Getting to Guardianship

I. Introduction

In Ontario, it is the *Substitute Decisions Act*, S.O. 1992, c.30 (the "SDA") that defines incapacity (and capacity) to grant a continuing power of attorney for property and a power of attorney for personal care. The tests for incapacity to grant a continuing power of attorney –either for property or for personal care- are clearly distinct from the test for testamentary capacity to make a Will. Where a person is incapable to grant a Power of Attorney and has not granted a valid Power of Attorney in the past, a guardianship application may be required to ensure that property and personal care needs are met.

Prior to the proclamation of the *SDA* on April 3, 1995, it was the *Mental Incompentency Act* that applied to declarations of incapacity. The *SDA* provides for additional rights and obligations with respect to mentally incapable adults. The

legislation provides a framework for people to make choices in advance of incapacity with respect to personal care and property.

This paper will examine difficulties under the existing SDA regime for powers of attorney ('POAs') and guardianship as well as the interpretation given to the legislation in some recent case law.

II. Legislative Framework

Under the Ontario legislation, there are two distinct tests for granting a Power of Attorney for property and one for personal care.

Property

A person is capable of giving another individual the power to deal with his or her property if s/he:

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

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

(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

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

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

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

(g) appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).[1]

The test for granting and revoking a Power of Attorney for property are one and the same.[2]

The legislation is also explicit that someone may be capable of giving a power of attorney for property even if s/he is incapable of managing property at that time.[3] That is, there are distinct tests for capacity to grant and capacity to manage one's own property.

Personal Care

The test defined by the statute for granting a Power of Attorney for personal care is substantially distinct. Someone can give a Power of Attorney for personal care if s/he

(a) Has the ability to understand that the proposed attorney has a genuine concern for the person's welfare; and

[1] SDA, 8(1).
[2] SDA, 8(2).
[3] SDA, 9(1).

(b) Appreciates that the person may need to have the proposed attorney make decisions for the person.[4]

Where the Power of Attorney for personal care document includes specific provisions, yet another test for capacity applies: here, the person must also have the capacity to understand the special provisions.[5]

Whether or not one is able to manage one's own personal care is a distinct question from the question as to capacity to grant a power of attorney for personal care.

Section 66 outlines the duties of both guardians and attorneys for personal care, including decisions with respect to the *Health Care Consent Act, 1996*, S.O. 1996, c. 2. Where a person is acting further to a power of attorney for personal care, decisions are to be made with a view to the incapable person's wishes where known, or otherwise in accordance with the incapable person's best interests as defined by the Act.[6]

The Court has authority to make an order for directions where questions arise in the course of carrying out the duties under a power of attorney or in the course of acting as a guardian.[7]

III. What the Courts are Saying

In this section, we consider one recent Ontario Superior Court case from July 2008, as an example of a dispute arising on the basis of a power of attorney designation.

[4] SDA, 47(1).
[5] SDA, 50.
[6] SDA, 66.
[7] SDA, 68.

Sly v. Curran, 2008 CanLII 36518, a July 2008 decision of Justice Himel of the Ontario Superior Court, features a conflict arising out of a POA dispute. In that case, Mr. Alfred Curran, an 86 year old man, was found incapable by a competency assessor in February 2008. Mr. Curran had four children from his first marriage. His first wife passed away in 1991 and he remarried in 1993. In 2000, the relationship between the children and the second wife began to deteriorate. It was in 2001 that Mr. Curran executed a power of attorney for property and personal care, appointing his wife, Nora.

In 2007, suffering from Parkinson's disease and dementia, Mr. Curran was admitted to Leisureworld Nursing Home. Disputes between Nora and Alfred's children arose with respect to visits to Alfred and his routine at the Home. A consent order dated April 4, 2008, addressed access arrangements, but conflict between the parties continued.

On June 27, 2008, Alfred's children brought an application for an Order of the court for the following: an Order to revoke the existing power of attorney for care, an Order that an independent therapist be retained for Alfred, an Order directing the Nursing Home to provide the children with any information requested and restraining Nora from telling Alfred about the court Orders, an Order providing for a schedule of access, an Order requiring Nora to provide medical information, and an Order requiring the consent of one of the children to any medical procedure.

Nora, for her part, was not opposed to the applicants having regularly scheduled access, but objected to a disruption of Alfred's routine. She was prepared to keep the

children informed of their father's medical condition but did not wish to limit her discretion under her Power of Attorney.

