Supreme Court adjourns B.C. Civil Liberties Association's assisted dying case. September 18, 2019 [cited 2019 Sep 30]. Available from: https://bccla.org/news/2019/09/release-b-c-supreme-court-adjourns-b-c-civil-liberties-associations-assisted-dying-case/

[189] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario,* 2019 ONCA 393 (CanLII)

The Court held that the law did not prohibit a course of medical treatment excluding attempts at resuscitation in event of cardiac or respiratory arrest and the validity of the physician's order to that effect did not depend on prior judicial approval.

Cruzan v. Director, Missouri Department of Health, et. al. **1990 110 S.Ct. 2841 U.S. Supreme Court**

As a result of a motor vehicle accident Nancy Cruzan was in a persistent vegetative state. Cruzan's parents sought a declaratory judgment seeking judicial sanction of their wish to terminate artificial hydration and nutrition.

The Court held that the United States constitution did not forbid Missouri from requiring clear and convincing evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment. The Court also held that the state Supreme Court did not commit a constitutional error in concluding that evidence adduced at trial did not amount to clear and convincing evidence of the patient's desire to cease hydration and nutrition. Further, due process did not require state to accept substituted judgment of close family members absent substantial proof that their views reflected those of the patient.

Malette v. Shulman **(1990), 72 OR (2d) 417 ONCA**

The Court of Appeal held that the defendant physician had committed a battery against an unconscious patient to whom he gave blood transfusions. Although she had signed a Jehovah's Witness medical alert card specifying that no blood be administered under any circumstances, the doctor refused to abide by its directive. It was beside the point that he saved her life and that the patient fully recovered from her injuries. As the court explained its decision: "to deny individuals freedom of choice with respect to their health care can only lessen, and not enhance, the value of life." The court went on to extol: "the freedom of the patient as an individual to exercise her right to refuse treatment and to accept the consequences of her own decision."

Fleming v. Reid; Fleming v. Gallagher **1991 4 OR (3d) ONCA**

The appellants were involuntary psychiatric patients who suffered from schizophrenia. The attending physician determined that they were not competent to consent to

psychiatric treatment and proposed to treat them with neuroleptic drugs (which control or minimize psychotic episodes or symptoms associated with schizophrenia for many, but not all, patients and which have significant and unpredictable harmful side effects). While competent, the patients expressed the desire not to take the drugs. The Official Guardian, the incompetent patient's substitute decision-maker, refused consent to the proposed treatment in accordance with the expressed wishes of the patient when the patient was competent. The physician applied to the review board for an order authorizing the treatment. The order was granted on the basis that the treatment was in the patient's best interest.

The orders were affirmed on appeal. Although the statutory scheme was found to deprive the appellants of their security of the person contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*, the deprivation was held not to violate the principles of the fundamental justice since the scheme was in accord with the common law principles that underlie the *parens patriae* jurisdiction of the court. The patients appealed.

The Court of Appeal held that at common law, every competent adult has the right to be free from unwanted medical treatment. A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to treatment.

The common law right to determine what shall be done with one's own body and the constitutional right to security of the person can be treated as co-extensive.

The impugned provisions of the *Mental Health Act*, from which the review board authorized the treatment, manifestly operated so as to deprive the appellants of their right to security of the person as guaranteed by s.7 of the *Charter*. Few medical procedures are more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible adverse side effects.

The *parens patriae* jurisdiction cannot be invoked to deprive competent mentally ill patients of rights expressly granted by statute or to abrogate their *Charter* rights.

A legislative scheme which permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, violates the basic tenets of our legal system and is not in accordance with the principles of fundamental justice.

The impugned legislative scheme was not saved by s.1 of the *Charter*. The violation of the principles of fundamental justice worked by the scheme could be neither "reasonable" nor "demonstrably justified in a free and democratic society". The fundamental right to personal security should not be infringed any more than is clearly necessary. Although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state had not demonstrated any compelling reason for entirely eliminating the right, without any hearing or review, in order to further the best interests of involuntary incompetent psychiatric patients in contravention of their competent wishes. To completely strip those patients of the freedom to determine for themselves what shall be done with their bodies could not be considered a minimal impairment of their *Charter* right.

***Re J (a minor)* [1992] 4 All ER 614 Court of Appeal**

J, a 16-month-old child was profoundly handicapped, both mentally and physically, as a result of an accident. He was severely micro cephalic, had a severe form of cerebral palsy, cortical blindness and severe epilepsy. He was largely fed by a nasogastric tube. Medical opinion was unanimous that J was unlikely to develop much beyond his present level of functioning, that that level might well deteriorate and that his expectation of life, although uncertain, would inevitably be short. He required constant attention day and night.

