

2010 World Elder Abuse Awareness Day

Powers of Attorney and Substitute Decision Making: Friends or Foes for Preventing Elder Abuse

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A. Introduction

An aging population combined with an increased life expectancy means that cognitive disorders, reduced functional abilities/decisional capacity and the consequent vulnerability associated therewith are, more than ever, a part of our world. These changing demographics render the law as it affects older individuals increasingly important. Older individuals can be and are particularly prone to legal abuses. Elder abuse, or the abuse of older adults, is often defined as any act or omission that harms a senior or jeopardizes his or her health or welfare. The World Health Organization defines abuse of older adults as "a single or repeated act, or lack of appropriate action, occurring in any relationship where there is an expectation of trust that causes harm or distress to an older person." Legal abuse of older adults can take many forms where the abuse of trust involves a legal instrument and construct.

The Power of Attorney document (the "**POA**") has long been viewed as one way in which a person can legally protect their various health and/or financial interests by planning for when they become ill, infirm or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. In our experience, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. We have also seen it used as a means of protection against predators, of which there is a very real risk. It is in these respects that a POA can be considered a '**friend**,' as opposed to a '**foe**.'



That POAs are generally a good thing is a widely shared view. This is evident from the fact that, since 1994 and to this day, the Ontario Ministry of the Attorney General has distributed free POA kits to the public and solicitors have routinely recommended them as part of an estate plan. Unfortunately, however, if any study has been conducted with respect to the outcomes or success of the use of such kits, it is not publicly available. Nor is there a known comprehensive study determining the extent to which attorneys appointed pursuant to such documents are actually aware of the statutory principles which guide them (such as the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the “**SDA**”) or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the “**HCCA**”) or, if they are aware of such principles, whether they adhere to them.

While a POA document can be used for the good of a vulnerable adult or an incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document. More often than not it becomes apparent that the grantor of such a document never put their mind to just what the powers are that are being bestowed, nor the ability of the chosen attorney to do the job and fulfill their duties or whether that attorney can truly be trusted to act in an honest and trustworthy manner. As a result of the foregoing, there is an extremely high risk that a vulnerable older adult or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there is a very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this respect that POA documents can in fact prove to be a ‘**foe**’ to the very grantors of such powers.

B. What is a Power of Attorney?

Put summarily, a POA is an instrument that facilitates the maintenance or control over one’s affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even incapacity. Proper, thoughtful preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor’s interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

- (1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;
- (2) the Continuing POA for Property (or “**CPOAP**”), pursuant to the provisions of the *SDA*; and
- (3) the POA for Personal Care (or “**POAPC**”) pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;
- a general authority granting the power to do all that is permissible under the governing principles and legislation; and
- a continuing authority which survives subsequent incapacity.

A POA for Personal Care can be used to grant powers exercised during incapacity only.

C. Selecting the Right Attorney

In advance of devising a POA, grantors must be made aware of the fact that there is a very real risk of fraud and abuse with respect to these documents, which we will explain later in this presentation. However, it is important to note from the outset that probably the most important advice that we, as practitioners, could give to a potential grantor of a CPOAP or a POAPC is **to carefully choose your attorney(s)**. In addition, we cannot but emphasize the fact that the most important characteristics that should be attributed to your chosen attorney(s) should be **honesty, integrity and accountability**.

D. The Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property (or "**CPOAP**") is commonly used to ensure that the financial affairs of a person are looked after in circumstances where that person is unable to look after them on their own.

Pursuant to the *SDA*, a POA for Property is a CPOAP if:

- (a) the document states that it is a continuing power for attorney; or
- (b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

A person is considered incapable of managing their property if they are unable to understand information that is relevant to making a decision in the management of their own property or unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. A CPOAP document can be limited to specific dates or contingencies and/or it can continue during the incapacity of the grantor, hence the name "*Continuing Power of Attorney for Property*."

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal test of capacity to give or revoke a CPOAP is different from that of capacity to manage property, to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property.

Much to the surprise of many older adults, the CPOAP is effective immediately upon signing *unless* there is a provision or “triggering” mechanism in the document which directs that it will come into effect in accordance with a specified date or event, such as incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance.

