WHALEY ESTATE LITIGATION ON GUARDIANSHIP

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Edited by Laura Cardiff

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FOREWORD

It is a great pleasure for me to write the foreword to this very timely book. We have been dealing with guardianship issues for many years already in Ontario under the *Children's Law Reform Act* and also under the *Rules of Civil Procedure* in respect of litigation guardians. Some 20 years ago, we were introduced to the guardianship regimes imposed by the *Substitute Decisions Act*. And although there is more and more case law on guardianship, it is surprising that no comprehensive discussion of this important legal institution has yet been published. This book seeks to fill that void and, I believe, does so very successfully.

The book, written entirely by members of Whaley Estate Litigation, comprises seven chapters that cover every conceivable issue that can arise in the context of guardianship. In the interests of full disclosure, I reveal that I am counsel to the firm, but have not had a hand in the writing of the book.

In Chapter 1, Arieh Bloom provides an excellent summary of the types of guardianship that can arise. It will be particularly useful for someone who seeks to orientate herself in this complex area of the law. Arieh clearly distinguishes between various guardianships: type (property and personal care); appointment process (court appointed or statutory); and legislative regime (*Substitute Decisions Act* and *Children's Law Reform Act*). He also introduces the reader to matters developed in later chapters, such as accounting and reporting obligations and the procedures anent the appointment of a guardian.

In Chapter 2, Kimberly Whaley describes the circumstances that necessitate the appointment of guardians. Guardians are appointed if the person whom they are to "guard" is incapable of managing his property or personal care himself. That raises the question of the meaning of "capacity." Kim is eminently able to discuss that topic, having written extensively about it. She makes it clear that capacity is decision-specific. Thus the test for capacity varies with the decision a person needs to make. The tests range from a very relaxed standard for entering into marriage to a very strict one for making a will. The chapter also contains a helpful discussion of the unique role of counsel appointed under s. 3 of the *Substitute Decisions Act* to represent an incapable person. The chapter concludes with a very useful consideration of the approach a professional advisor should take when dealing with an incapable person.

Chapters 3 and 4 are companion pieces. Joanne Hwang discusses guardianship of the person in Chapter 3. Lionel Tupman's focus in Chapter 4 is guardianship of property. Each examines why a particular guardian may need to be appointed and then discusses the procedure specific to that guardianship application. Thus, they consider the qualifications of guardians, the role of the Public Guardian and Trustee, who is entitled to receive notice of the application, the criteria the court will take into account and what the court order should contain. By reference to the governing legislation, Joanne and Lionel make clear how these applications differ from other kinds of applications under the *Rules of Civil Procedure*. They also outline the different processes that apply to the appointment of guardians for adults and for children. Finally, they discuss the guardians' right to compensation.

Birute Lyons has more than 25 years' experience preparing attorney and estate accounts. So she is eminently qualified to discuss the preparation and evaluation of guardianship and attorney accounts. In Chapter 5, Birute explains clearly the duty of the guardian under the *Substitute Decisions Act* and the *Children's Law Reform Act* to maintain accurate accounts and records of all transactions and she includes useful tips to guide guardians. Birute gives a helpful overview of the application to pass accounts and the process of the passing of accounts. Best of all, she includes a comprehensive set of mock accounts, complete with intentional errors to educate guardians and their advisors.

Heather Hogan introduces Rule 7 motions in Chapter 6. Rule 7 makes provision for the representation of parties under a disability by a litigation guardian. Rule 7.08 stipulates that court approval is required for a consent judgment or settlement of a claim by or against a party under disability. Heather looks at the historical context and rationale for the rule and discusses the process that must be followed on a motion in detail, including what disclosure is required, who needs to be served, what the court order should contain, and legal fees. The chapter contains a useful discussion of contingency fee agreements, which the courts tend to scrutinize closely.

Chapter 7 is a fitting conclusion to the first six chapters. In it Benjamin Arkin discusses the topic of costs in capacity-related litigation. Costs are dear to a lawyer's heart, but as the award of them is discretionary, they are often unpredictable. This is especially so in capacity litigation, because it concerns not the parties' own rights, but the rights of a third, non-participant party. Ben explains how the modern approach to costs in estates litigation has been carried over into capacity litigation and sets out the applicable principles. The chapter provides helpful tips on strategy. Ben suggests that counsel should keep the issue of costs in mind from the outset as they fashion their litigation strategy and not treat it as an afterthought when they make their costs submission.

Seven disparate chapters by seven different authors could render a volume such as this disjointed and fragmented. Laura Cardiff was assigned the task of editing the chapters to make them into a coherent whole. In my opinion, she has been eminently successful. I congratulate her and the writers of the individual chapters for a very readable and informative volume. It is a clear exposition of this important topic.

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PREFACE: THE GUARDIAN AS SUBSTITUTE DECISION-MAKER IN ONTARIO

The *Health Care Consent Act* contains a hierarchy of substitute decision-makers ("SDMs") for incapable individuals. A guardian of the person is at the top of the hierarchy – if the person who is the subject of the guardianship has been found to be incapable of making that treatment decision or decision about admission to a care facility and if the guardian has authority to make the decision.[1] Being at the top of the hierarchy means the guardian's authority trumps that of a Representative appointed by the Consent and Capacity Board, trumps an Attorney for Personal Care appointed pursuant to a valid Power of Attorney ("POA") and trumps all family members. However, like all SDMs, the *HCCA* requires that the guardian be him or herself capable with respect to the decision, willing to make it and available.

In the case of a full guardianship, the guardian has authority to make those decisions because the court has found the person incapable to make his or her own treatment and admission decisions.[2] In the case of partial guardianship, there must be specific authority to make treatment and admission decisions, based on a finding by the court that the person is incapable to make them.

Note that under the *HCCA*, capacity is both time and issue specific: a person may be capable in respect of some treatment decisions and incapable in respect of others, or capable at some times and incapable at others. Full guardianship or partial guardianship with authority to make decisions under the *HCCA* obviates the need to assess the person's capacity under the *HCCA* because, by court order the person has been found incapable to make health care decisions.

However, a partial guardianship order may provide the guardian with authority to make treatment decisions in respect of treatments for which the person has been found incapable by the health practitioner who proposed the treatment. In that case the guardian should ensure the person's capacity was assessed and the finding of incapacity noted in the person's chart. The process of making a finding of incapacity requires that the health practitioner advise the person of the finding, its consequences and of the right to challenge it by application to the Consent and Capacity Board. That the health practitioner complied with these rules should also be charted.[3]

While everyone has the right to make foolish or even dangerous health care decisions for themselves, SDMs do not: s. 21 of the *HCCA* sets out the criteria for substitute decision-making. First and foremost is the SDM's obligation to make treatment decisions that accord to the incapable person's previously expressed capable wishes, if the wish applies to the circumstances, was made after the incapable person turned 16 and if it is not impossible to comply with. If there is no such wish, or if it is impossible to comply with, the decision shall be made based upon the person's best interests – a determination of which must include consideration of incapable wishes, wishes expressed prior to the person's 16th birthday, consideration of the person's values and beliefs and best medical interests, along with any other relevant factor.

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1 *HCCA*, s. 20(1).

2 *SDA*, ss. 59, 45.

3 These obligations are part of the Rules of Professional conduct of every College of health practitioners and incorporated by reference into the *HCCA*: *HCCA* s. 17.

In obtaining substitute consent to treatment, the health practitioner's obligation includes ensuring that the decision is in accordance with these stipulations and they have the right if not the obligation to challenge inappropriate substitute treatment decisions by application to the Consent and Capacity Board.[4]

An SDM, including a guardian of the person, may on occasion have need of an application to the Consent and Capacity Board. The *HCCA* contemplates applications both to determine if a wish is applicable to the incapable person's circumstances and to depart from a previously expressed capable wish applicable to the person's circumstances.

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4 *HCCA* s. 31 with respect to treatment decisions, s. 54 with respect to decisions about admission to a care facility.

CHAPTER 1

Introduction to Guardianship in Ontario

INTRODUCTION

Individuals who are unable to manage their own finances and personal care and who are not capable of making their own financial or personal care decisions are vulnerable and may be susceptible to abuse. Guardianship, often a choice of last resort, is one means of managing the affairs of individuals under disability. There are various guardianship regimes recognized under the *Substitute Decisions Act*[1] ("*SDA*"), *The Children's Law Reform Act*[2] ("*CLRA*") and the *Rules of Civil Procedure*.[3] Across these regimes there are two basic categories of guardianship: of the person, and of property.

This introduction will seek to provide the reader with a broad overview of the guardianship regime in Ontario. The overview will describe the appointment process and powers and obligations of guardians under the various statutes, and will include an introduction of the rigorous accounting and reporting obligations of guardians, as well as the procedures surrounding the appointment of a guardian. The subsequent chapters in this book will then offer the reader a more focused exegesis on guardianship law in Ontario.

GUARDIANSHIP UNDER THE *SUBSTITUTE DECISIONS ACT*

The purpose of the *SDA* is to protect the vulnerable while at the same time ensuring that the dignity, privacy and autonomy of the individual are "assiduously protected."[4] The *SDA* presumes a person is capable.[5] Sections 22(3) and 55(2) of the *SDA* require that a court "shall not" appoint a guardian if it is satisfied that the need for decisions can be satisfied by an alternative course that is less restrictive of the person's decision-making rights.

Guardians of property and of the person are fiduciaries. These obligations are codified under subsection 32(1) and 66(1) of the *SDA*.

There are a number of ways a guardian can be appointed under the *SDA*. The first is an open-court hearing by way of application, while the second is by way of a summary disposition under sections 72, 74 and 77 of the *SDA*. The summary method of appointment avoids the involved parties having to attend court but requires more by way of documentary evidence before the application can be considered by a judge. Generally, the summary method for the appointment is utilized where the guardianship appointment is unopposed.[6]

If a certificate is issued under the *Mental Health Act*[7] certifying that a person who is a patient of a psychiatric facility is incapable of managing property, and that person has not appointed an

1 *Substitute Decisions Act,* 1992, SO 1992, c 30.
2 *Children's Law Reform Act*, RSO 1990, c C.12.
3 *Rules of Civil Procedure,* RRO 1990, Reg 194.
4 *Park v Park*, 2010 ONSC 2627 at para 47, [2010] OJ No 1840.
5 *SDA*, *supra* note 1, s 2(1).
6 *Ibid*, s 77(1).
7 *Mental Health Act*, RSO 1990, c M.7.

attorney, the Public Guardian and Trustee ("PGT") becomes the person's statutory guardian.[8] A person may request that a capacity assessor perform an assessment of his/her own capacity or of another person's capacity to determine whether the PGT should become the statutory guardian.[9] If the assessor finds the person incapable of managing property, statutory guardianship takes effect as soon as the incapable person receives a copy of the certificate issued by the assessor indicating that lack of capacity.[10] Statutory guardianship is different from other types of guardianship due to its automatic mechanism. Once the above-mentioned criteria occur, the guardianship is triggered.

Once a statutory guardianship takes effect, any of the following persons may apply to the PGT to replace the PGT as an incapable person's statutory guardian:

(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 but does not give the attorney authority over all of the incapable person's property.

(4) A trust corporation within the meaning of the *Loan and Trust Corporations Act*,[11] if the incapable person has a spouse or partner who consents in writing to the application.[12]

GUARDIANSHIP OF PROPERTY

i. Court appointment

A guardian for property can be court appointed to manage the financial affairs of a person who is declared mentally incapable of doing so.

Before appointing a guardian for property, the court must be satisfied that the following two conditions are met:

(1) the person is incapable of managing property; and

(2) as a result of such incapacity, it is necessary for decisions to be made by a person authorized to do so.[13]

In the absence of these two conditions, a guardian should not be appointed.[14]

A person is incapable of managing property if the person "is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."[15]

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8 *Ibid*, s 15
9 *Ibid*, s 16(1).
10 *Ibid,* s 16(5)
11 RSO 1990, c L.25
12 *SDA*, *supra* note 1, s 17(1)
13 *Ibid,* s 22(1).
14 *Deschamps v Deschamps*, [1997] OJ No 4894 at para 11, 75 ACWS (3d) 1130 (SC).
15 *SDA*, *supra* note 1, s 6.

In deciding who should be appointed a guardian, a court shall consider whether the proposed guardian is the acting attorney under a continuing attorney for property, the incapable person's wishes (if they can be ascertained) and the closeness of the relationship between the proposed guardian and the incapable person.[16]

Guardians under the *SDA* cannot be the same people who provide health care, residential, social, training or support services to the incapable person for compensation. The exception is where the person providing the services is a spouse, partner or relative or is the person's attorney for property or personal care.[17]

The court shall not appoint the PGT as a guardian unless the guardianship application proposes the PGT as guardian, the PGT consents and there is no other "suitable" person available and willing.[18]

The wishes of the incapable person play an important role in deciding who should be appointed a guardian, as was recognized in *Lazaroff v Lazaroff*. The court there held that the incapable person's wishes that her sister not be appointed should be respected; the PGT was appointed instead.[19]

An order appointing a guardian may:

(1) require a guardian to post security in a manner and amount the court considers appropriate;

(2) make the appointment for a limited period as the court considers appropriate; and

(3) impose such other conditions on the appointment as the court considers appropriate.[20]

When considering who should be appointed guardian where there are conflicting guardianship applications, the court's main focus will be the best interests of the incapable person.[21]

ii. The guardian's powers and obligations

A guardian for property can do anything the incapable person could normally do in relation to his/her own property. This includes collecting and depositing income, paying bills, making purchases, selling assets, handling investments, managing real estate and looking after legal matters. The only matter of a financial nature that a guardian of property cannot do is make, or change, a will on behalf of the incapable person.[22]

A guardian's authority ends if and when the person under guardianship dies.

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16 *Ibid*, s 24(5).
17 *Ibid*, s 24(1).
18 *Ibid*, s 24(2.1).
19 *Lazaroff v Lazaroff*, 2005 CarswellOnt 7007, 23 ETR (3d) 75 (SC).
20 *SDA, supra* note 1, s 25(2).
21 *Napper v Edwards* (1997), 16 ETR (2d) 309 at para 2, 69 ACWS (3d) 737 (Ont Gen Div).
22 *Supra* note 1, s 31.

There are general rules that dictate how a guardian for property shall use his/her powers. A guardian of property must encourage the incapable person to participate, to the best of his/her abilities, in the guardian's decisions about property.[23] The guardian shall consult with family and friends of the incapable person who are in regular contact with the incapable person and from whom the incapable person receives care.[24] A guardian for property must keep accounts as prescribed by the regulations under the *SDA*.[25]

A guardian shall act in accordance with the management plan established for property.[26] The only exception to this requirement concerns the Office of the Public Guardian and Trustee ("OPGT"), which is not required to file a management plan and acts in accordance with the policies of that office. If there is a management plan, then pursuant to section 32(11) of the *SDA*, the plan may be amended from time to time with the PGT's approval. Note that notwithstanding any requirement by a court order for court approval, the statute states that the PGT may approve the amendment of a management plan.

A guardian of property who does not receive compensation for managing property shall exercise the degree of care, skill and diligence that a person of ordinary prudence would exercise in the conduct of his or her own affairs. A guardian who is compensated for managing property is required to exercise a higher degree of skill, care and diligence, akin to that of a person in the business of managing the property of others.[27]

A guardian of property is liable for damages arising from breach of the guardian's duty.[28] However, if the court is satisfied that the guardian has acted "honestly, reasonably and diligently", even though there has been a breach of duty, the court may relieve the guardian of all or part of the liability.

Subsection 32(12) of the *SDA* expressly states that the *Trustee Act*[29] does not apply to the exercise of a guardian's powers or the performance of a guardian's duties.

iii. Compensation

The compensation allowed for a guardian of property is higher than the percentages recognized at common law for estate trustees. Based on the regulations to the *SDA*, a guardian is allowed compensation based on 3% of disbursements of capital and revenue plus an annual care and management fee of .6% of the fair market value of assets under administration by the guardian. Section 40(2) of the *SDA* directs that compensation may be taken by the guardian monthly, quarterly, or annually. In determining the appropriate level of compensation, courts have taken the percentage approach that is specified in the regulations and "cross-checked" it against the factors listed in *Toronto General Trusts Corp v Central Ontario Railway Co*[30] and *Jeffrey Estate (Re)*[31] to have a more holistic approach in determining income.[32] Those factors include:

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23 *Ibid,* s 32(3).
24 *Ibid,* s 32(5).
25 *Ibid,* s 32(6). O Reg 100/96.
26 *Ibid,* s 32(10). *Stachowski v Stachowski*, 2005 Canlii 35789 (SC) at para 15.
27 *Ibid*, ss 32(7-8).
28 *Ibid,* s 33(1).
29 *Trustee Act,* RSO 1990, c T.23.
30 (1905), 6 OWR 350 (HC).
31 (1990), 39 ETR 173, 22 ACWS (3d) 1198.
32 *Shibley (Re)*, [2004] OJ No 5246 at para 33, 136 A.C.W.S. (3d) 183 (SC).

- the magnitude of the trust;
- the care and responsibility springing therefrom;
- the time occupied in performing the duties;
- the skill and ability displayed; and
- the success which has attended the administration.

iv. Court appointment procedure

An application to appoint a guardian of property for an incapable person must include:

(1) the proposed guardian's consent;

(2) a management plan for property in the prescribed form (if the guardian is not the PGT); and

(3) a statement signed by the applicant, indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application. The statement must describe the manner in which the person was informed, or if it was not possible to give the person the necessary information, the statement must describe why it was not possible.[33]

The guardian may be required to post a bond pursuant to section 25(2)(b) of the *SDA*. The courts have been strict with requiring guardians to post a bond. Often the PGT is of the position that a bond should be posted. In *Gryszczuk v Gryszczuk,* the court required a spouse to post a bond even though he was the only beneficiary of his wife's estate. The court stated at para 7:

> I agree with the submission of the Public Guardian and Trustee that the fact that Mr. Gryszczuk is the only beneficiary of his wife's estate is not determinative of the issue of whether or not he ought to be required to post security. This issue must be considered from the perspective of what is in the best interests of Dinah Gryszczuk. The duty of the court is to ensure that Dinah Gryszczuk and her property are protected. The law is clear that security for the due performance of the duties of a guardian of property is to guard against the unforeseeable and unexpected.[34]

In an application to appoint a guardian for property the following parties must be served with the application material:

(1) The person alleged to be incapable of managing property.

(2) The attorney under his or her continuing power attorney, if known.

(3) His or her guardian of the person, if known.

33 *SDA*, *supra* note 1, s 70(1).
34 *Gryszczuk v Gryszczuk*, [2002] OJ No 5944 (SC) at para 7.

(4) His or her attorney for personal care, if known.

(5) The PGT.

(6) The proposed guardian of property.[35]

The notice of application and accompanying documents shall also be served on all of the following persons by ordinary mail sent to the person's last address:

(1) The spouse or partner of the person who is alleged to be incapable.

(2) The person's children who are at least 18 years.

(3) The person's parents.

(4) The person's brothers and sisters who are at least 18.[36]

In *Boyd v Thomson* Justice MacKenzie approved of dispensing with service on family members of the allegedly incapable person for the purposes of a guardianship application. The court held that notice is the right or entitlement of the family members under section 69(6) of the *SDA*. The court therefore ruled it was open to the family members of the incapable person to waive their right or entitlement to receive notice of the application record.[37] If family members waive their right, they do not need to be served.

GUARDIANSHIP OF THE PERSON

i. Court appointment

A guardian of the person will be appointed where an individual is incapable of personal care. Notably, a finding of incapacity to manage one of the mandated categories of personal care is not a finding that a person is incapable of all. Section 55(1) of the *SDA* provides that a court may appoint a guardian of the person where:

(1) the person is found to be incapable of personal care; and

(2) the incapacity results in a need to have decisions made on his/her behalf by a person who is authorised to do so.

Under section 45 of the *SDA*, 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 a decision or lack of decision.

35 *SDA*, *supra* note 1, s 69(1).
36 *SDA*, *supra* note 1, s 69(6).
37 *Boyd v Thomson*, [2006] OJ No 4796 at para. 32, 28 ETR (3d) 312 (SC).

Partial guardianships have been viewed as a way of protecting the dignity of those found to have some type of incapacity relating to their personal care who at the same time are still partially able to care for themselves.

The court may make an order for partial guardianship of the person if the court finds that the incapable person is only incapable with respect to some but not all or the functions referred to in section 45 of the Act.[38] Any court order tied to guardianship of the person shall specify whether it is full or partial.[39] In addition, the court may make the appointment for a limited period of time or impose conditions to the guardianship as it sees fit.[40]

Similar to the provisions for a guardian for property, a guardian for personal care may not be a person who provides health care, residential, social, training or support services to the incapable person for compensation. The only exceptions are where the person providing the services is a power of attorney for personal care, the incapable person's guardian of property, the continuing power of attorney for property or the court is satisfied there is no one else who could be the guardian for personal care.[41]

Where the guardianship is not applied for under the summary procedure, the court shall consider the following when appointing a guardian for personal care:

a) whether the proposed guardian is an attorney under a continuing power of attorney for property;

b) the incapable person's current wishes (if they can be ascertained); and

c) the closeness of the relationship of the applicant to the incapable person, and if the applicant is the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.[42]

An application for guardianship of the person requires the consent of the guardian, evidence of incapacity and that a guardianship plan be filed with the court. The plan explains what the guardian will do if appointed to care for the incapable person. The guardian has an obligation to encourage the independence of the incapable person where it is feasible. A plan of guardianship is in a prescribed form,[43] and may be amended with the approval of the PGT.[44]

ii. The guardian's powers and obligations

Where there has been a court order for full guardianship, the guardian may:

a) exercise custodial power over the person under the guardianship, determine his or her living arrangements and provide for his or her shelter and safety;

38 *SDA*, *supra* note 1, s 60(1).
39 *Ibid* s 58(3).
40 *Ibid* s 58(2).
41 *Ibid* ss 57(1), 57(2), 57(2.1), 57(2.2).
42 *Ibid* s 57(3).
43 O. Reg. 26/95 Form 3.
44 *SDA*, *supra* note 1, s 66(16).

b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;

c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;

d) have access to personal information, including health information and records, to which the person could have access if capable, and consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;

e) on behalf of the person, make decisions to which the *Health Care Consent Act, 1996*[45] applies, and make decisions about the person's health care, nutrition and hygiene;

f) make decisions about the person's employment, education, training, clothing and recreation and about any social services provided to the person; and

g) may exercise the other powers and perform the other duties as stated in the court order.[46]

For partial orders for guardianship of the person, the court shall specify which functions the person is found to be incapable of and the guardian may exercise the powers that are specified in the order.[47]

The guardian of the person has variously imposed statutory obligations to ensure the incapable person's friends and loved ones have involvement in the persons care.

A guardian must encourage the person to participate to the best of his or her abilities in the guardian's decisions on his or her behalf.[48] The guardian shall seek to foster regular personal contact between the incapable person and their supportive family members and friends.[49]

A guardian shall consult with supportive family members and friends of the incapable person and the persons from whom the incapable person receives personal care.[50] A guardian must make sure to choose the least restrictive and intrusive course of action that is available.[51]

The guardian of the person is required to keep records of decisions made by the guardian on the incapable person's behalf and must act in accordance with the guardianship plan.[52]

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45 SO 1996, c 2, Sched. A.
46 *SDA*, *supra* note 1, s 59(2).
47 *Ibid,* s 60.
48 *Ibid,* s 66(5).
49 *Ibid*, s 66(6).
50 *Ibid,* s 66(7).
51 *Ibid*, s 66(9).
52 *Ibid*, ss 66(4.1) and (15).

iii. Compensation

There is no scheduled or legislated compensation scheme for a guardian of the person like there is for a guardian for property. However, case law indicates that as there is no prohibition against compensation for services rendered for personal care there is no reason to construe the *SDA* as preventing the court from ordering compensation.

The courts in Ontario have ruled that there is jurisdiction to award compensation for *bona fide* services provided to the incapable person provided there is adequate evidence of the nature and extent of the services.[53] In *Sandhu (Litigation Guardian of) v Wellington Place Apartments,* the court cited the decision in *Cheney v Byrne* for the proposition that guardians of the person could be compensated. The court in *Sandhu* awarded costs to a guardian of the person who would be providing guardianship services on a regular basis as part of a damage award to a seriously injured minor.[54]

In the more recent decision of *Childs v Childs* the Superior Court considered a daughter's claim for compensation as a result of the personal care she provided for her incapable mother in the attorney and guardianship context. While the court held that a child should not be paid to care for an ailing mother, the court drew a distinction between care that is provided when a child acts as a primary care attendant and the services a child provides in managing an incapable person's personal care. The court awarded compensation to the guardian for personal care on the basis that the guardian would have to manage the services her mother received and the care givers provided to her mother.[55]

The court in *Childs* supported the principle that compensation may be awarded for personal care where the services performed were a benefit to the incapable person and the amounts claimed are demonstrably reasonable. The reasonableness of the amount of compensation awarded to a guardian of the person must be assessed in the context of the specific financial circumstances of the incapable person. The amount awarded must not only be reasonable in relation to the services performed, it must be proportional to the means of the incapable person. Its payment should not pose a risk to the overall financial affairs of the incapable person.[56]

The factors as outlined by Justice McDermid in *Brown (Re)* provide a helpful overview of how courts view compensation for guardians of personal care. The court stated at para 4:

> a) There is no statutory prohibition against such compensation to which I was directed;
>
> b) The fact that the Legislature has not passed a statute or regulation providing for the payment of compensation to a guardian of the person or fixing the manner in which it is to be calculated does not, in my opinion, prevent the court from awarding and fixing it.

53 *Cheney v Byrne,* [2004] O.J. No. 2773, 9 E.T.R. (2d) 164 (SC); *Brown (Re)*, [1990] OJ No 5851, 21 ETR (2d) 164 (SC).
54 *Sandhu (Litigation Guardian of) v Wellington Place Apartments*, [2006] OJ No 2448 (SC).
55 *Childs v Childs,* 2015 ONSC 4036 at paras 33, 45, 46.
56 *Ibid* at para 31.

c) I do not believe that s. 32(12) of the *Substitute Decisions Act* ousts the application of s. 61(1) of the *Trustee Act* as a basis for awarding compensation to a guardian. However, the use of the word "estate" in the latter section implies a guardian of property rather than a guardian of the person.

d) In any event, I believe that the court does have jurisdiction to award compensation for legitimate services rendered by a committee of the person to an incapable person so found, provided that there is sufficient evidence about the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation.

e) The court routinely deals with claims for compensation for work done or services rendered in a variety of situations and I see no reason, in the absence of any statutory prohibition, for rejecting such a claim simply because it is made by a committee of the person.

f) Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property. In the latter case, traditionally, courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person.

g) The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable.

h) The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided, the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question.

i) There must be some evidentiary foundation to support the claim for compensation.

iv. Court appointment procedure

An application to appoint a guardian of the person for an incapable person must include:

(1) the proposed guardian's consent;

(2) a guardianship plan in the prescribed form (if the guardian is not the PGT); and

(3) a statement signed by the applicant, indicating that the person alleged to be

> incapable has been informed of the nature of the application and the right to oppose the application. The statement must describe the manner in which the person was informed, or if it was not possible to give the person alleged to be incapable the information, then it must describe why it was not possible to do so.[57]

In an application to appoint a guardian of the person the following parties must be served with the application material:

(1) the person alleged to be incapable of personal care;

(2) the attorney under his or her continuing power attorney, if known;

(3) his/her guardian of property, if known;

(4) his/her attorney for personal care, if known;

(5) the PGT; and

(6) the proposed guardian of the person.[58]

The notice of application and accompanying documents shall also be served on all of the following persons by ordinary mail sent to the person's last address:

(1) the spouse or partner of the person who is alleged to be incapable;

(2) the person's children who are at least 16 years;

(3) the person's parents; and

(4) the person's brothers and sisters who are at least 16.[59]

REMOVING AN ATTORNEY UNDER POWER OF ATTORNEY WITH A GUARDIANSHIP APPLICATION

Replacing an attorney with a guardian is often seen as an option of last resort. Generally, courts are loath to interfere with the expressed will of a grantor of a power of attorney.[60] The reluctance to remove an attorney is compounded by the fact that sections 22(3) and 55(2) of the *SDA* require that a court "shall not" appoint a guardian if an alternative course that is less restrictive of the person's decision making rights is available.

The test for removing an attorney was outlined in *Teffer v Schaefers*. Fragomeni J. stated that there must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court ignores the clear wishes of the donor, provided the evidence established that the donor was capable of granting the proper power of attorney. The court will also investigate whether the best

57 *SDA*, *supra* note 1 s 70(1).
58 *Ibid* s 69(3).
59 *Ibid* s 69(6).
60 *McMaster v McMaster*, 2013 ONSC 1115 at para 22, [2013] OJ No 877.

interests of the incapable person are being served by the attorney.[61]

The standard for attorneys' conduct is not perfection. When attorneys are in conflict with one another the court will not replace them with a guardian unless it can be shown that the conflict is sufficient to conclude that the incapable person's interest are being adversely affected.[62]

STATUTORY GUARDIANSHIP

A statutory guardianship does not require the court appointment of the guardian. The guardianship is predicated on the basis that the incapable person has not granted a continuing power of attorney for property to anyone.

The PGT becomes an incapable person's statutory guardian in one of two ways: First, if a person is a patient in a psychiatric facility and a certificate is issued under the *Mental Health Act* certifying that the patient is incapable of managing property, the PGT de-facto becomes the person`s statutory guardian.[63] Second, if a capacity assessor issues a certificate of incapacity stating that the person is incapable of managing property, the PGT becomes the person's statutory guardian of property.[64]

It is important to realise that if the allegedly incapable person refuses the capacity assessment then the statutory guardianship cannot proceed and a court application will be necessary.[65]

After becoming a person's statutory guardian of property, the PGT must ensure that the person is informed, in a manner that the PGT considers appropriate, that the PGT has become the person's statutory guardian of property and that the person is entitled to apply to the Consent and Capacity Board for a review of the assessor's finding that the person is incapable of managing property.[66]

Under the *SDA* a capacity assessment under section 16 cannot be carried out if a Continuing Power of Attorney is known to exist.[67] If a capacity assessment takes place and the person is found to be incapable of managing property then subsequently a power of attorney is found, the statutory guardianship is terminated and the attorney becomes the statutory guardian, once the power of attorney document and a written undertaking signed by the attorney to act as set out in the power of attorney are provided to the PGT.[68]

An incapable person's spouse or partner, a relative, an attorney under a continuing power of attorney or a trust corporation (if the incapable person's spouse consents in writing) may apply to the PGT to replace the PGT as statutory guardian.[69] The application to the PGT must be accompanied by a management plan.[70]

The PGT shall appoint the applicant as the incapable person's statutory guardian of property if the

61 *Teffer v Schaefers* (2008), 93 OR (3d) 447 at paras 24-25, [2008] OJ No 3618.
62 *McNutt v Draycott*, 2014 ONSC 5363 at paras. 42, 45, [2014] OJ No 4358.
63 *SDA*, *supra* note 1, s 15.
64 *Ibid*, s 16.
65 *Ibid*, s 78.
66 *Ibid,* s 16(6).
67 *Ibid,* s 16(2)(b).
68 *Ibid,* s 16.1.
69 *Ibid,* s 17(1).
70 *Ibid,* s 17(3).

PGT is satisfied that the applicant is suitable to manage the incapable person's property and that the management plan is appropriate.[71] The PGT must also consider the incapable person's wishes and the closeness of the applicant's relationship to the person.[72] As a condition to an appointment to replace the PGT, the PGT may require the applicant post security. However, the court may order on an application that security be dispensed with or that the amount of security be reduced and subject to conditions.

If the PGT refuses the application for a replacement, there shall be written reasons given to the applicant.[73] If the applicant disputes the refusal by giving the PGT notice in writing, the PGT shall apply to the court to decide the matter.[74] It must be remembered, however, that a person can always bring a guardianship application to unseat the statutory guardian and is not restricted to applying to the PGT as a replacement.

TEMPORARY GUARDIANSHIP UNDER THE *SDA*

Under the *SDA*, the PGT is obligated to investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur. If as a result of the investigation the PGT has reasonable grounds to believe that the prompt appointment of a temporary guardian of property is required to prevent serious adverse effects, the PGT shall apply to the court for an order appointing it as temporary guardian of property. The court may appoint the PGT as temporary guardian for a period not exceeding 90 days.[75]

In a judgment that is reported as a schedule to another judgment in *Brown v Glawdan*, the court appointed the PGT as temporary guardian on its own accord.[76]

GUARDIANSHIP ACCOUNTING

Guardians of property are required to keep accounts pursuant to section 32(6) of the *SDA*. Guardians for personal care are required to keep records pursuant to section 66(4.1) *SDA*.

The contents of accounts are prescribed by O Reg 100/96 under the *SDA.* The format of accounts for the passing of an estate or guardian's accounts is outlined in Rule 74.17, and is the same format required for estate trustees pursuant to Rule 74.17 except there is no obligation to distinguish between income and capital accounts as a guardianship is not a testamentary accounting. The regulation also prescribes that personal care decisions be recorded, and provides disclosure and retention rules for accounts and records.

Guardians must act in accordance with their management plan and/or guardianship plan, as approved by the court or the PGT. If a guardian must amend a plan because circumstances have changed, an amended management plan or amended guardianship plan may be submitted to the PGT pursuant to its statutory authority in sections 32(11) and 66(16) of the *SDA*.

71 *Ibid,* s 17(4).
72 *Ibid,* s 17(5).
73 *Ibid,* s 18(1).
74 *Ibid,* s 18(2).
75 *Ibid,* s 27.
76 *Brown v Glawdan*, [1998] OJ No 5309 (SC).

The relevant provisions of the *SDA,* ss 42(1)-(8), identify the circumstances in which a court may order the passing of accounts:

(1) an attorney or grantor may apply to pass attorney accounts; and

(2) a guardian, incapable person, guardian/attorney for personal care, a dependent of the incapable person, the OPGT, the OCL, a judgment creditor, or any other person, with leave of the court, may apply to pass the accounts of the guardian.

The court-appointed guardian of property is a fiduciary pursuant to the *SDA.*[77] As such, the guardian of property shall deal with an incapable person's property in accordance with the regulations, and keep accounts of all transactions involving the incapable person's property.[78]

It is worth noting that as of January 1, 2016, there are changes to Ontario's *Rules of Civil Procedure* concerning the requirements for passing accounts under rule 74. Some of the changes include that where a person who was a guardian or attorney for property of a person under disability has a contingent or vested interest in a deceased's estate, the attorney or guardian of the disabled person shall be served with:

(1) The estate accounts verified by the affidavit of the estate trustee;

(2) A copy of the Certificate of Appointment of the applicant as estate trustee;

(3) A copy of the latest judgment, if any, of the court relating to the passing of accounts.[79]

If there is no litigation guardian and the PGT has not been authorized to represent the disabled person on a passing of accounts for which the disabled person may have a contingent or vested interest, the court may appoint someone to represent the person on the passing of accounts.[80]

GUARDIAN OF PROPERTY UNDER THE *CHILDREN'S LAW REFORM ACT*

A guardian of property for a child has charge of and is responsible for the care and management of the property of the child.[81] Guardianships for children may be necessary for a variety of purposes where monies or other assets will be paid out to a child.

Dealing with a Minor's Property

A parent cannot handle property of their child's that is over the amount of $10,000.[82] This necessitates a court order for the appointment of a guardian for property. There is a different guardianship regime for children under the *Children's Law Reform Act*.

Sections 47 and 58 of the *CLRA* establish the regime for appointing a guardian of a minor's property.

77 *Ibid* at s 32(1).
78 *Ibid,*, s 32(6).
79 *Rules of Civil Procedure*, RSO 1990, c C.43 at r. 74.18 (3.2) (in force as of January 1, 2016).
80 *Ibid*, r 74.18(6) (in force as of January 1, 2016).
81 *CLRA, supra* note 2, s 47(2).
82 *Ibid,* s 51(4).

A parent or any other person may be appointed as guardian of a minor's property upon application to the court and with notice to the OCL.[83] Subject to a court order or agreement, the parents of a child are equally entitled to be appointed as guardians. Where the amount of money is large, the court may require an insured professional, for instance a trust company or other independent professional, to act as guardian.

In deciding who should be a child's guardian to manage their money the court considers the ability of the applicant to manage the property, the merits of the proposed management plan for the investment of the child's funds and the views of the child. Guardians are required to submit a management plan in a prescribed form with their guardianship application to the court.

It is the Office of the Children's Lawyer ("OCL") who responds to a guardianship application brought concerning a minor's property in accordance with section 47 of the *CLRA*. The person making the application should be named as the *Applicant* and the minor child, ("X" by his litigation guardian, The Children's Lawyer) should be named as the *Respondent*.

Applicants should be aware of the bond requirements under section 55(1) of the *CLRA*.

In managing the child's money, the guardian is required to:

- keep accounts of the child's money;
- make proper trustee investments and invest the child's money as required by the management plan approved by the court (guardians have to comply with the *Trustee Act* for the investment of trust funds); and
- transfer property to the child when he turns 18.[84]

If the child has a legal obligation to support another person, the court will terminate the guardianship on the child's application.[85]

LITIGATION GUARDIANS UNDER THE RULES OF CIVIL PROCEDURE

Persons under a disability must be represented by a litigation guardian in civil litigation proceedings, unless a court orders otherwise.

Rule 7 of the Rules of Civil Procedure sets out the rules respecting the representation of parties under disability. The definitions in Rule 1.03 defines a person under a disability as a minor, someone who is "mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not," or an "absentee within the meaning of the *Absentees Act*."

83 *Ibid*, s 47.
84 *Ibid*, s 53.
85 *Ibid*, s 56.

Rule 7.01(1) provides that, unless the court or a statute provides otherwise, parties under disability must be represented by a litigation guardian in proceedings. In addition, under Rule 7.08 no settlement by or against a party with a disability is binding without the approval of a judge. The OCL or the PGT may provide a report on the merits of the settlement for the court's consideration where the court requests such a report.

Litigation guardians for Defendants or Respondents generally must be appointed by the court. Rule 7.03 sets forth the procedure and evidence required for a motion to appoint a litigation guardian. Where no litigation guardian is available, either the Children's Lawyer or the PGT is appointed as litigation guardian, depending on the age of the person under disability.

Rule 15 requires that a litigation guardian be represented by counsel.

A litigation guardian may do anything that a regular party in a proceeding is authorized to do. The litigation guardian must diligently attend to the interests of the person under disability and take all steps necessary for the protection of the person's interests, including the commencement and conduct of a Counterclaim, Cross Claim or Third Party Claim.[86]

Difference between a Litigation Guardian and a Guardian under the CLRA or SDA

The litigation guardian in the personal injury action and a court appointed guardian of a minor's property under the *CLRA* serve two different roles. As Justice Gordon noted in *O'Connell v Snyder*:

> The plaintiffs are reminded that the appointment of a Litigation Guardian is only for the purposes of the litigation. An appointment of a guardian of the property of the child is mandatory, pursuant to sections 47 to 60 of the *Children's Law Reform Act*.[87]

The litigation guardian cannot accept payment of settlement proceeds or court awards. It is the guardian of property under the *CLRA* that receives such payment. Guardians of property for minors are appointed under the *CLRA* on notice to the OCL.

CONCLUSION

This introduction has provided the reader a brief explanation of the various guardianship regimes in the Province of Ontario with a description of the obligations placed upon each type of guardian. The remainder of this book will provide a more in-depth analysis of the topics that have been broached in this introduction. It must always be remembered that the overriding theme in guardianship is to create a means of holding someone responsible to advance, protect and promote the best interests of the vulnerable person.

86 *Rules of Civil Procedure, supra* note 3, r 7.05.
87 *O'Connell v Snyder*, 2002 CarswellOnt 1954 (SC) at para 5.

CHAPTER 2

DECISIONAL CAPACITY

CHAPTER CONTENTS

INTRODUCTION

This chapter will not only address the fundamental role of decisional capacity in the context of guardianship applications, but it will provide an overview of decisional capacity relative to estates, trusts, property and guardianship. A guardian will only be appointed if and when a person is found to be incapable for the purposes of making decisions with respect to property or personal care (and if there is no other substitute decision maker, such as an attorney appointed under a power of attorney). It is imperative that a thorough review and understanding of decisional capacity be completed, when considering the process and procedures for guardianship applications.

This introductory chapter will outline and compare the various factors or criteria respecting decisional capacity in the context of, *inter alia*, guardianship applications, including property and personal care decisions for both adults and minors; the role of the Ontario Public Guardian and Trustee ("OPGT") and the Ontario Children's Lawyer ("OCL"); and where appropriate, the appointment of counsel pursuant to section 3 of the *Substitute Decisions Act, 1992* (the "*SDA*").[1] It will also address decisional capacity considerations in other relevant contexts.[2]

CAPACITY IN GENERAL

There is no single legal definition of "capacity." The *SDA*, which addresses various capacity decisions and their corresponding criteria, simply defines "capable" as "mentally capable," and provides that "capacity" has a corresponding meaning.

Similarly, there is no general approach to apply in determining or establishing "capacity," "incapacity," "mental capacity" or "competency." Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

Generally, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[3]

Capacity is defined or determined upon factors of mixed law and fact and by applying the evidence available to the standard or factors for determining requisite decisional capacity.[4] It is important to understand there is no capacity "test" *per se* ("test" is often colloquially referenced as an acceptable descriptive, but it is not technically correct), rather there is a standard to be applied, or factors to be considered in the assessment of requisite decisional capacity to make a certain decision at a particular time.

Capacity is an area of enquiry where medicine and law collide. Legal professionals often deal with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal standards in their clinical practices, or are asked to review evidence retrospectively to determine whether at a particular time an individual had the requisite capacity to complete a specific task or make a specific decision.

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1 *Capacity and the Estate Lawyer: Comparing the Various Standards of Decisional Capacity"* (2013) ET&PJ 215-250 by Kimberly Whaley and Ameena Sultan; the *Substitute Decisions Act*, SO 1992, c 30, as amend. ("*SDA*").

2 For ease of reference, in Appendix 3 to this book is a chart, "Summary of Capacity Criteria," which outlines the basic determining factors for capacity.

3 *Palahnuk v Palahnuk Estate*, [2006] OJ No 5304 (SC); *Brillinger v Brillinger-Cain*, [2007] OJ No. 2451 (SC); *Knox v Burton* (2004), 6 ETR (3d) 285 (Ont SC).

4 *Starson v Swayze*, [2003] 1 SCR 722.