Justice Himel dismissed the application on the basis that it is not the job of the courts to interfere in the substitute decision maker's discretion:

> the SDA was designed to allow someone to designate a person of his or her choice to act on personal care decisions in the event of incapacity or to allow the court to appoint a guardian who has presented the necessary evidence to demonstrate that the person is incapable and has proposed a management plan establishing to the court's satisfaction that the guardian will protect the person's interests in an appropriate manner. The attorney or guardian is then delegated a range of decision-making powers and is legally authorized to act so long as the actions are in the best interests of the incapable person. The court is not to micromanage the day to day decisions of the substitute decision-maker. An application for directions is designed to provide an avenue for guidance and direction by the court in how to approach decision-making, not to have the court make the decision for the substitute except for certain exceptional situations.[8]

Justice Himel also noted that if the applicants thought that Nora was not exercising her discretion appropriately, they could bring an application for guardianship pursuant to section 69 of the Act, which would include filing a management plan. It would then be up to the court to decide whether she should be replaced by a guardianship order.

Justice Himel did, however, order mandatory mediation as well as directing the Public Guardian and Trustee under section 3 of the *SDA* to arrange for legal representation to be provided for Mr. Curran so that he could be represented by counsel at the mediation.

[8] Para.15.

IV. Taking Instructions from Clients with Diminished Capacity

In the recent case of ***Sly v. Curran*** discussed above, the applicants did not contest the validity of the POAs for property and personal care granted to Nora, nor did they choose to pursue a guardianship application to replace the attorney. Instead, they chose to focus on their dissatisfaction with the attorney's exercise of discretion under the powers granted to her by the powers of attorney documents.

Applications also come before the court to replace attorneys with guardianship Orders. These applications may arise from allegations of attorney wrongdoing, mismanagement of assets, abuse of power, exercise of ultra vires power, or misappropriation of funds.

Disgruntled family and friends may also resort to challenging the validity of the POA documents themselves when there is any possibility that the now-incapable person may have been incapable of granting the POA at the time that it was granted.

For this reason, lawyers must proceed with extra caution when dealing with clients with possibly diminished capacity.

Capacity is task, time and situation specific.

It is task-specific in that, as we have seen in the 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 differs from the capacity to manage one's property or personal care. Testamentary capacity, the capacity to marry and the capacity to enter into a contract involve still-different considerations.

Capacity is time specific in that legal capacity can fluctuate. That is, the legal standard allows for "good" and "bad" days where capacity is concerned. Obviously, an otherwise capable person may lack capacity when he or she is under the influence of alcohol. But even where an individual suffers from a condition that is non-reversible, or even involves a progressive decline over time, his or her legal status with respect to capacity can vary.

On March 9, 2005, the Ontario Court of Appeal affirmed the decision in ***Knox v. Burton*** **(2005), 14 E.T.R.(3d) 27 (*'Knox')*,** establishing that a cognitively impaired person can fluctuate between being capable and incapable of granting a power of attorney.

In ***Knox***, three expert assessor opinions were sought to establish whether the grantor had capacity to grant a power of attorney for property. In 2004, at the time of the trial, Mrs. Knox was 80 years old. She had granted a continuing POA to her son in May 1999. In December 2002, she had been described by one geriatric psychiatrist as having "progressive cognitive decline suggestive of a dementing process that mildly interfered with her occupational and social functioning." One of the assessors found her incapable while the other two found her capable. The first assessor met Mrs. Knox on February 7, 2003 and found her incapable of granting or revoking a continuing power of

attorney. The second assessor met with her 17 days later and also found her capable in these regards. A third assessor found Mrs. Knox also capable upon meeting with her on April 24, 2003. A new continuing power of attorney for property was granted by Mrs. Knox to her nephew on May 2, 2003.

At trial, the third assessor testified and explained that she had read the assessments of both of the other assessors. The trial judge accepted her evidence, relied on the presumption of capacity, and found that in light of the evidence of the two assessors who found Mrs. Knox capable, the presumption of capacity had not been rebutted.