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

Guidelines for the execution, resignation, revocation, and termination of a CPOAP can be found in the *SDA*.

E. Power of Attorney for Personal Care

A POAPC enables the (capable) grantor to appoint a person or persons to make personal care decisions on their behalf in the event that they are found to be incapable of being able to do so on their own. A person/grantor is considered incapable of their personal care if they are unable to understand information relevant to health care, nutrition, shelter, clothing, hygiene, or safety, or if they are unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same. As with the differential tests of capacity for managing property and giving or revoking a CPOAP, the *SDA* also provides a differential test of capacity to make personal-care decisions and give or revoke a POAPC. Again, the *SDA* specifically provides that a person may be capable of giving or revoking a POAPC even if he or she is mentally incapable of making personal-care decisions.

There are limitations on who a grantor may appoint to act as their attorney pursuant to a POAPC. The *SDA* prohibits a person who provides health care, or residential, social, training or support services to the grantor *for compensation* from acting as an Attorney for Personal Care, unless the Attorney is the spouse, partner or relative of the grantor, in which case they are permitted to act.

When making decisions on an incapable person’s behalf, the Attorney for Personal Care is required to make those decisions in accordance with the *SDA*. Further guidance respecting consent to treatment

decisions is also found in the *Health Care Consent Act, 1996*. In addition, an Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person (ascertained at the period before incapacity) or otherwise act in the incapable person's best interests. To act in the incapable person's best interests, the attorney must consider the values and beliefs of the grantor in question, their current incapable wishes, if ascertainable, whether the decision will improve the grantor's standard and quality of life or otherwise either prevent it from deteriorating or reduce the extent or rate at which the quality of the grantor's life is likely to deteriorate, and whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.

A POAPC is generally considered a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so. Indeed, it is increasingly viewed as a planning tool for the end of a person's life.

The downside of the POAPC is that all too often the document does not contain detailed-enough instructions or, alternatively, the instructions provided are far too detailed, such to cause confusion. Attorneys for personal care should be informed that written wishes and oral wishes have equal weight, and that later capable wishes take precedence over earlier wishes. It is at this juncture that discussion with family members can be beneficial, noting of course, that the attorney must ensure that they facilitate the incapable person's independence and assist in choosing the least restrictive or intrusive courses of treatment or action. It is important to understand that an Attorney for Personal Care is not a care provider; they are decision makers.

Guidance regarding the execution, revocation, resignation, and termination POAPCs can be found in the *SDA*.

F. Duties of Attorneys

An Attorney is a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. Thus, in addition to any specific duties that may have been set out by the grantor in the POA document itself, the common law has also imposed the following duties upon an attorney:

- The attorney must stay within the scope of the authority delegated;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent

person managing his or her own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);

- The attorney must not make secret profits;
- The attorney must cease to exercise authority, if the POA is revoked;
- The attorney must not act contrary to the interest of the grantor or in a conflict with those interests;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

Notably, in situations where a *capable* grantor appoints an Attorney to deal with their property, the Attorney is considered to be an *agent* of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). Though the fiduciary standard or expectation is lower in such a relationship, an Attorney in this position is still a fiduciary with a duty only to the grantor and should, therefore, keep written documentation of instructions and act diligently and in good faith.

The Specific Duties of an Attorney for Property

All of the duties of the CPOAP are set out in the *SDA*. In the case of *Banton v. Banton*, Justice Cullity discussed many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. According to the Court, Some of the specific duties and obligations of an Attorney for Property include the following:

- (1) Manage a person's property in a manner consistent with decisions for the person's personal care;
- (2) Explain to the incapable person the Attorney's powers and duties;

- (3) Encourage the incapable person's participation in decisions;
- (4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;
- (5) Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will;
- (6) Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into account the value of the property of the incapable person, including considerations as to the standard of living and other legal obligations.

The Attorney for Property must consider whether a given transaction is in the best interests of the individual for whom he is acting, and also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA*. They are required to keep detailed records of all transactions as well as ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. An Attorney for Property must be prepared to keep accounts for the passing of such accounts, in the event it is required.