The assessment of capacity is a less-than-perfect science, both from a legal and a medical point of view. Capacity determinations are complicated. In addition to professional and expert evidence, lay evidence can be relevant to assessing capacity in many situations. Equally complicating is the fact that the standard of assessment varies, and this too can become a difficult obstacle to overcome in determining capacity and in resolving disputes involving the quality and integrity of assessment reports. And, to add further to the complexity, in contentious settings, often seen in an estate litigation practice, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long-past decision of a person, alive or deceased. The evidentiary weight given to such assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

Capacity is *decision*, *time* and *situation* specific. This means that a person may be capable with respect to some decisions, at different times, and under differing circumstances. It is incorrect to describe an individual as globally "incapable" or similarly "capable," and there is no standard or factors prescribed to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a specific task or decision at a moment in time.

Capacity is Decision Specific

Capacity is *decision* specific in that, for example, as determined by legislation, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one's property or personal care. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, separate or divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making personal care decisions, but not capable of managing property, or capable of granting a power of attorney document, but not capable of making a Will. The possibilities are limitless since each decision has its own specific capacity standard or factors to consider in its determination.

Capacity is Time Specific

Capacity is *time* specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for "good" and "bad" days where capacity can and does fluctuate. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. And even in situations where an individual suffers from a non-reversible, unremitting, and/or progressive disorder, that person may not be decisionally incapable, and may have requisite capacity to make certain decisions at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a Will can vary over time.[5]

The factor of time specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may impact the probative value of the expert evidence proffered. A drafting solicitor who applies the legal standard for determining requisite capacity at the time that instructions are received may have the preferred evidence.[6]

5 *Palahnuk Estate, Brillinger v Brillinger-Cain, Knox v Burton*, all *supra* note 3.
6 *Palahnuk Estate, supra* note 3 at para 71.

Capacity is Situation Specific

Lastly, capacity is *situation* specific in that under different circumstances, an individual may have differing capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, for example, an individual in one's own home may have capacity that may not be displayed in a lawyer's or doctor's office.

Although each task has its own specific capacity standard or factors to consider, it is fair to say that in general, capacity to make a decision is demonstrated by a person's ability to understand all the information that is relevant to the decision to be made, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court of Canada decision of *Starson v Swayze*[7] is helpful in elucidating capacity considerations. Although the decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act*, *1996,* there are similar themes in all capacity determinations.

Writing for the majority, Major J. made several points about capacity. First, he held that the presence of a mental disorder must not be equated with incapacity, and that the presumption of legal capacity can only be rebutted by clear evidence.[8]

Major J. emphasized that the ability to understand and process information is key to capacity. The ability to understand the relevant information requires the "cognitive ability to process, retain and understand the relevant information."[9] Then, a person must "be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof."[10]

A capable person requires the "ability to appreciate the consequences of a decision," and not necessarily "actual appreciation of those consequences."[11] A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if he or she possesses the ability to comprehend the information and consequences of a decision.

Major J. also recognized that the subject of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.[12] A capable person is entitled to be unwise in his or her decision-making. In the oft-cited decision of *Re Koch*, Quinn J. wrote as follows:

> It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...[13]

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7 *Supra* note 4.
8 *Ibid* at para. 77.
9 *Ibid* at para 78.
10 *Ibid* at para 78.
11 *Ibid* at paras 80-81 [emphasis in original].
12 *Ibid* at para 79.
13 *Re Koch*, 1997 CanLII 12138 (Ont SC) at para 89.

THE *SUBSTITUTE DECISIONS ACT* AND CAPACITY

The *SDA* incorporates tools to protect the autonomy of individuals who find themselves subject to its provisions. The statutory provisions are in recognition of the significance attributable to the potential loss of an individual's autonomy as a result of proceedings under the *SDA*.

As part of the protections afforded individuals under the *SDA*, the legislation sets out presumptions of capacity. The *SDA* presumes that individuals who are eighteen years of age or older are capable of entering into a contract.[14]

Individuals who are 16 years of age or older are presumed capable of giving or refusing consent in respect of their own personal care.[15]

Another example of these protections is the requirement that individuals undergoing capacity assessments be given "rights" advice, that is, fulsome information on their legal rights to refuse an assessment or challenge the outcome of an assessment.[16]

The *SDA* requires that an individual whose capacity is at issue in a proceeding be served with notice of the proceedings. The individual, regardless of capacity, has the right to take part in the proceedings and have access to a lawyer, and, as noted below, if such person does not already have counsel, section 3 of the *SDA* provides for the appointment of counsel.

Subsection 3(1) (b) provides for a further presumption of capacity. It sets out that a person who is represented by a lawyer appointed pursuant to section 3 of the *SDA* is "deemed to have capacity to retain and instruct counsel."

The purpose of the *SDA* is dual: to protect vulnerable individuals while at the same time respecting their autonomy.

CAPACITY CONSIDERATIONS: GUARDIANSHIP OF PROPERTY

When an individual is found to be incapable of managing property, a guardian of property may be appointed for that individual, if that individual does not already have an appointed attorney under a Power of Attorney. A guardian of property is either a court-appointed or statutory guardian who manages the financial affairs of a person who is declared mentally incapable of doing so.

CAPACITY TO MANAGE PROPERTY

The standard for determining the requisite decisional capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is defined as:

> (a) The ability to understand the information that is relevant in making a decision in the management of one's property; and
>
> (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

14 See section 2(1) of the *SDA*, *supra* note 1.
15 *Ibid*, s 2(2).
16 *Ibid,* s 78(2)(b).

Although the factors in assessing capacity to manage property are straightforward, a finding of incapacity to manage property is not easily made. This assessment is not one that is conducted informally.

Under the *SDA* there is a class of designated "capacity assessors" who may be requested to assess an individual's legal capacity with respect to managing property by conducting capacity assessments.

Restrictions respecting capacity assessments have been legislated in recognition of the serious ramifications of a finding of incapacity on a person's autonomy and ability to make future decisions. As Justice Quinn stated in *Re Koch*:

> The mechanisms of the *SDA* and the *HCCA* are, as I stated at the outset, formidable. They can result in the loss of liberty, including the loss of one's freedom to live where and how one chooses.
>
> ....
>
> Any procedure by which a person's legal status can be altered (which is the *inevitable* result on a finding of mental incapacity) must be cloaked with appropriate safeguards and capable of withstanding rigorous review.[17]

In the same case, Justice Quinn charged assessors with the responsibility of exercising extreme diligence in their assessments and reports: they are obliged to "maintain meticulous files," to inform the subject of his or her right to refuse to be interviewed, to carefully explain the "*significance* and *effect*" of a finding of incapacity to the person being assessed, to inform the subject that he or she may have a lawyer or friend in the interview, to carefully probe answers provided by the subject and to seek verification of answers, all the while taking caution not to be influenced by a party "harbouring improper motives."[18]

Justice Quinn emphasized also that for someone to be found incapable, the incapacity must be such that it is sufficiently serious to override the primacy of that person's right to make his or her own choices.

> The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Notwithstanding the presence of some degree of impairment, the question to be asked is whether the appellant has retained sufficient capacity to satisfy the statutes.19

The purpose of capacity provisions under the *SDA* were addressed in *Re Phelan*:

> The Substitute Decisions Act is a very important legislative policy. It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an

17 *Supra* note 13 at para 89 [emphasis in original]. In this case, Mrs. Koch, the allegedly incapable person, had been assessed for her capacity to manage property under the *SDA*, as well as her capacity to consent to placement in a care facility under the *HCCA.*

18 *Ibid.*

19 *Ibid* at para 19.

> individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to the incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court for the implementation of the plan and the costs of so doing.20

Only qualified assessors can assess capacity in respect of property and personal care, and the factors considered in determining capacity in these respects is often said to be higher than that for granting or revoking power of attorney documents for property or personal care. That said, our court has also found there to be no higher or lower thresholds; rather, the factors to be applied and considered in determining decisional capacity are simply different.

Capacity and Court Applications for Guardianship

In a court application for guardianship, the evidence presented must be sufficient to satisfy the court that it can make a finding that the person is incapable of managing property. There can be no court appointed guardian of property (as opposed to a statutory guardian, discussed below) without a finding of incapacity by the court first.

The *SDA* does not stipulate what type of evidence is required with respect to capacity, but it should be third party independent evidence, if at all possible.[21] This type of evidence would include either a report or letter or affidavit from a physician or psychologist. Or it could be a capacity assessment requested for the purposes of an application pursuant to s.22 or s.72 of the *SDA*, (distinct from an assessment under s.16, discussed below). It is quite rare for a court to make a finding of incapacity without independent evidence. However, if it is not possible to obtain third-party independent evidence of incapacity to manage property, compelling anecdotal evidence should be included, as this anecdotal evidence may be enough to convince a court to order that the alleged incapable person submit to a capacity assessment pursuant to s.79 of the *SDA*.

An order for a court-ordered capacity assessment under s.79 of the *SDA* must include specific information such as the name of the proposed assessor and the place of the assessment. If a capacity assessor has been asked to provide evidence for a court application for property guardianship, he or she is providing an opinion, one that the court may accept or not. Capacity assessors sometimes make statements in their assessments for court purposes that they "find X incapable."[22] This is likely incorrect, since it is the court that makes that finding, based on the evidence presented. Similarly, applicants' lawyers often draft affidavits setting out that "Dr. Y has found X to be incapable of managing property." This, too, is arguably incorrect.[23]

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20 *Re Phelan* (1999), 29 ETR (2d) 82, [1999] OJ No. 2465 (SC).

21 Law Society of Upper Canada, *How to Have a Guardian of Property Appointed through Court Application*, available at: http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/How-to-Have-a-Guardian-of-Property-Appointed-through-Court-Application/ Accessed on August 14, 2015.

22 *Ibid.*

23 *Ibid*.

The court is prohibited from finding a person incapable of managing property and appointing a guardian if there is an alternative course of action that does not require the court to make a finding of incapacity and is less restrictive of the person's decision-making rights than the court appointment of a guardian.[24] Other options, such as the appointing of an attorney under a continuing power of attorney for property should be canvassed, if the individual has the requisite capacity to make such an appointment.

STATUTORY GUARDIAN OF PROPERTY

Sections 15 and 16 of the *SDA* provide for the OPGT to become the statutory guardian of property for an allegedly incapable person. Such appointments do not involve court applications. Instead, there are two ways for someone to be deemed incapable and a statutory guardian appointed. The first circumstance, or means, is if a person is admitted to a psychiatric facility, at which point the *Mental Health Act* (the *"MHA"*)[25] requires that a physician assess the person's capacity to manage property.[26] Following that initial assessment, an attending physician is authorized by the *MHA* to assess the patient further, at later times, to determine whether the patient is capable of managing property.[27] If the assessing physician finds the patient to be incapable of managing property, the physician is required to issue a formal certificate of incapacity and deliver a copy of the certificate to the OPGT.

The second means to a finding of incapacity to manage property is via an assessment by an authorized capacity assessor.[28] Unless the assessment is ordered by a court (discussed above), a person has the right to refuse to have his or her capacity to manage property assessed by an assessor.[29] A person can only request that another person's capacity be assessed in limited circumstances: the assessment must be requested in the prescribed form; the person requesting the assessment must indicate that he or she has reasonable grounds to believe that the other person is not capable of managing property; and the person requesting the assessment must indicate that the requesting person has made reasonable inquiries and found that there is no power of attorney for property that authorizes an attorney to manage the other person's property or any other relatives who would seek to act as guardian of property.[30] If the OPGT is appointed as statutory guardian, certain persons may apply to the OPGT to replace it as guardian through an administrative process.[31]

Any individual can apply to the Consent and Capacity Board for a review of their capacity.

An application will be brought under the *MHA* if a person was found incapable by a doctor while in a psychiatric facility and under the *SDA* if found incapable by a capacity assessor.

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24 *SDA*, *supra* note 1, subsection 22(3).
25 RSO 1990, c M.7.
26 *MHA,* s 54(1).
27 *Ibid,* s 54(2).
28 "Assessor" is defined at subsection 1(1) of the *SDA* as "a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity." The training of capacity assessors is managed and conducted by the Capacity Assessment Office. http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp
29 *SDA*, *supra* note 1, section 78 and subsection 79(1).
30 *Ibid* s 16(2).
31 *Ibid* s 17.

MINORS

Capacity is a different concept when dealing with minors. Minors are considered incapable due to their age, rather than any medical diagnosis. In order to be the subject of a property guardianship proceeding pursuant to the *SDA*, a person must be at least 18 years of age.[32] If the alleged incapable person is younger than 18 the application must be made pursuant to s.47 of the *Children's Law Reform Act*[33] and such application must be done on notice to the Office of the Children's Lawyer ("OCL") and not to the OPGT.

In Ontario, while a parent is automatically the "guardian of the person" of his/her minor child, a parent is not automatically the "guardian of property" of his/her minor child's property.

CAPACITY CONSIDERATIONS: GUARDIANSHIP OF THE PERSON

A "guardian of the person" may be appointed when an individual is determined to be incapable of making personal care decisions and there is no attorney under a power of attorney for personal care. Unlike a guardian for property, there are no statutory guardians of the person and such a guardian will only be appointed by the court. A court can appoint a guardian of the person for an incapable person, for example where there is no power of attorney for personal care or where the appointed attorney resigns or becomes incapable and in circumstances where the court is satisfied there is not less restrictive option.

CAPACITY TO MAKE PERSONAL CARE DECISIONS

The standard of assessment to be applied to establish requisite capacity to make personal care decisions is found at section 45 of the *SDA*. The factors to be applied for determining the capacity required for managing personal care are:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own **health care, nutrition, shelter, clothing, hygiene or safety**; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

A person who is 16 years of age or older is presumed to be capable of making personal care decisions.[34]

As there are various tasks that are covered by "personal care," a person may be capable with respect to one or more personal care decisions, and not capable with respect to others. The court has the power to order a capacity assessment with respect to personal care decisions pursuant to s. 79 of the *SDA*.

Capacity to make personal care decisions can only be assessed by a qualified assessor, as defined under the *SDA* and the applicable regulations. Unless an assessment is ordered by a court, an

32 *Ibid* s 4.
33 *Children's Law Reform Act*, RSO 1990, c C.12.
34 *SDA, supra* note 1, s 2(2).

individual has the right to refuse to be assessed, and still even then may refuse. The principle of the careful protection of an individual's dignity and autonomy as found in *Re Koch, supra* hold equally for personal care decision making.

A court must be satisfied and make a finding that a person is incapable of making decisions in at least one aspect of their personal care before a guardian of the person will be appointed. As with a guardian for property, the court will not appoint a guardian of the person if the need for making personal care decisions can be met by an alternative course of action that does not require the court to find the person incapable of personal care, or there is a less restrictive option for the person's decision-making rights.

MINORS

Being a minor renders one incapable in the eyes of the law with respect to personal care decisions. An individual who is less than 16 years old is "incapable" of making such decisions. However, in Ontario, a parent is automatically the "guardian of the person" of his/her minor child.

Being a guardian of the person for a minor is described as having "custody" in Ontario legislation. The mother and father of the child are equally entitled to custody of the child. Both parents have the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child. These rights and responsibility relate to decisions over the child's education, religion, and healthcare.

SECTION 3 COUNSEL

Section 3 of the *SDA* provides that in cases where an individual whose capacity is in issue in proceedings under that legislation does not have counsel, the OPGT may be directed by the court to arrange legal representation for that person (otherwise referred to as "section 3 counsel"). The unedited provision of section 3 of the *SDA* reads as follows:

> **Counsel for person whose capacity is in issue**
>
> 3(1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,
>
> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person, and
>
> (b) the person shall be deemed to have capacity to retain and instruct counsel.
>
> **Responsibility for legal fees**
>
> (2) If legal representation is provided for a person in accordance with clause (1)(a) and no certificate is issued under the Legal Aid Services Act, 1998 in connection with the proceeding, the person is responsible for the legal fees.

Same

(3) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be brought on behalf of the person, by,

(a) the person's guardian of property; or

(b) the person's attorney under a continuing power of attorney for property.

The Duty of the OPGT to Arrange Legal Representation under Section 3

The OPGT would, in the ordinary course, be served with application or motion materials seeking the appointment of section 3 counsel.[35]

The office of the OPGT has a duty to arrange legal representation for persons alleged to be incapable in proceedings before the Ontario Superior Court of Justice, under the *SDA* where so ordered or directed by the court pursuant to section 3 of the *SDA*. When an order or endorsement is made by the court under section 3 of the *SDA*, counsel for any of the parties are expected to provide a copy of the endorsement or order to the OPGT. Once the OPGT receives the order or endorsement, the Office will take steps to arrange for a lawyer.[36]

More than one section 3 counsel may be appointed. That is, if the appointed section 3 counsel's services are terminated by the client, the court has discretion under the *SDA* to direct the OPGT to arrange legal representation for the individual once again. It is worth noting that "the Court is not obliged to make such a direction and may decide to continue the proceeding and adjudicate even if the person is unrepresented."[37]

Professional Responsibility of Section 3 Counsel

The role of section 3 counsel attracts a unique set of professional duties and responsibilities. Unfortunately there is limited guidance for section 3 counsel as to how to approach these duties and responsibilities. There continue to be, no doubt in part due to the lack of clear guidance available on the issue, a number of complaints raised against lawyers acting as court-appointed section 3 counsel, in the form of complaints to the Law Society of Upper Canada,[38] as well as claims alleging negligence.[39]

Section 3 counsel are obliged to consider obligations set out in the *Rules of Professional Conduct*

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35 *Ibid* ss 69(0.1)(4), 69(1)(5), 69(2)(4),69(3)(5), 69(4)(4).

36 Government of Ontario, Ministry of the Attorney General, "*Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation Under Section 3 of the Substitute Decisions Act, 1992*," available at : http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.pdf (hereinafter "PGT Information Update") at pp.5-6. [accessed on August 12, 2015] at pages 2 and 4.For more information see: *Between A Rock And A Hard Place: The Complex Role and Duties Of Counsel Appointed Under Section 3 of the Substitute Decisions Act, 1992"* by Kimberly A. Whaley and Ameena Sultan, Advocates Quarterly, November 2012, Volume 40, Number 3

37 *Ibid* at page 5.

38 The Law Society of Upper Canada, Regulatory Proceedings, Complaints Services.

39 *Newell v Felker* (August 7 2012), Edward J. Doc. CV-11-422094 (Ont. S.C.J.).

and related *Commentaries*, as well as the *Rules of Civil Procedure* and review an information circular provided by the Ministry of the Attorney General titled: "Ontario Information Update: Duty of the Public Guardian and Trustee to Arrange Legal Representation under section 3 of the *Substitute Decisions Act, 1992*" [the "PGT Information Update"].[40]

The *Rules of Professional Conduct* require that, despite a client's disability, a lawyer must attempt to maintain, as much as possible, a normal solicitor-client relationship with a client.[41] This applies equally to section 3 counsel. If, however, the client can no longer make the requisite decisions, the lawyer may have to take steps to have a litigation guardian appointed.

Rule 7 of the *Rules of Civil Procedure* sets out the rules respecting the representation of parties under disability. The definitions at Rule 1.03 provide for the meaning of "disability" as circumstances where a person is a minor, or "mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not." The definition of a party under disability also includes a person who is an "absentee within the meaning of the *Absentees Act*."

Rule 7.01(1) provides that, unless the court or statute provides otherwise, parties under disability must be represented by a litigation guardian in proceedings. Rule 7.01(2) provides a specific exception for applications under the *SDA* where the appointment of a litigation guardian is not required. Litigation guardians for defendants or respondents generally must be court appointed and Rule 7.03 sets forth the procedure and evidence required for a motion to appoint a litigation guardian.

Where no litigation guardian is available, either the Children's Lawyer or the OPGT may be appointed as litigation guardian, depending on the age of the person under disability.[42] Rule 15 requires that a litigation guardian must be represented by counsel.[43]

Settlement of litigation involving parties under a disability requires court approval, with the terms of settlement being reviewed by the Children's Lawyer or the OPGT, depending on the nature of the disability. The Children's Lawyer or the OPGT may provide a report on the merits of the settlement for the court's consideration.[44]

The OPGT Information Circular states that besides reviewing the *Rules of Professional Conduct* and *Rules of Civil Procedure*, it is "also important for the lawyer to review case law, academic works and continuing education materials touching upon the subject of legal representation in this context and capacity law issues generally."[45]

If possible, section 3 counsel should attempt to determine the client's instructions and wishes directly from the client. In some situations, the lawyer may attempt to determine the client's wishes or directions through medical practitioners, family members, caregivers and friends of the client.

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40 PGT Information Update, *supra* note 36 at pp.5-6.
41 See Rule 3.2-1 "Quality of Service"; Rule 3.2-9 "Client with Diminished Capacity"; 3.3-1 "Confidentiality – Confidential Information"; Rule 3.7-1 "Withdrawal from Representation"; and Rule 5.1-1 "Advocacy" and corresponding Commentary.
42 *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 7.04.
43 *Ibid*, Rule 15.01(1).
44 *Ibid*, Rule 7.08.
45 PGT Information Update, *supra* note 36, at p.5.

If the client's wishes or directions in the past or at present have been expressed to others, then consideration should be given to presenting the evidence in court.[46]

Importantly, the lawyer must not become a substitute decision maker for the client in the litigation. Section 3 counsel cannot act as litigation guardian to make decisions in the proceeding even if it appears to be in the best interests of the client. Best practices of section 3 counsel would include steps taken to ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.[47]

As with any lawyer in a solicitor-client relationship, section 3 counsel is required to act pursuant to the instructions of the client. This requires clarification and emphasis because section 3 counsel act for those whose capacity is in question such that there may be a tendency for counsel to hesitate to follow the client's instructions. The situation is different where there are no instructions. In a normal solicitor-client relationship termination by the client or a failure to give instructions are grounds for a lawyer to withdraw from the record.[48] Section 3 of the *SDA* does not expressly or otherwise permit a lawyer to act without instructions. Rather, it permits the solicitor to consider any instructions received to have been instructions received from a capable person as opposed to an incapable person.[49]

There is a growing precedent base of court and tribunal decisions involving section 3 counsel appointments that shed light on this very complex role of counsel in challenging circumstances.[50]

OTHER DECISIONAL CAPACITY CATEGORIES

CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PROPERTY

The factors to be applied in assessing capacity to grant or revoke a continuing power of attorney for property ("CPOAP") is found at section 8 of the *SDA*. A person is capable of giving a CPOAP if he or she possesses the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge that the attorney will be able to do on the person's behalf anything

46 *Ibid*.
47 *Ibid*.
48 Rule 3.7-7.
49 *SDA*, *supra* note 1, s 3.
50 *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Gen Div); *Mesenel (Attorney of) v Kumer*, 2000 CarswellOnt 1926 (SC); *Tepper v Branidis* (2001), 102 ACWS (3d) 1043, 2001 CarswellOnt 307 (SC); *Canada Trust Co. v York* (February 7, 2002), Doc. 086/93, [2002] OJ No. 435 (SCJ); *Ziskos v Miksche* (2007), 161 ACWS (3d) 651, 2007 CarswellOnt 7162 (SC); *Sly v Curran* (2008), 168 ACWS (3d) 855, 2008 CarswellOnt 7788 (SC); *Abrams v Abrams* (2008), 173 ACWS (3d) 606, 2008 CarswellOnt 7788 (SC); *Righter v Righter* (November 5, 2008), Doc. 03-20/08 (Ont.SC); *Woolner v D'Abreu* 2009 CarswellOnt 6479 (SC, Div.Ct); *Teffer v Schaefers* 2008 CarswellOnt 5447 (SC); *Baily v Baily* (2009), 55 ETR (3d) 198, 2009 CarswellOnt 8124 (SC); *PGT v Harkins* (2009), 175 ACWS (3d) 1203, 2009 CarswellOnt 1535 (SC); *Bon Hilllier v Milojevic* (2010) 184 ACWS (3d) 688, 2010 ONSC 435; *Cherry v Cherry* (2011), 204 ACWS (3d) 868, 2011 ONSC 4574; *Farrell (Re)* (October 21, 2011), Doc. 03-089 (SC); *DeMichino v DeMichino,* 2011 ONSC 142; and *Salzman v Salzman* 2011 77 ETR (3d) 301 (Ont. SC).

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) Knowledge that the attorney must account for his or her dealings with the person's property;

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

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

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

The factors to be applied in ascertaining capacity for revoking a CPOAP are the same as that for granting a CPOAP. A person is capable of revoking a CPOAP if he or she is capable of granting one.[51]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid, as long as the grantor had capacity at the time it was executed.[52]

The factors to be applied in determining requisite capacity to grant or revoke a CPOAP are often referred to being as less stringent than those required for the capacity to manage property. Again, the factors are simply different.

In fact, a person need not have capacity to manage his or her property to have capacity to grant or revoke a CPOAP. If the grantor is incapable of managing property, a CPOAP made by him or her is still valid so long as he or she meets the requisite standard or factors for capacity for granting that CPOAP at the time the CPOAP was made.[53]

Assessments of capacity to make or revoke CPOAPs need not be conducted only by certified capacity assessors, although they certainly can be completed by assessors.

Indeed, it is the responsibility of the solicitor retained to draft the document, to assess the client's capacity to grant or revoke a power of attorney, either for property or for personal care when asked to prepare such documentation for a client.[54] This does not mean to suggest that a solicitor in discharging this duty of care may not recommend, encourage or suggest a formal assessment by an assessor in cases where litigation is likely, or in borderline cases, all in an effort to protect the autonomy of the individual and the decision made.

CAPACITY TO GRANT AND REVOKE A POWER OF ATTORNEY FOR PERSONAL CARE

The factors to be applied in granting or revoking a POA for personal care ("POAPC") are found at

51 *SDA*, *supra* note 1, s 8(2).
52 *Ibid,* s 9(2)
53 *Ibid* s 9(1)
54 *Egli v Egli*, 2005 BCCA 627. In this case, the trial judge placed greater importance on the evidence of the drafting solicitor than that of a physician in finding that Mr. Egli had the requisite capacity to execute the POA in question.

section 47 of the *SDA*. A person is capable of giving a POAPC 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 for the person.[55]

As with a CPOAP, a person who is capable of granting a POAPC is also deemed capable of revoking a POAPC.[56]

A POAPC is valid if at the time it was executed, the grantor was capable of giving a POAPC, even if that person was incapable of managing personal care at the time of execution.[57] The only exception to this is if the POAPC incorporates specific instructions for personal care decisions. Those instructions are only valid if, at the time the POAPC was executed, the grantor had the capacity to make the decision(s) referred to in the document.[58]

The factors to be applied in assessing capacity to grant or revoke a POAPC have been referred to as less "stringent" (more correctly considered as "different") than those for granting or revoking a CPOAP. While the factors applied in determining requisite capacity to grant a CPOAP incorporates a significant amount of information that the grantor must be able to comprehend, whereas, for a POAPC, 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 POAPC means that the proposed attorney may be authorized to make such personal care decisions for the grantor. Again, the determination is relevant.

Moreover, as noted above, the onus of determining capacity to grant or revoke a POAPC falls squarely on the solicitor who has been retained to draft the documents.

CAPACITY TO CONTRACT

There are no statutory criteria for determining the requisite capacity to contract. A cogent approach for capacity to contract is set out in the Prince Edward Island Supreme Court decision of *Bank of Nova Scotia v Kelly.*[59] Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.

In undertaking an analysis of the requisite capacity to contract, the determining factor is a person's ability to understand the nature and consequences of the contract at hand. A person capable of entering into a contract has the ability not only to understand the nature of the contract, but its impact on his or her interests.

55 *SDA*, *supra* note 1, s 47(1).
56 *Ibid*, s 47(3).
57 *Ibid*, s 47(2).
58 *Ibid*, s 47(4).
59 (1973), 41 DLR (3d) 273 (PEI SC).

In *Bank of Nova Scotia v Kelly,* the court emphasized that a person entering into a contract must exhibit an ability to understand all *possible* ramifications of the contract. In the ruling, Nicholson J. concluded:

> It is my opinion that failure of the defendant to fully understand the consequences of his failure to meet his obligations under the promissory notes is a circumstance which must be taken into account. I find that the defendant was probably able to understand the terms and his obligations to pay the notes but that he was incapable, because of his mental incompetence, of forming a rational judgment of their effect on his interests. I therefore find that by reason of mental incompetence the defendant was not capable of understanding the terms of the notes *and of forming a rational judgment of their effect on his interests.*[60]

The criteria to be applied for determining capacity to contract are based on the principle that a contract requires informed consensus on the part of the contracting parties.

In *Royal Trust Co. v Diamant*, the court stated as follows:

> *The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be free and full consent to bind the parties. Consent is an act of reason accompanied by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are generally deemed to be invalid.*
>
> *The degree of mental incapacity which must be established in order to render a transaction inter vivos invalid is such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction. The plaintiff here need not prove that the donor failed to understand the nature and effect of the transaction. The question is whether she was capable of understanding it: Manches v. Trimborn (1946), 115 L.J.K.B. 305. 61*

All persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[62] A person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[63]

CAPACITY TO MAKE A GIFT

There are no statutory criteria for determining the requisite capacity to make a gift. The common law factors that are applicable depend in part on the size and nature of the gift.

In general, however, the criteria to be applied are the same as that applied to determine capacity to enter into a contract.

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60 *Ibid* at 284 [emphasis in original].
61 *Royal Trust Co. v Diamant*, [1953] 3 DLR 102 (BC SC) at para. 6
62 *SDA, supra* note 1, s 2(1).
63 *SDA*, *supra* note 1, s 2(3).

Similar to capacity to contract, the capacity to make a gift requires:

(a) The ability to understand the nature of the gift; and

(b) The ability to understand the specific effect of the gift in the circumstances.

The law on capacity to make a gift is set out in the 1953 decision of *Royal Trust Co. v Diamant*, referred to above. In that case, the court held that an *inter vivos* transfer is not valid if the donor had "such a degree of incapacity as would interfere with the capacity to understand substantially the nature and effect of the transaction."[64]

This approach was further supported in the case of *Re Bunio (Estate of)*:

> A gift *inter vivos* is invalid where the donor was not mentally competent to make it. Such incapacity exists where the donor lacks the capacity to understand substantially the nature and effect of the transaction. The question is whether the donor was capable of understanding it... [65]

Citing earlier case law on the capacity to gift, the Court in *Dahlem (Guardian ad litem of) v Thore* stated:

> The transaction whereby Mr. Dahlem transferred $100,000 to Mr. Thore is void. The Defendants have not demonstrated that a valid gift was made to Mr. Thore. **On the authority of *Kooner v. Kooner* (1979), 100 D.L.R. (3d.) 441, a transferor must have the intention to give and knowledge of the nature of the extent of what he proposes to transfer, or a resulting trust will be presumed.**[66]

In his study, *Gifts: a Study in Comparative Law*,[67] Professor Richard Hyland of Rutgers University examines the law of gifts in the United States, England, India, Belgium, France, Germany, Italy, and Spain and addresses the standards or framework for determining capacity in various jurisdictions. Referring to American law, Professor Hyland states:

> ...In American law, donors generally have the capacity to make a gift only if they understand the extent of their property, the natural object of their bounty, the nature of the disposition, and the effect the gift may have on their future financial security.68

While the approach is similar to that outlined in the cases referenced, it is somewhat more onerous than the simple understanding of the nature of the gift and its effect, in that it requires donors to understand the "extent of their property." This is more aligned with the requirement to possess the capacity to manage property.

64 *Royal Trust Co. v Diamant*, *supra* note 61 at 6.
65 2005 ABQB 137 at para. 4.
66 *Dahlem (Guardian ad litem of) v Thore* [1994] BCJ No. 809 (BC SC) at para 6 [emphasis added].
67 Hyland, R., *Gifts: A Study in Comparative Law* (Oxford: Oxford University Press, 2009).
68 *Ibid* at page 222.

Professor Hyland also points out that in analyzing whether an individual has the requisite capacity to give a gift, courts will look at the circumstances surrounding the gift, and in particular the gift itself to determine the donor's capacity. Professor Hyland importantly raises the consideration of the criteria determined on a balance of probabilities by reviewing all the circumstances of the gift:

> Though this is easily stated, the proof difficulties are often intractable. It is often impossible to separate the capacity question from all of the facts and circumstances of the transaction. The fact that a donor may be old, sick, or absent-minded is not enough to prohibit the gift. If the gift seems reasonable, the courts are likely to conclude, that the donor was competent. If the gift is difficult to explain, the court may reach the opposite conclusion. In other words, the capacity to make a gift may depend on the gift the donor is attempting to make. 69

Professor Hyland highlights the problem by proposing that a capable person is fully entitled to make a decision, and give a gift that others may perceive as foolish. Still, where a person's capacity is in question, a foolish and inexplicable decision could very much be evidence of that person's incapacity. Professor Hyland explains: "An unnatural and unreasonable disposition of property may be shown as bearing on the issue of mental condition."[70]

As Professor Hyland does not address Canadian law in his book, it is possible that this view is particularly American. Canadian case law emphasizes autonomy, and indeed the right to be foolish as long as the person is capable. Still it is true that courts will look at the decisions people make and the reasons they give for them, as well as the intent behind them[71] to assess their capacity to make those decisions, so it is possible that the gift in question can have a bearing on whether the donor has capacity.

Nature and Extent of Gift – A Factor

The determination of the requisite capacity to give a gift changes if the gift is significant in value, in relation to the donor's estate. In such cases, the applicable capacity criteria applied changes to that required for capacity to make a Will, that is, testamentary capacity. [72]

In the English case of *Re Beaney,*[73] the judge explained this difference in approach regarding the capacity to give gifts, or to make gratuitous transfers, as follows:

> At one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on an intestacy, then the degree of understanding required is as high as that required to make a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.

69 *Ibid.*
70 *Ibid*, FN 26 at pages 222 to 223.
71 *Pecore v Pecore*, [2007] 1 SCR 795, and *Madsen Estate v Saylor,* [2007] 1 S.C.R. 838.
72 Testamentary capacity, or capacity to make a Will, is addressed in detail in the following section.
73 [1978] 2 All ER 595 (Ch.D.).

While the judge in *Re Beaney* imposed the standard of testamentary capacity for gifts that are the donor's "only asset of value" and effectively comprise most of the estate, Canadian law imposes the standard of testamentary capacity for gifts that comprise less than the majority of an estate. In an even earlier case, *Mathieu v Saint-Michel,*[74] the Supreme Court of Canada ruled that the standard of testamentary capacity applies for an *inter vivos* gift of real property, even though the gift was not the donor's sole asset of value. The principle appears to be that once the gift is *significant*, relative to the donor's estate, even if it be less than the entirety of the estate, then the standard for testamentary capacity applies for the gift to be valid.

CAPACITY TO ENTER INTO REAL ESTATE TRANSACTIONS

There is no set standard or factors for determining the requisite capacity to enter into a real estate transaction. To determine which standard is applicable it is important to consider the nature of the real estate transaction.

When determining capacity in real estate transactions, such as purchasing or selling real property, courts generally consider whether the individual in question had capacity to enter into a *contract*.[75] This means that he or she requires the ability to understand the nature of the real estate transaction, and the ability to appreciate the impact of that transaction on his or her interests.

In cases where the person in question is undertaking a real estate transaction to make a gift, then the standard for capacity to make a gift is relevant. This may be in cases where an individual transfers a property for nominal consideration, or places someone on title on their property. In such instances, the transaction is a gift, rather than a contract.

Where that gift is a substantial gift, or otherwise affects the individual's testamentary dispositions, then it is arguable that the standard for testamentary capacity applies. Depending on the size of the gift, it may venture into the territory of testamentary transaction. That is to say, if the size of the gift is significant, and would affect the size of the client's estate, then arguably it is a testamentary disposition. It is worth noting that since most real estate transactions are of significant value compared to an individual's estate, then most gratuitous transfers of real property would require testamentary capacity.

Where the gift is significant in value, the onus is on the real estate lawyer to ensure the client has capacity, and clear enquiry into and well-documented notes on the issue of capacity are warranted.

CAPACITY TO MAKE A WILL (TESTAMENTARY CAPACITY)

The law on capacity to make a Will is established in the common law.

The legal criterion for determining requisite capacity to make a Will was established in the 1800s by the English case of *Banks v Goodfellow*.[76] Testamentary capacity is defined as the:

(a) Ability to understand the nature and effect of making a Will;

74 [1956] SCR 477 at 487.
75 See for example: *Park v Park,* 2013 ONSC 431; *de Franco v Khatri*, 2005 CarswellOnt 1744, 303 RPR (4th) 190; *Upper Valley Dodge v Estate of Cronier*, 2004 ONSC 34431.
76 (1870) LR 5 QB 549.

(b) Ability to understand the extent of the property in question; and

(c) Ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

In order to validly make a Will, a testator need not have a detailed understanding of the points listed above. The testator requires a "disposing mind and memory," which is defined as a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like." [77]

Testamentary capacity does not depend on the complexity of the Will in question. One is either capable of making a Will or not capable of making a Will. Testamentary capacity "focuses on the testator's ability to understand the nature and effect of the act of making a will, rather than the particular provisions of the proposed will."[78]

There is some school of thought in cases of borderline capacity that a change in a Will or a codicil could be undertaken where the testator understands the change in question and the reasons for the change even where it could not be said that the testator has full testamentary capacity. An example of this could be an instance where a testator with borderline capacity seeks to make a limited change by making a codicil that appoints a new executor, after the executor named in the will has died. The writer takes the respectful view that these are considerations a drafting solicitor would need to carefully and cautiously approach, perhaps with the assistance of a qualified capacity assessor, given the clarity of the requirements for testamentary capacity. Either a person has capacity to make the decision in question, or not.

The question of testamentary capacity focuses on the time at which instructions are given, not necessarily when the will is executed. Though, as our case law expands on this point, we know this to be a factor.[79] The rule in *Parker v Felgate*[80] provides that even if the testator lacked testamentary capacity at the time the Will was executed, the Will is still valid if:

(a) The testator had testamentary capacity at the time he or she gave the lawyer instructions for the will;

(b) The will was prepared in compliance with those instructions; and

(c) When the testator executed the will, he or she was capable of understanding that he or she was signing a will that reflected his or her own previous instructions.

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77 *Leger et al. v Poirier*, [1944] SCR 152 at 153.

78 Robertson, G., *Mental Disability and the Law in Canada*, 2nd ed. (Toronto: Carswell, 1994) at 214.

79 *Banton v Banton* (1998), 164 DLR (4th) 176; *Eady v Waring* (1974), 2 OR (2d) 627 (CA) at page 639: "While the ultimate probative fact which a Probate Court is seeking is whether or not the testator has testamentary capacity at the time of the execution of his will, the evidence from which the Court's conclusion is to be drawn will in most cases be largely circumstantial. It is quite proper to consider the background of the testator, the nature of his assets, his relatives and other having claims upon his bounty, and his relationship to them, and his capacity at times subsequent to the execution of the will, to the extent that it throws light upon his capacity at the time of the making of the will. Proven incapacity at a later date obviously does not establish incapacity at the time of execution of the disputed will, but neither is that fact irrelevant. Its weight depends upon how long after the crucial time the incapacity is shown to exist, and its relationship to matters that have gone before or arose at or near the time of the execution of the will itself." [emphasis added].

80 (1883), 8 PD 171.

The requirements for due execution are set out in the *Succession Law Reform Act* (the "*SLRA*").[81]

Courts have cautioned that the rule in *Parker v Felgate* can only be applied where the instructions for the Will (referred to in (a) above) were given to a lawyer. In other words, even if the testator provided instructions to a non-lawyer at a time when the testator had testamentary capacity, and that layperson then conveyed those instructions to a lawyer, the resulting Will could not be valid if the testator lacked testamentary capacity on the date of its execution.[82]

The threshold capacity required to make a Will is, again, often described as higher than the capacity required to grant a power of attorney, for property or for personal care.[83] In fact, it simply involves different criteria applied to a certain decision. The thresholds are different.

Still, a testator need not be capable of managing property in order to have testamentary capacity. A finding that a person is incapable of managing his/her own affairs does not automatically lead to a finding that that person lacks testamentary capacity. The question of whether the testator understood his/her assets and the impact of the Will may be distinct from the question of whether the testator actually managed or had the capacity to manage his or her own property.[84]

A solicitor drafting a Will is obliged to assess the client's testamentary capacity prior to preparing the Will. The drafting lawyer must ask probing questions to be satisfied not only that the testator can communicate clearly, and answer questions in a rational manner, but also that the testator has the ability to understand the nature and effect of the will, the extent of his or he property and all potential claims that could be expected with respect to the estate.[85]

In the case of *Laszlo v Lawton*[86] the Supreme Court of British Columbia examined the effect of delusions on testamentary capacity. In this case, the deceased believed that she could communicate telepathically with objects by touching them; that characters on television were communicating with her; and that unidentified individuals had stolen significant amounts of money from her, among other irrational beliefs. However, these delusions were not obviously connected to her decision to disinherit her husband's family who, on the evidence, were her previously-named beneficiaries and deserving of her generosity.

There was evidence that the deceased was still possessed of her cognitive faculties – that is, her ability to reason and remember – at the time she made her Will, in spite of the delusions (although it should be noted that there was also some evidence that she was confused and forgetful at times).

The court was left with an apparent dilemma. On the one hand, the deceased suffered from inexplicable and irrational beliefs that had only emerged in recent years; and the Will was a significant departure from the previous Will, cut out family members who would be expected to

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81 *Succession Law Reform Act,* RSO 1990, c S. 26, as amend., s. 4

82 *Re Fergusson's Will; Fergusson v Fergusson* (1981), 43 NSR (2d) 89 (CA); *Re Griffin's Estate* (1978), 21 Nfld. & PEIR 39 (PEI CA), leave to appeal to SCC refused 24 Nfld. & PEIR 90n (SCC)

83 *Penny v Bolen,* 2008 CanLII 48145 (Ont. SC) at para. 19: "There are different tests for the capacity to make a Power of Attorney for personal care and for property. A person may be incapable of managing property but capable of making a Power of Attorney for Property. With respect to Powers of Attorney for Personal Care the capacity threshold is much lower than for Power of Attorney for Property which is lower than the capacity required to execute a will."

84 *Hamilton v Sutherland*, [1992] 5 WWR 151 (BC CA).

85 *Murphy v Lamphier*, [1914] OJ No. 32 (CA); *Hall v Bennett Estate*, 2003 CanLII 7157 (Ont CA) at para. 58

86 2013 BCSC 305.

benefit, and made irrational bequests to two charities that the deceased and her husband had no affiliation with. On the other hand, there was some evidence that the deceased did not suffer from significant cognitive defects when she made her Will, and there is an apparent rule of law that non-vitiating delusions alone do not invalidate a Will.