His doctor wrote a report in which she expressed the view that "it would not be medically appropriate to intervene with intensive therapeutic measures such as artificial ventilation if J were to suffer a life-threatening event…"

The local authority sought and was granted an interim order requiring the health authority to use intensive therapeutic measures including artificial including artificial ventilation for so long as they were capable of prolonging his life.

The health authority, supported by the Official Solicitor and the local authority, having changed their mind, appealed against the order. J's natural mother sought to uphold the order.

The court held that it could not exercise its inherent jurisdiction over minors by ordering a medical practitioner to treat the minor in a manner contrary to the practitioner's clinical judgment since to do so would require the practitioner to act contrary to the fundamental duty which he owed to his patient, which, subject to obtaining any necessary consent, was to treat the patient in accordance with his own best clinical judgment. The appeal was allowed and the judge's order set aside leaving the health authority and its medical staff free, subject to those with parental responsibilities for J consenting to him being treated by the medical staff of the health authority, to treat J in accordance with their best clinical judgment.

***Sawatsky v. Riverview Health Care Centre*, 1998 CanLII 19469 (MBQB)**

Mr. Sawatsky was admitted to Riverview Health Care Centre and was under a resuscitation order. He had a tracheostomy and had difficulty communicating. His wife of 40 years was at his bedside every day. After 5 months, a do not resuscitate order was imposed without consulting Mrs. Sawatsky who then moved for an interlocutory injunction to enjoin Riverview from imposing the do not resuscitate order.

The Court ordered the Manitoba Public Guardian to represent Mr. Sawatsky and consented to his treatment despite his wife's objections. Mrs. Sawatsky claimed that she could communicate with her husband, but Riverview claimed that she was not being realistic about his condition and that he could not communicate. Inexplicably, the Public Trustee refused to become involved.

The resuscitation order was reinstated by the Court. The Public Guardian was chastised and ordered to represent Mr. Sawatsky. All parties were required to obtain medical

reports. The Court said that generally the Courts do not review such do not resuscitate orders, but it appeared that the Courts had never considered such cases in light of the *Canadian Charter of Rights and Freedoms* or the *Human Rights Code*. There were meritorious issues for trial and the status quo would be maintained until trial. There is a role for the Courts in advising of the legality of disputed medical decisions. There is a public interest in protecting patients and reassuring the public.

Madam Justice Beard, in ***Sawatsky***, claimed that in all her years on the Bench she has never dealt with so difficult a case. She said she was surprised to learn that a doctor can make a do not resuscitate order without the consent of the patient or his or her family, and that the Courts have held that such a decision is exclusively within the purview of the doctor, and is not a decision to be made by the Courts.

The Judge referred to many cases and distinguished them on the basis that most dealt with a patient in a persistent vegetative state. ***Sawatsky***, she said, is different. Mr. Sawatsky is conscious and alert, and in this case, unlike the others, there are serious issues in dispute as to Mr. Sawatsky's condition and prognosis.

The Manitoba League for Persons with Disabilities intervened in the case, concerned about the ramifications for vulnerable people if such decisions are considered to be purely medical. If these were tough decisions about the allocation of medical services, such considerations ought to have been raised.

The hospital and Mrs. Sawatsky were able to resolve their differences and the case did not proceed.

However, had it proceeded, the case would have, in the words of the lawyer for Mrs. Sawatsky, explored the boundaries of consent - when it is required and when it is not. He said that whether the treatment is futile and whether the quality of life might not be there is irrelevant as long as a cognizant and competent person chooses these results.

Janzen v. Janzen **[2002] 44 ETR (2d) 217**

In this case there was a dispute over the guardianship of a 42 year-old-man in a vegetative state, between his wife and sister. He did not have a POA for Personal Care and his wife was making personal care decisions on his behalf. When his doctors advised there was no chance of recovery, she intended to consent to withdrawing the life-prolonging treatment. His sister disagreed and started a court application to become his guardian to keep the treatment going in the hope that he would get better. The wife also applied for guardianship, claiming that her plan to withdraw treatment was in line with her husband's wishes as he wished to die naturally. The Court noted:

> I note that Maria Janzen and Edward Janzen have been married for over 12 years. They have two children. They have operated as an intimate family unit for many years. There is no evidence whatsoever to suggest that Maria Janzen would not know her husband's wishes in these circumstances and that she would not have his best interests at heart. I consider it instructive that under s. 20(1) of the *Health Care Consent Act, 1996*, supra, in the absence of a court order, the spouse of an incapable person is considered to have a higher right than a sibling to give or refuse consent to medical treatment on behalf of the incapable person. I believe this reflects that in the normal course, a spouse will have been more intimately involved than a sibling in the recent life of the incapable person.[190]

The Court agreed with the medical experts finding that there was little chance of recovery and found that the wife's guardianship plan to better represent the husband's wishes and dismissed the sister's application.