When the Court of Appeal affirmed this decision, they addressed the appellant's with respect to fluctuating capacity as follows:

> We also do not agree that the evidence that Mrs. Knox's capacity could fluctuate necessitated any shifting of the onus of proof. The appellant had the legal onus. The potential variability of Mrs. Knox's condition was one feature of the evidence. It was specifically addressed by Dr. Munson in his [sic] evidence. The trial judge accepted Dr. Munson's evidence as she was entitled to do.

More recently, in ***Palahnuk v. Palahnuk Estate*** **2006 WL 1135614 (*'Palahnuk')* and *Brillinger v. Brillinger–Cain* 2007 WL 1810585 *('Brillinger')***, Ontario courts have referred to ***Knox*** for the proposition that the capacity of a testator may be variable over time.

Both ***Re Grav* 2007 BCSC 123** and ***Palahnuk*** suggest that expert opinion need not be definitive where capacity is concerned. Given that capacity may be variable over time, expert examinations or assessments that do not state when the incapacity occurred, or are not contemporaneous with the giving of instructions may be less probative than the evidence of a drafting solicitor who applies the legal test for capacity at the time that the instructions are received.

Lastly, capacity is situation-specific in that the choices that a person makes in granting a power of attorney or making a Will, do affect a court's determination of capacity. For example, if a person appoints her eldest child as power of attorney, this choice will be viewed with less suspicion and concern for potential diminished capacity than if an individual appoints her recently-hired gardener for the same purpose.

What this means for a drafting solicitor is that s/he must be aware of these considerations from a court's perspective in taking instructions and taking detailed notes from the client. If capacity is fluctuating, the solicitor may see the client when s/he is capable while the assessor sees the individual at a time of incapacity. Since the expert assessment is not necessarily definitive, the solicitor should be aware of the fact that his or her determination, and notes substantiating it, may be determinative.

The client may need to be seen more than once in order for the solicitor to make a useful evaluation. In the case of drafting a power of attorney for property, probing questions about the client's property should be asked. Just as important is that the answers to these questions be recorded. When in doubt, it is also advisable to get

permission from the client to make inquiries and obtain independent confirmation of the information provided in relation to property. The solicitor should also take care to discuss the power of attorney document and its consequences in detail with the client. Providing a stock reporting letter outlining the risks related to the instrument are also a very good idea.

Since a person who no longer has capacity to grant or revoke a power of attorney for property may still have the capacity to grant or revoke a power of attorney for personal care, it is more common in situations of conflict with respect to an attorney's personal care decisions that the disgruntled parties will attempt to get the grantor to revoke the POA and grant a new one in their favour.

In the case of ***Sly v. Curran*** discussed above, one might imagine that if it were not so apparent that the father lacked incapacity, they may endeavour to take him to a lawyer to have the POA in favour of Nora revoked and in it's place a POA granted to one of them. Solicitors should be alert to this possibility and take steps to encourage the most helpful course of action. Often mediation is the best course in such cases, as recommended by Justice Himel in ***Sly v. Curran***.

Knowing the applicable standards and relevant criteria, taking time to interview the client, responding in detail the clients' questions, and using good judgment are all good places to start in taking instructions from clients with diminished capacity.

In this regard, ***Thibeault v. Household Realty Corp,*** **[1993] O.J. No. 2024**, a decision of Mr. Justice Binks of the Ontario Court, General Division, is instructive. In that case, a daughter and son-in-law mortgaged their elderly mother's home as security for their debts to Household Realty Corp. When they defaulted on the mortgage payments, the house was sold under power of sale. An action was commenced resisting payment to Household Realty Corp., citing a number of factors: the defence of *non est factum*, the failure of Household's lawyer to recommend independent legal advice, and unconscionability of the transaction. The plaintiffs were ultimately successful. Of particular interest for our purposes was Mr. Justice Binks' harsh criticism of the drafting solicitor, who acted for both Household Realty and the daughter and son-in-law, and who had attended on the elderly mother with the son-in-law. The ill and elderly woman's signature was obtained without any explanation made of the attendant risks and consequences. The following expert opinion was provided with respect to a drafting solicitor's standard of care:

> It is my opinion that any lawyer practising in Ontario in obtaining a power of attorney has a responsibility to fully explain the nature of the document to the person executing it. The lawyer must be in a position to be able to testify, if necessary at a later date, that there was no doubt of the fact that the person giving the power was fully aware of all the consequences. This statement is even of more importance when the solicitor has had no previous contact with the person involved, and is in fact acting on behalf of another client.