The court reconciled these opposing factors by accepting the evidence of an expert who explained that the onset of a delusional disorder "often heralds an unrecognized and, therefore, untreated somatic illness, impacting brain function or degeneration of the brain itself." Justice Ballance explained as follows:

> It follows that the existence of delusions, while not themselves sufficient to defeat testamentary capacity, ought not to be excluded from consideration under the rubric of suspicious circumstances or the ultimate assessment of whether a testator possessed testamentary capacity at the material time. Non-vitiating delusions may reflect the ravages upon the testator's mental functioning at large exacted by dementia or other brain disease, which cannot reasonably be ignored in the overall assessment of testamentary capacity.
>
> ...
>
> In my view, consideration of non-vitiating delusions in this broader sense where the evidence suggests that all or some of the testator's delusions accompany a progressive degenerative brain disease like Alzheimer's does not run afoul of the rule in Banks or its lineage.[87]

Ultimately, the court found that the testator lacked capacity, but not because she suffered from delusions. The court was not convinced on the evidence that the deceased understood the nature and quantum of her estate.

It remains to be seen whether the weight of scientific authority continues to support this opinion and whether other courts adopt this method of examining delusions as a feature of mental function at large, but notably it does seem to fit tidily into the legal analysis under *Banks v Goodfellow*.

Two other discussions in this case are worth noting. The court made some interesting observations about the use of MMSE results on the law of capacity. The deceased had twice been given a Mini-Mental State Examination (MMSE) around the time she made her will. She scored very well both times; i.e. the test showed no or minimal cognitive impairment. The court gave little weight to the test results, saying that the ubiquitous MMSE is a blunt tool, which has a limited ability to detect frontal lobe dysfunction or deficits in executive functioning, which are common in Alzheimer's disease. Without more evidence of its reliability, it is impossible to determine the relative importance of its role in determining testamentary capacity.[88]

The court also made interesting observations on the fluidity of capacity. As a generality, in the older adult, capacity will often emerge and worsen over time. However, capacity in any given case is not static. It can fluctuate slightly or wildly. There may be periods of incapacity interspersed with

87 *Ibid* at paras 227 and 229.
88 *Ibid* at para 199.

periods of lucidity. Appearances can be deceiving, since a person who seems rational may not have capacity and a person who seems compromised may be capable. A diagnosis of dementia is not equivalent to a finding of testamentary incapacity; testamentary capacity is a legal concept rather than a medical one and both medical and lay evidence feature importantly.

CAPACITY TO REVOKE A WILL

A testator who seeks to revoke a Will requires testamentary capacity, as outlined above.

This is clear in the case where a testator revokes a Will by executing a later Will or document.

As for revocation by physical destruction, however, for that decision to be a capable decision, the testator must be able to understand the nature and effect of the destruction and revocation at the time the Will is destroyed, and must have testamentary capacity at the time of the destruction. If the testator lacks that ability at the time of the destruction of the Will, then the Will is not deemed properly revoked.[89] It is extremely important, as a result, to know when precisely a Will was destroyed, and if at that time the person was capable of revoking the Will.

As revocation requires testamentary capacity, in cases where a testator makes a Will and then subsequently and permanently loses testamentary capacity, that testator cannot revoke that Will. The only exception to this is if the testator marries (and has capacity to marry)[90] at which time the Will is effectively revoked. [91]

CAPACITY TO MAKE A CODICIL

Subsection 1(1) of the *SLRA* defines "Will" as including:

> (a) A testament,
>
> (b) A codicil,
>
> (c) An appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) Any other testamentary disposition. ("testament")

Since a codicil is included in the definition of a "Will," the criteria for determining capacity to make a Will, that is, testamentary capacity, applies equally to a codicil. (Please note the discussion above about capacity to execute limited codicils or Wills in cases where an individual may lack capacity to execute.)

CAPACITY TO MAKE A TESTAMENTARY DESIGNATION

Subsection 51(1) of the *SLRA* provides that "A participant may designate a person to receive a benefit payable under a plan on the participant's death, (a) by an instrument signed by him/her or signed on his/her behalf by another person in his/her presence and by his/her direction; or (b) by will, and may revoke the designation by either of those methods."

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89 This principle is outlined in the English case of *Re Sabatini* (1969), 114 Sol. J 35 (Prob. D.), as well as in Canadian case law in *Re Beattie Estate,* [1944] 3 WWR 727 (Alta. Dist. Ct.) at 729-730, and *Re. Drath* (1982), 38 AR 23 (QB) at 537. For more detailed discussion on revocation and destruction of wills, please see *Mental Disability and the Law in Canada, supra* note 78 at 224 to 225.

90 Please see the section on "CAPACITY TO MARRY," below.

91 *Re Beattie Estate, supra* note 89.

Likewise, a person may revoke the designation by either a signed instrument or a Will. Since a testamentary designation is by definition in a Will, or similar document, to make such a designation a person requires testamentary capacity.

CAPACITY TO MAKE A TRUST

In order to create a testamentary trust, a person requires testamentary capacity, as it arguably constitutes "any other testamentary disposition" as defined under subsection 1(1)(d) of the *SLRA.*

Capacity to create an *inter vivos* trust is less clear. While the criteria of assessment for making a contract or gift may be applicable, in that a trust is comparable to a contract or gift, the fact that a trust may be irrevocable, and that another person handles the funds, complicates matters. A more comprehensive capacity standard might be required.

CAPACITY TO MARRY

There are no statutory criteria for determining the requisite capacity to marry, nor to separate or divorce.

Section 7 of the Ontario *Marriage Act* prohibits a person from issuing a license to or solemnizing "the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, *lacks mental capacity* to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason."*[92] Legislation in Ontario therefore requires that in order to marry, a person must possess the capacity to marry. The definition of what that capacity comprises is a developing area of common law.

The traditional English view is that the factors to be applied to determine capacity to marry are analogous to the capacity to enter into a contract. As a result, according to this view, in order to be deemed capable of entering into a marriage, a person must have the:

(a) Ability to understand the nature of the contract of marriage; and

(b) Ability to understand the effect of the contract of marriage.[93]

In this traditional view, spouses are required to understand only the most basic components of marriage, such as the commitment of the spouses to be exclusive, that the relationship is to be terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation. In general, to be found capable of marrying (according to historical common law), a person need not have the ability to understand the more serious financial implications that accompany marriage, such as revocation of previous Wills, support obligations, and potential equalization.[94]

This view that one only need have the ability to understand the basic components of marriage is based on the conclusion in the leading English case of *Durham v Durham* which finds that "the

92 RSO 1990, c M.3 [emphasis added].

93 Kimberly A. Whaley, Dr. Michel Silberfeld, The Honourable Justice Heather McGee and Helena Likwornik, *Capacity to Marry and the Estate Plan* (Aurora, ON: Cartwright Group, 2010).

94 *Ibid* at page 50.

contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."[95]

In another English case, *In the Estate of Park, Deceased*, Justice Singleton outlined that in order to be deemed capable of marrying, "a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage."[96]

Again starting from the proposition that the contract of marriage is a simple one, Birkett L.J. held as follows:

> The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.[97]

In the same decision, Karminski J. outlined the requirements for a valid marriage as follows:

i. the parties must understand the nature of the marriage contract;

ii. the parties must understand the rights and responsibilities which marriage entails;

iii. each party must be able to take care of his or her person and property;

iv. it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and

v. if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid…The question for consideration is whether he sanely comprehended the nature of the marriage contract.[98]

While the court struggled with developing the appropriate criteria to be applied in determining what defines capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract, and certainly at a lower threshold than testamentary capacity. Karminski J. stated clearly that there is "a lesser degree of capacity … required to consent to a marriage than in the making of a will."[99]

Historically, therefore, the courts have viewed marriage as a contract, and a simple one at that.

There is an alternative view of the requirements to determine capacity to marry, and it is one that

95 (1885), 10 P.D. 80 at 82.
96 *Estate of Park, Park v Park* [1954] p. 112, C.A.; aff'g, *Park* v *Park*, [1953] All ER Reports [Vol. 2] at 1411.
97 *Ibid* at 1411.
98 *Ibid.* at 1417.
99 *Ibid.* at 1425.

was alluded to in the cases of *Browning v Reane*[100] and *Spier v Spier.*[101] The court in *Browning v Reane* stated that for a person to be capable of marriage, he or she must be capable of managing his or her person and property. Similarly, in *Spier,* the court stated that one must be capable of managing his or her property in order to be capable of marrying.[102]

In recent cases before the Ontario Superior Court of Justice, the tension between the traditional historical view of marriage as an easy-to-understand contract, and the reality that marriage brings with it very serious implications for property and the estate, not the least of which is the revocation of all previous wills, is increasingly apparent.

In the case of *Banton v Banton*[103] Cullity J. was asked to assess whether the deceased, a then-88-year-old man had had the requisite capacity to marry a then-31-year-old woman.[104]

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors for determining testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care, capacity to marry, and the provisions of the *Substitute Decisions Act*.[105]

Justice Cullity observed Mr. Banton had been a "willing victim" who had "consented to the marriage."[106]

Justice Cullity took pains to distinguish between "consent" and "capacity," and then embarked upon an analysis of the appropriate criteria to be applied in determining capacity to marry and whether Mr. Banton met the criteria. He commenced his analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[107] In the court's view, the standard or factors to be met are not particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before the marriage in question and despite his weakened mental condition, the court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."[108]

Justice Cullity then turned his attention to whether or not, in Ontario law, there was or arguably could be an "additional requirement" for mental capacity to marry:

> An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in *Browning v. Reane* (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:

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100 (1812), 161 ER 1080 (Eng. Ecc.).
101 *Spier v Benyen (*sub nom. *Spier Estate, Re*) [1947] WN 46 (Eng. PDA); *Spier* v *Spier* [1947] The Weekly Notes.
102 *Ibid* at para. 46 per Willmer J.
103 *Banton*, *supra* note 79.
104 The woman the deceased married had worked as a waitress in the retirement home in which the deceased resided. Two days after the marriage, the couple attended at a solicitor's office and instructed the lawyer to prepare a Power of Attorney in favour of the wife, and a will, leaving all of the deceased's property to the wife.
105 *Banton, supra* note 79 at para. 33.
106 *Ibid* at para.136.
107 *Ibid* at para. 142.
108 *Ibid* at para. 144.

> If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. at pp. 70-1

The principle that a lack of the ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in *Spier v. Bengen*, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:

> There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "the test for capacity to marry at common law":

> Whether a person of unsound mind was capable of contracting a valid marriage depended, according to ecclesiastical law to which the court had to have regard, upon his capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities created, his freedom or otherwise from the influence of insane delusions on the subject, and his ability to take care of his own person and property.

After review of these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v Reane* appeared to require both a finding of incapacity to manage oneself as well as one's property; whereas Willmer J.'s statement in *Re Spier* could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to incapacity to marry. Notably, Halsbury's statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early nineteenth century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It is only with the enactment of the *SDA* that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."[109]

Despite articulating what would, at the very least, be a dual standard *per se* for capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity

109 *Ibid* at para. 157.

held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid.

Somewhat surprisingly at first blush, Justice Cullity made this determination in spite of the fact that he found that, at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "judgment was severely impaired and his contact with reality tenuous." Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v Reane*." However, you will note that, earlier in his reasons, he stated that the case of *Browning v Reane* is the source to which the "additional requirement" is attributed, which requirement goes beyond a capacity to understand "the nature of the relationship and the obligations and responsibilities it involves" and, as in both *Browning v Reane* and *Re Spier*, extends to capacity to take care of one's own person *and property*.

In 2003, five years after *Banton,* Justice Greer arguably extended the criteria and factors in the determination of the capacity to marry in another Ontario decision: *Feng v Sung Estate*.[110]

Greer J. adopted the criteria for determining the capacity to marry articulated by one of the medical experts, Dr. Malloy, in the Alberta decision of *Barrett Estate v Dexter.*[111] Dr. Malloy was qualified as an expert in geriatric medicine in that trial and detailed the requirements for capacity. In particular, Dr. Malloy stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.[112]

Applying the facts of the case to the requirements set out in *Barrett Estate*, Justice Greer found that Mr. Sung lacked capacity to marry as he had not understood the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.[113]

The law on capacity to marry is evolving. Apart from the many historical cases, including the case of *Park Estate,* which emphasizes the simplicity of marriage and the marriage contract, the cases of *Browning v Reane* and *Re Spier* suggest that capacity to manage one's person *and* one's property are a component of the standard for the requisite capacity to marry. In the more recent Ontario decisions of *Banton* and *Re Sung Estate,* courts appear to be moving in the direction of developing an approach that reflects the financial implications of death or marital breakdown. And since marriage carries with it serious financial consequences, it stands to reason that the requisite capacity to marry should be more involved and require the higher standard attributed to the capacity to manage property, which is itself a very high standard of capacity. The development of property rights over time reinforces the need for common law to keep pace in its development with the legislation, particularly when, pursuant to statute, marriage revokes a Will.

CAPACITY TO SEPARATE AND DIVORCE

The question of the requisite capacity to separate was addressed in the recent British Columbia

110 2003 CanLII 2420 (Ont SC). The deceased secretly married his caregiver just over a year after his first wife had died, and he died a mere six weeks after the marriage. Following the deceased's death, the caregiver made a claim against the estate for support and for her preferential share.

111 2000 ABQB 530.

112 *Ibid* at para. 72, also referred to in *Feng v Sung Estate, supra* note 110 at para. 62

113 The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the capacity to enter into the marriage with Ms. Feng. The Court of Appeal endorsed Justice Greer's decision, but remarked that the case was a close one.

Court of Appeal case of *AB v CD.*[114] In that decision, the court agreed with the characterization of the different standards of capacity and the standard of capacity to form the intention to leave a marriage, set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*.[115] Professor Robertson's standard focuses on the spouse's overall capacity to manage his or her own affairs. This standard, which had also been relied upon by the lower court, is found at paragraph 21 of the Court of Appeal's decision as follows:

> Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.

The court noted that this standard differs and is less onerous than that adopted in the English decisions of *Perry v Perry*[116] and *Brannan v Brannan*[117] which conclude that when a spouse suffers from delusions that lead to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notes that it prefers Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her life.[118]

In cases where capacity fluctuates or disappears altogether, courts have held that as long as a person had capacity at the time that he or she separated from his or her spouse, and maintained the intention to remain separate and apart from his or her spouse while capable, then the entirety of the separation period could be counted for the purposes of a divorce, even if the person lost capacity during the period of separation.[119]

In *Calvert (Litigation Guardian of) v Calvert*[120] Justice Benotto compared the different standards of capacity – to marry, separate and divorce:

> [57] Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to *remain* separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.
>
> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. **The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins*, 136 A.3d 45 (Ill., 1985).**

114 2009 BCCA 200, leave to appeal to SCC denied October 22, 2009, [2009] 9 WWR 82.
115 *Supra* note 78 at page 272.
116 [1963] 3 All ER 766 (Eng. PDA)
117 (1972), [1973] 1 All ER 38 (Eng. Fam. Div.)
118 *AB v CD*, *supra* note 114 at para.30.
119 *O (MK) (Litigation Guardian of) v C (ME)* 2005 CarswellBC 1690 (SC) at para. 40.
120 1997 CanLII 12096 (Ont SC), aff'd 1998 CarswellOnt 494; 37 OR (3d) 221 (CA), leave to appeal to SCC refused May 7, 1998.

Arguably the court places the threshold for capacity to divorce somewhat higher than the threshold for capacity to separate. It equates the threshold for capacity to divorce with the threshold for capacity to marry. Justice Benotto continues, and points to a "simple" standard for capacity to marry, consistent with the reasoning in *Durham*[121] and in *Park*:[122]

> [58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra,* at p. 1427. If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins,* 136 A.3d 45 (Ill., 1985).

As for the specifics of the factors to be applied in assessing capacity, Justice Benotto favourably refers to the evidence of an expert physician, Dr. Molloy, who outlined a case for the requisite factors for determining capacity:

> [73] I found the evidence of Dr. Molloy very helpful. Although he, like Drs. Silberfeld and Freedman, did not see Mrs. Calvert, he provided a useful analysis of the evidence and methodology for determining capacity. To be competent to make a decision, a person must:
>
> 1. understand the context of the decision;
>
> 2. know his/her specific choices; and
>
> 3. appreciate the consequences of these choices.

In English case law, the issue of capacity to consent to a decree of divorce is treated in the same manner as all other legally binding decisions. In the England and Wales Court of Appeal decision of *Masterman-Lister v Brutton & Co*., [123] the court wrote that "a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself" and, citing the decision of *Mason v. Mason,*[124] pointed out that this includes consenting to a decree of divorce.

In a recent decision,[125] the Missouri Court of Appeal upheld a lower court finding that the wife was capable to commence proceedings for the dissolution of her marriage as she was able to explain the reasons why she wanted the divorce (in spite of having difficulties with dates and events), and because her testimony was consistent with evidence in other legal proceedings. As a result, over the objections of her husband, the court granted the wife's request for a divorce.

Put simply, at common law the requisite factors for establishing the capacity to divorce, like the criteria for the capacity to marry, and the criteria for the capacity to separate appear (rightly or wrongly) to be based on whether the person in question has an ability to appreciate the nature and consequences of the act, and in particular to appreciate the fact that the act taken is legally binding. However, as the law on capacity to marry is evolving, so must the law on the capacity to divorce. This

121 *Durham*, *supra* note 95.
122 *Park*, *supra* note 96.
123 [2002] EWCA Civ 1889 (19 December 2002) at para. 57
124 [1972] Fam 302
125 *Szramkowski v Szramkowski*, SW 3d, 2010 WL 2284222 Mo.App. E.D.,2010. (June 08, 2010)

is an area worthy of tracking as the law continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights and attendant legislative changes.

The Saskatchewan Court of Queen's Bench reviewed capacity to separate, among other issues, in the case of *Babiuk v Babiuk*,[126] where the wife's capacity to make the decision to live separate and apart from her husband was examined. The court noted that the wife may not have been capable to manage her financial affairs but that did not mean she was not capable of making personal decisions. At para. 45, the court referenced *Calvert (litigation guardian of) v Calvert*,[127]: "Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does nor does not want to live." The court concluded:

> In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life.
>
> There is evidence that [the wife] wants to live in the care home and not with [her husband], and that she wants her half of the family property.[128]

The court found that she had the requisite capacity to decide to live separate from her husband.

Finally, in *SMBC v. WMP and others*[129] the fairly new Court of Protection of the High Court of England and Wales was asked to give directions in proceedings respecting the capacity to marry and capacity to manage property of a person referred to as "A." The case was prompted by police seeking forced marriage protection orders for A and his two brothers based on concerns about A's capacity to marry and family pressure for A to undergo an arranged marriage abroad.

A argued that the Court of Protection was not the proper forum for him, since he had not been properly found incapable. A relied on the fact that there was no conclusive finding that he was incapable, such that he could rely on the presumption of capacity.

Indeed, the court found that the capacity assessment (termed a "COP3") was incomplete and flawed, but noted that it did raise concerns of incapacity such that it warranted the attention of the Court of Protection. A further report was ordered, but the second assessing psychiatrist was unable to provide a fulsome assessment as he required background information and additional tests which A refused to participate in. There were further complications: a social worker had met with and interviewed A without involving his lawyer, which was in breach of the legal requirements. The court still allowed the social worker's evidence but gave it less weight.

One of the issues in question was whether, as part of capacity proceedings, an individual's medical records can be obtained.

The court appeared to have *prima facie* evidence that A lacked an understanding of marriage and

126 2014 SKQB 320.
127 (1997), 32 OR (3d) 281 (Div. Ct), at 294, aff'd (1998), 37 OR (3d) 221 (CA), leave to appeal ref'd [1998] SCCA No. 161.
128 *Babiuk, supra* note 126 at paras. 47-48.
129 [2011] EWHC B13 (CoP).

divorce, as well as of the proceedings in general. In light of the evidence of possible incapacity, the court allowed the release of A's information as sought by the expert.

The court used these proceedings as an opportunity to set out guidelines for capacity proceedings as follows:

(1) experts should seek information and set out questions before completing their reports;

(2) social workers investigating capacity must inform the party's lawyer of the intent to interview the party;

(3) medical assessors must provide clear reports;

(4) it is not a violation of human or common law rights for a medical expert to be provided with a party's medical records; and

(5) psychometric testing is appropriate even if the person who may indeed be capable so objects.

While these proceedings are different from those in the cases noted above, in that they were prompted by protective legislation that allows the state to prevent marriage on the basis of incapacity, the principles are interesting in that they emphasize the importance of clear assessments and the need for access to information. While the decision underscores the importance of respecting an individual's rights, and the presumption of capacity, it also emphasizes the need for experts to have access to full information in order to make proper, informed assessments.

The (Canadian) cases cited above also highlight the need for clear information, so that full and proper assessments can be obtained. Many of the difficulties in the above-cited cases are caused by the inability to properly determine whether the party in question had capacity to marry or divorce at the requisite time. For capacity assessments to be meaningful, they must not only address the legal issues in full, they must also be informed by proper and complete background information on the person in question.

PROFESSIONAL ADVISOR ROLE WHERE CAPACITY IS AT ISSUE

Capacity is a tremendously complicated concept in that each task has its own standard or factors to be considered, and the issues involved can often be less than crystal clear when capacity is in question. There is no clear hierarchy of capacity. Indeed courts are loath to say that one standard or set of factors to establish decisional capacity is higher or lower than another. Though, this does happen, as demonstrated by some of the decisions reviewed herein. In *Covello v Sturino,*[130] Justice Boyko was careful to distinguish the varying capacity standards as not necessarily higher or lower, but rather simply as different. My view is this approach makes more sense, but inconsistency of treatment underscores the complexity of understanding.

The fact that there is no all-encompassing capacity standard or set of factors to apply or criteria to consider means that a drafting solicitor must at all times be mindful of the client's capacity to complete the *specific* task at hand. This in effect means that a lawyer may be able to assist a client

130 2007 W.L. 1697372, 2007 CarswellOnt 3726 (SC)

with completing one task, but not another – yet advice and discussion of options may suffice.

The message from our common law precedent suggests that the drafting solicitor should satisfy him or herself that the client has capacity to give instructions for and execute the document in question, notwithstanding the presumption. This duty is particularly significant if the client is elderly, infirm, dependant or if the instructions vary substantially from previous documents (wills, trusts, powers of attorneys, etc.) or where the instructions are not received from the testator directly. Solicitors are also wise to exercise additional caution in circumstances where the potential beneficiary brings the client to the office, and appears overly involved in the process.

A recent case before the Ontario Superior Court of Justice provides some guidance on the proper steps to be taken by drafting solicitors when determining testamentary capacity and probing for indicators of undue influence. In *Walman v Walman Estate*, Justice Corbett observed that the drafting solicitor "did several things 'right' in connection with [the] interview" with an older adult client, including interviewing the older adult alone, keeping good notes and asking questions that, "facially, comport with the requirement of determining whether the testator understood the extent of his assets."[131] However, Justice Corbett found that in the circumstances of that particular case (the older adult suffered from Parkinson's Disease and Lewy Body Dementia, and he was changing his will so his second wife would receive the majority of his estate and his three sons very little) the solicitor "needed to go further than that." Not only should the solicitor have questioned whether the testator understood what his own assets were, but the testator should have understood what his wife's assets were as well: "Had these issues been explored, [the solicitor] would have discovered what the case law refers to as 'suspicious circumstances' – recent transfers of substantial wealth from [the husband] to [the wife] that had the effect of significantly denuding [the husband's] financial position to the benefit of [the wife]."[132]

The court found that the husband lacked testamentary capacity and that his will and certain transfers of capital to the wife were products of undue influence by the wife.[133]

As issues of capacity can cause complications and significant cost consequences many years after legal services have been rendered, a solicitor is well advised to maintain careful notes when dealing with clients, and to turn his or her mind to the issue of capacity and assure him or herself that the client has the requisite legal capacity required to complete the task requested.

It is always the obligation of the drafting solicitor, to interview the client for the purpose of determining the requisite legal capacity for the task sought by the client. If the lawyer is confident that the client meets the standard for capacity, he or she should clearly indicate this in file notes. Those notes should be thorough and carefully recorded and preserved.

It is wise for lawyers to take their time in asking the client probing questions, to give the client a chance to answer carefully, and to provide the client with as much information as possible about the legal proceedings. All questions and answers should be carefully recorded in detail. Lawyers should also consider seeking to corroborate the answers provided by the client, for example, relating to the extent of the client's assets.

131 *Walman Estate v Walman,* 2015 ONSC 185 at para. 55.
132 *Ibid.*
133 *Ibid* at para. 133.

If the solicitor has serious concerns about the client's capacity, it is worth discussing with the client the implications and benefits, or otherwise of having a capacity assessment to protect the planning in question.

The approach of professionals ought to be direct, yet sensitive.

Requests for capacity assessments should be clear and should concisely outline the legal criteria to be applied in assessing the specific decisional capacity that is to be met for the particular task sought. A capacity assessment that is not carefully written and that does not apply the evidence to the appropriate legal standard will be deemed deficient and unhelpful should a legal challenge arise in the future.

Lawyers have an important role to play where capacity is at issue. Solicitors must turn their minds to issues of capacity, undue influence and other red flags, including abuse, when discussing and preparing trusts, gifts, wills, contracts, powers of attorney, domestic contracts, and other legal documents. Although the area of capacity is complex, the more information a lawyer has about the issues and interaction of applicable factors, and the state of the client's abilities and understanding, the better protected both the lawyer and the client will be.

CHAPTER 3

GUARDIANSHIP OF THE PERSON

INTRODUCTION

An adult can be decisionally incapable or become so, and as a consequence be unable to manage his/her personal care. This can come as a result of many affecting issues, including injury or disease. In the absence of an attorney for personal care, it may become prudent or necessary as a matter of last resort for a guardian of the person to be appointed. Sections 55 through 68, under Part II of the *Substitute Decisions Act, 1992*[1] ("*SDA*") provide authority for the court to appoint guardians of the person for adults incapable of personal care.

Applications as they relate to children under age 16 are governed by Part III of the *Children's Law Reform Act*[2] (*CLRA*). They are not frequently sought in the same context as guardianships of the adult person. Also, they are not usually sought in the same circumstances where a guardianship of property for a child is required for the management of the child's property, as contemplated by the *CLRA*.

1. GUARDIANSHIP OF THE PERSON FOR ADULTS

The Health Care Consent Act

It should be understood from the outset that it is not always necessary for someone to make a power of attorney for personal care or, in the absence of such a document, to have a guardian appointed for his/her person. Practically speaking, it is arguably prudent planning for any adult to have an attorney for personal care or, failing one, to have the ability to have a guardian of the person appointed where necessary.

The *Health Care Consent Act, 1996*[3] ("*HCCA*") provides, at section 4(2), that a person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services. The word "treatment" is defined in section 2(1) as, *inter alia*, anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment.[4]

Section 20 of the *HCCA* provides a hierarchy of persons who may give or refuse consent on behalf of a person who is incapable with respect to treatment. In order, these persons are:

1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.

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1 SO 1992, c 30.
2 RSO 1990, c C.12.
3 SO 1996, c 2, Sched A.
4 The definition of "treatment" is dealt with in the Supreme Court of Canada decision in *Cuthbertson v. Rasouli*, [2013] 3 SCR 341. At paragraph 33, Chief Justice Beverly McLaughlin states that the provision of life support constitutes treatment under the *HCCA* and therefore requires consent.

2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.

3. The incapable person's representative appointed by the Consent and Capacity Board under section 33, if the representative has authority to give or refuse consent to the treatment.

4. The incapable person's spouse or partner.

5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.

6. A parent of the incapable person who has only a right of access.

7. A brother or sister of the incapable person.

8. Any other relative of the incapable person.

Section 20(2) provides that a person in the hierarchy may only give or refuse consent if he/she:

(a) is capable with respect to the treatment;

(b) is at least 16 years old, unless he or she is the incapable person's parent;

(c) is not prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on his or her behalf;

(d) is available; and

(e) is willing to assume the responsibility of giving or refusing consent.

A person named in the hierarchy can only give or refuse consent if no one higher in the hierarchy meets the criteria in subsection (2).

If two or more persons described in the same paragraph of section 20(1) (the hierarchy) and who meet the requirements of section 20(2) disagree about whether to give or refuse consent, and if their claims rank ahead of all others, the Public Guardian and Trustee ("PGT") shall make the decision in their stead.[5]

Section 20(6), which provides resort to the PGT, should make the merits of having an attorney for personal care or guardian of the person readily apparent. Disputes amongst family members concerning whether, when, and in what circumstances consent to a treatment should be given can potentially result in the aggravation of a medical condition or result in unnecessary suffering. These

5 *HCCA*, *supra* note 3, s 20(6).

disputes most often arise when the patient's prior capable wishes are not clear or not followed, particularly with respect to refusal of life-saving treatments and end-of-life decisions.

The decision to refuse or accept treatment by a substitute decision maker (guardian of the person, attorney for personal care, or a relative of the incapable patient) can be challenged by the patient's health practitioner. Section 37 of the *HCCA* provides that the health practitioner may apply to the Consent and Capacity Board ("CCB") for a determination as to whether the substitute decision maker's consent or refusal has been given in accordance with the patient's prior capable wish or best interests.[6]

Substitute Decisions Act Application Materials

Section 69(3) of the *SDA* prescribes the materials to be used on an application for a guardian of the person for an adult. The application must contain a notice of application to appoint a guardian of the person and the documents referred to in section 70(2) as well as those referred to in sections 71(1) and 74, if applicable. The documents referred in section 70(2) include the following:

> (a) the proposed guardian's consent;
>
> (b) if the proposed guardian is not the Public Guardian and Trustee, a guardianship plan, in the prescribed form; and
>
> (c) a statement signed by the applicant,
>
> (i) indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or
>
> (ii) if it was not possible to give the person alleged to be incapable the information referred to in sub-clause (i), describing why it was not possible.

The optional documents in section 71(1) include one or more statements, each made in the prescribed form, by a person who knows the person alleged to be incapable and has been in personal contact with him/her during the twelve months before the notice of application was issued. If the applicant for guardianship of the person wishes for the application to be dealt with under section 77 (summary disposition), the application materials should also include two statements, each made in the prescribed form by an assessor.

The summary disposition procedure prescribed by section 77 allows a court to make an order without anyone appearing before it and without holding a hearing. To avail oneself of this process, the applicant on an application for guardian of the person, or the moving party on a motion to terminate a guardianship of the person, shall file the following:

> (a) in the case of an application, the applicant's written certification that,
>
> (i) no person has delivered a notice of appearance,

6 See *HCCA* section 21 for the principles in accordance with which the substitute decision-maker must give or refuse consent on an incapable person's behalf.

(ii) the documents required by Part III of the SDA accompany the application, and

(iv) in the case of an application, at least one of the statements referred to in section 74 indicates that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so;

(b) in the case of a motion, the moving party certifies in writing that,

(i) the documents required by Part III of the *SDA* accompany the motion, and

(ii) every person entitled to be served with the notice of motion has filed with the court a statement indicating that they do not intend to appear at the hearing of the motion.

On considering the application or motion under section 77, the judge may,

(a) grant the relief sought;

(b) require the parties or their counsel to adduce additional evidence or make representations; or

(c) order that the application or motion proceed to a hearing or order the trial of an issue, and give such directions as the judge considers just.[7]

Service of the Application

The service requirements for applications to appoint guardians of the person are set out in section 69(3) of the *SDA*. The persons that must be served with the notice of application, along with the documents referred to in section 70(2), and those referred to in sections 71(1) and 74, if applicable, are:

1. The alleged incapable person;
2. The attorney under his or her continuing power of attorney, if known;
3. His or her guardian of property, if known;
4. His or her attorney for personal care, if known;
5. The Public Guardian and Trustee; and
6. The proposed guardian of the person.

In accordance with section 69(6) of the *SDA*, the notice and the accompanying documents shall

7 *Ibid*, section 77(3).

also be served on all of the following persons who are known, by ordinary mail sent to the person's last known address:

1. The spouse or partner of the person who is alleged to be incapable of personal care or who is under guardianship of the person, as the case may be;

2. The person's children who are at least 16 years old, in the case of an application or motion under Part II of the *SDA*;

3. The person's parents; and

4. The person's brothers and sister who have attained the age of 16.

Capacity to Make Personal Care Decisions

The criteria for incapacity for making personal care decisions are set out in section 45 of the *SDA*:

> A person is incapable of personal care if he or she 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 a decision or lack of decision.

A person may be capable of making some of the named personal care decisions but not others.

The Role of the Public Guardian and Trustee

Once served with a guardianship application, the PGT will likely respond with any concerns and with its position. For example, if the application does not contain sufficient medical evidence of the person's incapacity, and an assessment of capacity is being sought, the PGT may propose that further medical evidence be produced in order to determine the merits of the allegation of incapacity first, before any order is made that the person go through a capacity assessment. It is frequently the case that two or more of the allegedly incapable person's family members would seek to be appointed sole guardian. The PGT may provide a position as to which applicant it favours, and the reasons for the preference. The PGT will likely provide its position as to the merits of the proposed guardianship plan.

If a settlement is reached in a guardianship proceeding, the PGT's position on the proposed settlement should be sought and provided to the court on the motion to approve the settlement.

2. GUARDIANSHIP OF THE PERSON RESPECTING CHILDREN

General Comments

In Ontario, parents are automatically guardians of the person of their minor children. A "guardian of the person" is described as "custody" in Ontario legislation. The mother and father of the child are equally entitled to custody of the child.[8] Both parents have the rights and responsibilities as a

8 *CLRA, supra* note 2, s 20(1).

parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child.[9] These rights and responsibilities relate to decisions over the child's education, religion and health care.

Applications for guardianship of minor children are brought under Part II of the *CLRA*. Among others, the purpose of Part II of the *CLRA* is to ensure that applications in respect of the custody and guardianship of children will be determined on the basis of the best interests of the child.[10]

Section 24 of the *CLRA* requires the court to make custody orders in the best interests of the child, whether the order is of a temporary or final nature. The relevant criteria are set out in section 24(2):

> The court shall consider all the child's needs and circumstances, including,
>
> (a) the love, affection and emotional ties between the child and,
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons involved in the child's care and upbringing;
>
> (b) the child's views and preferences, if they can reasonably be ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
>
> (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
>
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
>
> (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

9 *Ibid*, s 20(2).
10 *Ibid*, s 19(a).

As with guardianship applications for incapable adults, the court has authority to order that more than one person be appointed guardian of the person for the child. The courts do not expect communication between the co-guardians to be easy, comfortable, or free of conflict. The question is whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis.[11]

The courts recognize that the needs of very young children and special needs children are especially complex. With respect to those children in particular, if joint custody is to be ordered, there must be evidence of good communication as between the proposed co-guardians.

Two Ontario cases illustrate this point.

In *Kaplanis v Kaplanis*[12] the subject child was only one year and nine months old at the time of the custody hearing. In the appellate decision, the court noted that her parents' marriage was tumultuous and that they could not communicate with each other. The court held that there must be some evidence that, despite their differences, the parents could communicate effectively with one another. When the child is so young that she can hardly communicate her developmental needs, communication is even more important – the younger the child, the more important communication is.[13] In this case the court set aside the joint custody order and awarded sole custody to the mother.

Ciutcu v Dragan[14] dealt with motions seeking temporary custody of two minors, aged nine and eight. Both children had Autism Spectrum Disorder and were severely disabled. They were both non-verbal and had a limited ability to comprehend speech and communicate with other people. The court held that the reasoning in *Kaplanis* with respect to good communication applies, if not even more, to special needs children. For these children, important decisions frequently have to be made about medical treatment, supportive services, education and activities. They require stability and consistency in decision making, and conflict can be particularly harmful to them. In this case, the mother was awarded temporary sole custody. She was required to consult with the father on any major decision regarding the children and to keep him apprised of any medical directions, treatment or prescriptions required for the children.

COMPENSATION FOR THE GUARDIAN OF THE PERSON UNDER THE *SDA*

The *SDA* does not provide a compensation scheme for guardians of the person. This is in contrast to guardians of property and attorneys for property, who may take annual compensation in accordance with the prescribed fee scale.[15]

The guardian of the person is required to maintain a record of all decisions made regarding the incapable person's health care, safety and shelter, as well as medical reports, names of persons consulted and a description of the incapable person's wishes. The regulation and the *SDA* do not specifically require any form of financial accounting on the part of the guardian of the person, even if these expenditures relate to the incapable person's health or personal care. Nonetheless, on

11 *Warcop v Warcop*, 2009 CanLII 6423 (Ont SC) at para 94, 66 RFL (6th) 438.
12 2005 CanLII 1625, 249 DLR (4th) 620 (Ont CA).
13 *Ibid* at para 12.
14 2014 ONCJ 602.
15 *SDA, supra* note 1, s 40.

passing of accounts applications courts have entertained requests for, and granted, compensation on a *quantum meruit* or fee-for-services basis for certain guardians of the person.

Three leading cases in Ontario address the issue of compensation for guardians of the person and attorneys for personal care: *Brown, Re,*[16] *Cheney v Byrne (Litigation Guardian of)*[17] and *Kiomall v Kiomall.*[18] The cases follow the principles delineated in *Brown*, *Re,* namely:

1. There is no statutory prohibition against such compensation;
2. The fact that the legislature has not passed a statute or regulation providing for the payment of compensation to a guardian of the person or fixing the manner in which it is to be calculated does not prevent the court from awarding and fixing it;
3. Section 32(12) of the *SDA* does not oust the application of section 61(1) of the *Trustee Act* as a basis for awarding compensation to a guardian;
4. The court does have jurisdiction to award compensation for legitimate services rendered by a committee of the person to an incapable person so found, provided that there is sufficient evidence about the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation;
5. The court routinely deals with claims for compensation for work done or services rendered in a variety of situations and there is no reason in the absence of any statutory prohibition for rejecting such claim simply because it is made by a committee of the person;
6. Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property. In the latter case, traditionally the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;
7. The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;
8. The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided, the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of the factors that will have to be considered, depending on the context in question; and
9. There must be some evidentiary foundation to support the claim for compensation.

16 1999 CarswellOnt4628, 31 ETR (2d) 164 (SC).
17 2004 CarswellOnt 2674 (SC).
18 2009 CarswellOnt 2246 (SC).

The court's discretion is wide when fixing compensation for guardians of the person.

In *Osmulski Estate v Osmulski*,[19] the court addressed the issue of compensation for a guardian of the person on an application to pass accounts by the applicant son, who was the guardian of the person and of property for his incapable mother. The accounts covered a 10-year period. The applicant had nine other siblings. None of them applied to be the guardian. The applicant managed his mother's finances and personal care on his own and with the assistance of his wife. During the period of the applicant's guardianship, the incapable person resided exclusively in long-term care facilities. She suffered from dementia and was in a wheelchair.

The court was critical of the applicant's record keeping and found him to have breached his fiduciary duty in several instances. The applicant was also found to have helped himself to his mother's money and treated it as though it were his own. With respect to the applicant's claim for compensation in the personal care arena, the court made the following observations:

1. The applicant did nothing extraordinary in his capacity as a guardian for personal care. He did the essentials of what was required and nothing else. There was no fault in his work but also nothing that merited any extra compensation;

2. All his claims for extra compensation arising from his actions as guardian for personal care were unfounded and unproven;

3. The incapable person's affairs were relatively straightforward to administer from a personal care perspective; and

4. The applicant's evidence as to what he did as a guardian of the person was deficient. His evidence lacked particularity and there was no record of the hours he spent.

In reviewing this and other cases on compensation for guardians of the person and attorneys for personal care, one is left with the impression that this is not something to be routinely asked for and that to have any chance at getting compensation, one must bring a robust evidentiary record to the court.

In the recent case of *Childs v Childs,*[20] the court commented that the guardian of the person is a manager of personal care; he or she is not the primary care provider. The court reviewed the principles in *Brown, Re* and confirmed that it has authority to award compensation to guardians of the person. In that instance, the court found a small monthly stipend, plus room and board and disbursement of expenses directly related to the incapable person's care, to be reasonable.

Guardianships of the person for an adult are to be considered as a measure of last resort and only in circumstances where there is no other less restrictive alternative. The *HCCA* goes a long way to minimizing the need or requirement for a guardian of the person. Guardianships of the person of a child are less common but exist subject to the provisions of the *CLRA*, and importantly are not usually sought in the circumstances contemplated herein. One should pay careful attention to the

19 2014 ONSC 6370.
20 2015 ONSC 4036.

age provisions set out in the *SDA* and *CLRA*.

A guardianship plan for the person must accompany a guardianship application and must be court approved. Appended here as **Appendix "A"** to this chapter is a blank guardianship plan, which shows the information that the court will require.

The guardian must then act in accordance with the court approved plan. The procedural requirements of the guardianship of the person application are set out in the governing legislation the *SDA* or the *CLRA* as the case may be, and in the Ontario Rules of Civil Procedure, which must be complied with. Guardianship plans may range in complexity depending on the particular needs and circumstances of the person, and may need to be updated or altered from time to time as that person's needs and circumstances change. Certain other steps may need to be taken in preparing an appropriate guardianship plan, such as decisional capacity assessments, needs assessments and other medical professional guidance and direction.

SUBSTITUTE DECISIONS ACT, 1992 ***Form 3***

GUARDIANSHIP PLAN

Note: Where this document is completed as part of an application for court appointed guardianship of the person, please insert general heading and court file number.

(*Attach additional pages if more space is needed*)

Section I - *Identifying Information*:

A. This plan is for:

_____

Name (in full): _____
(Referred to throughout this guardianship plan as 'the person')

Address: _____

_____

_____

Telephone number: Residence _____
Business _____

Date of Birth: _____

B. (1) As the proposed guardian of the person (or attorney for personal care) for _____,

I have consulted with the following persons in preparation of this guardianship plan:

the person identified in A.
family members of the person
friends of the person
care providers to the person
the person's guardian of property (attorney under a continuing power of attorney)
others (please specify relationship): _____

Section II - *Areas where personal care decision making authority is sought:*

A. I am seeking personal care decision making authority in the following areas: (*mark applicable boxes*)

Health Care
(Including decisions to which the *Health Care Consent Act, 1996* applies)
Nutrition
Shelter/Accommodation
Clothing
Hygiene
Safety

SUBSTITUTE DECISIONS ACT, 1992 ***Form 3***

B. Powers Requiring Specific Court Authorization (*this section is only to be completed by applicants for court-appointed guardianship of the person):*

1. I am asking the court for an order authorizing me to apprehend the person [Section 59 (3)].

   Yes No

2. I am asking the court for an order authorizing me to change existing arrangements in respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child [Section 59(4)].

   Yes No

3. a) I am asking the court for an order permitting me to exercise other powers or perform other duties in addition to those set out in the *Substitute Decisions Act, 1992* [Section 59(2)(g)].

   Yes No

   b) If the answer to 3a is yes, please identify the other powers and duties:

   _____
   _____
   _____

C. Notice Regarding Extraordinary Matters:
The law limits or restricts a guardian's authority to make decisions in the following areas relating to personal care:

Sterilization
The law prohibits a substitute decision maker from consenting to non-therapeutic sterilization of a person who is mentally incapable of such a decision. Any proposal to consent on behalf of the person to his or her sterlization as medically necessary for the protection of the person's health must be consistent with the law and should appear in the Guardianship Plan or be the subject of an amendment to the Guardianship Plan prior to consent being given.