***Scardoni v. Hawryluck*, [2004] ETR (3d) 226**

In this case an older adult was suffering from Alzheimer's disease and aspirant pneumonia and had been placed in intensive care on two occasions. Her doctor met with her two attorneys for personal care, her daughters, and suggested that treatment be stopped. The attorneys refused to consent to the ending of treatment and the doctor applied to the Consent and Capacity Board under section 37 of the ***Health Care Consent Act*** (an application to determine compliance with principles for giving or refusing consent under section 21 of the Act).

[190] *Janzen v. Janzen* [2002] 44 ETR (2d) 217 at para 42.

The **CCB** found that the attorneys had not complied with the principles of substitute decision making by withholding consent. The attorneys appealed arguing that the **CCB** effectively ignored the mother's personal beliefs, values and wishes and determined the case entirely on the basis of its estimate of the benefits and burdens to her health and quality of life and the weight that it would give to them.

The Ontario Superior Court of Justice allowed the appeal. Justice Cullity concluded:

> I do not, however, believe that the Board was correct in its interpretation of s. 21(2)(b) which directs that, in determining what an incapable person's best interests are, a substitute decision-maker "shall take into consideration . . . any wishes expressed by an incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1)".
>
> The Board addressed the meaning, and significance, of this paragraph as follows:
>
> > Did the legislature mean a wish expressed that was incapable or that was expressed before the person attained the age of 16, or did the legislature mean a wish that was not applicable to the circumstances, or both? In our view, a wish had to be applicable to the circumstances in order to be covered by this provision.[191]

Justice Cullity also stated:

> I cannot agree that wishes expressed by an adult person that do not fall within s. 21(1) because they are insufficiently specific to permit an inference that they are "applicable to the circumstances" cannot be "wishes . . . that are not required to be followed" under s. 21(1) for the purposes of s. 21[(2)](b).[192]

The **CCB** also erred as its factual conclusions were found to have no evidentiary basis, including the finding that the mother had suffered cardiac arrests. The **CCB** assumed, without evidence, that the mother's death would be swift if there was no further life-prolonging treatment.

***Barbulov v. Cirone*, 2009 CarswellOnt 1877 (SCJ)**

A father was in hospital with no chance of neurological recovery. His doctor proposed a treatment plan to the family to take the father off a ventilator and not put him back on if

[191] *Scardoni v. Hawwryluck*, [2004] ETR (3d) 226 at paras 51-52.
[192] *Ibid* at para 55.

his breathing worsened and no CPR to be given. The father had a POA for Personal Care appointing his son as his attorney. The POA provided instructions not to prolong his death with life support. The attorney argued that the instructions in the POA did not accurately reflect his father's wishes as English was his second language and he would not have been able to read and understand the POA. The doctor applied to the **CCB**, and the **CCB** agreed that the son had not complied with the principles of substitute decision making as set out in the ***HCCA***. The **CCB** ordered the attorney to consent to the proposed treatment plan. The son appealed.

On appeal, the Court held that the **CCB** erred in concluding that the POA consisted of a "prior capable wish". The issue was not whether the document met the requirements of the Act, but whether the father understood and approved of its contents so that it could be said that the document truly expressed his wishes with respect to treatment. However, the Court held that the **CCB** had not erred in deciding that the son had failed to give or refuse consent to treatment in accordance with the principles contained in section 21 of the *HCCA*. As a substitute decision maker, the son had an obligation to do what was in the father's best interests.

Of note, the son sued the lawyer who drafted the POA for his father for lawyer's negligence and to recover the legal fees he spent on the appeal of the **CCB** decision. However, the Court concluded that the father's lawyer owed no duty of care to the son and his claim was dismissed.[193]

***SL(Re)* 2012 CanIII 35952 (ON CCB)**

A dispute arose between family members as to whether the incapable patient, who may have been Jehovah's Witness, should receive a blood transfusion. There was no advance directive, and the Consent and Capacity Board made the decision regarding the patient's best interests based on an examination of her "conversations, behaviours ad actions or

[193] *Barbulov v. Huston*, 2010 ONSC 3088.

inactions" over the course of several years. These provided evidence that the patient distanced herself form the Jehovah's Witness faith.