Mr. Justice Binks approved of these remarks with respect to the requisite standard of care.

It is important therefore to ensure that when drafting a power of attorney or presiding over its execution, you take the following precautions: fully explain the nature of the power of attorney and the powers that are bestowed on the grantee; do not act for

both the grantor and the grantee, particularly where the grantee stands to gain financially from acquiring power of attorney; do not make the power of attorney broader than is necessary for the purpose or purposes contemplated.

VII. Guardianship Proceedings – A Too Frequent Remedy?

Have Guardianship proceedings become an all too frequent remedy to right the wrongdoings of Attorneys?

In ***Sly***, Justice Himel suggested that the applicants could apply for a court appointed guardian for personal care if in the future it appeared that Nora was not performing her duties properly.

This is precisely what the applicant chose to do in ***Glen v. Brennan, 2006 CanLII 343 (ON S.C.)***, a decision of Mr. Justice Somers of the Ontario Superior Court. In that case, an application was brought pursuant to s.55 of the *Substitute Decisions Act, 1992*, S.O. 1992, c.30 for an order appointing the applicant as guardian for the person of the applicant's uncle ('Fred') who suffered from severe Alzheimers. He had been moved to a care facility in or about 2003.

The respondent had been appointed as attorney for personal care in 1996. The respondent and Fred had been romantically involved many years prior and had remained friends. The respondent had, however, moved to Nova Scotia. Affidavit evidence from the applicant was presented to the court to the effect that the respondent was very poorly cared for. A family member had, for example, found him on one

occasion 'lying half naked in a bed with his human waste on his clothes on the floor in the room'.

The basis for the application was that the attorney for personal care was too far away to perform her function properly and alleged negligence on the part of the respondent in failing to ensure that Fred was adequately cared and provided for.

Justice Somers referred to the remarks of Justice Brennan in the Ontario Superior Court of Justice decision of *Catesv Forbs v. Public Guardian and Trustee* 2003 CarswellOnt 1999 1 E.T.R. (3rd) 185:

> I am of the view that the court has jurisdiction pursuant to the *Substitute Decisions Act, 1992,* S.O. 1992 c. 30 to order a change of substitute decision-maker in the best interest of the person if a valid grant of a power of attorney no longer serves the person's best interests.

On the other hand, the advisability of considering the grantor's original wishes was also contemplated. In particular, the remarks of Chief Justice Hickman of the Newfoundland Supreme Court Trial Division in the case of *Re Hammond Estate* [1998] 25 E.T.R. (2d) 188 said at para. 31 were considered apposite:

> There must be strong and compelling evidence of misconduct or neglect on the part of the donee duly appointed under an enduring power of attorney before a court should ignore the clear wishes of the donor and terminate such power of attorney.

Ultimately, Justice Somers decided that concerns have been expressed by the family and that it would be more convenient to have the Applicant as guardian of the person for Fred, his Honour was not satisfied that the power of attorney given to the Applicant had been exercised improperly or that there was 'strong and compelling evidence of misconduct or neglect."

Accordingly, His Honour dismissed the application, allowed the power of attorney to stand, and awarded costs to the successful party.

. Even where an application is successful, appointing a guardian can be a lengthy and costly process. Often those involved in conflict over an Attorney's actions do not possess the means to seek guardianship as a remedy.

In addition, a recent OBA working group LCO consultation paper on the Law Affecting Older Adults cited concerns raised by the Trusts and Estates Action with respect to monitoring guardians. In particular, the group stated that with respect to the SDA, there are concerns that there is insufficient monitoring of guardians once they are appointed.

The SDA also fails to set out the process by which statutory guardians are appointed. It is accordingly unclear what the rules and rights of the various individuals involved in the process are. It was also recommended that since a corporate trustee is often an excellent alternative to the appointment of an individual family member, the process for appointing such a corporate trustee should be made more widely accessible.

These concerns suggest that resorting to a guardianship application where an existing Power of Attorney is not adequately protecting the grantor's interests is not an uncomplicated solution and is not without extraordinary and uncertain cost consequences.

Accordingly, it is all the more important to provide good guidance to a grantor when the power of attorney document is put in place, to try to predict potential difficulties ahead of time and make strategic recommendations. As is so often the case, when it comes to granting a power of attorney, preventative steps are paramount.