Regenerative Tissue Donation
The law restricts the authority of a substitute decision maker regarding decisions to permit regenerative tissue donations by a person who is mentally incapable of such a decision. Any proposal to authorize the removal of regenerative tissue for implantation in another person's body must be consistent with the law and should appear in the Guardianship Plan or be the subject of an amendment to the Guardianship Plan prior to permission being given.

Section III - The plan for personal decision making:

(*Please complete only those sections where decision making authority is sought, and please attach any additional relevant documentation.*)

HEALTH CARE (INCLUDING TREATMENT), NUTRITION AND HYGIENE

Background:

(a) Describe the current status of the health, nutrition and hygiene of the person, including all known health conditions for which treatment is being received or is proposed:

_____
_____
_____

(b) Describe any wishes or instructions made by the person while capable that are known by you and that relate to his/her preferences about health care, treatment, nutrition and hygiene and attach a copy of any written wishes or instructions (e.g., a written advance directive, power of attorney for personal care, living will, etc.):

_____
_____
_____

Plan:

(c) Describe the long-term goals (2-6 years) for decisions under this heading:

_____
_____
_____

(d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

_____
_____
_____

(e) Briefly describe your reasons for these plans:

_____
_____
_____

SHELTERING/LIVING ARRANGEMENTS AND SAFETY

Background:

(a) Describe the current status of the person's living arrangements, including any factors relating to safety:

_____
_____
_____

(b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about living arrangements and safety issues and attach a copy of any written wishes or instructions:

_____
_____
_____

Plan:

(c) Describe the long-term goals (2-6 years) for decisions under this heading:

_____
_____
_____

(d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

_____
_____
_____

(e) Briefly describe your reasons for these plans:

_____
_____
_____

LEGAL PROCEEDINGS

Background:

(a) Describe the current status of any existing or anticipated legal proceedings relating to this person, (including divorce, custody, access, adoption, restraining orders, criminal matters, landlord and tenant matters):

_____
_____
_____

(b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about existing or anticipated legal proceedings and attach a copy of any written wishes or instructions:

_____
_____
_____

(c) If legal proceedings are in progress, describe arrangements for legal representation of the person, if known:

_____
_____
_____

(d) Where there is a guardian of property or attorney under a continuing power of attorney, is he or she aware of the existing or anticipated legal proceedings described in (a)? If so, please describe his or her involvement:

_____
_____
_____

(e) Are you are aware of any existing court orders or judgments against the person? If yes, describe or attach copies:

_____
_____
_____

(f) Is the person on probation or are there pending criminal proceedings in which the person is involved? If so, please provide details:

_____
_____
_____

Plan:

(g) Describe the long-term goals (2-6 years) for decisions under this heading:

_____
_____
_____

(h) Briefly describe your reasons for these plans:

_____
_____
_____

EMPLOYMENT, EDUCATION AND TRAINING

Background:

(a) Is the person employed, or involved in any educational or training programs? If so, please describe current status:

_____
_____
_____

(b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about participation in employment, education or training programs:

_____
_____
_____

Plan:

(c) Describe the long-term goals (2-6 years) for decisions under the heading:

_____
_____
_____

(d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

_____
_____
_____

(e) Briefly describe your reasons for these plans:

_____
_____
_____

RECREATIONAL, SOCIAL AND CULTURAL ACTIVITIES

Background:

(a) Describe the activities that the person is involved in (or significant activities that the person was involved in), including hobbies, clubs, affiliations, volunteering:

_____
_____
_____

(b) Describe any known wishes or instructions made by the person while capable that relate to his or preferences about participation in recreational, social and cultural activities:

_____
_____
_____

Plan:

(c) Describe the long-term goals (2-6 years) for decisions under this heading:

_____
_____
_____

(d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

_____
_____
_____

(e) Briefly describe your reasons for these plans:

_____
_____
_____

SOCIAL AND SUPPORT SERVICES

Background:

(a) Describe social and support services received by the person within the past year, including any services currently received:

_____
_____
_____

(b) Describe any known wishes or instructions made by the person while capable that relate to his or her preferences about receipt of social and support services:

_____
_____
_____

Plan:

(c) Describe the long-term goals (2-6 years) for decisions under this heading:

_____
_____
_____

(d) Describe the steps you propose to take (within the next 12 months) to achieve the goals under this heading:

_____
_____
_____

(e) Briefly describe your reasons for these plans:

_____
_____
_____

SUBSTITUTE DECISIONS ACT, 1992 ***Form 3***

Section IV - Additional Information:

(a) I have consulted with the person for whom guardianship is sought in making this plan: (*check one*)

Yes No

If no, please provide reasons:

_____
_____
_____

(b) I have consulted with the following other people in preparing this plan: (*please provide full names, addresses, telephone numbers and relationship to the person, of the people you consulted with*)

_____
_____
_____

(c) If consultation did not occur with any of the persons identified in Section I-B (1) above, provide reasons why:

_____
_____
_____

(d) To the best of my knowledge, the person for whom guardianship is sought would not object to any aspect of this guardianship plan: (*check one*)

Yes, would object No, would not object

If yes, please explain:

_____
_____
_____

(e) I am aware of my duty as a guardian of the person to foster the person's independ- ence, to encourage the person's participation in decisions I make on his or her behalf, and to consult with supportive family and friends and caregivers. My plans to do so are as follows: (*briefly describe*)

_____
_____
_____

SUBSTITUTE DECISIONS ACT, 1992 *Form 3*

SUBSECTIONS 66 (15) AND 66 (16) OF THE *SUBSTITUTE DECISIONS ACT, 1992* PROVIDE*:*

ss.65(15): A GUARDIAN SHALL ACT IN ACCORDANCE WITH THE GUARDIANSHIP PLAN.

ss.66(16): IF THERE IS A GUARDIANSHIP PLAN, IT MAY BE AMENDED FROM TIME TO TIME WITH THE PUBLIC GUARDIAN AND TRUSTEE'S APPROVAL.

SECTION 67 OF THE *SUBSTITUTE DECISIONS ACT, 1992* PROVIDES:

s.67: SECTION 66, EXCEPT SUBSECTION 66(15) AND (16), APPLIES WITH NECESSARY MODIFICATIONS TO AN ATTORNEY WHO ACTS UNDER A POWER OF ATTORNEY FOR PERSONAL CARE.

SUBSECTIONS 89 (5) AND 89 (6) OF THE *SUBSTITUTE DECISIONS ACT, 1992* PROVIDE:

ss.89(5): NO PERSON SHALL, IN A STATEMENT MADE IN A PRESCRIBED FORM, ASSERT SOMETHING THAT HE OR SHE KNOWS TO BE UNTRUE OR PROFESS AN OPINION THAT HE OR SHE DOES NOT HOLD.

ss.89(6): A PERSON WHO CONTRAVENES SUBSECTION (5) IS GUILTY OF AN OFFENCE AND IS LIABLE, ON CONVICTION, TO A FINE NOT EXCEEDING $10,000.002

_____

Date Signature of proposed Guardian(s)/
Attorney(s) for Personal Care

Name(s): _____

Address(es): _____

_____

Telephone Number(s): Residence: _____Business: _____

CHAPTER 4

GUARDIANSHIP OF PROPERTY

INTRODUCTION[1]

Most people have property. While we are decisionally capable of doing so, we manage our own property as we see fit, or as we direct. When a person loses or does not have the requisite decisional capacity to manage their property, another person or entity may need to fill this void and manage the incapable person's property on the person's behalf.

If the person executed a continuing power of attorney for property ("CPOAP"), while capable of doing so as prescribed by governing legislation, the named attorney under the CPOAP will have the legal authority to manage the incapable person's property. If the person has not executed a CPOAP (or in other circumstances described below), then a guardian of the property may be appointed, where necessary to manage the person's property, if the person is declared incapable of doing so pursuant to the *Substitute Decisions Act, 1992*[2] ("*SDA*").

If the incapable person is a minor, a Guardian of the Property may be appointed pursuant to the *Children's Law Reform Act*[3] ("*CLRA*") to manage the incapable minor's property.

This chapter is divided into three sections:

1) Guardianship of property generally;

2) Guardianship of property applicable to minors; and

3) Guardianship of property applicable to adults.

1. GUARDIANSHIP OF PROPERTY GENERALLY

Why Guardianship?

The first question to consider is, "why guardianship"?

Primarily, there are three instances in which a guardian of the property might be appointed when a person is found to be decisionally incapable of property management:

1) the incapable person has not executed a CPOAP, and a guardianship appointment is in order such that the incapable person's property can be managed on their behalf;

2) the incapable person has executed a power of attorney for property, but it does not survive incapacity like a CPOAP contemplates, or there is no appropriate less restrictive means to have substitute decisions made for the person, or for one reason

1 Much of the content included in this chapter derives from a paper drafted by Kimberly A. Whaley for the Society of Trust and Estate Practitioners Toronto Branch Program, held January 14, 2015, at Osgoode Hall, Toronto.
2 SO 1992 c C.30.
3 RSO 1990, c C.12.

or another, it becomes necessary or advisable for a person to apply for appointment as the incapable person's guardian of property, thus overriding the CPOAP appointment. For example, where a third party is concerned that an incapable person's chosen attorney under CPOAP is not managing the incapable person's property appropriately, or if the chosen attorney herself becomes incapable, it may be necessary for a third party to apply for appointment as the incapable person's guardian of the property;[4] or

3) the incapable person is a minor who has, for one reason or another, property which must be managed on the incapable minor's behalf as indicated in the *CLRA*.

What is a Guardianship Application?

It is beyond the scope of this chapter to fully address the procedure on a guardianship application, but it will be of assistance to the reader to understand, at a high level, what the process entails and what criteria the court will consider when hearing a guardianship application. Careful attention must be paid to the statutory provisions of the *SDA* and/or *CLRA* as well as the Ontario *Rules of Civil Procedure*[5] ("Rules").

A guardianship application is a court application like any other application under the Rules, and consists of a notice of application, supporting affidavit, management plan, consent to act and draft order, all of which are contained in an application record. In most procedural respects, the application is governed by the Rules, including timelines for service, formatting of documents, the requirement of facta (in some instances) and bills of costs, to name a few.

Guardianship applications are, however, different from other types of applications under the Rules because the *SDA* and *CLRA* require certain documents to be filed and/or steps to be taken (including service of certain parties) which are not otherwise required under the Rules. These distinguishing characteristics of guardianship applications will be considered below in relation to proceedings under both the *SDA* and the *CLRA*.

In the next section of this chapter, guardianship as it applies to incapable minors will be considered. Though the legislative scheme which governs guardianship applicable to children is substantially different from the *SDA*, in all cases of guardianship, guardians are fiduciaries for the incapable person.

2. GUARDIANSHIP APPLICABLE TO INCAPABLE MINORS

Minors are incapable by virtue of their designation as a minor under the age of 18.[6] Guardianship applications in relation to minors are governed by the *CLRA*.

Money may be payable to a child:

- under a court order for damages, or other;

---

4 See, for example, *Teffer v Schaefers*, 2008 CanLII 46929, 93 OR (3d) 447 (SC), regarding the removal of an appointed attorney under a power of attorney for misconduct despite the grantor's wishes.

5 RRO 1990, Reg 194.

6 See generally, *Dixon v Hinsley*, 2001 CanLII 38986, 22 RFL (5th) 55 (Ont. CJ)

- in an estate (with or without a will) or trust;
- under a life insurance policy where the child has been named as the designated beneficiary;
- under an RRSP or other pension plan; or
- under some other death or accident benefit.

A parent is not automatically the "guardian" of his/her own child's property. A parent (or other person with custody) cannot receive property belonging to a minor if it has a value in excess of $10,000, absent authority.[7]

Unless money is payable to a minor under a judgment or order of the court, if any amount owed to a minor is less than $10,000, the person under a duty to deliver it to the minor may deliver it to:

- a parent with whom a child resides;
- a person who has custody of a child; or
- the child, if the child has a legal obligation to support another person.[8]

A person who receives the minor's property has the same responsibility as a guardian for the care and management of the property.[9]

A court order is required for a person to be appointed as the guardian of a minor's property. Sections 47 and 58 of the *CLRA* establish the framework for appointing a guardian of a minor's property. Since it is the Office of the Children's Lawyer of Ontario ("OCL") who responds to guardianship applications brought concerning a minor's property in accordance with s 47 of the *CLRA*, the person making the application should be named as the applicant and the application must be brought on notice to the OCL.

Parties Who May be Appointed

A parent or any other person may be appointed as guardian of a minor's property upon application to the court and on notice to the OCL.[10] Subject to a court order, judgment, or agreement, the parents of a child are equally entitled to be appointed as guardians. Parents are preferred over non-parents. More than one guardian may be appointed and multiple guardians are jointly responsible.[11] Where the amount of money is large, the court may require an insured/bonded professional, for instance a trust company or other independent professional, to act as guardian.

The Ontario Superior Court of Justice and the Ontario Court of Justice have jurisdiction to make guardianship orders for a minors' property.[12] However, only the Ontario Superior Court of Justice

7 *CLRA*, *supra* note 3, s 51; Office of the Children's Lawyer for Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/propguard.asp.
8 *CLRA*, *supra* note 3, s 51(1).
9 *Ibid*, s 51(4).
10 *Ibid*, s 47.
11 *Ibid*, s 48.
12 *Ibid*, s 18(1).

has jurisdiction to grant a guardianship judgment that permits encroachment.[13]

Responsibilities of a Guardian of Property under the CLRA

A guardian of property is responsible for the care and management of the minor's property.[14] The guardian is required to:

- keep careful accounts of all dealings with the child's money;
- make proper trustee investments and invest the child's money as required by the management plan approved by the court (guardians must comply with the *Trustee Act*[15] requirements for the investment of trust funds); and
- transfer all the property to the child at age 18.[16]

If the child has a legal obligation to support another person, the court will terminate the guardianship on the child's application.[17]

In a guardianship application, the court considers all circumstances, including the ability of the applicant to manage the property, the merits of the proposed management plan for the investment of the child's funds and the views and preferences of the child where they can be reasonably ascertained.[18]

Section 55 of the *CLRA* stipulates that the court "shall require" the guardian to post a bond, but the court may dispense with a bond where the applicant is a parent of the child.[19] Usually, the court will not dispense with a bond where the applicant does not have assets in excess of the amount of the child's funds.[20]

Guardianship Applications for Minors

In reviewing a guardianship application, the OCL evaluates the requirements listed in the *CLRA* and considered by the courts, such as:

- The applicant's ability to manage the property;[21]
- Merits of the Plan for the Care and Management ("management plan") put forward by the applicant;[22]
- Whether the anticipated rate of return is likely to be more favourable than if the funds are paid to the Accountant of the Superior Court of Justice ("ASCJ")[23];

13 *Ibid*, s 59(1).
14 *Ibid*, s 47(2).
15 RSO 1990, c T.23
16 *CLRA*, *supra* note 3, s 53.
17 *Ibid*, s 56.
18 *Ibid*, s 49.
19 *Ibid*, s 55.
20 See also *Cusson v Denofrio*, 2006 CarswellOnt 9912, a case in which the court declined to dispense with the requirement that a bond be posted.
21 *CLRA*, *supra* note 3, s 49(a).
22 *Ibid*, s 49(b).
23 *Jones (Litigation Guardian of) v Downing,* [2001] OJ No. 1307 (SC) at paras 14-16.

- Information about the applicant's ability to keep accounts, to account and, if required, pass accounts;[24]

- That the guardianship must terminate when the minor attains the age of majority and the funds must be transferred to the former minor;[25]

- Whether the applicant will charge compensation for acting as guardian;[26] and

- The applicant's ability to post a bond[27] which is mandatory for any applicant who is not a parent, though as noted above, a parent may seek a court order dispensing with the requirement to post a bond.[28]

The Management Plan

The management plan should be prepared and signed by the applicant, and not the financial advisor or lawyer, because it is the applicant's plan and it is the applicant whom the court will hold accountable.

The proposed investments should reflect consideration of the duty to act as a prudent investor under s 27 of the *Trustee Act* (though the *CLRA* does not reference the *Trustee Act*). The management plan should allow for flexibility by providing a percentage range of investments as among cash, fixed income and equities, and should include particulars of any fees, loads or commissions associated with the investments.

The management plan must set out details of any authorized encroachments, for example for the minor's income tax and preparation of income tax returns. The management plan must be sufficiently specific to permit meaningful review on a passing of accounts or when the child attains 18 years.[29] There will be less room for dispute on review if the judgment is specific as to the powers of the guardian, and specifically if it states what, if any, expenditures from the minor's funds will be permitted by the guardian. If the guardian seeks authority to use the minor's funds for the minor's support, details supporting this request will be required, particularly if the applicant is a parent. Under s 31 of the *Family Law Act*[30] ("*FLA*"), a parent has a legal obligation to support his or her child. Any change in circumstance may require a new management plan and further court order reflecting the change. A sample, blank management plan was provided as an appendix to Chapter 3: Guardianship of the Person. See Chapter 3, Appendix A.

The Guardianship Order

The guardianship order/judgment should incorporate the management plan for the child's money or property such that the guardian has clear directions for managing the money. The guardian is required to account. The guardian is required to keep careful records of all transactions including investments, receipts and disbursements of the child's funds so as to be able to account to the

24 *CLRA*, *supra* note 3, s 59(2).
25 *Ibid*, s 53.
26 *Ibid*, s 54.
27 *Ibid*, s 55.
28 *Ibid*, s 55(2).
29 *Green v Green Estate*, 1993 CarswellOnt 1771.
30 RSO 1990, c F.3.

court as required and to the child when he/she reaches the age of 18 years.[31] Where a large amount of money is involved, the guardianship order may require the guardian to regularly pass the guardianship accounts before the court at fixed intervals. The interval may range depending on age, stage and circumstances, but is usually from one to five years.[32]

Where the guardianship order/management plan does not expressly authorize the guardian to spend the child's money, the guardian only has the authority to hold and invest the money until the child reaches the age of 18 years.

Generally speaking, the child's money cannot be used for the financial support of the child. Parents have a legal obligation to support their children. Guardians are not entitled to use the child's funds to provide for support for the child unless the guardianship order/management plan so authorizes it. Notably, however, a guardian of the property of a child is entitled to payment of a reasonable amount for fees for and expenses of management of the property of the child.[33]

A guardianship order is specific to the property, rather than to the minor/person. Accordingly, a guardianship application should only be commenced AFTER the minor's entitlement to property (and the quantum) has been finally determined. Practically speaking, however, the application is made as close to the same time as circumstances will permit. As well, in order for the OCL and the court to assess the application against the requirements of the *CLRA*, particularly the reasonableness of the management plan and the applicant's accounting plan, the nature and quantum of the minor's property must be ascertained with certainty.

Personal Injury Proceeds

The role of guardian of a minor's property and litigation guardian in the context of a legal proceeding are two distinct roles. Litigation guardians are addressed later in this chapter.

If the guardianship order applies to funds received by the minor from a personal injury settlement, specific, current information about the minor's ongoing needs will be required (for example, a current Future Care Costs Report and a Home Accessibility Report). Factors considered will include the timing and size of payments from a structure, the costs of housing, transportation, therapies, assessment, attendant care, professional fees, equipment and renovations to existing structures. Depending on the quantum involved, and the structure of the award, a corporate guardian may be more appropriate, particularly since structured settlements can be complicated for the lay guardian to manage.

If there is a possibility that a minor may be incapable upon attaining the age of majority, the guardianship judgment should include a term requiring the guardian to arrange and pay for the minor's assessment of capacity to manage property, in other words to be assessed by a qualified capacity assessor under the *SDA* prior to the minor's 18th birthday. The judgment should set out who will arrange for the assessment and how it will be funded. It should also provide that, if the minor is found incapable, arrangements will be made for a guardian to be appointed in accordance with the *SDA*.

---

31 *CLRA*, *supra* note 3, ss 52-53.

32 Section 52 of the *CLRA* has been compared to s 42(6) of the *SDA* in relation to voluntary accounting by guardians, in *Silver Estate, Re*, 1999 CarswellOnt 4217 at para. 36, 31 ETR (2d) 256 (SC).

33 *CLRA*, *supra* note 3, s 54.

Investment of Trust or Guardianship Funds in an RESP

Courts and the OCL recognize the advantages of a parent or other relative contributing to an RESP to benefit a minor child, but investment in an RESP may not necessarily be prudent when the proposal is to fund the RESP with assets belonging to the minor, and the parent is the subscriber. The prospect comes with some risk and the views on whether it is appropriate vary.

If an RESP has been established for a minor who does not attend post-secondary education, the savings grant is returned to the government, and any interest may be lost, resulting in minimal return on the investment.

Because the subscriber is the owner of the funds, the subscriber may withdraw RESP contributions at any time, roll the RESP over into the subscriber's RRSP or designate another child as beneficiary. RESP contributions may be considered property of the subscriber upon marriage breakdown, and therefore subject to equalization. RESP funds are not creditor proof in the event of the subscriber's bankruptcy. Upon the death of the subscriber, RESP funds may be considered an asset of the subscriber's estate and subject to creditor claims. Some of these concerns were expressed by Quinn J in *Hoad v Giordano*, in which the court stated:

> In this application only one reason is advanced as to why the settlement funds should not be paid into court - Mr. Hoad feels he will garner a higher rate of return. I regret to say that I find his plan overly vague. He refers to the government making contributions "of up to 20%." Is there a ceiling on those contributions both annually and over the lifetime of the RESP? Is there a maximum annual amount which may be paid into a RESP and, if there is, and if it is less than the amount of the settlement, what is to become of the balance of the settlement funds after the first maximum annual contribution is made and pending the contributions in future years? What occurs if Thomas does not commence or complete his post-secondary education? Finally, would the funds not have to become the property of Mr. Hoad in order for him to be the subscriber of the RESP of which Thomas would be the beneficiary? (In other words, may Thomas be both subscriber and beneficiary?)[34]

Alternatives to Guardianship in Relation to Minors

Payment to the Accountant of the Ontario Superior Court of Justice

Payment into court to the ASCJ often allows for a more flexible approach or option respecting unanticipated expenses for the minor. If any funds are required for the direct benefit of the child before the age of 18 years, the OCL has an informal procedure for parents or caregivers to request payments out of court for the direct benefit of the child when the parent/caregiver cannot afford the expense. The parent/caregiver may write directly to the OCL. Counsel from the OCL attends before a judge for a decision as to whether the money requested will be paid out of court to the parent/caregiver. Alternatively, the parent/caregiver may apply formally to the court on notice to the OCL pursuant to Rule 72 of the *Rules of Civil Procedure*.

The Office of the Public Guardian and Trustee operates the ASCJ. Funds held by the ASCJ are secure and earn interest at a competitive rate. The funds will be paid out to the minor when she/he attains

34 *Hoad v Giordano,* 1999 CarswellOnt 607 (Gen Div) at para 9; see also *Martin v Robins*, 2006 CarswellOnt 1405 (SC).

the age of 18 years, unless a will, court order etc., establishes a later distribution date.

Trust Terms

Further alternatives may exist having some bearing on the appointment of a guardian under the *CLRA*, including various trust arrangements which may provide authority for the property to be held in trust by a parent or other individual/trustee, a will that contains trust terms, the designation of a trustee or a trust or trust settlement (*inter vivos* trust).

Litigation Guardian for Minors

In a civil case, a child under the age of 18 cannot sue or be sued in his/her name. A litigation guardian ("LG") would need to be appointed.[35] One exception to this rule is in Small Claims Court cases for $500 or less.

An LG is an adult who makes decisions on behalf of a child in a court case. An LG is authorized to take all steps that the child would be able to take in the proceeding, as if the child were an adult. The LG must take all necessary steps to protect the child's interest.[36] An LG must be represented by a lawyer.[37]

Litigation Guardian and Guardian of a Minor's Property are Distinct Roles

In the case *O'Connell v Snyder*, a decision on a motion under Rule 7 to approve a settlement on behalf of a minor, the court considered the motion materials filed by the plaintiff, and stated:

> The plaintiffs also seek an order appointing Jody O'Connell as litigation guardian. The settlement proposal does not direct payment of the minor's settlement into court but, despite my request, no information has been provided to justify the proposal. The plaintiffs are reminded that the appointment of a litigation guardian is only for the purposes of the litigation. An appointment of a guardian of the property of the child is mandatory, pursuant to sections 47 to 60 of the Children's Law Reform Act.[38]

Importantly, an LG is not the guardian that accepts payment of settlement proceeds or court awards. An LG therefore is not a guardian of the property or the person. It is the guardian of property appointed pursuant to a court order under the *CLRA* who receives payment of monies payable to the minor.

On a motion to appoint an LG, the applicant/moving party shall file an affidavit which speaks to:

(a) the nature of the proceeding;

(b) the date on which the cause of action arose and the date on which the proceeding was commenced;

(c) service on the party under disability of the originating process and the request for

35 See Rule 7 of the *Rules of Civil Procedure, supra* note 5.
36 *Ibid*, Rule 5.05(1).
37 *Ibid*, Rule 7.05(3).
38 *O'Connell v Snyder*, 2002 CarswellOnt 1954 (SC) at para 5.

appointment of litigation guardian;

(d) the nature and extent of the disability;

(e) in the case of a minor, the minor's birth date;

(f) whether the person under disability ordinarily resides in Ontario and,

except where the proposed litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, evidence,

(g) concerning the relationship, if any, of the proposed litigation guardian to the party under disability;

(h) whether the proposed litigation guardian ordinarily resides in Ontario;

(i) that the proposed litigation guardian,

(i) consents to act as litigation guardian in the proceeding;

(ii) is a proper person to be appointed;

(iii) has no interest in the proceeding adverse to that of the party under disability; and

(iv) acknowledges having been informed that he or she may incur costs that may not be recovered from another party.[39]

The Children's Lawyer for Ontario ("CL") may initiate a proceeding on behalf of a minor, pursuant to Rule 7.02(2), which permits the CL to act as LG for a minor plaintiff or applicant, but the CL is a litigation guardian of last resort under Rule 7.04 and will act only if no parent, guardian or other adult exists who is willing and able to act as LG.

The most frequent proceedings initiated by the CL in the area of estates and trusts include motions or applications for an order requiring a passing of accounts, and dependant relief/support claims. The CL also reviews and approves settlements reached on behalf of minor litigants if a report is requested by the court pursuant to Rule 7.08.[40]

Notice to the OCL

Pursuant to the *CLRA* and the Rules, the OCL must be given notice of certain motions, applications and actions, including, for example, dismissal of a minor's action for delay (Rule 24.02), removal of a minor's litigation guardian (Rule 7.06(2)) and removal of the lawyer for a litigation guardian (Rule 15.04(3)).

The OCL represents minor respondents in a proceeding against their interest in a trust or estate by operation of law, unless the court orders otherwise, pursuant to Rule 7.03(2). The OCL will respond to, *inter alia*, the following types of claims on behalf of a minor, unborn or ascertained beneficiary:

39 See Rule 7.03(10) of the *Rules of Civil Procedure*.

40 Motions under Rule 7.08 are discussed more fully by Heather Hogan in Chapter 6 of this collection.

- Variation of trusts;
- Applications to pass accounts;
- Removal of trustees;
- Will challenges;
- Will interpretations;
- Applications for directions;
- Dependant relief/support applications under the *Succession Law Reform Act*[41] ("*SLRA*");
- Sale/encumbrances of a minor's real estate; and
- Guardianship applications brought in respect of a minor's property.

3. GUARDIANSHIP OF THE PROPERTY OF INCAPABLE ADULTS

The Substitute Decisions Act, 1992

The *SDA* governs the appointment of guardians of the property for adults. Section 22(1) of the *SDA* states that "[t]he court may, on any person's application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so."[42] In the absence of these two conditions (incapacity to manage property, and resulting necessity of having decisions made by another person), a guardian should not be appointed.[43] Importantly, those seeking to be appointed as guardian of the property for an incapable adult cannot, themselves, be incapable of making decisions regarding the management of property.[44]

The purpose of the *SDA* is to protect the vulnerable while at the same time ensuring that the dignity and privacy of the individual are "assiduously protected." Autonomy of the person and the presumption of capacity are paramount. In *Park v Park*, Turnbull J identified the balance which courts must achieve between the fundamental rights of citizens and their vulnerability to abuse when they become incapable:

> The court is therefore placed in a position where it must weigh the fundamental rights of each citizen against the danger that that vulnerable person may be taken advantage of due to his/her incapacity to protect or care for her/himself or his/her assets and property. In doing that, the court must be cognizant that the capacity to perform certain functions differs, depending on the nature of the function.[45]

41 RSO 1990, c S.26.
42 The "court" referred to is the Superior Court of Justice.
43 *Deschamps v Deschamps*, [1997] OJ No 4894 at para 11, 75 ACWS (3d) 1130 (SC).
44 *SDA*, *supra* note 2, s 55.
45 2010 ONSC 2627 at para 48.

Pursuant to s 6 of the *SDA,* a person is incapable of managing property if:

> [t]he person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The Public Guardian and Trustee

The Office of the Public Guardian and Trustee ("OPGT") is a corporation created under the *Public Guardian and Trustee Act*.[46] The OPGT is part of the Victims and Vulnerable Persons Division of the Ministry of the Attorney General. Lawyers at the OPGT may be assigned to conduct litigation in family law, general civil, trusts and estates law and corporate law. Other lawyers do solicitor's work, including opinions, policy, the administration of estates, contracts, privacy and real estate law. Specialized legal work such as personal injury or bankruptcy is done by retainer of private-sector lawyers, where appropriate.

Overview of the role of the PGT[47]:

- Acts as guardian of property and in certain instances of the person in circumstances of last resort for incapable adults under the *SDA*;[48]

- Acts as statutory guardian of property for incapable adults, when appointed by s 16 of the *SDA* (pursuant to a capacity assessment), and by s 15 of the *SDA* (pursuant to a *Mental Health Act*[49] ("*MHA*") certificate) and when court ordered for some clients;

- Acts as guardian for personal care when court ordered pursuant to the *SDA*;

- Conducts investigations into allegations of risk of serious adverse effects to incapable adults under the *SDA*;

- Reviews and comments upon private applications to the Ontario Superior Court of Justice for guardianship under the *SDA*, taking a formal position in a proceeding if necessary;

- Makes treatment and long-term care placement decisions under the *Health Care Consent Act,* 1996[50];

- Under the *Crown Administration of Estates Act*,[51] administers certain estates of deceased persons who die in Ontario without a will and without known next of kin in Ontario;

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46 RSO 1990, c P.51.

47 See the Office of the Public Guardian and Trustee: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/overview.asp.

48 See, as authority for example, the case of *Public Guardian and Trustee v. Lico*, 2012 ONSC 1872 whereby the PGT sought to be appointed guardian of property pursuant to s.22 of the *SDA*.

49 RSO 1990 c M.7.

50 SO 1996, c H.2.

51 RSO 1990, c C.48.

- Performs the functions of the ASCJ;

- Acts as litigation guardian or legal representative of last resort of incapable adults in litigation under the Rules, the Family Law Rules[52] and the Rules of Small Claims Court[53];

- Provides reports to the court under Rule 7.08(5) on settlements affecting adult parties under disability;

- Administers perpetual care trust funds of some cemeteries under the *Cemeteries Act* (Revised),[54] and pursuant to the *Escheats Act*[55] may take possession of corporate property forfeit to the Crown under the *Ontario Business Corporations Act*,[56] or property escheating to the Crown under the *SLRA* or other statutes; and

- Monitors the use of charitable property in Ontario, to ensure protection of the public interest under the *Charities Accounting Act*[57] and other statutes.

Appointment of the PGT as "Statutory Guardian"

A statutory guardianship does not require the court appointment of the guardian.

The PGT may be appointed as a "statutory guardian" of property, pursuant to s 15 or s 16 of the *SDA* in circumstances where an incapable person has not executed a valid power of attorney, or alternatively, if no application for guardianship of property is brought under the *SDA* and the assessment has issued under the *SDA* or the *MHA*, automatically activating their statutory appointment as guardian of property.

After becoming a person's statutory guardian of property, the PGT must ensure that the person is informed in a manner that the PGT considers appropriate, that the PGT has become the person's statutory guardian of property and that the person is entitled to apply to the Consent and Capacity Board for a review of the assessor's finding that the person is incapable of managing property.[58]

If a certificate issues under the *MHA* certifying that a person who is a patient of a psychiatric facility is incapable of managing property, the PGT is the person's statutory guardian (s 15 of the *SDA*). Under s 16 of the *SDA*, if the person is not a patient in a psychiatric facility anyone can request that a capacity assessor perform an assessment of the person to determine if the person is capable of managing property. If the person does not refuse to be assessed and the capacity assessor finds the person incapable of managing property, the prescribed forms are forwarded to the OPGT and the PGT thereafter automatically becomes the person's statutory guardian of property.

When the PGT is acting as statutory guardian for an incapable person it can, in turn, appoint certain people to act in its place, or agree to be replaced on application to replace the PGT. A relative,

52 O Reg 114/99.
53 O Reg 258/98.
54 RSO 1990 c C.4.
55 RSO 1990 c E.20.
56 RSO 1990 c B.16.
57 RSO 1990, c C.10
58 *SDA*, *supra* note 2, s 16(6).

spouse or partner of the incapable person may, for example, be appointed by the PGT. Applications can be made to replace the PGT as statutory guardian.[59]

The PGT shall appoint the applicant as the incapable person's statutory guardian of property if the PGT is satisfied that the applicant is suitable to manage the incapable person's property and that the management plan is appropriate.[60] The PGT must also consider the incapable person's wishes and the closeness of the application's relationship to the person.[61] As a condition to an appointment to replace the PGT, the PGT may require the applicant to post security. However, the court may order on an application that security be dispensed with or that the amount of security be reduced and subject to conditions.

If the PGT refuses the application for a replacement, there shall be written reasons given to the applicant.[62] If the applicant disputes the refusal by giving the PGT notice in writing, the PGT shall apply to the court to decide the matter.[63] It must be remembered, however, that a person can always bring a guardianship application to unseat the statutory guardian and is not restricted to applying to the PGT as a replacement.

While the PGT is limited as to who it can appoint, a court is not. The court also has the exclusive authority to appoint a guardian to replace an attorney under a CPOAP. As the court held in *Valente v Valente*, "where there is a Power of Attorney in existence and the court determines that there is strong evidence of misconduct or neglect, on the part of the Attorney, the court may ignore the wishes of the donor."[64]

Procedure under the SDA for Guardianship Applications

Part III of the *SDA* prescribes the procedure to be followed in applications to appoint guardians of property for incapable adults. Importantly, s 69(1) lists the persons who must be served with the application. Far too often, litigants seeking guardianship appointments fail to bring their applications in accordance with section 69 by, amongst other things, failing to serve the appropriate or required persons and entities. Section 69(1) states that the application must be served on the following people, together with the documents referred to in section 70(1), and those referred to in section 72 if applicable:

1. The person alleged to be incapable of managing property.

2. The attorney under his or her continuing power of attorney, if known.

3. His or her guardian of the person, if known.

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59 *Ibid*, s 17.
60 *Ibid*, s 17(4).
61 *Ibid*, s 17(5).
62 *Ibid*, s 18(1).
63 *Ibid*, s 18(2).
64 2014 ONSC 2438, 100 ETR (3d) 134; *Valente* provides an overview of the appointment of guardians under the *SDA*. In this case a son and daughter-in-law were appointed as joint guardians of the property and of personal care of an elderly woman who was suffering neglect at the hands of her grandson and daughter (who were removed as her attorneys for property by reason of misconduct). See also: *Glen v Brennan*, [2006] OTC 18 (SC), at paras 8-10; *Teffer v Schaefers*, *supra* note 4 at para 52.

4. His or her attorney for personal care, if known.

5. The Public Guardian and Trustee.

6. The proposed guardian of property.

The remainder of section 69 of the *SDA* prescribes the procedure for various other steps in or types of proceedings related to guardianship including termination of guardianship and is reproduced at **Appendix "A"** to this chapter.

Section 70 of the *SDA* prescribes documents which must accompany a guardianship application (which would not ordinarily be required, for example in other applications under the Rules):

> An application to appoint a guardian of property shall be accompanied by,
>
> (a) the proposed guardian's consent;
>
> (b) if the proposed guardian is not the Public Guardian and Trustee, a plan of management for the property, in the prescribed form; and
>
> (c) a statement signed by the applicant,
>
> (i) indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or
>
> (ii) if it was not possible to give the person alleged to be incapable the information referred to in subclause (i), describing why it was not possible.

A precedent Plan of Management is attached hereto as **Appendix "B"** to this chapter.

Routes to Guardianship in Applications under the SDA

Section 72 of the *SDA* addresses the procedure to be followed by an applicant who seeks an application for guardianship to be dealt with by way of summary disposition under section 77 of the *SDA*. Sections 72 and 77 of the *SDA* state (in relevant part):

> 72. (1) If the applicant wishes an application to appoint a guardian of property to be dealt with under section 77 (summary disposition), it shall also be accompanied by two statements made in the prescribed form, one by an assessor and the other by an assessor or by a person who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months before the notice of application was issued.
>
> [...]

> 77. (1) In an application to appoint a guardian of property or guardian of the person or a motion to terminate a guardianship of property or guardianship of the person, the court may, in the circumstances described in subsection (2), make an order without anyone appearing before it and without holding a hearing.

Criteria a Court Will Consider in Appointing a Guardian for an Incapable Adult

Section 24 of the *SDA* lists the criteria the court will consider when determining whether to appoint a guardian of the property for a decisionally incapable adult, and as a result, the supporting affidavit of the potential guardian applicant should speak to these criteria. Subsection 24(5) states:

> Except in the case of an application that is being dealt with under section 77 (summary disposition), the court shall consider,
>
> (a) whether the proposed guardian is the attorney under a continuing power of attorney;
>
> (b) the incapable person's current wishes, if they can be ascertained; and
>
> (c) the closeness of the relationship of the applicant to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.

The degree of importance of consideration of the incapable person's express wishes is demonstrated in the case *Lazaroff v Lazaroff*, in which Corbett J stated, "[the incapable person's] wishes should be accorded significant consideration in appointing her guardian of property [see *SDA*, ss. 8, 9, and 12(1)(c)]. But they should not dispose of the issue."[65]

Duties and Obligations of a Guardian for Incapable Adults: SDA sections 31-42

The duties and obligations (including potential liabilities) of a guardian for an incapable adult are prescribed at ss 31-42 of the *SDA*. Some of the most foundational principles which apply to and govern guardians are as follows:

- Guardians of property are required to keep accounts pursuant to s 32(6) of the *SDA*. The contents of accounts are prescribed by O Reg 100/96 under the *SDA*. The format of accounts for the passing of an estate or guardian's accounts is outlined in Rule 74.17 of the Rules, which is the same format required for estate trustees pursuant to Rule 74.17, except there is no obligation to distinguish between income and capital accounts as a guardianship is not a testamentary accounting.[66]

- Guardians of property are fiduciaries for and of the incapable person; their powers and duties shall be exercised and performed diligently, with honesty and integrity

65 2005 CarswellOnt 7007 at para 17, 23 ETR (3d) 75 (SC).

66 For further guidance on fiduciary accounting, see: "*Whaley Estate Litigation on Fiduciary Accounting: Guardianship Accounts; Attorney Accounts; Estate Accounts; Trust Accounts,*" http://whaleyestatelitigation.com/resources/WEL_On_Fiduciary_Accounting_2014.pdf.

and in good faith, for the incapable person's benefit.[67]

- Guardians may do on the incapable person's behalf anything in respect of the incapable person's property that the person could do if capable.[68]
- The guardian's powers are subject to the *SDA* and any conditions imposed by the court.
- If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit.[69]
- A guardian must encourage the incapable person to participate in the guardian's decision regarding the incapable person's property.[70]
- A guardian shall consult from time to time with supportive family members and friends of the incapable person who are in regular personal contact with the incapable person and the persons from whom the incapable person receives personal care.[71]
- A guardian shall explain to the incapable person what the guardian's powers and duties are.[72] A guardian shall also encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property.
- Guardians must act in accordance with their management plan and/or guardianship plan, as approved by the court or the PGT. If a guardian must amend a plan because circumstances have changed, an amended management plan or amended guardianship plan may be submitted to the PGT pursuant to its statutory authority in sections 32(10) and (11) of the *SDA*.
- A guardian who does not receive compensation for managing the property shall 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.[73]
- A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.[74]
- A guardian of property is liable for damages resulting from a breach of the guardian's duty.[75]

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67 *SDA*, *supra* note 2, s 31.1.
68 *Ibid*, s 31(1); This includes collecting and depositing income, paying bills, making purchases, selling assets, handling investments, managing real estate and looking after legal matters. The only matter of a financial nature that a guardian of property cannot do is make or change a will on behalf of the incapable person.
69 *Ibid*, s 32(1.1).
70 *Ibid*, s 32(2).
71 *Ibid*, s 32(5).
72 *Ibid*, s 32(2).
73 *Ibid*, s 32(7).
74 *Ibid*, s 32(8).
75 *Ibid*, s 33.

Compensation of Guardians of Property for Incapable Adults under the SDA

Section 40 of the *SDA* describes the circumstances, manner and quantum in which a guardian of property may take compensation for performing their duties:

> 40. (1) A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale.
>
> (2) The compensation may be taken monthly, quarterly or annually.
>
> (3) The guardian or attorney may take an amount of compensation greater than the prescribed fee scale allows,
>
> (a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or
>
> (b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.
>
> (4) Subsections (1) to (3) are subject to provisions respecting compensation contained in a continuing power of attorney executed by the incapable person if,
>
> (a) the compensation is taken by the attorney under the power of attorney; or
>
> [...]
>
> (c) the compensation is taken by a guardian of property who was the incapable person's attorney under the power of attorney.

The Regulations enacted under the *SDA* permit a guardian to take compensation based on 3% of disbursements of capital and revenue plus an annual care and management fee of 0.6% of the fair market value of assets under administration by the guardian.

Courts consider appropriate compensation for guardians in light of the percentages indicated in the Regulations to the *SDA*, but have also in their decisions adopted factors originally used in the case law to assess executors' compensation, and in consideration of section 61 of the *Trustee Act*, which states:

> [a] trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.