***Rasouli v. Sunnybrook Health Sciences Centre*, 2013 SCC 53**

As a result of contracting meningitis following surgery to remove a brain tumour, Mr. Rasouli suffered severe brain damage. He was first diagnosed as being in a persistent vegetative state, but later "upgraded" to being minimally conscious. After winding its way through the court system and on final appeal the Supreme Court of Canada was required to consider whether ending life support was a personal care decision for an attorney, or a decision to be made by the treating physicians. The doctors sought to withdraw life support, which they argued was not "treatment" in the circumstances since, in their view, there was no prospect of recovery.

However, the Mr. Rasouli's wife, Dr. Salasar, who trained as a physician in Iran, disagreed and refused to authorize the removal of life support. She and their children felt he was aware and responsive and, in any event, his religious beliefs require that all things be done to keep him alive. Mr. Rasouli did not have a POA for Personal Care, nor had he expressed any prior instructions.

The Supreme Court of Canada, by a five-judge majority, held that the wording of the ***HCCA*** does not limit a "health-related purpose" to that which physicians consider to be medically beneficial. As a result, the Court agreed with the wife's position that the removal of life support constituted a treatment decision, which one's family, or attorney, if appointed had the authority to make.

***Friedberg at al v. Korn* 2013 ONSC 960**

This case highlights the problems that arise in the use of boiler-plate clauses with respect to "end-of-life" clauses in POA for Person Care. In this case, a no "artificial or heroic" measures clause had been included in the POA signed by Mrs. Freidberg. The lawyer's evidence was that this clause had not been reviewed in detail with the client. The Superior Court of Justice overturned the finding of the Consent and Capacity Board, holding that

there was insufficient evidence to establish that the grantor understood the effect of the clause or knew and approved of the POA.

While the use of templates and precedents can be a cost-effective and appropriate tool, lawyers are urged to tailor the POA documents to the client's wishes by obtaining detailed instructions and having thorough discussions with the client.

***Bentley v. Maplewood Seniors Care Society*, 2015 BCCA 91**

The family of an elderly woman with advanced Alzheimer's disease, who resided in a long-term care home, applied to the court for an order to stop staff from feeding her in compliance with her previous expressed capable wishes. The older adult had prepared a document in 1991 called a "statement of wishes" in which she had asked that she be "allowed to die and not be kept alive by artificial means or 'heroic measures'" should there be no reasonable expectation of her recovery from extreme physical or mental disability. She also noted: "no nourishment or liquids" and if she became "unable to recognize the members of my family, I ask that I be euthanized".

Her family asked the staff at the home to stop feeding her because they believed she had reached the health condition described in her "statement of wishes". The home refused, arguing that the older adult would open her mouth and accept the food, and that this was not a reflexive action. The Court agreed with the home. The older adult was still capable of making choices as she chose dessert over other food. To deprive the resident of food was not legally permitted and was a denial of the necessities of life under section 215(2) of the *Criminal Code*. The "statement of wishes" was not a valid "advance directive" and the Court went on to state:

> Even if [the older adult] was found incapable of making the decision to accept oral nutrition and hydration, I am not satisfied that the British Columbia legislature intended to allow reference to previously expressed wishes or substitute decision makers to be relied on to refuse basic care that is necessary to preserve life.[194]

[194] *Bentley v. Maplewood Seniors Care Society*, 2015 BCCA 91 at para 8.

***HM (Re),* 2017 CanLII 34282 (ON CCB)**

HM was an 81-year-old man who was being kept alive by live support, machines, tubes and monitors in the ICU with no realistic chance of recovery. The standing order of his substitute decision maker (his wife) was to apply all measures available to keep HM alive. HM's physician submitted that HM had expressed a wish, while still capable, that in such circumstances he should not be kept alive artificially, but should be allowed

The **CCB** concluded that HM was not capable of consenting, or refusing consent, to the doctor's proposed treatment plan. The **CCB** held that his wife, as his spouse and attorney for personal care was the appropriate substitute decision maker for HM's treatment. The **CCB** further held that the wife had not complied with the principles of giving or refusing consent as set out in the **HCCA**[195] and ordered the wife to consent to the proposed treatment plan.

PART IX – CONCLUDING REMARKS

The drafting of POA'S have far wider reaching affects given the increase of incidents of incapacity combined with an aging population and a population that lives longer generally.

Lawyers must endeavor to be fully aware of the potential minefield of things that can go wrong as the result of a granting of a POA. It is essential to become inherently familiar with the legislation and recent caselaw in order to confidently advise our clients and ultimately think more laterally when drafting a document that confers an enormous degree of power over what may be a vulnerable person's affairs. The areas covered in this paper do not purport to be an exhaustive address of each and every issue. Rather it is intended that the issues raise concerns for which we as professionals can strive to provide satisfactory solutions, and increase the standard of accountability.

[195] *Health Care Consent Act*, *supra* note 59, at s. 21.

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

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