The recent case *Goetz v Goetz* provides an example of the way in which courts will address the question of compensation to guardians (or in this particular case, an estate trustee):

> Courts have attempted to set down specific rules for dealing with estate trustees' compensation (see: Widdifield on Executors and Trustees, 6th ed. at p. 11.4). The leading cases continue to be *Toronto General Trusts Corp. v. Central Ontario Railway* (1905), 6 O.W.R. 350 (Ont. H.C.); and *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.). More recent cases have considered the application of the percentages discussed in *Atkinson Estate, Re* Estate. In *Jeffery Estate, Re* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.), Killeen J. held that the percentages should be used as a preliminary guide for the audit judge. However the audit judge should consider the mathematical result against the factors from the *Toronto General Trusts Corp.* case. Those five factors are:
>
> 1) the size of the trust;
>
> 2) the care and responsibility involved therefrom;
>
> 3) the time occupied in performing the duties;
>
> 4) the skill and ability shown;
>
> 5) the success resulting from its administration.[76]

Rule 7.08 Settlements and Payment into Court under Rule 7.09

This topic is addressed more fully in this collection in Chapter 6 of this Collection, "Court Approval of Settlements", by Heather Hogan. Nevertheless Rule 7.08 motions will be briefly canvassed in this chapter.

Where an incapable person, who has no attorney under a CPOAP, is the plaintiff in a tort action or a claim for lump-sum Statutory Accident Benefits and there is or will be funds flowing to the incapable person, it is important to arrange for a guardianship of property appointment at the earliest opportunity.

If the adult is declared incapable and cannot manage funds, the OSCJ will not pay funds to the incapable person on the motion for approval of the settlement under Rule 7.08. Rule 7.09 provides that those funds must be paid into court, unless the court orders otherwise; therefore, the application under the *SDA* should precede the Rule 7.08 motion or application.

It is a more efficient, cost-effective and timelier service to a person under disability to avoid payment into court where guardianship is or should be arranged.

If a guardian is already in place at the time of the approval of the settlement, there may be additional terms imposed on the guardian as a result of the settlement, and in any event it is likely the management plan in place, if any will need to be revised; for example, respecting the posting of a bond, or the formal passing of accounts, or other terms. If these pending legal proceedings are known at the time the guardianship is initiated, they should be included and listed in "Legal Proceedings" in the proposed management plan. The review of the management plan by the OPGT should then trigger a consideration of terms to be included in the original guardianship order, to avoid amendments at a later date upon court approval of the settlement.

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76 2014 ONSC 729 at para 54, 99 ETR (3d) 167; see also *Shibley Estate, Re*., 2004 CarswellOnt 5536 (SC) at para 33.

Payment out of Court to a Guardian of Property for an Incapable Adult

As noted, a litigation guardian is a distinct role from that of a guardian for property appointed under both the *SDA* and the *CLRA*.

In the decision of Stinson J, *626381 Ontario Ltd. v Kagan, Shastri*, *Barristers & Solicitors*, the court described the relationship and distinction between a litigation guardian and a guardian appointed pursuant to an order made under the *SDA*. His Honour stated:

> It is important to highlight that, while the definition of disability in the *Rules* borrows from the *SDA*, the latter is a different legislative regime with a different purpose than Rule 7. Unlike Rule 7, which is designed to protect the integrity of the court process, the focus of the *SDA* is solely on the protection of the individual, and rightly so. There is much more at stake, in regards to an individual's dignity, privacy, and legal rights, when, following a court-ordered capacity assessment under s. 79 of the *SDA*, he or she is deemed incapable of managing his or her personal care or property. As Strathy J stated in *Abrams v. Abrams*, [2008] O.J. No. 5207 (S.C.), at para. 48, *SDA* proceedings "are not a *lis* or private litigation in the traditional sense. The interests that these proceedings seek to balance are not the interest of litigants, but the interests of the person alleged to be incapable as against the interest and the duty of the state to protect the vulnerable."
>
> In non-*SDA* matters, however, when the nature of the proceedings before the court has nothing to do with the type of substitute decision making governed by the *SDA*, different considerations apply. Indeed, when a matter simply involves a litigant who is a person under a disability, the procedures outlined in Rule 7, including the mandatory appointment of a litigation guardian (rule 7.01(1) and the mandatory court approval of any settlement (rule 7.08(1)), are designed and intended to provide adequate safeguards not just for the litigant under a disability, but also the other litigants, and the entire court process.[77]

A guardian of property appointed by the court for a minor or incapable adult, whether under the *CLRA* or *SDA*, requires a specific term in a court order directing the ASCJ to pay to "[minor or incapable person], by his/her guardian of property, X, the funds held in Court File No. xxx/14 (or, if this is in respect of a guardianship order, held in trust for X including all accrued interest) in the Ontario Superior Court at Toronto."

If such a term is not included in the guardianship order, a separate order, obtained on motion in the original proceeding (e.g., Court File No. xxx/15) is required, directing the ASCJ to pay out the funds. The order should not specify the exact amount of the funds, as interest accrues monthly. Rule 72.03(5) provides that interest is automatically included in the payment out of court, unless the order provides otherwise.

77 2013 ONSC 4114 at paras 19-20, 116 OR (3d) 202.

CONCLUSION

This chapter aimed to provide the reader with an overview of the relevant legislation and case law related to guardianship of property of persons under disability in Ontario. As the reader will no doubt have gleaned, guardianship applications are substantially different from other types of applications, despite procedural similarities which exist under the Rules. Different legislative regimes govern guardianship of property in relation to adults (the *SDA*) and minors (the *CLRA*), and both substantively and procedurally, litigants must ensure they comply with the requirements of the correct statute in any guardianship proceedings in which they are involved. The OCL and OPGT are also different entities and, under the *CLRA* and the *SDA*, have different duties and powers. Too, a litigation guardian is different from a guardian of property appointed under the *CLRA* or the *SDA*.

The distinctions, procedures and principles considered in this chapter are very important, particularly for the purposes of minimizing costs to litigants who act erroneously in the context of guardianship litigation.

GUARDIANSHIP OF PROPERTY: APPENDIX A

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

SECTION 69

SERVICE OF NOTICES

Application to terminate statutory guardianship of property

69. (0.1) Notice of an application to terminate a statutory guardianship of property shall be served on the following persons:

1. The statutory guardian of property.
2. The applicant's guardian of the person, if known.
3. The applicant's attorney for personal care, if known.
4. The Public Guardian and Trustee, if he or she is not the statutory guardian. 1996, c. 2, s. 45 (1).

Application to appoint guardian of property

(1) Notice of an application to appoint a guardian of property shall be served on the following persons, together with the documents referred to in subsection 70 (1), and those referred to in section 72 if applicable:

1. The person alleged to be incapable of managing property.
2. The attorney under his or her continuing power of attorney, if known.
3. His or her guardian of the person, if known.
4. His or her attorney for personal care, if known.
5. The Public Guardian and Trustee.
6. The proposed guardian of property. 1992, c. 30, s. 69 (1).

Motion to terminate guardianship of property

(2) Notice of a motion to terminate a guardianship of property shall be served on the following persons, together with the documents referred to in section 73 if applicable:

1. The person whose property is under guardianship.

2. His or her guardian of the person, if known.

3. His or her attorney for personal care, if known.

4. The Public Guardian and Trustee.

5. The guardian of property. 1992, c. 30, s. 69 (2); 1996, c. 2, s. 45 (2).

Application to appoint guardian of the person

(3) Notice of an application to appoint a guardian of the person shall be served on the following persons, together with the documents referred to in subsection 70 (2), and those referred to in subsection 71 (1) and section 74 if applicable:

1. The person alleged to be incapable of personal care.

2. The attorney under his or her continuing power of attorney, if known.

3. His or her guardian of property, if known.

4. His or her attorney for personal care, if known.

5. The Public Guardian and Trustee.

6. The proposed guardian of the person. 1992, c. 30, s. 69 (3).

Motion to terminate guardianship of the person

(4) Notice of a motion to terminate a guardianship of the person shall be served on the following persons, together with the documents referred to in section 75 if applicable:

1. The person under guardianship.

2. His or her guardian of property, if known.

3. The attorney under his or her continuing power of attorney, if known.

4. The Public Guardian and Trustee.

5. The guardian of the person. 1992, c. 30, s. 69 (4); 1996, c. 2, s. 45 (3).

Same

(5) The notice and accompanying documents need not be served on the applicant or moving party. 1992, c. 30, s. 69 (5); 1996, c. 2, s. 45 (4).

Service on family

(6) The notice and accompanying documents shall also be served on all of the following persons who are known, by ordinary mail sent to the person's last known address:

1. The spouse or partner of the person who is alleged to be incapable of managing property, whose property is under guardianship, who is alleged to be incapable of personal care or who is under guardianship of the person, as the case may be.

2. The person's children who are at least 18 years old, in the case of an application or motion under Part I, or at least 16 years old, in the case of an application or motion under Part II.

3. The person's parents.

4. The person's brothers and sisters who have attained the relevant age referred to in paragraph 2. 1992, c. 30, s. 69 (6); 1996, c. 2, s. 45 (5).

Exception

(7) Subsection (6) does not require service on a person whose existence or address cannot be ascertained by the use of reasonable diligence. 1992, c. 30, s. 69 (7).

Parties

(8) The parties to the application or motion are the applicant or moving party and the persons served under subsection (0.1), (1), (2), (3) or (4), as the case may be. 1996, c. 2, s. 45 (6).

Adding parties

(9) Any of the following persons is entitled to be added as a party at any stage in the application or motion:

1. A person referred to in paragraph 2 or 3 of subsection (0.1), paragraph 2, 3 or 4 of subsection (1), paragraph 2 or 3 of subsection (2), paragraph 2, 3 or 4 of subsection (3) or paragraph 2 or 3 of subsection (4), as the case may be, who was not served with the notice of application or notice of motion.

2. A person referred to in subsection (6), whether or not served with the notice of application or notice of motion. 1996, c. 2, s. 45 (6).

(10) Repealed: 1996, c. 2, s. 45 (6).

(11) Repealed: 1996, c. 2, s. 45 (6).

GUARDIANSHIP OF PROPERTY: APPENDIX B

SUBSTITUTE DECISIONS ACT, 1992 ***Form 2***

MANAGEMENT PLAN

Note: Where the document is completed as part of an application for court appointed guardianship of property, please insert general heading and court file number.

A. This Management Plan is provided as part of the application made by:

_____
(Full names(s) of applicant(s))

to be appointed as guardian of the property of

_____
(Full name of person for whom guardianship is sought)

To the best of my knowledge and belief, the assets, liabilities, income and expenditures of

_____
(Name of person for whom guardianship is sought)

at this date are stated below. My plans for managing them and the reasons for these plans are as follows:

Complete the parts below that apply to the finances of the person for whom guardianship is sought. Attach additional pages if the space below is insufficient. Where a part does not apply, write 'None' or 'Not Applicable' in the space provided.

B. **LAND:**

Type and address of property or properties	Estimated market value
	TOTAL:

PLAN:
For each of the above noted properties indicate your plans (e.g., sell at market value, lease at market value, other), the anticipated time frame for completing the transactions, if applicable, and your reasons for these plans:

_____
_____
_____

C. **GENERAL HOUSEHOLD ITEMS AND VEHICLES:** (*Give general description for vehicles, list year, model, make.)*

Item	Particulars	Estimated Current Market Value
General Household: Vehicles:		
		TOTAL:

PLAN:
Explain your plans for these items (e.g., retain for use of person for whom guardianship is sought, sell at market value, place in storage, gift, other) and your reasons for these plans:

_____
_____
_____

D. **VALUABLES** (*including antiques, art, collectibles, jewellery*):

Item	Particulars	Estimated Current Market Value
		TOTAL:

PLAN:
Explain your plans for these items (e.g., sell at market value, place in storage, other) and your reasons for these plans:

_____
_____
_____

E. **SAVINGS AND SAVINGS PLANS** (*include cash, assets in financial institutions, registered retirement or other savings plans, deposit receipts, pension plans etc.*):

Category	Institution	Account Number	Current Amount or Value
			TOTAL:

PLAN:
Explain your plans for the savings described above (e.g., close current accounts and consolidate in a trust account, deposit cash, maintain savings plans, collapse plans as required to meet ongoing expenditures, etc.) and your reasons for these plans:

_____
_____
_____

F. **SECURITIES AND INVESTMENTS** (*include bonds, shares, warrants, options, debentures, notes and any other securities*):

Category	Number	Description	Estimated Current Market Value
			TOTAL:

PLAN:
Explain your plans with respect to the above-noted securities and investments (e.g., maintain in current form, renew as required, convert, redeem, etc.) and your reasons for these plans:

_____
_____
_____

G. **ACCOUNTS RECEIVABLE** *(include all debts owing to person for whom guardianship is sought):*

Particulars	Amount
	TOTAL:

PLAN:
Explain your plans regarding collection of the above-noted debts and your reasons for these plans:

_____
_____
_____

H. **BUSINESS INTERESTS:** *(Show any interests owned by the person for whom guardianship is sought in an unincorporated business. An interest in an incorporated business may be shown here or under Securities.)*

Name of Firm or Company	Interest	Estimated Current Value
		TOTAL:

PLAN:
Explain your plans regarding the above-noted business interests (e.g., maintain, dissolve, sell, etc.) and your reasons for these plans:

_____
_____
_____

I. **OTHER PROPERTY:** *(Show any other property owned by the person for whom guardianship is sought and which is not shown above.)*

Category	Particulars	Estimated Current Market Value
		TOTAL:

PLAN:
Explain your plans for the property described above and the reasons for these plans:

_____
_____
_____

J. **LIABILITIES:** *(Show the debts owed by the person for whom guardianship is sought including personal loans, credit card balances, outstanding bills, income tax owing, etc.)*

Description of Debt	Particulars	Amount of Debt
		TOTAL:

PLAN:
Explain your plans with respect to these debts and the reasons for these plans:

_____
_____
_____

K. **INCOME:** *(Show net income from all sources on an annual basis.)*

Type of Income	Particulars	Approximate Annual Amount
Pension Employment Interest Rental Business Other		
		TOTAL:

PLAN:
Explain your plans for the collection, deposit and allocation of the income described above:

_____
_____
_____

L. **EXPENSES:** (*Describe the expenses, calculated on an annual basis, which you anticipate will be required to be made on behalf of the person for whom guardianship is sought.*)

Expense	Particulars	Approximate Annual Amount
Residential Utilities Recreational/Entertainment Travel Personal Care Support for Dependents Property Maintenance Gifts Loans Charitable Donations Other		
		TOTAL:

PLAN:

Explain below:

(a) Whether any of the payments described above are of direct or indirect financial benefit to you, a person you live with or to whom you are related. If so, please explain why these payments are necessary and appropriate:

_____
_____
_____

(b) Whether any significant increases or decreases in the above expenditures are anticipated, or whether any additional expenditures are likely. If so, please explain:

_____
_____
_____

(c) Whether the expenditures listed above will adequately meet the personal needs and maximize the enjoyment of life of the person for whom guardianship is sought:

_____
_____
_____

(d) If you are planning to make gifts, loans or charitable donations, please explain the reasons why you believe these expenditures are appropriate:

_____
_____
_____

(e) If payments to dependents, or for their benefit, are required please provide details about the nature of these payments and the reasons for them:

_____
_____
_____

(f) Are there any expenditures which others have recommended which you are <u>not</u> planning to make? If so, please explain:

_____
_____
_____

M. **LEGAL PROCEEDINGS:** *(Identify any current legal proceedings relating to property to which he or she is a party including any civil or criminal proceedings.)*

Nature of Legal Proceedings	Status of Proceedings

PLAN:

(a) Please explain your plans in respect of these proceedings:

_____

_____

_____

Do you anticipate that legal proceedings may need to be commenced or defended on the person's behalf in respect of his or her property? If so, please explain:

_____

_____

_____

(b) What arrangements for legal representation for the person have been made or do you propose?

_____

_____

_____

(c) Are you aware of any existing court orders or judgments which are relevant to the management of the person's property? If yes, describe or attach copies.

Yes No If yes, describe: _____

_____

_____

N. **ADDITIONAL INFORMATION:**

(a) I have consulted with the person for whom guardianship is sought in making this plan: *(check one)*

Yes No If no, please provide reasons: _____

_____

_____

(b) I have consulted with the following other people in preparing this plan:

_____

_____

_____

(c) To the best of my knowledge, the person for whom guardianship is sought would not object to any aspect of this management plan: *(check one)*

Yes, would object No, would not object

If yes, please explain: _____

_____

_____

(d) I am aware of my duty to encourage the participation of the person for whom guardianship is sought in decisions I may make and to consult with supportive family and friends and caregivers. My plans to do so are as follows: *(briefly describe)*

_____

_____

_____

(e) I am aware that I would, as guardian of property, be required to make reasonable efforts to determine whether the person for whom guardianship is sought has a will and, if so, what the provisions of the will are and I am entitled to obtain the incapable person's will. My plans to do so are as follows:

_____

_____

_____

(f) I am aware that I am <u>not</u> to dispose of property that I know is subject to a specific testamentary gift in the will of the person for whom guardianship is sought unless the specific testamentary gift is of money or if the disposition of that property is necessary to comply with my duties as guardian of property or to make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37 of the *Substitute Decisions Act, 1992*.

SUBSECTIONS 32(10) and 32(11) OF THE *SUBSTITUTE DECISIONS ACT, 1992*, PROVIDE:

ss.32(10): A GUARDIAN SHALL ACT IN ACCORDANCE WITH THE MANAGEMENT PLAN.

ss.32(11): IF THERE IS A MANAGEMENT PLAN, IT MAY BE AMENDED FROM TIME TO TIME WITH THE PUBLIC GUARDIAN AND TRUSTEE'S APPROVAL.

SUBSECTIONS 89(5) AND 89(6) of the *SUBSTITUTE DECISIONS ACT, 1992,* PROVIDE:

ss.89(5): NO PERSON SHALL, IN A STATEMENT MADE IN A PRESCRIBED FORM, ASSERT SOMETHING THAT HE OR SHE KNOWS TO BE UNTRUE OR PROFESS AN OPINION THAT HE OR SHE DOES NOT HOLD.

ss.89(6): A PERSON WHO CONTRAVENES SUBSECTION (5) IS GUILTY OF AN OFFENCE AND IS LIABLE, ON CONVICTION, TO A FINE NOT EXCEEDING $10,000.00.

SUBSTITUTE DECISIONS ACT, 1992 ***Form 2***

_____ _____

Date Signature of proposed Guardian (s) of property

Name (s) (please print) : _____

_____

Address (es) : _____

_____

Telephone number (s) : _____

Form No. 237

CHAPTER 5

GUARDIANSHIP ACCOUNTING TIPS AND TRAPS AND PREPARATION OF GUARDIANSHIP ACCOUNTS

CHAPTER CONTENTS

INTRODUCTION

A fiduciary is a person who holds a legal or ethical relationship of trust with another person. A guardian of property is a fiduciary and is subject to the governing provisions of the *Substitute Decisions Act,* 1992 (the "*SDA*").[1] "Fiduciary accounting" describes the legal duty of the guardian to maintain the financial accounts and records of all transactions involving the person under guardianship in the management of their property. The guardian is to act in accordance with the statute governing the appointment, whether the *SDA*, its regulations and the court-approved management plan, or the *Children's Law Reform Act*[2] (the "*CLRA*").[3] Accounts and records kept by the guardian must be made available to certain statutorily designated persons or entities on request.

Application to Pass Accounts

An application by the guardian for property to "pass" accounts (also referenced in this chapter as a "passing of accounts," "passing" and "accounting") is a formal procedure governed by statute that results in court approval of the relevant period of property management. The jurisdiction and procedure for the passing of accounts by a guardian for property are set out in the *Rules of Civil Procedure* (the "Rules") in Rules 74.16 through 74.18 inclusive.[4] As with any application, the court has the jurisdiction on an accounting application to grant the relief sought, dismiss, adjourn or direct a trial, in whole or in part, and with or without terms. This jurisdiction applies to applications to pass accounts in accordance with Rule 38.10(1) (a) of the Rules.[5]

A passing of accounts is not strictly, in legal terms, a mandatory requirement. Rather the guardian may choose to pass its accounts, may have an existing court order requiring an accounting from time to time, or alternatively, a guardian may be compelled to do so by those legally entitled to request a passing, including:

1. the incapable person's guardian of the person;
2. a dependent of the incapable person;
3. the Public Guardian and Trustee ("PGT") or the Children's Lawyer; and
4. a judgment creditor of the incapable person.[6]

Also "any other person" may apply for a passing of accounts, but only with leave of the court.[7] It should be noted that the right to compel an accounting is not an absolute right, regardless of the circumstances; rather, it remains within the discretion of the court to either grant or refuse such an order.

---

1 SO 1992, c 30, s. 32(1): A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.
2 RSO 1990, c C.12.
3 *SDA* at ss. 32(6) and 32(10). Note the exception of the Public Guardian and Trustee ("PGT"), who acts in accordance with the policies of the office of the PGT and is not required to file a management plan.
4 RRO 1990, Reg. 194, as amended under the *Courts of Justice Act*, RSO 1990, c C.43.
5 Rules, *Ibid*, r. 38.10(1)(a): "On the hearing of an application the presiding judge may a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms."
6 *SDA, supra* note 1, ss. 42(1)-(8).
7 *Ibid*, ss. 42(1)-(8).

Although a passing of accounts may not be required, it may nevertheless be advisable for a guardian to make an application for a passing, since once the accounts have been passed, the accounts will have received court approval and cannot be questioned at a later date by persons having had notice of the passing (exceptions will apply in the case of fraud by the guardian or mistake).

A passing of accounts application may go uncontested, if no one "objects" to the accounts by filing a Notice of Objection. Where there is an uncontested passing of accounts and an unopposed order is sought, in many instances a court attendance before a judge may be avoided as long as all of the requirements under Rule 74.18 have been complied with.

Where there is an objection to the accounts, there will be a contested hearing for a passing of accounts.[8] The hearing may proceed on the date specified in the Notice of Application to Pass Accounts on the objections raised in the Notices of Objection to the Accounts as filed. The attendance may result in disposition of the matter or an Order Giving Directions respecting steps to be taken to its disposition. An Order Giving Directions is "designed to provide the parties with a procedural framework in which to prepare the proceeding for final adjudication."[9] It compels the parties to give the necessary forethought to implement a process and the procedure that is most likely to lead to a just, expeditious and cost-effective determination.

The benefits of an Order Giving Directions are, generally speaking, their flexible and consensual nature as every application to pass accounts is unique. Some objections may be about the fiduciary's failure to keep accurate records; some may be about the propriety of claimed or stated expenses; some may be concerns over poor investment decisions; and others may be about misappropriation/ misallocation of assets; just to name some of the more common objections. A well-negotiated and well-crafted Order Giving Directions is less likely than the "default" procedure (i.e. no fixed procedure) to result in wasteful interlocutory motions.

Costs

The costs of an unopposed Judgment are addressed in Rule 74.18(10) and Tariff C,[10] and for an opposed hearing they are set out in Rule 74.18(13).[11] In respect of costs, often the costs set out at Tariff C are insufficient. The court has the discretion to modify costs awards and a Request for Increased Costs may be made.[12]

Compensation

Under the *SDA,* a guardian of property has a statutory right to compensation, pursuant to a fee schedule set out in the legislation. The current rate is set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee.[13] The compensation can be taken monthly, quarterly or annually.[14] If consent in writing is given by the Office of the PGT and by the incapable person's guardian or attorney under a Power of Attorney for Personal Care, if any, the guardian of

8 *Rules*, *supra* note 4, r. 74.18(11)-(13).
9 Consolidated Practice Direction Concerning the Estates List, Toronto Region, July 1, 2014 ["Practice Direction"] at para. 44.
10 *Rules*, *supra* note 4, r. 74.18(10)
11 *Ibid,* r. 74.18(13)
12 *Ibid,* r. 58.01; *Courts of Justice Act, supra* note 4, s. 131; *Re Briand Estate* (1995), 10 ETR (2d) 99 (Ont. Gen. Div.)
13 *SDA,* Ontario Regulation 26/95, s. 1(a) through (c)
14 *SDA*, s. 40(2).

property may take compensation in an amount greater than the prescribed fee schedule.[15]

This chapter will examine in detail the proper procedure and process involved in preparing, passing and reviewing the accounts of a person under a disability, including the documents to be filed and the service of those documents; the role of the OPGT; guardian compensation; and costs. This chapter will also address some helpful tips and traps when preparing guardianship accounts.

Importantly, this chapter will introduce the new rules and regulations (effective January 1, 2016) affecting passing of accounts proceedings.

PART I : KEEPING ACCOUNTS

1. GENERAL

A guardian of property is a fiduciary, pursuant to section 32 of the *Substitute Decisions Act, 1992*[16] (the "*SDA*"), "whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit." As such, a guardian of property shall deal with an incapable person's property and "in accordance with the regulations, keep accounts of all transactions involving the property" (ss. 32(6)).

A guardian of property is required to "act in accordance with the management plan established for the property" (ss. 32(10)), with the exception of the Public Guardian and Trustee, who is not required to file a management plan and acts in accordance with the policies of the Public Guardian and Trustee. If there is a management plan, then pursuant to subsection 32(11) of the *SDA*, the plan "may be amended from time to time with the Public Guardian and Trustee's approval." The language of this subsection is not entirely clear, but it would appear that no court Order is necessary as long as the Public Guardian and Trustee approves the amendment.

Guardians of property or attorneys have a serious responsibility to keep good, detailed and understandable accounts that reflect their diligence and transparency. The accounts are really a snapshot of their handling of a person under disability's property. If the assets are administered over long periods of time and are of considerable volume, guardians/attorneys may wish to pass their accounts every few years. This relieves them of any liability to further account for transactions during the period of accounts that have been passed.

Ontario Regulation 100/96, s. 1, applies to attorneys under continuing powers of attorney, statutory guardians of property, court-appointed guardians of property, attorneys under powers of attorney for personal care and guardians of the person. Ontario Regulation 100/96, subsection 2(1) sets out the specific components and the form of accounts and records to be maintained by a guardian of property and an attorney under a continuing power of attorney, as follows:

15 *SDA*, s. 40(3)(a).
16 SO 1992, c 30.

2. (1) The accounts maintained by an attorney under a continuing power of attorney and a guardian of property shall include,

(a) a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;

(b) an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;

(c) an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;

(d) an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;

(e) an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;

(f) a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;

(g) an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;

(h) an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation;

(i) a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any. O. Reg. 100/96, s. 2 (1)."

A guardian of property continues to maintain such accounts until the guardian of property ceases to have authority to act and the guardianship is terminated by the court on a passing of accounts under s. 42 of the *SDA.*

In accordance with s. 42 of the *SDA,* a guardian of property has a statutory duty to account and may choose to voluntarily pass accounts or may be required to pass accounts by Order of the court. Subsections 42 (2), (3) and (4) of the *SDA* set out who is entitled to apply to pass the accounts, whether it is a guardian of property, an attorney or other person(s), and subsections 49(3) and (4) of the *Estates Act*[17] set out the powers of a judge on the passing of any accounts.

17 RSO 1990, c E.21.

Subsection 32(12) of the *SDA* states that "the *Trustee Act*[18] does not apply to the exercise of a guardian's powers or the performance of guardians' duties." It would however appear that the procedural requirements remain the same, despite subsection 32(12) of the *SDA*, as subsection 23(1) of the *Trustee Act* provides that the proceedings and practice for a passing of accounts for a trustee are the same as for an estate trustee.

2. PROCEDURE

The procedures governing the obligation to prepare accounts and the requirement to keep and maintain accurate records in a specific format are set out in Rule 74.17 of the Rules, as follows:

> **Form of Accounts**
> 74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,
>
> (a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;
>
> (b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;
>
> (c) an account of all money received, but excluding investment transactions recorded under clause (e);
>
> (d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);
>
> (e) where the estate trustee has made investments, an account setting out,
>
> (i) all money paid out to purchase investments,
>
> (ii) all money received by way of repayments or realization on the investments in whole or in part, and
>
> (iii) the balance of all the investments in the estate at the closing date of the accounts;
>
> (f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;
>
> (g) a statement of all money and investments in the estate at the closing date of the accounts;
>
> (h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;
>
> (i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and
>
> (j) such other statements and information as the court requires.

18 RSO 1990, c T.23.

(2) The accounts required by clauses (1)(c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with the capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.[19]

Accounts must be consistent with the form set out in Rule 74.17 and shall contain a full and detailed list of all of the person under disability's assets as of the date of the first transaction by the guardian of property, cross-referenced to entries in the accounts that show the acquisition or disposition of the assets, an account of all money received and disbursed on behalf of the person under disability (separated as to capital and revenue), a statement of property remaining, an investment account (investment items recorded are not included when calculating compensation only used to determine a care and management fee), a statement of compensation claimed/taken by/paid to the guardian of property, if any, including the method of calculating the compensation, and a statement of liabilities, contingent or otherwise, at the date of the accounts.

The guardian of property must be familiar with the transactions within the accounts and be in a position to make the accounts available to be reviewed, if required, and to satisfactorily respond to any reasonable questions raised by a person with a financial interest in the assets of a person under disability. If the guardian/attorney is aware that there may be difficulties with the administration or persons having a financial interest in the future then proper and complete accounts will offer some protection to the attorney/guardian down the road. Many harmonious relationships between guardians/attorneys and those having a financial interest in the future end very quickly when transparency and information is lacking. The guardian/attorney's record-keeping should be governed by the possibility that the accounts may eventually be scrutinized by those with a financial interest or by the courts.

The accounts are compiled from a multitude of sources and weaved together in chronological order so that there is an entry for every related transaction that takes place. The transactions recorded are **actual** cash amounts (or specie transactions, i.e. distributions of assets in their present form); figures are not rounded up or down. There is no "depreciation" and/or "accrual" type of accounting when maintaining guardian/attorney accounts.

As a general rule, the more information recorded in each entry, the better. The detail must be sufficient to enable anyone unfamiliar with the administration to clearly understand everything that has transpired during the accounting period. Anyone with a financial interest is entitled to full and complete information as to the status of the assets, the nature of investments, the quantum of income generated and the disbursements made. Failure to provide such detail in a timely fashion in a format that is easily understood may result in the guardian/attorney being cited to pass accounts before the court. Proper guardian/attorney accounts provide up-to-date information as to the overall status of the guardian/attorney's administration.

Although not forming part of the accounts submitted to the court, the specific detail from all entities holding assets and all receipts/disbursements recorded in bank and brokerage statements, supported by electronic copies of cancelled cheques, invoices, and vouchers often referred to as

19 O. Reg 484/94, s.12

source documents, must be kept and be available in the event the guardian/attorney is required to pass the accounts at a hearing and may also be viewed by any opposing parties on a passing of accounts.

3. GATHERING AND MAINTAINING INFORMATION

It is self-sabotage not to be organized and devote the time necessary to your fiduciary duty as guardian of property or attorney under a power of attorney to maintain proper financial records. It is time consuming but wise to ensure early on that all source documents will be made available by redirecting them to the guardian/attorney for property. Correspondence should be kept with the source documents to support the guardian/attorney's efforts to obtain information and documents.

To start, consider preparing an Information Summary (see **APPENDIX "A" to this chapter** as an example of a guardianship appointment where the management plan is one of the governing documents). In the future, you will be glad you did this for your reference. To supplement this Summary, consider including a list of contacts at the bank, brokerage company, accountants office and any family members, attorneys for personal care etc. with telephone numbers, addresses and email addresses.

Tip: Keep a copy of the supporting documents attached to the Information Summary to verify the source of the figures recorded therein for assets and liabilities at the date of commencing the accounts. It is also a useful reference to make certain you are complying with the terms of the management plan.

Keep appraisals of assets, copies of property deeds, reporting letters with enclosures, insurance policies and tax returns. Where anything has to be calculated that is not readily obvious, for example, a statement of income paid out, these documents should be close at hand.

Keep a copy of the court Order, continuing power of attorney, certificate of statutory guardianship constituting the authority of the guardian/attorney and a copy of the management plan, if any, and the Will, if there is one, with the Information Summary.

A guardian/attorney must be familiar with the person under disability's Will, if there is one. As a precaution, the guardian/attorney needs to know what personal assets, if any, pass as a testamentary bequest. These assets must be preserved until the person under disability departs this world.

Tip: If new assets are discovered or assets change – e.g. a house will be sold and decisions must be made regarding investment of the proceeds – then the Public Guardian and Trustee's approval may be required to an amended management plan.

Tip: A person under disability's financial accounts and transactions must be kept completely separate from the guardian/attorneys. Never borrow or use the person under disability's money for the guardian/attorney or family and friends unless the guardian/attorney is authorized in the management plan or allowed by the court to receive a specific amount as compensation for their work as the guardian (see Compensation section).

4. PREPARING ACCOUNTS

If an Information Summary which includes a true and accurate inventory of all the assets and liabilities has been prepared (as in the example provided) and the assets and liabilities which the guardian/attorney is aware of at the time of appointment have been identified in a management plan, prior to the guardian's appointment, then the preparation of a Statement of Original Assets and Liabilities will be relatively easy to prepare. Compare the Information Summary and management plan and make certain all assets have been identified. The bank and brokerage account statements generally provide information to record in a Statement of Original Assets.

Arrangements can certainly be made for an account preparer, accountant, or lawyers to prepare the accounts – it must be remembered they will charge an hourly rate for their time spent on behalf of the guardian/attorney, and they will usually ask for a deposit up front (called a retainer) when hired. They will hold this deposit in trust until the guardian/attorney is sent a bill for the work done, and it may be necessary to top up the retainer before they will continue any further work. It is the guardian/attorney's responsibility to maintain accounts, so it should be kept in mind that the cost of any work done on behalf of the guardian/attorney may need to be deducted from any compensation the guardian/attorney ultimately is entitled to receive.

Tip: If an account preparer is hired the guardian/attorney may be required to personally pay them. A guardian/attorney may be challenged for paying a third party for services from the person under disability's assets that are their responsibility. Account preparers will not start any work if they do not have a retainer. This is not unreasonable – they are, after all, running a business.

Often account preparers are not supplied with sufficient information to prepare the accounts properly – nor can they invent details! The accounts need to reflect **actual** receipts and disbursements with sufficient detail to explain each of them. Delays and costs are incurred where an account preparer has to constantly follow up to obtain information or documents. It is not an account preparer's responsibility to get in touch with the bank/investment brokers. Remember: they have other clients, and if the accounts cover a long period of time it can be a lengthy process to have them prepared. Efforts ought to be made to ensure that an account preparer is supplied with absolutely everything, and in an organized manner. Remember, the guardian/attorney – not the preparer – needs to be familiar with every entry in the accounts!

A sample of attorney accounts can be found as **APPENDIX "B."** If an asset and liability summary has been prepared, in detail, then that summary provides a good start to preparing guardian/attorney accounts.

5. ACCOUNTS

The accounts can be prepared using specific software programs for keeping financial records, a spreadsheet program like *Excel* or by inserting Tables in *Word*. The guardian/attorney should use a program they are comfortable with. To start, prepare a template similar to the sample accounts at **APPENDIX "B"** to this chapter.

Statement of Original Assets

This is a statement recording, in detail, all the assets and their values as at the date the guardian/attorney for property begins the financial administration of the person under disability's affairs: note this means on the actual date of appointment or commencement, not at the beginning or end of the month. Each asset ought to be numbered. When recording transactions relating to each asset, for ease of reference refer to such asset number within the particulars.

Note for securities or investments the book value of the asset is recorded, NOT the market value.

A notation needs to be recorded on the Statement of Original Assets under a column entitled "Disposed of – item No. and page No." to define the status of a particular asset. For example, "CR 1-6" denotes the capital receipt transaction number and the page number under capital receipts as a cross-reference recording the disposition of a particular original asset, whether partial or complete.

This is important because the accounts will also contain a Statement of Original Assets as at the end of the accounting period and only those assets which have not been realized or only partially realized are recorded there.

Capital/Revenue Receipts

There is an essential question to consider when faced with an accounting decision: Is the transaction capital or revenue?

As a general rule, transactions which arise from the redemption of original assets are capital in nature whereas income earned is characterized as revenue. To illustrate, consider a bank account held by the person under disability, which is then closed by the guardian (provided the management plan permits the guardian to do so). The balance in the account is recorded as a capital receipt. All interest generated in the bank account after the date of the guardian/attorney's assumption of administration would be recorded as a revenue receipt.

Tip: Keeping bank and investment statements, whether electronic or hard copies, in individual folders/binders, in chronological order (e.g. one for Receipts and another for Disbursements) will greatly simplify posting entries from source documents. All original receipts and vouchers should be retained and kept in chronological order with the source documents.

Tip: It is useful to photocopy or scan department store receipts before their ink fades. Keep the photocopy with the original receipt stapled to it. Perhaps place both in plastic pocket folders specially made for binders and available in most Dollar Stores or office supply stores.

If, for example, the guardian sells the person under disability's house, an original asset, the proceeds of sale are recorded as a capital receipt in the accounts. There are various methods of recording sales of real estate, but commonly the adjustments are recorded as separate entries. If property taxes and utility expenses prior to the sale were recorded in the revenue account, the adjustments on the sale price should be credited (or debited) to the revenue account as individual items. Some prefer to record the net proceeds of sale under capital receipts, with a summary of the adjustments within the particulars for the transaction. *(The "Balance due on closing," i.e. the amount of net funds received, is found on a Statement of Adjustments provided by the lawyer who handled the house sale and usually accompanies the reporting letter. Other deductions are made, such as any*

balance of real estate commission, legal fees and repayment of any liabilities directed and relating to the house.)

The profits (gains) from the sale of any investment(s) made during the accounting period are recorded as capital receipts. Similarly, losses are recorded as capital disbursements.

In addition to revenue receipts arising from original assets, all income generated from investments made by the guardian/attorney are properly recorded as revenue receipts.

Revenue receipts, as the name suggests, is where all income for the person under disability would be recorded, e.g. pensions, interest from investments, etc.

Capital/Revenue Disbursements

Improvements – as compared with maintenance and repairs to a real property – are often more difficult to determine for the purposes of recording them under capital or revenue. As a general rule, improvements are recorded under capital, while ongoing maintenance expenses are recorded under revenue. A guardian/attorney has a duty to preserve the assets; therefore, any repairs are considered capital transactions. Insurance is customarily recorded under revenue.

Revenue disbursements include expenditures that are necessary for the support and care of the person under disability, e.g. nursing home fees, medical expenses, personal care expenses, etc. The purchase of, say, a wheelchair or new bed for the person under disability may be more appropriately recorded under capital disbursements.

Any bank charges, including safety deposit box fees or investment management fees, are considered revenue disbursements. If the guardian/attorney is maintaining accounts for a minor, then education costs would be recorded as revenue disbursements.

Discretionary expenditures that have been determined and included in the management plan, e.g. gifts to the person under disability's relatives or friends, **may** be made if (before becoming incapable) he or she would make those gifts. For example, if Aunt Georgia gave each nephew and niece $1,000 on their respective birthdays each year, then provided there are sufficient funds available, these gifts can continue.

Similarly, if the person under disability previously made charitable gifts, these may continue provided they do not represent more than 20% of the person under disability's income in the year the donation is made.

Tip: If the person under disability has expressed that they do not wish to make a gift or donation, the guardian/attorney must follow those wishes. A guardian/attorney should not make a gift or donation to a family member or friend or make a charitable donation that is contrary to the person under disability's express wishes. Remember, where possible and practical, keep the person under disability informed of their expenditures and the status of their assets – the guardian/attorney is, after all, looking after their assets! Ownership remains in the name of the person under disability.

Tip: If any difficulty arises about the management of the property, a guardian/attorney may apply to the court for directions on how to resolve it. The court will provide directions as to how to deal with any issues. A lawyer can provide the services of bringing an application for directions to the court.

Investments

Investments is an area where an interesting twist comes into play. The Rules clearly state that a separate investment account must be maintained where a trustee, here a guardian/attorney, has made investments of trust funds. Although it appears straightforward, the establishment and maintenance of a proper investment record within the accounts seems, for some, to be a challenge in the accounting process. One needs to consider whether to record the transaction as an original asset or as an investment. Investment entries should not be co-mingled with capital receipts and capital disbursements.

Legislation in the 1950s required a separate account for investments to limit the compensation calculated as a result of investing trust funds. Trustees seemed to change investments more frequently than was necessary in order to achieve greater capital receipt and disbursement totals and consequently to increase the amount of compensation claimed. Separating the investment transactions from the capital transactions eliminated that practice.

An investment account may be considered something of a fiction. It does not relate to original assets in any way but instead records the use of funds arising from the realization/sale of an original asset. Take as an example the net proceeds from the sale of a house that can now be invested. Say the guardian/attorney decides to invest the proceeds by purchasing a Treasury Bill for a 30 day period. The proceeds from the sale of an original asset, in this case the house, that are subsequently invested in the purchase of a Treasury Bill would be recorded under Investments. The Investments made by the guardian/attorney can be recorded under separate headings entitled Investment Disbursements and Investment Receipts; however, most often the investment account is a chronological statement with two columns, one for debits (to record purchases) and one for credits (to record sales). The total purchase price of an investment (including brokerage fees) is recorded as a debit (Investment Disbursement). The subsequent sale or realization of an investment records the initial price paid for the investment, less any gain, as a credit (Investment Receipt). The gain is recorded under capital receipts so that the guardian/attorney may claim a percentage of compensation on the gain. Similarly, any losses are recorded as debits under capital disbursements. Note that compensation is calculated and claimed on net gains.

The investment portion of the accounts is strictly related to principal funds. Any interest earned or dividends received in relation to the various investments are not recorded in the investment statement but under revenue receipts. In the case of mutual funds where dividend re-investments occur, the dividends are recorded under revenue receipts and the re-invested amounts are recorded under investments.

The accounts must balance. The difference between the debits and the credits should be the cost of investments held at the end of the accounting period.

The separation of investments serves a number of practical purposes. The separation enables anyone to review, at a glance, the nature of the investments and whether they comply with *The Trustee Act* and the terms of the management plan, in the case of a guardianship. Also they reveal whether the guardian/attorney has been diligent with investment obligations or merely rolling over term deposits on maturity dates. Of course, the nature of investments must be in accordance with any management plan and the individual needs of the person under disability. A review of the investments also reveals information as to the rate of return obtained on the investments and whether the maximum was obtained.

The substance or absence of investments could influence the care and management fee.

A review of the investments on hand at the end of the accounting period ought to indicate whether the holdings are balanced as between equity and income producing assets.

Compensation

The compensation calculation, using the tariff for guardian/attorney compensation, is recorded in a statement at the end of the accounts. Note that any non-compensable transactions, e.g. transfers between accounts or overpayments that are subsequently refunded, should be deducted from the Capital/Revenue Receipt/Disbursement totals prior to calculating compensation.

Section 40 of the *SDA* provides that an attorney for property may take an annual compensation from the property under control, in accordance with a prescribed fee scale[20] currently set at 3% on receipts and disbursements and three-fifths of 1% as a care and management fee, provided there is no express provision in a continuing power of attorney for compensation. If the compensation is predetermined in a continuing power of attorney then that arrangement would govern the compensation to be taken. Under the *SDA*, a guardian for property or an attorney have a unique statutory right to compensation. The compensation may be taken monthly, quarterly or annually (*SDA* s. 40(2)). If consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of person or attorney under a power of attorney for personal care, if any, the guardian or attorney may take an amount of compensation greater than the prescribed fee scale (*SDA* s. 40(3)(a)).

The standard of care that applies to a guardian of property or attorney depends on whether compensation is received or not. Subsection 32(8) of the *SDA* states that "a guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise." Under s. 32(7) a guardian of property who does not receive compensation is judged by a lower standard and is only required to "exercise a degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs."

PART II: PROCEDURES TO PASS ACCOUNTS

As indicated by Rule 74.16 of the *Rules of Civil Procedure*, Rules 74.16 to 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money.

The following reproduces the relevant text from these Rules, and provides brief annotations with more detail on procedures for compliance. The Rules and annotations reflect the changes coming into effect on January 1, 2016.

20 O. Reg. 159/00

Material to be Filed

> 74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,
>
> (a) the estate accounts for the relevant period verified by an affidavit of the estate trustee (Form 74.43);
>
> (b) a copy of the certificate of appointment of the applicant as estate trustee;
>
> (c) a copy of the latest judgment, if any, of the court relating to the passing of accounts.

The accounts are attached to the affidavit verifying the accounts as an exhibit. The guardian of property or attorney swears or affirms that the accounts are complete and correct and that all persons having a financial interest in the property of the person under disability have been named. If there is more than one guardian or attorney, they must each swear an affidavit, unless sworn or affirmed jointly at the same time.

A copy of any previous judgment of the court relating to a former passing of accounts is filed in part to provide any carry-forward figures for Capital/Revenue Receipts/Disbursements and Investments including a list of remaining original assets/trustee investments as a starting point for the current period of accounts.

A guardian of property or an attorney under a continuing power of attorney shall also keep, together with the accounts, a copy of the continuing power of attorney, certificate of statutory guardianship or court Order constituting the authority of the attorney or guardian, a copy of the management plan, if any, and a copy of any court Orders relating to the guardian's or attorney's authority or to the management of the incapable person's property (O. Reg. 100/96. s. 2).

Issuing a Notice of Application

> 74.18 (2) On receiving the material referred to in subrule (1), the court shall issue a notice of the application to pass accounts (Form 74.44)

In addition to the Rules, the particular requirements of the local court office through which the accounts are being passed should be checked in advance as minor procedural steps (e.g. procedure for choosing the hearing date) can vary among the court offices.

The court office will fill in a hearing date and time on the notice of application to pass accounts and the Registrar will then date and sign the notice, provided the documents set out above are submitted along with the notice.

Incorporated in the notice of application is a notice to any person having a financial interest in the property of the person under disability indicating that such person can object to the accounts (Form 74.45).

Service of documents and notice requirements

Rule 74.18 (3) to (5) of the Rules set out the service requirements, as follows:

> ***Service***
>
> (3) The applicant shall serve the notice of application and a copy of a draft of the

judgment sought on each person who has a contingent or vested interest in the estate by regular lettermail.[21]

(3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3).[22]

(3.2) Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).23

(4) Where the person is served in Ontario, the documents shall be served at least **60** days before the hearing date specified in the notice of application.[24]

(5) Where the person is served outside Ontario, the documents shall be served at least **75** days before the hearing date specified in the notice of application.[25]

Person under Disability or Unknown

(6) If a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,

(a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person, and

(b) there is no litigation guardian to act for the person on the passing of accounts.[26]

Lengthy notice periods of **60 days before the hearing date specified in the notice of application if service is in Ontario** and at least **75 days for service outside of Ontario** are required to give the persons served time to prepare, serve, and file their objections, if any.

Objections and Requests for Further Notice

Rules 74.18(7) to (8.1) specify the options open to someone served with the notice of application and draft judgment. Such a recipient may file a notice of objection if they wish to object, or – as of January 1, 2016 – if they do not object but wish to continue to be served with notice of any further steps in the application, they may serve a new form called a "Request for Further Notice" (Form 74.45.1), included below.

Notice of Objection to Accounts

74.18 (7) A person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35** days before the hearing date specified in the notice

21 O. Reg. 484/94, s. 12
22 O. Reg. 377/95, s. 6
23 O. Reg. 193/15, s.12 (1)
24 O. Reg. 193/15 s. 12 (2)
25 O. Reg. 193/15 s. 12 (3)
26 O. Reg. 193/15, s. 12 (4)

of application, serve on the applicant, and file with proof of service, a notice of objection to accounts (Form 74.45).

Request for Further Notice [new form commencing January 1, 2016] (see page 128)

74.18 (8) A person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35** days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts (Form 74.45.1). (O. Reg. 193/15, s. 12 (4).

(8.1) Unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material relating to costs under subrule (8.6), (11) or (11.2); and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11).

FORM 74.45.1

Courts of Justice Act

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF *(insert name)*, deceased.

REQUEST FOR FURTHER NOTICE IN PASSING OF ACCOUNTS

I *(insert name)* have been served with a notice of application to pass accounts. By serving this request for further notice, I acknowledge that:

I do not object to the accounts but wish to receive notice of any further step in the application, including a request for costs or a request for increased costs, and

I shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, this request for further notice.

I further acknowledge that, unless the court orders otherwise, I am entitled to,

(a) receive notice of any further step in the application to pass accounts;

(b) receive any further document in the application;

(c) file material relating to a request for increased costs on the application at least 10 days before the hearing date of the application; and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs.

DATE SIGNATURE

(Name, address and telephone number of person requesting further notice)

Next Steps Before Hearing

Rules 74.18(8.2) to (14) specify next steps between service of the notice of application and draft judgment and the ultimate disposition. These steps, and who is involved in them, differ depending on whether any notices of objection or requests for further notice have been filed.

No Response

74.18 (8.2) Unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material on the application; or

(d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

Response to Application – Public Guardian and Trustee or Children's Lawyer

74.18 (8.3) If the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, as the case may be, shall, at least **30** days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

(a) a notice of objection to accounts (Form 74.45)

(b) a request for further notice in passing of accounts (Form 74.45.1);

(c) a notice of no objection to accounts (Form 74.46); or

(d) a notice of non-participation in passing of accounts (Form 74.46.1).

Withdrawal of Objection

74.18 (8.4) A person who wishes to withdraw a notice of objection to accounts shall, at least **15** days before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48). O. Reg. 193/15, s. 12 (4).

When a Hearing not Required

74.18 (8.5) An applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

(a) no notices of objection to accounts are filed; or

(b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule. (O. Reg. 193/15, s. 12 (4))

Request for Costs

74.18 (8.6) Subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least **10** days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49) or 74.49.1) and file the request with proof of service. (O. Reg. 193/15, s. 12 (4).)

Judgment on Passing of Accounts Granted Without Hearing

74.18 (9) The court may grant a judgment on passing accounts without a hearing if, at least **five** days before the hearing date of the application, the applicant files with the court,

(a) a record containing,

(i) an affidavit of service of the documents served under subrule (3), (3.1) or (3.2),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record; (O. Reg. 193/15, s. 12 (8))

(b) a draft of the judgment sought, in duplicate; and

(c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be. O. Reg. 484/94, s. 12; O. Reg. 69/95, ss. 19, 20; O. Reg. 332/96, s. 4 (2, 3); O. Reg. 575/07, s. 1, O. Reg. 193/15, s. 12 (9).

Costs

74.18 (10) Where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4). O. Reg. 55/12, s. 12 (5), O. Reg. 193/15, s. 12 (10).

Request for Increased Costs

74.18 (11) Where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),

(a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

(b) a costs outline (Form 57B). O. Reg. 55/12, s. 12 (5).

74.18 (11.1) Unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least **15** days before the hearing date of the application:

1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.

2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).

3. The Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (12).

74.18 (11.2) Any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least **10** days before the hearing date of the application. O. Reg. 193/15, s.12 (13).

74.18 (11.3) Where a request for increased costs is served under subrule (11), the person making the request shall, at least **five** days before the hearing date of the application, file with the court a supplementary record containing, O. Reg. 193/15, s. 12 (14))

(a) the documents served under that subrule, together with an affidavit of service of those documents; and

(b) an affidavit containing,

(i) a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

(ii) the factors that contributed to the increased costs. O. Reg. 55/12, s. 12 (5).

Judgment on Increased Costs Granted Without Hearing

74.18 (11.4) The court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies. O. Reg. 55/12, s. 12 (5).

Contested Passing of Accounts (Hearing)

74.18 (11.5) If one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least **10** days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,

(a) a consolidation of all the remaining notices of objection to accounts; and

(b) a reply to notice of objection to accounts (Form 74.49.4). O. Reg. 193/15, s. 12 (15).

(11.6) The documents referred to in subrule (11.5) shall be served on,

(a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;

(b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and

(c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (15).

74.18 (11.7) If the application to pass accounts proceeds to a hearing, the applicant shall, at least **five** days before the hearing date, file with the court a record containing,

(a) the application to pass accounts;

(b) the documents referred to in subrule (11.5);

(c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

(d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

(e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

(f) any requests for further notice in passing of accounts (Form 74.45.1);

(g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

(h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

(i) a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15).

74.18 (11.8) If the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order. O. Reg. 193/15, s. 12 (15).

74.18 (11.9) If the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,

(a) the applicant shall indicate that it is the applicant's draft order; and

(b) any person referred to in clause (11.6) (a) may file an alternative draft order at least **three** days before the hearing date of the application or, with leave of the court, at the hearing. O. Reg. 193/15, s. 12 (15).

74.18 (12) No objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (6).

74.18 (13) At the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts. O. Reg. 193/15, s. 12 (16).

Trial may be Directed

74.18 (13.1) On the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

(a) respecting the issues to be tried and each party's position on each issue;

(b) respecting the timing and scope of any applicable disclosure;

(c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

(d) respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s. 12 (17).

Directions regarding mediation

74.18 (13.2) In making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

(a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

(b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 12 (17).

Form of Judgment

74.18 (14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51. O. Reg. 484/94, s. 12.

Chapter 5 - Appendix A – Information Summary

GENERAL INFORMATION RE: GEORGINA SMITH

DATE OF BIRTH:	APRIL 8, 1932
PLACE OF BIRTH:	EXETER, DEVON, ENGLAND
DATE OF CONTINUING POWER OF ATTORNEY FOR PROPERTY:	AUGUST 3, 2015
OR	
DATE OF ORDER RE COURT- APPOINTED GUARDIAN:	JULY 4, 2015
DATE OF INCAPACITY:	JUNE 3, 2015
RESIDENTIAL ADDRESS:	SWEET COMFORT NURSING HOME ROOM 4 - 1 DRAKES ROAD TORONTO, ON M9M 3E3
TELEPHONE:	(416) 247-1743
MARITAL STATUS:	WIDOW
LAST INCOME TAX RETURN FILED:	2013
DOMICILE:	ONTARIO
CITIZENSHIP:	CANADIAN
S.I.N.:	412 968 044
NAME OF DOCTOR:	NIGEL HADEN – Geriatrician TEL: (416) 486-2567
COURT FILE NO:	**01-0046/15** SUPERIOR COURT OF JUSTICE TORONTO, ON

LAWYERS:	FLORENCE ANGEL ANGEL, GILBERT & EGAN 600 – 900 ST. CLAIR AVENUE WEST TORONTO, ON M0M L7L TEL: (416) 647-0723 FAX: (416) 647-0700 Email: Flo@AGELawyers.com

SUMMARY OF MANAGEMENT PLAN

LAND

46 Elder Avenue, Weston, ON	Obtain two independent appraisals of market value of house from realtors and list house for sale once furniture and household items removed. *File amended Management Plan once house is sold to show how proceeds will be managed.*
Cottage at Source Lake, ON 60	Arrange automatic debit for payment of one-half of cottage property taxes, Georgia's brother has agreed to continue to maintain cottage and boats at his own expense.
VALUABLES	Investigate - appraisals may have already have been done – locate same • locate key to safety deposit box • store jewellery in current safety deposit box at bank • painting at AGO (on loan until DOD)

SAVINGS AND SAVINGS PLAN

Notify of change - convert TD Canada Trust Plan 60 and Scotia GIC bank accounts to trust accounts on behalf of Georgia Smith

- continue to hold TD Every Day Savings account #11-6287833 (as it passes to friend on Georgia's death) and convert passbook to electronic monthly statements
- open chequing account
- request bank to provide statements with electronic copies of cancelled cheques
- order cheque books

SECURITIES AND INVESTMENTS

Notify of change - bank and investment brokers re investments

- arrange for stock/share certificates in SDB to be held by investment brokers and placed in new investment portfolio under separate account number (no dispositions)
- request monthly statements from investment brokers and instruct that any securities and/or investments be held in trust at maturity/renewal dates

BONDS AND DEBENTURES

On maturity transfer funds to Investment portfolio

When all bonds and debentures matured file amended Management Plan to show how proceeds will be managed.

ACCOUNTS RECEIVABLE

Mortgage from sister – notify of new banking particulars to arrange for her continued mortgage payments to Georgia Smith

OTHER PROPERTY

Notify bank - list contents of safety deposit box, obtain stocks/shares and check for

- any unidentified assets and appraisals
- locate Will, title documents and mortgage from sister
- insurance policies on Georgia Smith's life re beneficiary designations
- any pre-paid funeral documents
- deed re cemetery plot

Place antique furniture in storage after appraisal, arrange insurance for storage unit and dispose of general household items to charity (discuss with family)

LIABILITIES

Cancel credit and department store cards and pay balances

Pay ambulance fees and outstanding dental and footcare bills

INCOME

Notify Government re OAS and CPP pensions and State Pension in UK re appointment and change

Arrange for annuity payments from Georgia's deceased husband's annuity to be paid into new chequing account (annuity ceases on Georgia's death)

Arrange for income payments from "Discretionary Trust" where Georgia has a lifetime interest from her father's estate to be made to new chequing account

Obtain amortization schedule re mortgage from sister and for electronic fund transfers from sister to new chequing account

Arrange for surplus/shortfall of income to/from new chequing account to/from investment account

EXPENSES

Arrange pre-authorized debit from chequing account re nursing home fees

Speak to personal care attorney re budget for personal care costs, clothing, medicines, medical services, recreation and entertainment for Georgia

Continue all existing expenses re house until it is sold including gardening and snow shoveling

WILL

SPECIFIC LEGACIES

NAME AND ADDRESS OF BENEFICIARIES	DATE OF BIRTH	RELATIONSHIP	PARTICULARS
NATHANIEL SMITH 61 BALMORAL AVENUE OTTAWA, ON M4V 1K8	18+	BROTHER	$400,000.00 MUSKOKA BOAT/MOTOR and PETERBOROUGH 'MERMAID' CEDAR STRIP CANOE (1956) TRANSFER 50% LEASEHOLD INTEREST IN COTTAGE AT SOURCE LAKE, ALGONQUIN PARK (99 year lease-expires 2072)
MRS. EDITH WALLSHINGHAM 109 JOHN STREET KITCHENER, ON K8J 8V1	18+	SISTER	2KT DIAMOND/EMERALD GOLD RING (Mother's) ANTIQUE FURNITURE (originally at Parent's home)
MS. SYLVIA SMITH 9 KING STREET BOWMANVILLE, ON L9P 5M3	18+	NEICE	$100,000.00 SAPPHIRE PLATINUM EARRINGS and NECKLACE VINCENT CONSTABLE PAINTING ("*Cottage in Valley*")

MS. NIGELLA MILO 51 WILSON ROAD LONDON, ON J0L 3T0	18+	GODDAUGHTER	ROYAL DOULTON BONE CHINA DINNER SERVICE (“*Paradise*” pattern 40 pcs.)
MS. MONA BLISS APT 1- 911 WOLMER AVENUE GEORGETOWN, ON L9E I8P	18+	FRIEND	BALANCE AT DATE OF DEATH IN TD CANADA TRUST EVERY DAY SAVINGS ACCOUNT NO. 0744-6287832
GOD HELP THE AGED 1951 YONGE STREET P.O. BOX 2640 TORONTO, ON M9M 3E3	N/A	CHARITY	$ 50,000.00
ST. JOHN THE EVANGALIST CHURCH 215 DONALD STREET TORONTO, ON M3C 3P5	N/A	CHARITY	$ 20,000.00
TOTAL CASH LEGACIES		$ 570,000.00	**PERSONAL EFFECTS TO BE APPRAISED AT DOD**

RESIDUE

NAME AND ADRESS OF BENEFICIARIES	DATE OF BIRTH	RELATIONSHIP	PARTICULARS
NATHANIEL SMITH and SYLVIA SMITH (addresses as above)	18 +	BROTHER AND NEICE	100% OF RESIDUE IN EQUAL SHARES

Funeral Instructions

- Cremation (pre-paid funeral arrangements)

- No Service or Interment

GENERAL REMINDERS

Meet with accountant re preparation of outstanding 2014 T1 tax return

Cancel memberships and subscriptions

Attend house to meet with appraisers and movers re moving antique furniture to storage

Arrange for delivery of wing chair, reading lamp and family photos from house to nursing home for Georgia

Attend nursing home on delivery of items for placement in Georgia's room

Change locks on house

Arrange vacancy insurance

Arrange for neighbor/property manager to check house daily pending sale

Redirect mail

Notify home security service re changes

Cancel telephone and cable

SUMMARY OF ASSETS AND LIABILITIES

SUMMARY	AMOUNT
REAL ESTATE	
- 46 Elder Avenue, Weston, ON, approximately	$ 2,500,000.00
- 50% leasehold interest in cottage at Source Lake, Algonquin Park	$ 100,000.00
BANK ACCOUNTS	$ 107,004.60
GUARANTEED INVESTMENT CERTIFICATES	$ 175,028.50
INVESTMENTS	$ 919,178.10
MUTUAL FUNDS	$ 796,044.70
BONDS & DEBENTURES	$ 178,000.00
HOUSEHOLD ITEMS AND VEHICLES	$ 206,614.15
RECEIVABLES – MORTGAGE	TBD
OTHER ASSETS (JEWELLERY/ART WORK) approximately	$ TBD
TOTAL VALUE	$ 4,981,870.05
LIABILITIES	- 5,559.10
NET VALUE	**$ 4,976,310.95**

REAL ESTATE

PROPERTY	VALUE
46 ELDER AVENUE WESTON, ON M9M 3E3 (pending appraisal) approximately	$ 2,500,000.00
COTTAGE AT SOURCE LAKE, ALGONQUIN PARK 50% LEASEHOLD INTEREST, approximately	$ 100,000.00
TOTAL	**$ 2,600,000.00**

CASH ON DEPOSIT

ACCOUNT NO.	NAME AND ADDRESSOF BANK	BALANCE
	TD CANADA TRUST 291 DUNDAS STREET WEST TORONTO, ON M3L 1Y5	
011-3127434	PLAN 60 ACCOUNT	$ 56,501.85
011-6287832	EVERY DAY SAVINGS	$ 48,876.75
		$ 105,378.60
	SCOTIABANK 623 COLLEGE STREET TORONTO, ON M3M 0W3	
2472597	GUARANTEED INVESTMENT ACCOUNT	$ 1,626.00
		$ 1,626.00
	TOTAL CASH ON DEPOSIT	**$ 107,004.60**

GUARANTEED INVESTMENT CERTIFICATES

QUANTITY	DESCRIPTION	VALUE
$ 10,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 345 MONTHLY PAY 3.0826% DUE DEC 14/15	$10,000.00
10,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 451 MONTHLY PAY 3.2016% DUE SEPT 8/15	10,000.00
10,028.44	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 433 MONTHLY PAY 3.2767% DUE JAN 1/16	10,028.50
15,000.00	BANK OF NOVA SCOTIA NON-RDM MTHLY GIC NO. 439 3.600% DUE JULY 25/17	15,000.00
15,000.00	BANK OF NOVA SCOTIA NON-RDM MTHLY GIC NO. 805 3.350% DUE SEPT 5/15	15,000.00
20,000.00	BANK OF NOVA SCOTIA ULT LADDERED GIC NO. 1045 MONTHLY PAY 3.2346% DUE JUNE 23/15	20,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 9007 3.500% DUE FEB 12/16	10,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 9008 3.500% DUE FEB 21/16	10,000.00
10,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 991 3.000% DUE MAY 24/16	10,000.00
25,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 501 2.500% DUE NOV 25/15	25,000.00
30,000.00	TD MORTGAGE CORP NON-RDM MTHLY CERT. NO. 348 3.200% DUE AUG 12/15	30,000.00
	TOTAL GUARANTEED INVESTMENT CERTIFICATES	**$175,028.50**

INVESTMENTS

# SHARES	DESCRIPTION	CERTIFICATE AND ACCOUNT NO.(S)	VALUE PER UNIT	TOTAL VALUE
1,440	DENISON MINES COMMON	00000111	1.940	$ 2,793.60
800	ABERDEEN ASIA-PACIFIC INCOME INVESTMENT CO (FORMERLY FIRST AUSTRALIA PRIME INCOME INVESTMENT CO	SW008582	7.35	5,880.00
1,900	BANK OF NOVA SCOTIA COMMON	00010632STSP	58.16	110,204.00
100	FORTE RESOURCES INC (WORTHLESS SECURITY)	00000201		0.00
		(above in SD Box)		$118,877.60
	ROBERTSTON GMP Investment Portfolio No. GP742-008	(see attached investment statement with **book values** of holdings)		$800,300.50
	TOTAL INVESTMENTS			**$919,178.10**

MUTUAL FUNDS

NO. OF UNITS	DESCRIPTION	ACCOUNT NO.	PRICE PER UNIT	VALUATION
30,000.000	TD CANADIAN MONEY MARKET FUND	3694131	10.000	$300,000.00
50,004.504	TD SHORT TERM BOND FUND	3694132	9.922	496,044.70
	TOTAL MUTUAL FUNDS			**$796,044.70**

BONDS AND DEBENTURES

PAR VALUE	DESCRIPTION	SERIAL NO.(S)	VALUE
$ 6,000.00	CANADA SAVINGS BONDS	RS050M0154068A (1 X 1,000)	
		RS050V0070129K (1 X 5,000)	
	SER 50 DUE NOV 1/16		$ 6,000.00
6,000.00	CANADA SAVINGS BONDS	RS050M0256770J (1 X 1,000)	
		RS050V0092256A (1 X 5,000)	
	SER 50 DUE NOV 1/17		6,000.00
10,000.00	CANADA SAVINGS BONDS	RS051V0076922K/30J	
		(2 X 5,000)	10,000.00
	SER 51 DUE NOV 1/18		
20,000.00	CANADA SAVINGS BONDS	RS052V0055993A/94M	
		(2 X 5,000), RS052L0039821A	
	SER 52 DUE NOV 1/17	(1 X 10,000)	20,000.00
10,000.00	CANADA SAVINGS BONDS	RS054V6035665A, V7295965H	
		(2 X 5,000)	
	SER 54 DUE NOV 1/18		10,000.00
10,000.00	CANADA SAVINGS BONDS	R S 0 7 2 M 0 0 6 1 3 6 0 D , M3832856L	
		M3946692D, M5880027M,	
	SER 72 DUE NOV 1/15	M7750816H (5 X 1,000)	
		RS072V5219936J (1 X 5,000)	10,000.00
10,000.00	CANADA PREMIUM BOND	RP003V5254136A, V5743456B	
	SER 3 DUE NOV 1/18	(2 X 5,000)	10,000.00
5,000.00	CANADA PREMIUM BOND	RP021V5314964C (1 X 5,000)	
	SER 21 DUE NOV 1/15		5,000.00

15,000.00	CANADA PREMIUM BOND	RP027V3312296C (1 X 5,000)	
		RP027L7386717A (1 X 10,000)	
	SER 27 DUE NOV 1/15		15,000.00
10,000.00	CANADA PREMIUM BOND	RP035V3531146D, V4352256L	10,000.00
	SER 35 DUE NOV 1/14	(2 X 5,000)	
20,000.00	CANADA PREMIUM BOND	RP040V1908416D, V6093366H	
	SER 40 DUE NOV 1/14	(2 X 5,000), RP040L4915776H (1 X 10,000)	20,000.00
5,000.00	CANADA PREMIUM BOND	RP046V6742146K (1 X 5,000)	
	SER 46 DUE NOV 1/15		5,000.00
6,000.00	CANADA PREMIUM BOND	RP052M3851176L (1 X 1,000)	
	SER 52 DUE NOV 1/16	RP052V8714116C (1 X 5,000)	6,000.00
5,000.00	CANADA PREMIUM BOND	RP058V8070046M (1 X 5,000)	5,000.00
	SER 58 DUE NOV 1/17		
30,000.00	ONTARIO HYDRO BONDS	459840000	30,000.00
	SER 9 DUE JUNE 15/16		
10,000.00	ONTARIO HYDRO BONDS	459950001	10,000.00
	SER 10 DUE JUNE 15/17		
	TOTAL BONDS AND DEBENTURES		**$178,000.00**

OTHER ASSETS

PARTICULARS	VALUE
HOUSEHOLD GOODS, FURNITURE & PERSONAL EFFECTS	$ 200,000.00
(including Muskoka boat and Peterborough canoe at cottage)	
JEWELLERY	TBD
PAINTING	TBD
GOVERNMENT OF CANADA	
- JULY 2015 CANADA PENSION PLAN – SURVIVOR'S BENEFIT	417.95
- JULY 2015 OLD AGE SECURITY	526.85
MANULIFE ANNUITY NO. 78431 - JULY 2015 (CEASES ON DEATH)	1,920.00
INCOME FROM DISCRETIONARY TRUST RE ESTATE OF CARL JONES	
August monthly payment direct deposited into TD PLAN 60 account ($4,000.00 per month)	
STM ALLSTREAM INC	
- REFUND OVERPAYMENT OF ACCOUNT	63.90
MARKLAND ROOFING	
- REFUND DEPOSIT RE 46 ELDER AVENUE	3,000.00
CASH FOUND IN HOUSE AND WALLET	685.45
TOTAL OTHER ASSETS	**$ 206,614.15**

LIABILITIES

CREDITOR NAME AND ADDRESS	PARTICULARS	AMOUNT
ATTORNEY FOR PERSONAL CARE UNIT 40 – 200 PORT AVENUE TORONTO, ON M3C 3X2	ITEMS PURCHASED FOR GEORGIA SMITH	$ 37.95
RECEIVER GENERAL FOR CANADA CONTRACT NO G500-339 P.O. BOX 12000 BATHURST, NB E2A 4T6	2012 INTEREST REFUND	29.90
CITY OF TORONTO-FIRE & PARAMEDIC 510 IVY STREET TORONTO, ON M3B 1B9	AMBULANCE SERVICE JULY 3, 2015	152.00
MARIANNE MENZES 42 - 194 WHITE CRESCENT TORONTO, ON M3K 1L6	PURCHASES AND VISITS WITH GEORGIA SMITH	574.15
CANADA REVENUE AGENCY 875 HERON ROAD OTTAWA, ON K1A 1B1	2013 T1 TAXES	1,068.10
BART NEILSON 301 NOTRE DAME AVENUE ETOBICOKE, ON M3H 1B9	ACCOUNTANT RE 2013 T1	3,697.00
TOTAL LIABILITIES		**$ 5,559.10**

Chapter 5 - Appendix B – Attorney Accounts

PROPERTY OF ELLA SMITH BY HER ATTORNEY

STATEMENT OF ACCOUNTS
for the period June 17, 2013 to February 27, 2015

for Attorney for Property
John B. Good
144 Flett St., Bowmanville, ON

NOTE: This sample Attorney for Property Accounts contains some deliberate errors. Can you spot them? Answers noted under "Trustee's Investments" on Page 161

CONTENTS:

PROPERTY OF ELLA SMITH BY HER ATTORNEY
SUMMARY
AS AT FEBRUARY 27, 2015

Capital Account			
Balance Forward (no previous accounting)		$-	
Receipts		$3,057,367.83	
Disbursements		$487,540.20	
Capital Balance			**$2,569,827.63**
Revenue Account			
Balance Forward (no previous accounting)			
Receipts		$155,802.50	
Disbursements		$41,210.97	
Revenue Balance			**$114,591.53**
Total Balance			**$2,684,419.16**
Consisting of:			
Trustee Investments			$670,045.00
Scotiabank - Gain Plan	# 67112 58359		$35,625.20
CIBC - Powerchequing	# 45002 76320		$180,507.24
BMO - Joint Chequing (registered to Ella Smith and John B. Good JWRS)	# 10174 82516		$220,001.22
BMO - Investment (registered to Ella Smith and John B. Good JWRS)	# 10174 7789		$1,578,240.50
TOTAL			**$2,684,419.16**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
STATEMENT OF ORIGINAL ASSETS
AS AT JUNE 17, 2013

Asset No.	Assets	Book Value	Disposed of Item Page No.
	Real Estate		
1	39 Lady Valentina Ave., Vaughan, ON	$2,180,000.00	CR28-7
	Bank Accounts		
2	**Scotiabank,** Yonge & St. Clair Gain Plan Account No. 67112 58359	$32,891.45	
3	**CIBC,** Yonge & St. Clair Powerchequing Account No. 45002 76320	$45,689.20	
4	**TD Canada Trust,** Yonge & Eglinton Account No. 780 1598 488	$82,335.90	CR15-7
	Guaranteed Investment Certificate		
5	**Effort Trust** #0072000244 2 year Non-Redeemable GIC, 4.5%, maturing July 1, 2015, interest paid annually	$250,000.00	
	Bonds		
6	**Canada Savings Bonds,** Series 44, $50,000.00, maturing November 1, 2015	$50,000.00	
7	**Ontario Savings Bond,** $20,000.00 Certificate No. 010987132, maturing September 30, 2015	$20,000.00	
	Scotiabank Private Client Group 66 King St., Suite 1200, Toronto, ON		
	Registered Retirement Plan		
8	Scotia iTRADE RIF Account No. 554-90082-61	$134,762.32	CR 4,6,7,8,11,12,14, 16-18, 19-23,25, 26 -7
	Mutual Funds		
9	Scotia Private Client Group - 4,592.527 units @ $12.74 Scotia Canadian Income Fund Account No. 4327800	$58,508.79	CR 13, 27 - 7

10	Scotia Private Client Group - 7,540.883 units @ $10.26 Scotia Cassels Short-Mid Government Bond Fund Account No. 4327800	$77,369.46	
11	Scotia Money Market Fund 352.768 shares @ 10.00 per share	$3,527.68	CR5 - 7
	Richardson GMP Limited 541 King St. E. Toronto, ON M6K 1L3		
	Investments		
	Richardson GMP Portfolio No. 785009-001		
12	Bank of Nova Scotia 25,000 shares @ $58.37	$1,459,250.00	
13	Royal Bank of Canada 18,000 shares @ 63.32	$1,139,760.00	
14	Toronto Dominion Bank 5,550 shares @ $52.31	$290,320.50	
15	BCE Inc. 10,500 shares @ $54.60	$573,300.00	
16	Cash Account	$28,864.00	
	Personal effects		
17	Household contents	$10,230.00	
	Jewellery - in Scotiabank Safety	$87,940.00	
18	Deposit Box #11		
	TOTAL ASSETS	**$6,524,749.30**	

PROPERTY OF ELLA SMITH BY HER ATTORNEY
STATEMENT OF LIABILITIES
AS AT JUNE 17, 2013

Creditor	Particulars	Outstanding Balance
American Express	Account No. 4538 998 6109	$2,110.43
Receiver General	2013 T1 Tax Return	$101,921.66
	2014 T1 Tax Return	TBD
	2015 T1 Tax Return	TBD
	Total Liabilities	**$104,032.09**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
STATEMENT OF UNREALIZED ORIGINAL ASSETS
AS AT FEBRUARY 27, 2015

Assets	Book Value
Bank Accounts	
Scotiabank, Yonge & St. Clair Gain Plan Account No. 67112 58359	$35,625.20
CIBC, Yonge & St. Clair Powerchequing Account No. 45002 76320	$89,504.18
Guaranteed Investment Certificate	
Effort Trust #0072000244 2 year Non-Redeemable GIC, 4.5%, maturing July 1, 2015, interest paid annually	$250,000.00
Bonds	
Canada Savings Bonds, Series 44, $50,000.00, maturing November 1, 2015	$50,000.00
Ontario Savings Bond, $20,000.00 Certificate No. 010987132, maturing September 30, 2015	$20,000.00
Mutual Funds	
Scotia Private Client Group - 7,540.883 units @ $10.26 Scotia Cassels Short-Mid Government Bond Fund - Account No. 4327800	$77,369.46
Richardson GMP Portfolio No. 785009-001	
Bank of Nova Scotia 20,000 shares @ $58.37	$1,167,400.00
Royal Bank of Canada 18,000 shares @ 63.32	$1,139,760.00
Toronto Dominion Bank 4,000 shares @ $52.31	$209,240.00
BCE Inc. 10,500 shares @ $54.60	$573,300.00
Household Contents & Personal effects	
Household contents	$10,230.00
Jewellery - in Scotiabank Safety Deposit Box #11	$87,940.00
TOTAL ASSETS	**$3,710,368.84**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
STATEMENT OF LIABILITIES
AS AT FEBRUARY 27, 2015

Creditor	Particulars	Outstanding Balance
American Express	Account No. 4538 998 6109	$6,720.00
Receiver General	2013 T1 Tax Return	$101,921.66
	2014 T1 Tax Return	TBD
	2015 T1 Tax Return	TBD
	Total Liabilities	**$108,343.20**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
CAPITAL RECEIPTS
JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	18-Jun-13	To record opening balance Scotiabank #67112 58359 21	32,891.45
2	18-Jun-13	To record opening balance CIBC #45002 76320	45,689.20
3	18-Jun-13	To record opening cash balance Richardson GMP #785009-001	28,864.00
4	1-Jul-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
5	3-Jul-13	Sale Scotia Money Market Fund 352.768 shares @ 10.00 (Asset No. 11) [CIBC 4502 76320]	3,527.68
6	1-Aug-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
7	1-Sep-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
8	1-Oct-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
9	3-Oct-13	Transfer to BMO # 10174 82516 [CIBC 4502 76320]	180,000.00
10	28-Oct-13	Transfer to BMO # 10174 82516 [CIBC 4502 76320]	40,000.00
11	1-Nov-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
12	1-Dec-13	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
13	20-Dec-13	Sale Scotia Canadian Income Fund 2,592.895 units @ 12.74 (Asset No. 9) [CIBC 4502 76320]	29,144.14
14	1-Jan-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
15	6-Jan-14	Received TD Canada Trust #780 1598 488 (Asset No. 4) [CIBC 4502 76320]	82,520.45
16	1-Feb-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
17	14-Feb-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	110,385.68
18	1-Mar-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
19	1-Apr-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54

20	1-May-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
21	1-Jun-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
22	1-Jul-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
23	1-Aug-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
24	31-Aug-14	Transfer to BMO #10174 82516 [CIBC 4502 76320]	25,000.00
25	1-Sep-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
26	1-Oct-14	Received from Scotia iTRADE RIF (Asset No. 8) [CIBC 4502 76320]	1,523.54
27	1-Nov-14	Sale of Scotia Canadian Income Fund 1,646.632 units @ 12.74 (Asset No. 9) [CIBC 4502 76320]	20,978.09
28	30-Nov-14	Sale of 39 Lady Valentina Ave., Vaughan, ON (Asset No. 1) Sale price $2,220,000.00 Less: Tax adjustment - 4,582.00 Commission - 150,516.00 Legal fees - 3,842.00 [CIBC 4502 76320]	2,061,060.00
29	1-Dec-14	Sale of 5,000 Bank of Nova Scotia shares @ 58.37	291,850.00
30	5-Dec-14	Sale of 1,550 Toronto Dominion Bank shares @ 52.31	81,080.50
	TOTAL		**3,057,367.83**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
CAPITAL DISBURSEMENTS
JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	3-Oct-13	Transfer from CIBC #4502 76320 to BMO #10174 82516	180,000.00
2	28-Oct-13	Transfer from CIBC #4502 76320 to BMO #10174 82516	40,000.00
3	4-Nov-13	Balmler Construction - deposit re extension 144 Flett St., Bowmanville, ON	50,000.00
4	30-Nov-13	Oshawa Electric - rewiring Flett St., Bowmanville, ON (invoice #5608)	5,342.50
5	31-Aug-14	Transfer from CIBC #4502 76320 to BMO #10174 82516	25,000.00
6	31-Aug-14	Balmler Construction - balance re extension 144 Flett St., Bowmanville, ON	130,492.45
7	15-Sep-14	Clean Edge Painting - Invoice 541 - 144 Flett St., Bowmanville, ON	5,000.00
8	24-Nov-14	Purchase 2014 Lexus RX350 SUV [registered to John B. Good]	51,705.25
			487,540.20

PROPERTY OF ELLA SMITH BY HER ATTORNEY
REVENUE RECEIPTS
JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	30-Jun-13	Interest - Scotia Gain Plan	1,355.87
2	15-Jul-13	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
3	31-Jul-13	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
4	31-Jul-13	Dividend re 25,000 BNS shares @ .66 [Richardson 785009-001]	16,500.00
5	24-Aug-13	Dividend re 18,000 RBC shares @ .72 [Richardson 785009-001]	12,960.00
6	15-Oct-13	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
7	30-Oct-13	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
8	30-Oct-13	Dividend re 25,000 BNS shares @ .66 [Richardson 785009-001]	16,500.00
9	24-Nov-13	Dividend re 18,000 RBC shares @ .74 [Richardson 785009-001]	13,320.00
10	30-Dec-13	Interest - Scotia Gain Plan	1,355.88
11	15-Jan-14	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	6,116.25
12	31-Jan-14	Dividend re 25,000 BNS shares @ .68 [Richardson 785009-001]	17,000.00
13	31-Jan-14	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
14	15-Apr-14	Dividend re 10,500 BCE shares @ .5825 [Richardson 785009-001]	16,500.00
15	30-Apr-14	Dividend re 5,550 TD shares @ .51 [Richardson 785009-001]	2,830.50
16	30-Apr-14	Dividend re 25,000 BNS shares @ .70 [Richardson 785009-001]	17,500.00
17	22-May-14	Dividend re 18,000 RBC shares @ .73 [Richardson 785009-001]	13,140.00
	TOTAL		**155,802.50**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
REVENUE DISBURSEMENTS
JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Particulars	Amount
1	3-Sep-14	Elizabeth Davies - nursing care services - Cheque #7663	1,198.00
2	14-Sep-14	Nana Mendes - nursing care services - Cheque #7664	1,158.00
3	30-Sep-14	Laura Miles - nursing care services - Cheque #7665	1,400.00
4	3-Oct-14	Audrey Chevalier - nursing care services - Cheque #7666	1,316.00
5	10-Oct-14	Ritchies Auctioneers - appraisal services - Cheque #7668	367.50
6	19-Oct-14	Nana Mendes - nursing care services - Cheque #7669	840.00
7	31-Oct-14	Elizabeth Davies - nursing care services - Cheque #7670	1,392.00
8	19-Nov-14	Audrey Chevalier - nursing care services - Cheque #7671	1,316.00
9	30-Nov-14	Tippet-Richardson Limited - moving - Vaughan to Bowmanville Cheque #7672	10,150.00
10	30-Nov-14	Laura Miles - nursing care services - Cheque #7673	1,400.00
11	4-Dec-14	Shoppers Medicare - walker Cheque #7674	1,852.80
12	1-Jan-15	Rogers Cable Communications - services 08/23/14 to 09/22/14 - Cheque #7675	32.19
13	1-Jan-15	Bell Canada - final services 08/18/14 - 9/27/14 - Cheque #7676	60.16
14	4-Jan-15	Shoppers Drugmart - personal care items - American Express	444.94
15	15-Jan-15	Flying Dutchman - dinner - American Express	88.74
17	15-Jan-15	Butlers Healthcare - invoices #803145 & 802879 - Cheque #7677	283.20
18	22-Jan-15	Integra Care - invoice dated September 5, 2014 - Cheque #7678	417.20
19	22-Jan-15	Manulife Financial - quarterly premium payment re life policy #7857279-9 - Cheque #7679	15,338.24
20	23-Jan-15	Nana Mendes - nursing care services to 12/10/14 - Cheque #7680	840.00
21	25-Jan-15	Audrey Chevalier - nursing care services to 1/14/15 - Cheque # 7681	1,316.00
	TOTAL		**41,210.97**

PROPERTY OF ELLA SMITH BY HER ATTORNEY
TRUSTEE'S INVESTMENTS
JUNE 17, 2013 TO FEBRUARY 27, 2015

Item	Date	Transaction	Purchase	Sale
1	14-Jul-14	BMO 1 yr. GIC 2.25%, maturing July 14, 2015 - Certificate No. 400-345	200,000.00	
2	31-Aug-14	BMO 1 yr. GIC 2.62%, maturing Aug 31, 2015 - Certificate No. 400-346	140,000.00	
3	20-Dec-14	Partial redemption of Certificate No. 400-345		50,000.00
4	31-Dec-14	Bank of Nova Scotia, 5,000 shares @ 60.03 - BMO Investment #7789 [Ella and John JWROS]	300,150.00	
5	31-Dec-14	Toronto Dominion Bank 1,450 shares @ 55.10 BMO Investment #7789 [Ella and John JWROS]	79,895.00	
		Remaining under investment		670,045.00
		Total	720,045.00	720,045.00

ANSWERS - re deliberate errors

1	House extension on attorney's property
2	Not preserving attorney's assets
3	Purchase of car in attorney's name and no accounting re same as Trustee Investment
4	Moving Ella from Vaughan to Bowmanville to live in attorney's house -explanation needed
5	Totals in bank accounts do not correspond with remaining totals in Accounts
6	Opening joint bank/investment account registered with Ella and John with right of survivorship
7	Non compensable transfers not deducted in compensation calculation
8	Unaccounted for income
9	No accounting re income tax
10	No explanation re appraisal
11	Life insurance policy taken out on Ella's life

PROPERTY OF ELLA SMITH BY HER ATTORNEY
COMPENSATION STATEMENT
JUNE 17, 2013 TO FEBRUARY 27, 2015

	CAPITAL			
	Capital Receipts	$3,057,367.83		
Less:	Non-compensable Capital Receipts	$-		
	CR 1 - opening balance Scotiabank	-$32,891.45		
	CR 2 - opening balance CIBC	-$45,689.20		
	Transfers	-$245,000.00		
	3% of net amount	$3,057,367.83	**$91,721.03**	
	Capital Disbursements	$487,540.20		
Less:	Non-compensable Capital Disbursements			
	3% of net amount	$487,540.20	**$14,626.21**	
	REVENUE			
	Revenue Receipts	$155,802.50		
Less:	Non-compensable Revenue Receipts			
	3% of net amount	$155,802.50	**$4,674.08**	
	Revenue Disbursements	$41,210.97		
Less:	Non-compensable Revenue Disbursements			
	3% of net amount	$41,210.97	**$1,236.33**	
	Total Compensation			**$112,257.65**
	Care and Management			
	3/5 of 1% per annum on average market value of $2,400,934 for 1.7 years		$24,489.52	
	Total Care and Management			**$24,489.52**
TOTAL COMPENSATION CLAIMED				**$136,747.17**

CHAPTER 6

RULE 7 MOTIONS FOR COURT APPROVAL: WHAT, WHY AND HOW?

INTRODUCTION: WHAT IS A RULE 7 MOTION?

Rule 7.08(1) of the Rules of Civil Procedure provides that a settlement of a claim by or against a party under disability is not binding on that party without the approval of a judge.[1] Court approval is also required for consent judgments in favour of or against a party under disability.[2] Rule 1.03(1) defines "a party under disability" as a person who is a minor, mentally incapable,[3] or an absentee.[4]

In addition to court approval of the settlement agreement, Rule 7 motions invite the court's approval of legal fees.[5] Court approval is expressly required where counsel have entered into a contingency fee agreement.[6]

For many lawyers, a Rule 7 motion signals the end of legal proceedings, and the end of a file. But for a client who was acting as litigation guardian on behalf of an injured loved one, a Rule 7 motion may be just the beginning. If the Rule 7 motion pertains to a significant settlement arising from an injury, your client may wish to commence an application for an order appointing him/her as guardian of property in respect of the injured party.

A Rule 7 motion represents your client's transition from his or her role as litigation guardian, to the role as an applicant in guardianship proceedings, wherein the court and the Children's Lawyer or Public Guardian and Trustee will scrutinize their intentions regarding the care of their loved one. If the guardianship application is successful, the newly-appointed guardian must then assume the role of a fiduciary who is accountable to the court for all of the decisions he or she makes in respect of the management of the settlement funds.

This fiduciary role does not always rest easily with the role of a loving parent. Counsel representing the litigation guardian in personal injury proceedings must therefore consider the process and procedure for Rule 7 motions within this larger guardianship context in order to help their clients navigate the road ahead.

WHY ARE RULE 7 MOTIONS NECESSARY?

A litigation guardian acting on behalf of a party under disability is responsible for ensuring that a settlement is in the best interests of that party. However, the litigation guardian's recommendation respecting settlement, and his/her agreement to legal fees payable from the property of the party under disability, are subject to approval of the court. This can come as a surprise to some.

The Ontario Court of Appeal explained the historical context of Rule 7 motions in *Wu Estate v Zurich Insurance Co.*:

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1 *Rules of Civil Procedure*, RRO 1990, Reg 194 ["Rules"], r 7.08 (1).
2 *Ibid*, r 7.08(2).
3 Within the meaning of the *Substitute Decisions Act,* 1992, SO 1992, c 30, in respect of an issue in the proceeding.
4 Within the meaning of the *Absentees Act*, RSO 1990, c A.3.
5 See, for example, *Cogan v MF*, 2007 CanLII 50281 (Ont SC) at para 20.
6 *Henricks-Hunter v 81488 Ontario Inc (Phoenix Concert Theatre)*, 2012 ONCA 496 ["*Henricks-Hunter*"].

> The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves…to be exercised in the 'best interest' of the protected person…for his or her 'benefit or 'welfare'": *Re Eve,* 1986 CanLII 36 (SCC), [1986] 2 S.C.R. 388 at para. 73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis (Litigation Guardian of) v. Baetz* (1998),1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 at 268 (C.A.). The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability: *Poulin v. Nadon*, 1950 CanLII 121 (ON CA), [1950] O.R. 219 (CA). The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.[7]

For this reason, it is necessary in a Rule 7 motion for the litigation guardian and his/her solicitor to set out the rationale in support of a settlement in their respective affidavits, as discussed in more detail below.

HOW IS A RULE 7 MOTION COMMENCED?

The settlement in question may arise either before or after a claim is commenced. The colloquial term "Rule 7 motion" can therefore be a misnomer if an originating process has not yet issued; in that case, court approval under Rule 7 is actually obtained by way of an application.[8]

If a statement of claim, notice of claim or notice of application has been issued, then the appropriate procedure for obtaining court approval of a settlement is by way of a motion.

To start, you should review Rule 37 for the usual notice requirements, and take note of the extra material to be filed in support of a Rule 7 motion, as discussed below.

Full and Frank Disclosure

Regardless of whether proceedings have been commenced or not, Rule 7.02(4) provides that the following material shall be served and filed with the notice of motion or application:

> (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;
>
> (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;
>
> (c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and
>
> (d) a copy of the proposed minutes of settlement.

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7 2006 CanLII 16344, [2006] OJ No. 1939 at para 10, 268 DLR (4th) 670 (CA) ["*Wu Estate*"].

8 Rules, *supra* note 1, r 7.08(3).

Jurisprudence tells us that counsel who fail to appreciate the historical context of these motions, or those who are too literal-minded, risk running afoul of Rule 7.02(4); counsel for the litigation guardian in *Rops v Intact Insurance Company* filed affidavits setting out the reasons in support of the settlement without actually asserting that the settlement was in the best interests of the party under disability. The court declined to approve the settlement.[9]

While it is open to counsel to bring a Rule 7 motion in writing, given that the opposing party will usually not participate, it would be a mistake to assume that these motions are purely procedural, or that the materials can be perfunctory or summary in their content. In fact, Rule 7 motions require full and frank disclosure, much like the disclosure obligations in *ex parte* motions.

The rationale for this heightened disclosure requirement is articulated by Justice Grace in the following excerpt from His Honour's reasons in *CT v KJ*, a 2013 motion for approval of settlement on behalf of a minor:

> Like settlement approval, the fees issue is usually determined on a written record and in a non-adversarial setting. Albeit in the context of class proceedings, Juriansz J.A. addressed the problems that can arise in those instances. He wrote:
>
> > Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered and impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations, and seek to undermine the position of the other. Motions for approval of settlements and class counsel fees in class proceeding (sic) depart from this basic tenet as a matter of routine. [*Smith Estate v National Money Mart Company*, 2011 ONCA 233 at para 15]
>
> That same dynamic – or lack of it – exists in motions of this kind. The court exercises a supervisory role over the litigation guardian. Vigilance and care are required but the record provided to the court is compiled by the persons seeking approval.
>
> It is for that reason that persons seeking approval of settlements on behalf of a party under disability must treat the proceeding as if it was one brought without notice. They must, therefore, make full and frank disclosure of all material facts relevant to the issues the court is asked to determine. They must also make every effort to follow the mandated procedural and substantive rules that apply.
>
> Fulfilment of that duty allows the reviewing judge to make an initial determination: is the material sufficient to permit disposition or should the decision be postponed pending receipt of further material from the moving party or assistance from the OCL. It should be self-evident that complete, accurate and understandable information is required for that initial – and ultimate - determination to be made.[10]

9 *Rops v Intact Insurance Company*, 2013 ONSC 7366, paras 10-13.
10 2013 ONSC 7563 at paras 31-34.

The following issues should be addressed in detail in your affidavit material:

- The details of the injury;
- The positions taken by the parties involved;
- The prospect for success at the outset of the claim; and
- The experts retained and the opinion produced.

But What about Solicitor-Client Privilege?

There is no rule that waives a solicitor's duty of privilege as regards the litigation guardian client for the purpose of Rule 7 motions. Yet , the requirement of full and frank disclosure, and the necessity of advising the court of all of the reasons why a settlement is in the best interests of the party under disability, clearly places the solicitor in a difficult position by requiring service of the motion record on opposing counsel.

To protect your client, consider removing the solicitor and litigation guardian affidavits from the motion records that are served on opposing parties. You may also wish to include in your notice of motion a request for an order sealing the motion record.

CONTINGENCY FEE AGREEMENTS

A solicitor entering into a contingency agreement must comply with section 5(1) of the *Solicitors Act* Regulation, "Contingency Fee Agreements," which provides that:

> A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,
>
> (a) apply to a judge for approval of the agreement before the agreement is finalized; or
>
> (b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the *Rules of Civil Procedure*.[11]

Contingency fee agreements are permitted by the Law Society of Upper Canada's *Rules of Professional Conduct*[12]; litigation guardians are free to enter into one on behalf of a party under disability. However, counsel and their litigation guardian clients must have regard for the fact that section 24 of the *Solicitor's Act* expressly provides that any fee agreement may be declared void by the court if the court is of the view that the terms of the agreement are not fair and reasonable.

The process of enforcing contingency fee agreements was reviewed in detail by the Ontario Court of Appeal in *Henricks-Hunter*:

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11 O Reg 195/04, under *Solicitors Act,* RSO 1990, c S.15.

12 Law Society of Upper Canada, *Rules of Professional Conduct*, rule 3.6-2 and commentary ["LSUC Rules"].

> When a solicitor seeks to enter into an enforceable contingency fee agreement with a party under a disability, the solicitor must comply with the regulations passed pursuant to the *Solicitors Act.* ...
>
> Therefore, the solicitor can choose to have the agreement approved by the court before it is finalized with the PGT. If a contingency fee agreement is approved by the court before being finalized, the fairness of the agreement is no longer an issue.
>
> Alternatively, the agreement can be finalized and presented on a motion or application for approval of a settlement under rule 7.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Upon hearing a rule 7.08 motion or application, the judge cannot simply disregard a finalized contingency fee agreement. Rather, the motion judge must assess both the fairness and reasonableness of the agreement. If the agreement is fair and reasonable, the motion judge may give effect to it.[13]

The Court of Appeal then provided the following commentary on the two-step process to be followed by the court when counsel seeks to enforce a contingency fee agreement on a motion for approval of settlement:

> First, the fairness of the agreement is assessed as of the date it was entered into. Second, the reasonableness of the agreement is assessed as of the date of the hearing. A contingency fee agreement can only be declared void, or be cancelled and disregarded, where the court determines that it is either unfair or unreasonable.[14]

On the hearing of the Rule 7 motion, the court will consider whether the contingency fee agreement was in the best interests of the party under disability. Jurisprudence provides that, in theory, fees are "fair" if the lawyer can precisely quantify their fee before settlement of the action is completed, the client fully understands and appreciates the nature of the agreement, and the agreement appears fair when assessed in light of the entire course of dealings between the parties regarding the lawyer's remuneration.[15] With respect to the reasonableness of fees, much will depend on the time expended, the legal complexity of the matter at issue, the results achieved and the risks assumed by the lawyer.[16] The court's determination of the proper fee in contingency agreements is not based on the amount of time, but rather the amount recovered.[17] This is not to say that dockets will not be considered, but it suggests that the outcome is a more significant factor than the time spent by the lawyer to achieve that outcome.

The risks assumed by the lawyer will be greater where the retainer is contingent. Such retainer agreements require lawyers to fund the litigation and, in some cases, the disbursements, which means the lawyer assumes the risk of non-payment if the litigation fails.[18] Factors include the risk of adverse liability and/or contributory negligence.[19]

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13 *Henricks-Hunter, supra* note 6 at paras 15-18.
14 *Ibid* at para 13, citing *Raphael Partners v Lam*, 2002 CanLII 45078, [2002] OJ No 3605, 61 O.R. (3d) 417 (CA) ["*Raphael Partners*"].
15 *Raphael Partners, ibid*, paras 37-41.
16 *Ibid* at para 50.
17 *Henricks-Hunter*, *supra* note 6 at para 14.
18 *Ibid*.
19 *Raphael Partners*, *supra* note 14 at paras 52-53.

The determination of fairness requires the court to consider factors that existed at the outset of the retainer, while the determination of reasonableness requires the court to consider the outcome of the retainer and the proceedings as a whole. However, if the retainer agreement included a contingency fee agreement, the court's investigation into both fairness and reasonableness will be conducted at the time of settlement approval.

THE CHILDREN'S LAWYER / THE PUBLIC GUARDIAN AND TRUSTEE

The Rules do not require that the motion record be served on the Children's Lawyer or the Public Guardian Trustee. However, one should arguably serve the appropriate office in any event if the settlement has arisen prior to the appointment of a litigation guardian under the appropriate Rule.

Where a litigation guardian is already acting on behalf of the party under disability, the court hearing or reading a Rule 7 motion may direct the service of the Motion Record on either office and require a report from the Children's Lawyer or the Public Guardian and Trustee regarding any objections or recommendations pertaining to the settlement.

TIMING OF GUARDIANSHIP PROCEEDINGS: A DIFFICULT DANCE

If the litigation guardian is acting as an attorney for property under a valid continuing power of attorney for property of the party under disability, he or she already has the authority under the *Substitute Decisions Act, 1992*[20] to receive payment of the settlement funds in trust for the party under disability.

If the settlement payment in respect of a minor is modest, there may be an argument in favour of considering and requesting an order to pay the settlement funds into court until the minor turns 18, rather than to a guardian of property. The costs of additional legal proceedings in respect of guardianship, and the duty to periodically account, can erode a modest settlement. However, this approach is not always appropriate; counsel should contact the Accountant for the Ontario Superior Court of Justice for more information.

In most other circumstances, a guardianship order will be necessary. The lawyer for the litigation guardian will want to ensure that his or her client has an opportunity to receive advice and recommendations on any necessary guardianship proceedings well in advance of the judgment approving settlement.

For many families, the settlement in question is the product of a traumatic and life-changing event, followed by a long, emotionally exhausting litigation process. The necessity of additional guardianship proceedings should not come as an unpleasant surprise. Parents of a catastrophically injured child, for example, will be understandably frustrated if they believe that the settlement of tort/personal injury proceedings represents the end of litigation, when in fact they must immediately commence a new legal proceeding to obtain the appointment of guardian of property before the settlement funds can be put to use for the benefit of their injured child.

Many litigation guardians are unaware of the legal obligations and duties of guardians of property,

20 *Substitute Decisions Act, 1992*, SO 1992, c 30.

and have little understanding of the work involved in meeting their fiduciary duties. A parent acting as litigation guardian for an injured child may be surprised to learn that the Children's Lawyer – not the parent – acts as litigation guardian in guardianship proceedings. In other words, it is not presumed that a parent is acting in the best interest of their child; the parent will be required to justify his or her decisions with respect to the use of the settlement funds, and the proposed plan of care of their child will be scrutinized by the court and the Children's Lawyer. This is a significant shift in mindset that should not be foisted on the parents for the first time immediately prior to a Rule 7 motion.

For these reasons, if a litigation guardian intends to apply for an order appointing him/her as guardian of property, an early consultation with lawyers experienced in guardianship proceedings can be useful in managing the expectations of clients.

Clients and their legal team must understand that the timing of guardianship applications and Rule 7 motions may not always easily coincide. For example, the court and the Children's Lawyer or the Public Guardian and Trustee will want to understand the needs of the injured party as of the date of the guardianship application. Where the personal injury litigation has been ongoing for several years, many of the expert reports relied upon in the personal injury litigation may be outdated by the time it becomes necessary to commence guardianship proceedings. Up-to-date experts' and/or future care reports may be necessary, especially if the status or nature of any functional disability has changed over time, whether due to the benefit of treatments received, or due to changes in the age and stage of the injured party.

In addition, the management plan required for an application for guardianship must address all of the details pertaining to the investment and management of the settlement funds, whether that settlement be a lump sum, structured settlement, occasional balloon payments, or a combination thereof. Accordingly, these details are not always available until the personal injury litigation has actually settled.

It may therefore be ill-advised to incur legal fees to research and complete a management plan too far in advance of any settlement agreement if the pertinent details regarding the needs of the injured party and the nature of the settlement are subject to change.

A consultation with counsel who is experienced in guardianship proceedings can assist in educating the proposed guardian of property about the intricacies of guardianship proceedings well in advance of any settlement, and can work with the applicant's legal team to ensure a smooth transition into guardianship proceedings at the right time.

THE COURT JUDGMENT

The court's judgment should include the following:

- In the preamble, a list of all of the material before the court in respect of the Rule 7 motion, as well as the birth dates of any minors;
- Approval of legal fees and any contingency agreement, and terms providing for the payment of those fees;

- Where appropriate, where the funds will be held pending the court's appointment of a guardian of property;
- Dismissal of claims of other parties;
- A schedule containing any structured settlement or management plan approved by the court.

Rule 7.09(1) requires the payment into court of any funds payable to a person under disability unless a judge orders otherwise. Larger settlements tend to be paid to the party under disability by his or her guardian of property. Where guardianship is required but not yet in place, judgments may provide that the funds be held in trust by counsel pending the appointment of a guardian of property.

CONCLUDING COMMENTS

Clients who are acting as litigation guardians do not want to be surprised to find that upon settlement, the decisions they made regarding contingency fee agreements and settlement are contingent upon the approval of the court. Consider advising your client of the Rule 7 process at the outset of your retainer to avoid any unpleasant surprises.

Similarly, if the litigation guardian intends to apply for an order appointing him or her as guardian of property of the party under disability, consider referring him or her to counsel with experience in guardianship proceedings for a preliminary consultation well in advance of any settlement.

Guardianship proceedings are not always straightforward, and the legal and fiduciary obligations of guardians of property are not always intuitive; it may take some time for your client to fully appreciate the new role that he or she will assume if appointed as guardian of property.

CHAPTER 7

COSTS OF CAPACITY LITIGATION

INTRODUCTION

Cost treatment and awards in guardianship, power of attorney, fiduciary accounting and capacity litigation proceedings are, in a word, unpredictable.

While the applicable principles become clearer through decisions of the court, the courts have been given a wide discretion to apply cost principles to fit the particular circumstances of a case. The result has been a range of outcomes that stand well enough on their own but are not always easy to reconcile with one another.

CAPACITY RELATED LITIGATION VERSUS GENERAL CIVIL LITIGATION

A discussion about costs in capacity, guardianship, and power of attorney litigation, and fiduciary accounting – which we will refer to collectively as capacity litigation – must begin with a look at what makes this area of litigation unique.

In ordinary civil litigation, the dispute is over the parties' own respective rights, as between themselves. Once the court decides the case, there is a winner and a loser. The longstanding rule in civil litigation is that the loser, who was wrong and ought not to have brought or defended the claim, pays the winner's costs.

By contrast, in capacity litigation, the parties' dispute is not about their own rights, but about the rights of a third party who is not capable of participating personally. It is common for the parties to take the view that they have no personal interest in the matter and are only acting out of duty or altruistic motives; that they are only acting in the best interests of the incapable person. It follows that they would see themselves as being entitled to indemnification for their expenses, either from the incapable person's assets or by the opposing parties.

The reality is more often than not different from the theory. Parties in capacity litigation may be motivated by self-interest rather than the best interests of the incapable person. There are various different kinds of self-interest. A party might want to avoid liability for past misconduct; take revenge on a family member for a historic perceived injustice; gain control of the incapable person's assets for personal gain; or claim moral victory in a family power struggle.

Even if a party's motivations are genuine, they may conduct the litigation in an unreasonable way so that the legal costs are higher than they ought to have been if they had cooperated to reach a speedy resolution.

THE DEVELOPMENT OF THE MODERN COSTS RULES IN CAPACITY LITIGATION

The dynamics of estate litigation, which has undergone a revolution in its costs rules, are similar to those that animate capacity litigation. The estates rules have been carried over into the law of costs in capacity litigation.

The traditional rule in estate litigation was that all parties' costs were paid out of the estate. The parties were entitled to come to court for an adjudication of the issues without any risk to themselves, regardless of whether they were successful. This stood in contrast to the usual rule in civil litigation that the successful party's costs were paid by the loser.

In 2005, the Ontario Court of Appeal in the case of *McDougald Estate v Gooderham* pushed aside the traditional rule in favour of a more modern approach.[1] The modern approach is as follows: the loser pays the successful party's costs unless there is an applicable public policy reason for the costs to be paid out of the estate. There are two such public policy reasons. First, where the difficulties or ambiguities that give rise to the litigation are caused by the testator, it is appropriate that the testator, through his or her estate, bear the costs of their resolution.[2] Second, if there are reasonable grounds to question the execution of the will or the testator's capacity in making it, it is in the public interest to resolve the question without cost to the parties who have raised the issue.[3]

The Court of Appeal summarized this modern approach to costs in estate litigation as follows:

> The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.[4]

These principles were restated briefly but powerfully in 2009 by Justice D.M. Brown in *Bilek v Salter Estate*, in an oft-quoted passage:

> Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes.[5]

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1 *McDougald Estate v Gooderham*, 2005 CanLII 21091 (Ont. CA).
2 *Ibid* at paras 78-80.
3 *Ibid*.
4 *Ibid* at para 95.
5 *Bilek v Salter Estate* (sub nom *Salter v Salter Estate*), 2009 CanLII 28403 (Ont. SC) at para 5.

These principles are now well enshrined in estate litigation, having been revisited and endorsed by the Ontario Court of Appeal as recently as 2014.[6]

COSTS OF CAPACITY LITIGATION: *FIACCO V LOMBARDI*

Not long after Justice Brown decided *Salter Estate*, he had an opportunity to consider the question of costs in a contested guardianship application in *Fiacco v Lombardi*.[7] In that case, the court said that the principles in *McDougald Estate* and *Salter Estate* – i.e., the importance of imposing discipline on the parties through a loser-pays costs rule – applied, with necessary modifications, to capacity litigation.

The following is the proper approach to costs in capacity litigation, as set out in *Fiacco*.

The court may exercise its discretion to order costs payable out of the incapable person's assets in light of the basic purpose of the *Substitute Decisions Act, 1992*[8] (*"SDA"*), which is to safeguard and properly manage the property of incapable persons in their sole best interests. Therefore, the key question in judging whether costs should be paid from the incapable person's assets is what benefit the person gained from the litigation, given the costs incurred.

In unopposed guardianship applications, which often arise when a person becomes incapable without having made a power of attorney, the incapable person typically receives a benefit from an application. The benefit is a guardianship order allowing his/ her property to be properly managed. In these cases, the court will usually allow the costs to be paid out of the incapable person's assets, although with discretion to consider the reasonableness of the amount.

In opposed guardianship applications, the court will be much more circumspect. Capacity disputes often arise because of a conflict between attorneys or where multiple people claim a competing right to manage the incapable person's property or personal care as a guardian. In *Fiacco*, the court allowed that *bona fide* disputes about the wellbeing of the incapable person may well be raised and resolved by the court in the best interests of the incapable person, but that the parties and the court must not be allowed to lose sight of the purpose: the best interests of the incapable person. Justice Brown noted that these cases often degenerate into a battle among family members, some of whom put their own interests ahead of the incapable person's.

Further Statements of the Principle

In *Ziskos v Miksche*, the court emphasized the court's role in protecting the incapable person from unreasonable exposure to costs:

> 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 costs be paid by the assets or estates of the vulnerable person.[9]

6 *Feinstein v Freedman*, 2014 ONCA 205.
7 *Fiacco v Lombardi*, 2009 CanLII 46170 (ON SC).
8 *Substitute Decisions Act, 1992*, SO 1992, c 30.
9 *Ziskos v Miksche*, 2007 CanLII 46711 (Ont. SC) at para. 75

The court further stated as follows:

> ...it can no longer be said in estate matters, and in this regard I would include matters under the *SDA*, that parties and their counsel can reasonably expect all of their costs to be paid for by the assets or in this case now from the estate of Johanna Miksche. The trend for some time now has been to examine the nature of the dispute and the conduct of the parties. Although in most cases it is also possible to consider which party is the "successful" party, that is not as significant a factor in these types of cases provided it can be said that the parties are properly motivated by the best interests of the person under a disability and are acting reasonably.[10]

In *Wercholoz v Tonellotto*, Justice Glithero said:

> 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 grantor of the power of attorney's] perspective.[11]

THE LEGISLATIVE FRAMEWORK FOR COSTS AWARDS

The unique approach to costs of capacity litigation, as contrasted with the costs of ordinary civil litigation, is not based on any difference in the underlying legislation. It arises out of reasoned judicial application of the usual statutes and rules applicable to the exercise of the court's discretion to award costs: the *Courts of Justice Act*[12] and the *Rules of Civil Procedure.*[13] It is important to refer to these sources when advising on or making a claim for costs.

The court's authority to make a costs award is derived from section 131 of the *Courts of Justice Act*, which provides:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.[14]

This provision is subject to applicable rules, which, in capacity litigation, means Rule 57 of the *Rules of Civil Procedure*. Under this rule, the court is authorized to consider various factors in exercising the discretion to award costs. These factors include:

i) the principle of indemnity;

ii) the degree of success of each party;

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10 *Ibid* at para 56.
11 *Wercholoz and Tonellotto*, 2013 ONSC 1106 at para 37.
12 *Courts of Justice Act*, RSO 1990, c C.43.
13 *Rules of Civil Procedure*, RRO 1990, Reg 194.
14 *Courts of Justice Act*, *supra* note 12, s 131.

iii) the amount claimed and recovered;

iv) the importance of the issues;

v) the complexity of the issues; and

vi) any step taken by the parties that tended to lengthen or shorten the proceedings.[15]

The court's overarching goal in making a costs award is to fix costs "in an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant."[16]

In ordinary civil litigation, costs are typically awarded to the successful party on a partial indemnity basis. There are two circumstances in which a party may be entitled to a higher scale of costs; i.e., costs on a substantial indemnity or full indemnity basis.[17] First, elevated costs are available to a party who has made an offer to settle pursuant to Rule 49 of the *Rules of Civil Procedure.* Second, a party who has acted in a reprehensible manner in the litigation may be punished by an award of elevated costs.[18]

A full discussion of the law of costs of litigation is beyond the scope of this chapter, but reference may be had to various helpful texts on this topic.[19]

APPLICATION OF THE PRINCIPLES

The following are some examples of recent Ontario cases in which the court has been asked to make costs orders in capacity litigation. This is not an exhaustive review of the cases, but it is nonetheless enough to see that judicial discretion plays an enormous role in the outcome of a case.

Scalia v Scalia

In the 2015 case of *Scalia v Scalia*,[20] about an incapable older man, a dispute erupted between his wife and his son from his previous marriage.

The son developed suspicions that his stepmother was misappropriating the husband's property. He demanded an accounting, but did not receive what he considered to be an adequate response. The son then took matters into his own hands. He moved funds out of his father's and stepmother's joint account and put them beyond her reach. He redirected some of his father's income, which had previously been paid into the joint account and was available to the stepmother to support herself. Then he commenced an application.

The son asked for financial disclosure and an accounting from the stepmother and orders dealing with various assets. His application was dismissed, and the court was critical of his unilateral steps

15 *Rules of Civil Procedure, supra* note 13*,* r 57.01.
16 *Boucher v Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 at para 26, 71 OR (3rd) 291 (CA).
17 *Clarington (Municipality) v Blue Circle Canada Inc* (sub nom *Davies v Clarington (Municipality)*), 2009 ONCA 722, 100 OR (3d) 66.
18 *Ibid* at para 28.
19 See in particular M. Orkin, *The Law of Costs*, 2nd ed, (Aurora, ON: Canada Law Book, 2015), looseleaf.
20 2015 ONCA 492; 2015 CarswellOnt 9780.

to control his father's assets before commencing the litigation. However, the court found that the application itself was not brought in bad faith, nor was it unreasonable. The court ordered that the stepmother's costs be paid on a partial indemnity basis, but out of the husband's assets rather than the son's.

The stepmother responded with her own claim to remove the son as attorney for property, set aside her marriage contract with her husband, and for orders for interim support and dealing with assets, among others. She was partly successful in her own application. She was awarded support and granted orders allowing her to deal with the husband's assets. In this application, the judge ordered the son to pay the stepmother's substantial indemnity costs in the amount of $13,500 personally.

The son appealed the court's order that he personally pay substantial indemnity costs in his stepmother's application. Although the Court of Appeal agreed with some of his arguments, the costs award was upheld.

The Court of Appeal reviewed the application judge's approach. The application judge found that the son had not performed his fiduciary duties honestly, diligently, and in good faith as required under s 32 of the *SDA*. The son had demonstrated bad faith by unilaterally withdrawing funds from the joint account and holding back support for his stepmother. He had unilaterally moved his father into a long-term care facility against his father's expressed wishes, and then told his irate father that it had been his stepmother's choice. The application judge also found that the son's conduct in the litigation created an adversarial proceeding that split the family. He concluded that the son's conduct was "reprehensible."

The Court of Appeal reviewed the evidence and found that the son had not in fact completely cut off the stepmother's support, was not acting unreasonably when he acted to preserve his father's assets for the father's benefit in light of his mounting healthcare costs, and did not cut off his stepmother's visits. The court reversed the application judge's finding of bad faith on the basis that the son did not intend to inflict harm or deceive, which are the hallmarks of bad faith.

However, the court upheld the application judge's finding that the son had taken steps in the litigation that were of no benefit to his father and refused to accept reasonable offers to settle. The Court of Appeal considered the rule in *McDougald Estate* and found that neither exception applied. In the result, the court upheld the costs award against the son.

The Public Guardian and Trustee v Dodson

When Edmund Sobies died, he left behind his wife Stella. Stella was incapable of managing her property, did not have a continuing power of attorney for property, and the Public Guardian and Trustee ("PGT") was appointed as her statutory guardian pursuant to the *SDA*.

Stella's sister Jennie unsuccessfully applied to the PGT for a Certificate of Statutory Guardianship for Stella (i.e., to replace the PGT as guardian). The PGT refused to grant the certificate and, in *Public Guardian and Trustee v Dodson*,[21] commenced a court application to confirm its refusal, as required by the *SDA*.

21 2015 ONSC 1927; costs decision at 2015 ONSC 2810.

The PGT's evidence was that Jennie did not understand the role of a guardian of property, repeatedly made allegations not grounded in fact and could not objectively manage Stella's property because she was fixated on attacking Stella's late husband's will. The court agreed.

The PGT sought costs in the amount of $5,942.50. It asked the court to order that Jennie pay $1,000 of these costs and that the balance be paid from Stella's assets.

The court held that the PGT was entitled to its costs as it was discharging its statutory burden. The modern approach to estate litigation applies, and costs will typically follow the result. However, Stella obtained a benefit by the confirmation of the PGT as her statutory guardian, so it was reasonable for her estate to pay for a portion of the costs. However, Jennie ought to be responsible to pay the additional and unnecessary costs caused by her position.

The court called the $1,000 amount sought by the PGT "exceedingly generous" to Jennie and ordered that she pay it, stating, "The message needs to be sent to Jennie Dodson that there are financial consequences to her unjustified behavior."

Lisowick v Alvestad

Even if parties manage to settle all of the substantive issues in a guardianship dispute, they may disagree about who should bear the costs. This was the situation in *Lisowick v Alvestad*.[22]

The case involved competing applications by the two daughters of the incapable person, both named attorneys for property and personal care, each of which asked for an order to be appointed as the sole guardian of property and personal care.

In the course of the litigation, a capacity assessor found the father capable of granting a new power of attorney ("POA"). He proceeded to grant a new POA to just one of his two daughters. Ultimately, that newly-named attorney served an offer to settle to solidify the new arrangements and end the litigation. By accepting the offer, the other sister essentially capitulated.

Despite the settlement, the issue of costs remained outstanding. Each sister claimed costs from the other, the amounts being $76,897.50 and $93,683.31 (the larger amount being claimed by the successful sister).

The court found that the terms of the settlement essentially repudiated the original position of the sister who ultimately agreed to be removed. This disentitled her from receiving any costs.

With respect to the "successful" sister, the court reviewed the Rule 57 factors and found the quantum of costs sought to be somewhat excessive, reducing the amount that it was prepared to order to $50,000.

The interesting question in this case is who would pay the successful sister's costs: the unsuccessful party or the alleged incapable person? In a perhaps surprising turn, the court reviewed the principles in *Fiacco* and similar cases, but declined to order that the loser pay any costs. This was so even though the losing sister had continued the litigation well beyond the point where the father had

22 2015 ONSC 257.

made new powers of attorney in favour of the successful sister. The court reasoned as follows at paras 28-30:

> As noted by Brown J. in *Fiacco*, the paramount consideration in the exercise of the court's discretion in cost claims arising from capacity litigation is the protection of the property of the individual whose capacity is being challenged. The property of such persons must not be significantly depleted by cost awards which undermine its ability to generate income for the care of the incapable person.
>
> On the other hand, the quantum of costs awarded must not be tantamount to a judicial licence for siblings to opt for litigation in contested guardianship cases rather than resolving their differences in a manner that reflects the best interests of the incapable relative. The fact that a parent or relative has a sizeable estate, therefore increasing the chances of costs recovery, should not be construed as an incentive to commence litigation in these types of cases.
>
> It may be suggested that in as much as Ms. Rivera is seeking costs against Ms. Lisowick rather than against Mr. Alvestad's property, that the court should not be guided by the legal principles set out in *Fiacco*, *Wercholoz* and *Ziskos*. However misguided Ms. Lisowick may have been in initiating the guardianship application, she did so on behalf of Mr. Alvestad and her scrupulous desire to ensure his personal wellbeing and to protect his property. Furthermore, she brought the application in her capacity as Mr. Alvestad's Attorney for Personal Care and for Property. To that extent, any costs awarded in this case should be paid from Mr. Alvestad's property, rather than against Ms. Lisowick.[23]

This case highlights a different approach to judicial discretion. While some courts have used costs to punish parties for succumbing to their emotions and baser instincts, others have found that strong emotions are natural in family litigation and are a mitigating, rather than aggravating, factor for bad behavior.

Kulyski v Kulyski Estate

The case of *Kulyski v Kulyski Estate*,[24] which began as capacity litigation and continued as estate litigation after the woman who was the unfortunate subject of the case died, contains a thorough practical application of the costs rules.

This was a dispute between two siblings on the one side and their sister on the other side over the validity of their mother's powers of attorney and wills. It also involved an accounting of the sister's dealings with the mother's assets, and a claim by the sister for *quantum meruit* compensation for her alleged care services for her mother.

The dispute was touched off when the sister took her allegedly incapable mother to a lawyer, where the mother revoked her previous powers of attorney and will and made new ones favouring the sister.

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23 *Ibid* at paras. 28-30.
24 2014 ONSC 3615.

Almost three years of protracted and procedurally dense guardianship litigation followed, with no resolution by the time the mother died. On the eve of the trial some months after death, the sister withdrew her intention to probate the new will that favoured her and to prove the validity of the new powers of attorney. Other issues were resolved on consent between the parties. The trial went ahead only on the issue of the sister's *quantum meruit* claim, in which she was mostly unsuccessful, receiving judgment only for about $6,000.

In the court's costs decision, Justice Greer reviewed the parties' offers to settle, and found that the siblings had served the offer with terms that matched most closely with the eventual result.

The court heavily criticized the sister for her conduct. It found that she disregarded and even tried to hide evidence that demonstrated that she had little chance to succeed, but proceeded anyways. She never proposed a realistic plan for resolution of the case. Her conduct was "intransigent" and dragged the proceedings out for nearly four years. She did not admit taking various funds which she was found to have taken. She did not acknowledge her role in the deceased's execution of new wills and POAs. She breached a court order to apply to pass her accounts and ultimately did not provide proper accounts.

The judge reviewed the principles in *McDougald*, *Fiacco*, *Bilek*, and other cases stating the relevant principles. She found that the litigation did not benefit the mother at all. Instead, this was, "one of those Estate cases that revolved around the family of the incapable person being unable to rationally deal with the sale of the house." The court explained that, "the house should have been sold in 2011 to allow Stella to use the benefit of that money for a placement in a proper retirement residence. Instead, Patricia chose to oppose this for 3 more years."

For these reasons, the court attributed the failure to the sister almost exclusively.

The sister's own costs were $144,681, and she was awarded none of them. The siblings claimed full indemnity costs in the amount of $243,000. The court fixed their costs in the amount of $136,563, payable by the sister and to be deducted from her share of the estate.

In contrast to *Lisowick*, *supra*, the court in *Kulyski* gave no indication that the sister's emotionally-driven conduct was grounds to excuse her unreasonable positions and bad litigation behaviour.

Blair v Reijers

Blair v Reijers[25] is an example of a case in which the court determined not only that one of the parties to the capacity litigation ought to pay costs personally, but that the costs ought to be fixed on a substantial indemnity basis on the grounds that the party's conduct was "scandalous."

The scandalous conduct included: not serving necessary parties before seeking court orders; dismissing her counsel on the eve of court hearings; failing to obey court orders; and removing her mother's belongings from her home without authority and refusing to return them. There were also allegations of elder abuse made against her by the mother, who was the subject of these proceedings.

25 2013 ONSC 6021.

Cordeiro v Sebastiao

Capacity litigation can be highly emotional. In the case of *Cordeiro v Sebastiao*,[26] the unsuccessful party – an attorney for property who was removed for helping himself to over $100,000 of his mother's funds – tried to appeal to the court's sympathy for his own difficult circumstances. He argued that:

> any question of guardianship over a parent is a highly sensitive and emotional one for the parties. As such, [the unsuccessful party] ought not to be punished unduly for exercising his procedural right to respond to the application or for exhibiting emotion that may have hampered his ability to act in a timely way.

However, the court found that he had only himself to blame, with no evidence before the court that his conduct was rooted in emotional causes. He unnecessarily lengthened and aggravated the pace of the proceedings, and was in default of discharging some of his court-ordered obligations.

The court fixed costs payable at first instance out of the assets of the incapable person, but to be fully reimbursed by the unsuccessful party.

This case is a reminder of the impact that court-appointed Section 3 counsel can have in protecting the rights of a person whose capacity is at issue under the *SDA*. In this case, the incapable party was represented by counsel, who made a compelling argument on her behalf that she, as an innocent party, should not have to bear the costs herself.

This case explicitly addresses the effect of a party's entreaty to emotional distress as a mitigating factor in awarding costs. The court did not give effect to the argument, but apparently only because there did not appear to be any evidentiary basis for the losing party's argument that he was suffering from emotional distress.

CONCLUDING COMMENTS

The principles applicable to costs in capacity litigation are easy to state, but outcomes are difficult to predict in practice. Nonetheless, there are some practical lessons.

Parties should be mindful to always temper their emotions and measure their conduct against the objective best interests of the incapable person. Cooperation and settlement proposals are key to considering and minimizing adverse cost consequences, because the court is generally more likely to make a costs award from the incapable person's assets on a motion to approve a settlement than after trial in unseemly and acrimonious litigation. If cooperation and settlement do fail, the parties must be prepared to show the court, clearly and concisely, what steps they took to encourage cooperation and reasonable settlement.

26 2012 ONSC 2291.

APPENDICIES

1. Undue Influence Checklist

http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist.pdf

2. Capacity Checklist: The Estate Planning Context

http://www.whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

3. Summary of Capacity Criteria

http://www.whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf

4. Guardianship Checklist: Personal Care

http://www.whaleyestatelitigation.com/resources/WEL_Guardians_for_personal_care_checklist.pdf

5. Guardianship Checklist: Property

http://www.whaleyestatelitigation.com/resources/WEL_Guardians_for_property_checklist.pdf

6. Additional Reading

APPENDIX 1

UNDUE INFLUENCE CHECKLIST

UNDUE INFLUENCE: SUMMARY

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where, as a result of another party's exertion of influence, the mind of the testator or grantor falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments, such as powers of attorney.

The Courts' Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of *Hall v Hall* (1968):[1]

> *To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made*.

In describing the influence required for a finding of undue influence to be made, the court in *Craig v Lamoureux*[2] stated:

> *Undue influence in order to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not mean*.[3]

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence." We see in *Hall v Hall* influence of a more

1 (1968) LR 1 P&D.
2 *Craig v Lamoureux*, [1919] 3 WWR 1101.
3 *Ibid* at para 12.

subtle characterization which, when read together with more recent cases, arguably broadens the application and scope of the doctrine.

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.[4]

In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[5]

Relationships Where There is an Imbalance of Power

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet constitute a subtle influence sufficient for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid. [6]

Multiple Documents

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.[7]

Language

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[8] For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.[9]

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4 *Dmyterko Estate v Kulikovsky,* 1992 CarswellOnt 543.

5 *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353.

6 *Dmyterko Estate, supra* note 4: the court in this case looked at the relationship between a father and his daughter at the time when he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.

7 See for example *Kohut Estate v Kohut,* (1993), 90 Man R (2d) 245 (QB), where seven wills were made by an elderly (now deceased) lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

8 See for example *Kohut Estate (Ibid)*, *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877; *Grewal v Bral*, 2012 MBQB 214.

9 *Nguyen Crawford v Nguyen*; *Grewal v Bral (Ibid)*.

Other Factors Indicative of Undue Influence

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.[10]

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual to be appointed as that person's guardian of property. [11]

Not All Relationships of Dependency Lead to Findings of Undue Influence

As individuals grow older, or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, that may well be seen as indicative of that family member's intentions, and of the genuine willingness of the grantor to effectuate an otherwise questionable transaction in a favourable manner.[12]

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[13]

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10 *Juzumas v Baron*, 2012 ONSC 7220.

11 *Covello v Sturino*, 2007 CarswellOnt 3726.

12 See for example *Hoffman v Heinrichs*, 2012 MBQB 133, in particular para 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.

13 *Ibid* at paras 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.

Indicators of Undue Influence

The court in the 2013 decision of *Gironda v Gironda*[14] provided a (non-exhaustive) list of indicators of undue influence:

- ❑ The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- ❑ The testator is socially isolated;
- ❑ The testator has experienced recent family conflict;
- ❑ The testator has experienced recent bereavement;
- ❑ The testator has made a new Will that is inconsistent with his or her prior Wills; and
- ❑ The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[15]

In *Tate v Gueguegirre*[16] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- ❑ Increasing isolation of the testator, including a move from his home to a new city;
- ❑ The testator's dependence on a beneficiary;
- ❑ Substantial pre-death transfers of wealth from the testator to the beneficiary;
- ❑ The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- ❑ The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- ❑ The beneficiary conveyed the instructions to the lawyer;
- ❑ The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- ❑ There were documented statements that the testator was afraid of the beneficiary.[17]

Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.[18]

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14 *Gironda v Gironda*, 2013 CarswellOnt 8612.
15 *Ibid* at para 56.
16 *Tate v Gueguegirre*, 2015 ONSC 844 (Div. Ct.)
17 *Ibid* at para.9.
18 *Goodman Estate, supra* note 5; *Hoffman v Heinrichs*, *supra* note 12 at para 63.

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[19]

Although the leading Supreme Court of Canada ("SCC") case of *Vout v Hay* held that "*the extent of proof required is proportionate to the gravity of the suspicion*,"[20] the more recent SCC case of *C(R) v McDougall*[21] held that there is a single standard of proof in civil cases—the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*[22] elicited the principles that apply to the standard of proof relating to undue influence:

> *The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's".*

It has been held that in the context of gifts where the potential for domination exists in the relationship, the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention that the transaction was made as a result of the donor's "*full, free and informed thought*."[23]

See also *Buccilli et al v Pillitteri et al*,[24] where the court stated that:

> *The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely*.

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader,*[25] the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy on the influencer, including consideration of the influencer's "physical presence and volatile personality." The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

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19 *Nguyen Crawford v Nguyen, supra* note 8; *Grewal v Bral*, *supra* note 8.
20 *Vout v Hay,* [1995] 2 SCR 876 at para 24.
21 2008 SCC 53, cited in *Hoffman v Heinrichs*, *supra* note 12 at para 34.
22 *Supra* note 7 at para 38.
23 *Fountain Estate v Dorland, supra* note 5 at para 64, citing in part *Goodman Estate v Geffen*, *supra* note 5 at para 45.
24 2012 ONSC 6624 at para. 139, upheld 2014 ONCA 337.
25 *Shrader v Shrader,* [2013] EWHC 466 (ch)

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[26]

In *Leger v Poirier*,[27] the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing mind and memory*" without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances can refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[28]

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly "unnatural" dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.[29]

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26 See for example the case of *Gironda v Gironda*, *supra* not e 14 at para 56. In this case, the applicants challenged a 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.

27 *Leger v Poirier*, [1944] SCR 152.

28 *Vout v Hay, supra* note 20.

29 Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[30]

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence is adduced demonstrating that the requisite formalities have been complied with and the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[31]

Lawyer's Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- ❑ What are the familial circumstances of your client? Is he/she well supported, or more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- ❑ Is there conflict within your client's family?
- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- ❑ If the client is isolated, does he/she live with one particular individual?

30 Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).

31 Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

- ❑ Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?

- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and why those particular witnesses were chosen.

- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?

- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

- ❑ Has the client had any recent significant medical events?

- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document, and if so, why?

- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

- ❑ Overall, do the client's opinions tend to vary? Or have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- ❑ Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?
- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- ❑ Is the client making a marked change in the planning documents as compared to prior documents?
- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
- ❑ Does the client have a physical impairment of sight, hearing, mobility or other?
- ❑ Is the client physically dependant on another?
- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- ❑ Interview the client alone;
- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/ to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.
- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

- ❑ Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;

- ❑ Address recent health changes;

- ❑ Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;

- ❑ Determine whether the client has any physical impairment, such as hearing, sight, or mobility limitations;

- ❑ Consider evidence of intention and indirect evidence of intention; and

- ❑ Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers

Checklist

- ❑ Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;

- ❑ Determine Intentions;

- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment or requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions first);

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[32] and

- ❑ Be mindful of the Rules of Professional Conduct[33] which are applicable in the lawyer's jurisdiction.

32 For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf
* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

33 In Ontario, see the *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

APPENDIX 2

CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

Capacity Generally

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[1]

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.[2]

In determining the ability to understand information relevant to making a particular decision, or to appreciate the consequences of making a particular decision, the following capacity characteristics and determining criteria are provided for guidance purposes.

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document requires that the testator have the ability to understand the following:

(a) The nature of the act of making a Will (or testamentary document) and its effects;

(b) The extent of the property of which he or she is disposing; and

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[3]

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1 *Palahnuk v Palahnuk Estate*, 2006 WL 1135614; *Brillinger v Brillinger-Cain*, 2007 WL 1810585; *Knox v Burton* (2005), 14 ETR (3d) 27; *Calvert v Calvert*, [1997] O.J. No. 533 (Gen.Div.) at para 11, aff'd [1998] O.J. No 505 (CA) leave ref'd [1998] SCCA No. 161

2 Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013

3 *Banks v. Goodfellow* (1870) LR 5 QB. 549 (Eng. Q.B.)

Further elements of the criteria for testamentary capacity are:

- A "disposing mind and memory" to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.[4]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption, described in *Vout v Hay:*

> *Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity*.[5]

Notably, the court recently opined on delusions and the effect on testamentary capacity, finding that their existence alone is not sufficient to determine testamentary capacity, but that they are a relevant consideration under the rubric of suspicious circumstances.[6]

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act*[7] defines a "Will" to include the following:

> (a) a testament,
>
> (b) a codicil,
>
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) any other testamentary disposition. ("testament").

A testamentary disposition may arguably include designations as part of an estate plan in a Will;

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4 The test for testamentary capacity is addressed in the following cases: *Murphy v Lamphier* (1914), 31 OLR 287 at 318; *Schwartz v. Schwartz* (1970), 10 DLR (3d) 15, 2 OR 61 (CA); *Hall v Bennett Estate* (2003), 64 OR (3d) 191 (CA), 277 DLR (4th) 263; *Bourne v Bourne* Estate (2003), 32 ETR (2d) 164 (Ont. SC); *Key v Key,* [2010] EWHC 408 (ch.).

5 *Vout v Hay,* [1995] 2 SCR 876 at para 26.

6 *Laszlo v Lawton*, 2013 BCSC 305.

7 RSO 1990 c. S.26, as amended, subsection 1(1) ("*SLRA*").

for example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.[8] Therefore, capacity is determined on the criteria applied to determining testamentary capacity

A testamentary disposition may arguably include the transfer of assets to a testamentary trust.[9] The criteria to be applied is that of testamentary capacity.

The capacity required to create an *inter vivos* trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

Capacity to Grant or Revoke a Continuing Power of Attorney for Property ("CPOAP")

Pursuant to section 8 of the *Substitute Decisions Act, 1992* ("*SDA*"),[10] to be capable of granting a Continuing Power of Attorney for Property ("CPOAP"), a grantor requires the following:

(a) Knowledge of what kind of property he or she has and its approximate value;

(b) Awareness of obligations owed to his or her dependants;

(c) Knowledge 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) Knowledge that the attorney must account for his or her dealings with the person's property;

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

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

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[11]

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[12]

8 *SLRA* s 51(1).
9 *SLRA* s 1(1)(a).
10 RSO 1992, c 30, as am.
11 *SDA* s 8(2).
12 *SDA* s 9(1).

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.[13]

When an Attorney Should Act under a CPOAP

If the CPOAP provides that the power granted 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 Power of Attorney 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*[14]

Capacity to Manage Property

The criteria for assessing the capacity to manage property are found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

(a) The ability to understand the information that is relevant in making a decision in the management of one's property; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. 15

A person may be incapable of managing property, yet still be capable of making a Will.[16]

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the *SDA*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

(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 for the person.17

13 *SDA* s 9(2).
14 RSO 1990, c. M.7.
15 See also *Re Koch*, 1997 CanLII 12138 (Ont SC).
16 *Royal Trust Corp. of Canada v Saunders*, [2006] OJ No. 2291.
17 *SDA* s 47(1).

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[18]

A POAPC is valid if, at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[19]

When an Attorney Should Act under a POAPC

In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the Attorney must act, having regard to section 45 of the *SDA*.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

Capacity under the Health Care Consent Act, 1996[20]

Subsection 4(1) of the *Health Care Consent Act, 1996* ("*HCCA*") defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

(a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law.

18 *SDA* s 47(3).
19 *SDA* s 47(2).
20 SO 1996, C.2, Schedule A.

Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[21]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[22]

Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.[23]

The presumptions relating to capacity to contract are set out in the *SDA*. Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract. Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

(a) The ability to understand the nature of the gift; and

(b) The ability to understand the specific effect of the gift in the circumstances.[24]

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.[25]

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[26] which as set out above requires the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.

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21 G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
22 *Thomas v Thomas* (1842), 2 QB 851 at p. 859 .
23 *Bank of Nova Scotia v Kelly* (1973), 41 DLR (3d) 273 (PEI SC) at 284; *Royal Trust Company v Diamant* (1953), (3d) DLR 102 (BC SC) at 6.
24 *Royal Trust Company v. Diamant (Ibid)* at 6; and *Bunio v Bunio Estate,* [2005] AJ No. 218 at paras. 4 and 6.
25 *Re Beaney*, [1978] 2 All ER 595 (Eng. Ch. Div.); *Mathieu v Saint-Michel,* [1956] SCR 477 at 487.
26 See for example: *Park v Park,* 2013 ONSC 431; *de Franco v Khatri*, 2005 CarswellOnt 1744, 303 RPR (4th) 190; *Upper Valley Dodge v Estate of Cronier*, 2004 ONSC 34431.

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

(a) The ability to understand the nature and effect of making a Will or undertaking the transaction in question;

(b) The ability to understand the extent of the property in question; and

(c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.[27]

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.[28]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[29]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[30]

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

To ascertain incapacity to instruct counsel involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic is "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.[31] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

(a) Understand what they have asked the lawyer to do for them and why,

(b) Be able to understand and process the information, advice and options the lawyer presents to them; and

(c) Appreciate the advantages, disadvantages and potential consequences of the various options.[32]

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27 *Hart v Cooper* (1994), 2 ETR (2d) 168 (BC SC).
28 *Barrett Estate v Dexter* (2000), 34 ETR (2d) 1, 268 AR 101 (Q.B.).
29 *Browning v Reane* (1812), 161 ER 1080, 2 Phill.ECC 69; *Spier v Spier (Re),* [1947] WN 46 (PD); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik.
30 *AB v CD*, 2009 BCCA 200, leave to appeal to S.C.C. denied, [2009] 9 WWR 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (Ont. SC), aff'd 1998 CarswellOnt 494.
31 Staff lawyer at ARCH Disability Law Centre.
32 At page 3.

ISSUES RELATED TO CAPACITY

Undue Influence

Undue influence is a legal concept, where the onus of proof is on the person alleging it.[33]

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;[34]
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion [35]

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependency.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[36]

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state.[37]

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences.[38]

Psychological pressures creating fear may be tantamount to undue influence.[39]

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document … "cannot be said to be that of the deceased."[40]

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33 *Longmuir v. Holland*, 2000 BCCA 538, per Southin J.A. (dissenting in part); *Keljanovic Estate v Sanseverino* (2000), 34 ETR (2d) 32; *Berdette v Berdette* (1991), 41 ETR 126, 3 OR (3d) 513; *Brandon v Brandon,* [2007] OJ.No. 2986, (SC) ; *Craig v Lamoureux,* 3 WWR 1101, [1920] AC 349; *Hall v Hall* (1868), LR 1 P & D.

34 *Dmyterko Estate v Kulilovsky* (1992), 46 ETR; *Leger v Poirier,* [1944] SCR 152, at pages 161-162.

35 *Wingrove v Wingrove* (1885), 11 PD 81

36 *Scott v Cousins* (2001), 37 ETR (2d) 113 (Ont. SC).

37 *Wingrove v Wingrove*, supra note 35.

38 *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (QB).

39 *Tribe v Farrell,* 2006 BCCA 38.

40 *Banton v Banton,* [1998] OJ No 3528 (Gen.Div.) at para 58.

Undue influence must be corroborated. [41]

Suspicious circumstances will not discharge the burden of proof required.[42] (See Undue Influence Checklist in Appendix 1)

Suspicious Circumstances

Suspicious circumstances relating to a Will may include:

(a) circumstances surrounding the preparation of the Will;

(b) circumstances tending to call into question the capacity of the testator; or

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[43]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[44]

41 Section 13 of the *Ontario Evidence Act,* RSO 1990, c. E.23, s. 13 states: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence; see also Orfus Estate v Samuel & Bessie Orfus Family Foundation, 2011 ONSC 3043.

42 *Vout v Hay*, *supra* note 5 at para 27.

43 *Scott v Cousins*, supra note 36; *Vout v Hay, supra* note 5.

44 *Laszlo v Lawton, supra* note 6.

APPENDIX 3

SUMMARY OF CAPACITY CRITERIA

The following is a synopsis which attempts to summarize the various criteria or factors – or 'test,' so to speak – respecting certain decisional capacity evaluations:

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Manage property	*Substitute Decisions Act, 1992*[1] *("SDA"),* s. 6	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	*SDA,* s. 45	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	*SDA,* s. 8	(a) Knowledge of what kind of property he or she has and its approximate value; (b) Awareness of obligations owed to his or her dependants; (c) Knowledge 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) Knowledge that the attorney must account for his or her dealings with the person's property; (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney; (f) Appreciation that unless the attorney manages the property prudently its value may decline; and (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Grant and revoke a POA for Personal Care	*SDA,* s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; and (b) Ability to understand the specific effect of the gift in the circumstances. *In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.*
Make a Will **Testamentary Capacity**	Common law	(a) Ability to understand the nature and effect of making a Will; (b) Ability to understand the extent of the property in question; and (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; and (b) Ability to understand the trust`s specific effect in the specific circumstances. *In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)*

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Undertake Real Estate Transactions	Common law	(a) Ability to understand the nature of the contract; and (b) Ability to understand the contract's specific effect in the specific circumstances. *In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)*
Marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one`s children. Also possibly required: capacity to manage property and the person Dr. Malloy[2] stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.
Separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry)[3].
Divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry)[4].
Instruct Counsel	Common law	(a) Understanding of what the lawyer has been asked to do and why; (b) Ability to understand and process the information, advice and options the lawyer presents to them; and (c) Appreciation of the advantages, disadvantages and potential consequences of the various options.[5]

CAPACITY TASK/ DECISION	SOURCE	DEFINITION OF CAPACITY
Give Evidence	*Evidence Act*,[6] ss. 18(1), 18(2), 18(3)	*18. (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).* ***Challenge, examination*** *(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).* ***Exception*** *(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).*
	Canada Evidence Act,[7] s. 16(1)	***Witness whose capacity is in question*** *16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine* *(a) whether the person understands the nature of an oath or a solemn affirmation; and* *(b) whether the person is able to communicate the evidence*

1 S.O. 1992, c.30.
2 Barrett Estate v. Dexter (2000), 34 E.T.R. (2d) *1, 268 A.R. 101 (Q.B.).*
3 Calvert (Litigation Guardian of) v. Calvert, 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal *to S.C.C. refused May 7, 1998 [hereinafter Calvert].*
4 *Calvert*.
5 Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0.
6 R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3).
7 R.S.C. 1985, c.C-5, S. 16(1).

APPENDIX 4

GUARDIANSHIP CHECKLIST: PERSONAL CARE

The powers and duties of a guardian of the person are fully set out in the *Substitute Decisions Act*, *1992*, S.O. 1992, c. 30 (the "*SDA*") and the *Health Care Consent Act, 1996*, S.O. 1996, c.2 (the "*HCCA*"). While attorneys under a power of attorney for personal care have similar duties and obligations, this checklist is tailored to address the specific duties of a guardian of the person.

PERSONAL CARE DECISIONS

- The essential role of a guardian of the person (personal care) is to act as a substitute decision maker. The guardian makes decisions in respect of an incapable person and makes personal care decisions when necessary.
- Personal care decisions pursuant to the applicable statutes and legislation may include decisions about where to live, what to eat, safety, security, clothing, personal hygiene, healthcare, and treatment decisions.

APPOINTMENT

- An individual of 16 years of age is capable of giving or refusing consent to his/her own personal care.
- Not every incapable person has, or needs, a guardian of the person. The person under disability may have already appointed an attorney for personal care or may be content to have the provisions of the HCCA govern if necessary.
- A guardian of the person can only be appointed by the court. The court will not appoint a guardian if there is an alternative that is less restrictive of the person's decision making rights and does not require the court to declare the person incapable, or if there is a valid power of attorney for personal care appointing an Attorney. Therefore, it is only in exceptional circumstances that an incapable person needs, or will get, a guardian.
- A person cannot be appointed as a guardian for personal care if that person is providing health care, residential, social, training or support services to the incapable person, for compensation, unless that person is a spouse, partner or relative of the incapable person, or is the incapable person's guardian of property, attorney for personal care or attorney under a continuing power of attorney for property.1

1 *SDA*, s.57

- The Public Guardian and Trustee ("PGT") will not be appointed as a guardian of the person unless the application proposes the PGT as guardian, the application is accompanied by the PGT's written consent, and there is no other suitable person who is available and willing to be appointed as guardian.

GUARDIANSHIP PLAN

A guardian of the person is required to act in accordance with the guardianship plan, which must accompany an application to appoint a guardian of the person. A guardianship plan outlines information about the incapable person and the proposed guardianship, including:

- who the person has consulted with in preparation of the plan,
- what personal care decision making authority they are seeking,
- known wishes and/or instructions of the person while capable,
- the current status of the health, nutrition, hygiene, shelter/living arrangements, safety, legal proceedings, employment, education, training, recreational, social, cultural activities, social and support services of the incapable person, as well as long-term goals (2-6 years) for each of these items, the steps the guardian will take to fulfill those goals and reasons why.

POWERS & RIGHTS

Under an order for full guardianship, a guardian of the person may obtain the following powers resulting from an application for guardianship or otherwise from a court order or judgment:

- The right to exercise custodial power over the incapable person, determine his or her living arrangements and provide for his or her shelter and safety;
- The right to be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;
- The right to instruct a lawyer, settle claims and commence and settle proceedings on the incapable person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;
- The right to have the same access to personal information, including health information and records, that the incapable person could have access to if capable, and the right to consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;
- The right to make any decision on behalf of the incapable person to which the HCCA applies;The right to make decisions about the incapable person's healthcare, nutrition and hygiene;
- The right to make decisions about the incapable person's employment, education, training, clothing and recreation and any social services provided to the person;

- The right to apprehend the person, with the assistance of a police officer, by entering specified premises at specified times, if the guardian has custodial power over the person.2
- Unless the court order provides otherwise a guardian does NOT have power to change existing arrangements with respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child.

DUTIES & RESPONSIBILITIES

A guardian of the person must exercise his or her duties and powers diligently, and in good faith. Where a decision is made on behalf of an incapable person, that decision must be made solely for the benefit of the incapable person. A guardian must be aware of, and act in accordance with, the following mandates:

- To exercise and perform powers and duties diligently and in good faith.
- To explain to the incapable person the guardian's powers and duties.
- In accordance with the regulations, to keep records of decisions made by the guardian on behalf of the incapable person.
- To encourage the incapable person to participate, to the best of his or her abilities, in the decision on his or her behalf.
- To facilitate contact between the incapable person, relatives and friends.
- To consult with supportive family members and friends of the incapable person and the persons from whom the incapable person receives care.
- To facilitate and foster the incapable person's independence.
- To make decisions which are the least restrictive and intrusive to the incapable person.
- To refrain from using or permitting the use of confinement, monitoring devices, physical restraint by the use of drugs or otherwise except in so far as preventing serious harm to the incapable person or another.
- To refrain from using or permitting the use of electric shock treatment unless consent is obtained in accordance with the HCCA.
- To act in accordance with the guardianship plan, if there is one, and to understand that such guardianship plan may be amended from time to time with the PGT's approval.

Be aware that no claim for damages can be commenced against a guardian for anything done or omitted in good faith in connection with the guardian's powers and duties under the *SDA*.

If an incapable person has a guardian of the person the court may give direction on any question arising in the guardianship. The request for direction must be made on motion in the proceeding in which the guardian was appointed, if a guardian of the person has been appointed under section 55 or 62 of the *SDA*.

2 *SDA* s.59

GUIDING PRINCIPLES FOR DECISIONS

In making a decision for an incapable person, a guardian of the person must follow these principles:

- The guardian shall make decisions on the incapable person's behalf to which the *HCCA* applies in accordance with that Act.
- The guardian shall make decisions on the incapable person's behalf to which the *HCCA* does not apply in accordance with the following principles:
    - If the 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.
    - The guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.
    - A later wish or instruction expressed while capable prevails over an earlier wish or instruction.
    - If the 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.
- In deciding best interests the guardian shall take into consideration:
    - The values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;
    - The person's current wishes, if they can be ascertained; and
    - The following factors:
        - Whether the guardian's decision is likely to improve the quality of the person's life, prevent the quality of the person's life from deteriorating, or reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate. The person's situation could include his or her condition and well-being (where a treatment decision is being made) or his or her quality of life (where a placement decision or other personal care decision is being made).
        - Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision.
        - Whether the incapable person's situation is likely to improve, remain the same or deteriorate if the guardian does not choose the course of action under consideration.
        - Whether the benefit to the incapable person from the proposed course of action outweighs the risk of harm to him or her.

- Whether there is a more desirable alternative to the course of action under consideration (for example, a less restrictive or intrusive course of treatment, or a less restrictive option than admission to a long-term care facility).[3]

RECEIPT OF INFORMATION

A guardian of the person is entitled to receive the information relating to the incapable person that is necessary for the guardian to make a decision regarding treatment or admission to a nursing home. This may include medical reports, hospital records and reports and records from a community care access center.

ASSISTANCE: CONSENT AND CAPACITY BOARD

Sometimes a guardian may find it difficult to interpret a wish, or may believe that if the incapable person were capable at the present time, and asked to make the decision, he or she would now make a decision contrary to the wish.

If the decision is about treatment or admission to a nursing home, the guardian may ask the Consent and Capacity Board to assist him or her in interpreting the wish or deciding whether the attorney/guardian may depart from the wish.

A guardian of the person who wants to ask the Consent and Capacity Board for assistance may wish to consult with a lawyer before doing so.

ASSISTANCE: COURT APPLICATION FOR ADVICE AND DIRECTIONS

A guardian of the person can also ask the court for directions on any question arising in a guardianship. This involves a formal court procedure, and the guardian may want to consult with a lawyer for assistance in doing so.

RECORDS

The legal responsibilities of a guardian of the person with respect to the records required to be kept by the guardian of the person are set out in Regulation 100/96 of the *SDA*. A guardian of the person is required to maintain:

- A list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date;
- Copies of medical reports or other documents, if any, relating to each decision;
- The names of any persons consulted, including the incapable person, in respect of each decision and the date;
- A description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed. Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor;

3 *SDA* at s. 66 (2)- (4)

- A description of the incapable person's current wishes, if these can be ascertained, and if they are relevant to the decision;
- For each decision taken, the guardian's opinion on each of the guiding principles listed above;
- A copy of the guardianship plan and all other court documents relating to the guardianship;
- The accounts and records until the guardian ceases to have authority and one of the following occurs:
    - The guardian obtains a release of liability form a person who has authority to give the release,
    - Another person has acquired the authority to make decisions concerning the incapable person's personal care, and the guardian delivers the accounts or records to that person,
    - The incapable person has died and the guardian delivers the accounts or records to the incapable person's personal representative,
    - The guardian is discharged by the court on a passing of accounts and either the time for an appeal has expired or an appeal from the decision is finally disposed of and the guardian is discharged on appeal, or
    - A court order is obtained directing the guardian to destroy or otherwise dispose of the accounts or records.[4]

CONFIDENTIALITY

A guardian of the person is not allowed to disclose any information contained in his or her records unless required to do so in order to make decisions on the incapable person's behalf or otherwise fulfill the guardian's duties, or if ordered to do so by a court.

However, a guardian of the person *must* produce copies of his or her records upon request to:

- The incapable person.
- The incapable person's attorney under a continuing power of attorney or guardian of property.
- The PGT if he or she is not the incapable person's guardian of property or of the person.[5]

COMPENSATION

The *SDA* does not regulate or prescribe compensation for a guardian of the person, though the court has been known to make such awards on application. The guardianship of the person involves ethical implications concerning the payment of a person on carrying out life and death decisions being made on behalf of an individual with a disability, and therefore compensation remains in the

4 Regulation 100/96 of the *SDA* at s.6.
5 Regulation 100/96 of the *SDA* at s. 5(4)

jurisdiction and at the discretion of the court.

The case of *Re Brown*[6] was a case in which a trust company was appointed as the guardian of property and of the person. In the course of passing its accounts, an objection was raised by the PGT to a claim for personal care services compensation. The court made an award based on the following observations:

- There is no statutory prohibition against such compensation;
- The fact that the legislature has not passed a statute, or regulation providing for the payment of compensation to a guardian of the person, or fixed the manner in which it is to be calculated, does not prevent the court from awarding it and fixing it;
- Section 32(12) of the *SDA* does not oust the application of Section 61(1) of the *Trustee Act*, as the basis for awarding compensation to a guardian. However, the use of the word "estate" in the latter section implies a guardian of a property rather than a guardian of the person;
- The court does have jurisdiction to award compensation for legitimate services rendered by a committee of a person to an incapable person so found, provided there is sufficient evidence of the nature and extent of the services provided and evidence from which a reasonable amount can be fixed for compensation;
- The court routinely deals with claims for compensation for work done or services rendered in a variety of situations, and there is no reason, in the absence of any statutory prohibition, for rejecting such a claim, simply because it is made by a committee of the person;
- Compensation for services rendered by a committee of the person must be determined differently from that awarded to a committee of property; in the latter case, traditionally, the courts have awarded compensation based upon a percentage of the value of the property administered. That method does not lend itself to fixing fair compensation for services rendered by a committee of the person;
- The hallmark of such compensation must be reasonableness. The services must have been either necessary or desirable and reasonable. The amount claimed must also be reasonable;
- The reasonableness of the claim for compensation will be a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided; the qualifications of the person providing the services, the value of such services and the period over which the services were furnished. This is not meant to be an exhaustive list but merely illustrative of factors that will have to be considered, depending upon the context in question; and
- There must be some evidentiary foundation to support the claim for compensation.

In the more recent decision of *Childs v Childs*[7] the Ontario Superior Court considered a daughter's

6 1999 CarswellOnt 4628 (SCJ).
7 2015 ONSC 4036.

claim for compensation as a result of the personal care she provided for her incapable mother in the attorney and guardianship context. While the Court held that a child should not be paid to care for an ailing mother, the Court drew a distinction between care that is provided when a child acts as a primary care attendant and the services a child provides in managing an incapable person's personal care. The Court awarded compensation to the guardian for personal care on the basis that the guardian would have to manage the services her mother received and the care givers provided to her mother.[8]

The court in *Childs* supported the principle that compensation may be awarded for personal care where the services performed were a benefit to the incapable person and the amounts claimed are demonstrably reasonable. The reasonableness of the amount of compensation awarded to a guardian of the person must be assessed in the context of the specific financial circumstances of the incapable person. The amount awarded must not only be reasonable in relation to the services performed, it must be proportional to the means of the incapable person. Its payment should not pose a risk to the overall financial affairs of the incapable person.[9]

8 *Ibid* at paras. 33, 45 and 46.
9 *Ibid* at para. 31.

APPENDIX 5

GUARDIANSHIP CHECKLIST: PROPERTY

The Substitute Decisions Act, *1992*, S.O. 1992, c.30 (the "*SDA*") is the statute/legislation governing the role, powers, duties and obligations of a guardian of property whether by court appointment or by statutory appointment. While an attorney for property under a continuing power of attorney for property has similar duties and obligations, this checklist focuses solely on guardians.

PROPERTY

- Property as it is used in the substitute decision-making context has a broad definition. It includes all of the real property, monies, investments, income, proceeds of costs awards/ other pecuniary entitlements, GICs, RRSPs RIFs, vehicles, personal effects and property of the grantor, including valuables such as, paintings, vehicles, boats, jewellery, and personal and household effects.

POWERS

- A guardian for property can do anything on the incapable person's behalf, except make a Will, or other testamentary disposition. In other words, the guardian may make financial arrangements, pay bills, cash cheques, direct payments, sell property and make a multitude of other financial decisions for the incapable person.
- The guardian's powers are also subject to the *SDA* and to any conditions imposed by a court.

MANAGEMENT PLAN

- A guardian must act in accordance with the management plan established for the property of the incapable person. A management plan includes information about the assets and liabilities of the incapable person, including any land, general household items and vehicles, valuables, savings and bank accounts, securities and investments, the incapable person's expenses, any legal proceedings that the incapable person is involved in, etc.
- The management plan also requires the guardian of property to outline his or her proposed plans to deal with the assets (keep in current form, sell, convert, close accounts, purchase, pay off debt, etc.) and the reasons for those plans.

DUTIES AND OBLIGATIONS

- A guardian of property must act in accordance with the management plan.
- A guardian of property must explain to the incapable person what the guardian's powers and duties are.
- The guardian is **always** responsible for keeping detailed records and accounts.
- A guardan must encourage the incapable person to participate to the best of his or her abilities in the property decisions.
- The guardian must seek to foster regular contact between the incapable person and supportive family members and friends of the incapable person and must consult from time to time with those supportive family members and friends as well as people who provide personal care to the incapable person.
- The guardian should be careful to make arrangements which are in the best interests of the incapable person. The guardian must take care of the incapable person, in all respects, concerning the property and financial management and investment of his or her affairs. The guardian must take steps to protect, manage and invest the incapable person's property prudently, maximizing the benefit to the incapable person.
- A guardian is a fiduciary, placed in a position of trust, and held accountable to a high standard of ethics and conduct. A guardian's powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith for the incapable person's benefit.
- A guardian must manage property maintaining ownership with the incapable person. Though the guardian may have signing authority over the incapable person's bank account, financial instruments and other financial affairs, the property should not be put into an account in joint names, or under the guardian's name alone.
- The guardian must also ensure that all relevant persons having financial dealings with the incapable person know that the guardian is managing his/her property.
- In addition, the guardian must consider the personal comfort, best interests, well-being of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The view should always be to maximize the quality of life of the incapable person, and in that regard, liaise with the attorneys for personal care where appropriate and proper to do so. The guardian of property therefore must manage the property of the grantor, commensurate with decisions made about the incapable person's personal care.
- A guardian who does not receive compensation must 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.

- A guardian who does receive compensation 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.
- It is intended that the guardian act honestly, reasonably, and diligently, in all circumstances, which is the guardian's protection from any possible liability which may ensue.

REQUIRED EXPENDITURES AND GUIDING PRINCIPLES

A guardian of property *shall* make the following expenditures from the incapable person's property:

- Expenditures that are reasonably necessary for the person's support, education and care;
- Expenditures that are reasonably necessary for the support, education and care of the person's dependants;
- Expenditures that are necessary to satisfy the person's other legal obligations.[1]

In making a decision for an incapable person, a guardian of property must follow these guiding principles:

- The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations shall be taken into account;
- Expenditures on the support, education and care of the person's dependants may be made only if the property is and will remain sufficient to provide for the incapable person's own support, education and care; and
- Expenditures that are necessary to satisfy the person's other legal obligations may be made only if the property will remain sufficient to provide for the incapable person's (and their dependants') support, education and care.[2]
- In respect of gifts and loans, and the testamentary intentions of the incapable person, the guardian is meant to make decisions commensurate with the capable wishes of the incapable person.
- In respect of professional assistance, the guardian can seek assistance from professionals, including from tax planners, accounting advisors and lawyers. It is essential to seek professional assistance when appropriate to do so, because the guardian for property is liable for damages resulting from a breach of the guardian's duty. The guardian should seek legal advice if any of their duties or obligations are unclear or not fully understood.

ACCOUNTS AND RECORDS

The legal responsibilities of a guardian of property with respect to the form of accounts and records are set out in Regulation 100/96 of the *SDA*. A guardian of property must:

1 *SDA*, s. 37.
2 *SDA*, s. 37.

- Make a list of all the incapable person's assets as of the date of the first transaction by the attorney or guardian on the incapable person's behalf, including real property, money, securities, investments, motor vehicles and other personal property;
- Keep an ongoing list of assets acquired and disposed of on behalf of the incapable person, including the date of and reason for the acquisition or disposition and from or to whom the asset is acquired or disposed;
- Keep an ongoing list of all money received on behalf of the incapable person, including the amount, date, from whom it was received, the reason for the payment and the particulars of the account into which it was deposited;
- Keep an ongoing list of all money paid out on behalf of the incapable person, including the amount, date, purpose of the payment and to whom it was paid;
- Keep an ongoing list of all investments made on behalf of the incapable person, including the amount, date, interest rate and type of investment purchased or redeemed;
- Keep a list of all the incapable person's liabilities as of the date of the first transaction by the attorney or guardian on the incapable person's behalf;
- Keep an ongoing list of liabilities incurred and discharged on behalf of the incapable person, including the date, nature of and reason for the liability being incurred or discharged;
- Keep an ongoing list of all compensation taken by the attorney or guardian, if any, including the amount, date and method of calculation; and
- Keep a list of the assets, and value of each, used to calculate the attorney's or guardian's care and management fee, if any.

In addition to proper accounts, a guardian of property must also keep a copy of the certificate of statutory guardianship or court order constituting the authority of the guardian, a copy of the management plan, if any, and a copy of any court orders relating to the guardian's authority or to the management of the incapable person's property.

The guardian of property must retain the accounts and records until he or she ceases to have authority and one of the following occurs:

- The guardian of property obtains a release of liability from a person who has the authority to give the release. This applies, with necessary modifications, to former guardians.
- Another person has acquired the authority to manage the incapable person's property and the guardian delivers the accounts or records to that person.
- The incapable person has died and the guardian delivers the accounts or records to the incapable person's personal representative.

- A guardian of property is discharged by the court on a passing of accounts under section 42 of the *SDA* and either the time for appealing the decision relating to the discharge has expired with no appeal being taken or an appeal from the decision relating to the discharge is finally disposed of and the guardian is discharged on the appeal.
- A court order is obtained directing the guardian to destroy or otherwise dispose of the accounts or records.

CONFIDENTIALITY & DISCLOSURE OF ACCOUNTS

A guardian of property is not permitted to disclose any information contained in the accounts and records of the incapable person, unless directed or required to do so, in order to make transactions on the incapable person's or grantor's behalf, or otherwise fulfill his/her duties, or is ordered to do so by the court. However, a guardian of property must produce copies of the accounts and records upon request to the following people:

- The incapable person;
- The incapable person's attorney for personal care or guardian of the person;
- If the Public Guardian and Trustee is the guardian of property, the incapable person's spouse, except a spouse from whom the incapable person is living separate and apart within the meaning of the *Divorce Act* (Canada), or the incapable person's partner, child, parent, brother or sister; and
- The Public Guardian and Trustee, if he or she is not the incapable person's guardian of property or guardian of the person.

COMPENSATION

Guardian of property compensation is provided for under the *SDA* and is subject to court scrutiny:

- A guardian of property may take annual compensation from the property in accordance with the prescribed fee scale.
- The compensation may be taken monthly, quarterly or annually.
- The prescribed fee consists of:

  (a) 3 per cent on capital and income receipts;

  (b) 3 per cent on capital and income disbursements; and

  (c) three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.
- The prescribed amount per page to be paid for photocopies is 50 cents.
- The guardian may take an amount of compensation greater than the prescribed fee scale allows,

(a) in the case where the Public Guardian and Trustee is not the guardian or attorney, if consent in writing is given by the Public Guardian and Trustee and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or

(b) in the case where the Public Guardian and Trustee is the guardian or attorney, if the court approves.[3]

APPLICATION FOR ADVICE, OPINION, AND DIRECTION OF THE COURT

A guardian of property may from time to time have questions about the management of the property that he/she deems appropriate for resolution and direction by a court. A guardian may apply to the court for the opinion, direction, and advice of the court, and may consult a lawyer for assistance in doing so.

PASSING OF ACCOUNTS

A guardian of property may be required, during the course of their guardianship, to pass the records and accounts for court review, which application is governed by the *Rules of Civil Procedure* (Rules 74.17-74.18). Please note that the following Rules reflect the amendments as of January 1, 2016:

FORM OF ACCOUNTS

- Rule 74.17(1) states that guardians shall keep accurate records of the assets and transactions, and accounts filed with the court *shall* include,

(a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

(b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;

(c) an account of all money received, but excluding investment transactions recorded under clause (e);

(d) an account of all money disbursed, including payments for the guardian's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

(e) where the guardian has made investments, an account setting out,

(i) all money paid out to purchase investments,

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

3 *SDA* ss. 40(1), 40(2), 40(3).

(f) a statement of all the assets of the incapable person that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments of the incapable person at the closing date of the accounts;

(h) a statement of all the liabilities of the incapable person, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the guardian and, where the statement of compensation includes a management fee based on the value of the assets of the incapable person, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income.

MATERIAL TO BE FILED

- Rule 74.18 (1) deals with the material to be filed on an application to pass accounts. The guardian must file:

  (a) The accounts for the relevant period verified by affidavit of the guardian. This is **Form 74.43;**

  (b) A copy of the order appointing the guardian;

  (c) A copy of the latest judgment, if any, of the court relating to the passing of accounts.

NOTICE OF APPLICATION

- Rule 74.18(2) states that on receiving the material referred to above, the court must issue a notice of the application to pass accounts which is **Form 74.44.**

SERVICE

- Rule 74.18 (3) states that the person seeking to application to pass the accounts (the applicant) must serve the notice of application and a copy of a draft of the judgment sought on every person who has a contingent or vested interest in the estate (or presumably the accounts of the incapable person in a guardianship passing) by regular lettermail.
- Rule 74.18 (3.1) states that where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate (or accounts of the incapable person), the Public Guardian and Trustee or the Children's Lawyer must also be served with the documents referred to in subrules (1) and (3).
- Rule 74.18 (3.2) states that where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate

[or presumably the accounts of an incapable person], the attorney or guardian shall be served with the documents referred to in subrules (1) and (3).

- Rule 74.18 (4) states that where the person is served in Ontario, the documents shall be served at least **60 days** before the hearing date specified in the notice of application.
- Rule 74.18 (5) states that where the person is served outside Ontario, the documents shall be served at least **75 days** before the hearing date specified in the notice of application.

PERSON UNDER DISABILITY OR UNKNOWN

- While likely more relevant to a passing of accounts application by an estate trustee (rather than a guardian) rule 74.18 (6) states if a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of accounts if,

  (a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person; and

  (b) there is no litigation guardian to act for the person on the passing of the accounts.

NOTICE OF OBJECTION TO ACCOUNTS

- Rule 74.18 (7) states that a person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts, which is Form 74.45.

REQUEST FOR FURTHER NOTICE

- Rule 74.18 (8) states that a person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least **35 days** before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts which is **Form 74.45.1.**

- Rule 74.18 (8.1) states that unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,

  (a) receive notice of any further step in the application;

  (b) receive any further document in the application;

  (c) file material relating to costs under subrule (8.6), (11) or (11.2); and

  (d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11).

NO RESPONSE

- Rule 74.18(8.2) states that unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

  (a) receive notice of any further step in the application;

  (b) receive any further document in the application;

  (c) file material on the application; or

  (d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit.

RESPONSE TO APPLICATION – PGT OR CHILDREN'S LAWYER

- Rule 74.18 (8.3) states that if the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, shall, at least 30 days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

  (a) a notice of objection to accounts (Form 74.45);

  (b) a request for further notice in passing of accounts (Form 74.45.1);

  (c) a notice of no objection to accounts (Form 74.46); or

  (d) a notice of non-participation in passing of accounts (Form 74.46.1).

WITHDRAWAL OF OBJECTION

- Rule 74.18 (8.4) states that a person who wishes to withdraw a notice of objection to accounts shall, at least **15 days** before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48).

WHEN HEARING NOT REQUIRED

- Rule 74.18 (8.5) states that an applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

  (a) no notices of objection to accounts are filed; or

  (b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule.

REQUEST FOR COSTS

- Rule 74.18 (8.6) states that subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least 10 days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49 or 74.49.1) and file the request with proof of service.

JUDGEMENT ON PASSING GRANTED WITHOUT A HEARING

- Rule 74.18 (9) states that the court may grant a judgment on passing accounts without a hearing if, at least five days before the hearing date of the application, the applicant files with the court,

  (a) a record containing,

  (i) an affidavit of service of documents served under subrule (3), (3.1) or (3.2),

  (ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

  (iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

  (iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

  (iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

  (v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record;

  (b) a draft of the judgment sought, in duplicate; and

  (c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be.

COSTS

- Rule 78.14 (10) states that where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4).

REQUEST FOR INCREASED COSTS

- Rule 74.18 (11) states that where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),

  (a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

(b) a costs outline (Form 57B).

- Rule 74.18 (11.1) states that unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least 15 days before the hearing date of the application:

  1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.

  2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).

  3. The Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.

- Rule 74.18 (11.2) states that any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 10 days before the hearing date of the application.
- Rule 74.18 (11.3) states that where a request for increased costs is served under subrule (11), the person making the request shall, at least five days before the hearing date of the application, file with the court a supplementary record containing,

  (a) the documents served under that subrule, together with an affidavit of service of those documents; and

  (b) an affidavit containing,

  i. a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

  ii. the factors that contributed to the increased costs.

JUDGEMENT ON INCREASED COSTS GRANTED WITHOUT HEARING

- Rule 74.18 (11.4) states that the court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies.

CONTESTED PASSING OF ACCOUNTS (HEARING)

- Rule 74.18 (11.5) states that if one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least 10 days before the hearing date of the application, serve on the persons referred to in subrule (11.6), and file with proof of service,

  (a) a consolidation of all the remaining notices of objection to accounts; and

  (b) a reply to notice of objection to accounts (Form 74.49.4).

- Rule 74.18 (11.6) states that the documents referred to in subrule (11.5) shall be served on,

  (a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;

  (b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and

  (c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts.

- Rule 74.18 (11.7) states that if the application to pass accounts proceeds to a hearing, the applicant shall, at least five days before the hearing date, file with the court a record containing,

  (a) the application to pass accounts;

  (b) the documents referred to in subrule (11.5);

  (c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

  (d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

  (e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

  (f) any requests for further notice in passing of accounts (Form 74.45.1);

  (g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

  (h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

  (i) a draft order for directions or of the judgment sought, as the case may be.

- Rule 74.18 (11.8) states that if the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order.
- Rule 74.18 (11.9) states that if the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,

  (a) the applicant shall indicate that it is the applicant's draft order; and

  (b) any person referred to in clause (11.6) (a) may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing.

- Rule 74.18 (12) states that no objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise.
- Rule 74.18 (13) states that at the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts.

TRIAL MAY BE DIRECTED

- Rule 74.18 (13.1) states that on the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

  (a) respecting the issues to be tried and each party's position on each issue;

  (b) respecting the timing and scope of any applicable disclosure;

  (c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

  (d) respecting the procedure to be followed at the trial, including methods of adducing evidence.

DIRECTIONS REGARDING MEDIATION

- Rule 74.18 (13.2) states that in making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

  (a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

  (b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4).

FORM OF JUDGMENT

- Rule 74.18 (14) states that the judgment on a passing of accounts shall be in Form 74.50 or 74.51.

APPENDIX 6

ADDITIONAL READING

Between A Rock And A Hard Place: The Complex Role And Duties Of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992, by Kimberly Whaley and Ameena Sultan, Advocates Quarterly, June 2012 Volume 40, Number 1, Pp. 55-79.

http://whaleyestatelitigation.com/resources/WEL_2012_40_Adv_Q_408.pdf

Capacity And The Estate Lawyer: Comparing The Various Standards Of Decisional Capacity, by Kimberly Whaley and Ameena Sultan, Estates Trusts & Planning Journal, May 2013, Volume 32, Number 3, Pp. 215-250.

http://whaleyestatelitigation.com/resources/WEL_Estates_and_Trusts_Pensions_Journal_Vol32_No3_May2013.pdf

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