The Specific Duties of an Attorney for Personal Care

The Attorney for Personal Care must exercise powers diligently and in good faith. As with an attorneyship for property, attorneys for personal care are required by law to foster the incapable person's independence, to encourage the incapable person to participate in personal-care decisions to the best of his or her ability and to consult with the incapable person's supportive family and friends and with the persons who provide personal care to the incapable person. They are required to keep thorough and detailed records of any and all decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.

G. Attorney Disasters: What Can Go Wrong

POA documents often create suspicion, which frequently and inevitably brings the Attorney's actions, motives and conduct into question, whether warranted or not. In our practice, we are seeing ever-increasing numbers of POA disputes, complaints and attendant to this, guardianship disputes.

Issues that frequently arise with respect to Attorneys for Personal Care and for Property:

- (1) Disputes and accounting discrepancies concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;
- (2) Disputes regarding whether it was the grantor, or the Attorney, who was acting at any given stage;
- (3) Whether the Attorney has made unauthorized, questionable or even speculative investment decisions, or decisions or decisions lacking in diversity;
- (4) Whether the Attorney has taken into consideration the tax effects of the Attorney's action or inaction;
- (5) Whether the Attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages from inaction;
- (6) Whether the Attorney has sought professional advice where deemed necessary or appropriate;
- (7) The Attorney's treatment of and dealings under jointly held assets or accounts;
- (8) Attorney disputes between siblings regarding the capacity, action/inaction, of a parent\grantor;
- (9) Attorney disputes among step-children, children of prior relationships, subsequent spouse/partner;
- (10) Attorney misappropriation of grantor's assets;
- (11) Incapacity of a grantor to grant a POA and/or POA secured by a predator with mal-intent;
- (12) POA obtained from a vulnerable or physically dependent grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances;
- (13) Disputes where one or several Attorneys have acted without the knowledge or approval of the others either under a Joint, or Joint and Several, POA.

Some of these issues arise as a result of the Attorney giving such issues secondary attention, since in all likelihood the focus of their attention has been directed to the care and interests of the grantor. However,

an Attorney's inattention to the sorts of duties and responsibilities expected can cause a multitude of problems later on, particularly in an area where family emotions run high.

H. Attorney Abuse: When Friends Become Foes

As mentioned, a POA is a powerful document which enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will. Consequently, there are a number of ways in which a POA document can be used to the detriment of a grantor. Three common scenarios in which a POA can be used to the detriment of an older adult who is vulnerable or dependent are:

1. POAs fraudulently procured, for the sole purpose of abuse;
2. POAs fraudulently used, for the sole purpose of self-interest; and
3. POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty.

The use of fraudulently obtained POAs is an increasing concern and vulnerable elderly individuals are highly susceptible to such fraud. The most common forms of "title fraud" or "mortgage fraud" involve fraudsters using stolen identities or forged documents to transfer a registered owner's title, legally, without the registered owner's knowledge. The fraudster then obtains a mortgage on this property and once the funds are advanced on the mortgage, he or she disappears. In the POA context, an Attorney appointed pursuant to a fraudulently-obtained CPOAP could mortgage or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the Power granted.

Fraud can also be the product of validly executed powers of attorney. Many older adults are predisposed to vulnerability if they are dependent on another for certain necessities of life. Such dependence may be attributable to physical or mental disability, or simply to the overwhelming task of suddenly managing all of their own affairs. The issue of incapacity necessarily raises the question of exploitation of vulnerable persons.

I. Real-life Examples Extracted from Our Growing Collection of Case Law

(1) POAs fraudulently-procured, for the sole purpose of abuse

(a) *Re Koch*

Although not a POA case *per se*, the case of ***Re Koch*** provides an example of a situation where one person may have an ulterior motive when seeking an assessment that a vulnerable person be assessed as incapable. In this case, Ms. Koch has suffered from multiple sclerosis for fifteen years. She was

confined to a wheelchair, although able to walk short distances with a walker. Ms. Koch and her husband separated in January 1996. Each retained lawyers and negotiations commenced with a view to resolving the usual property and support issues. On April 23rd, 1996, her lawyer forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In or about May, 1996, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the formidable mechanisms of both the *Substitute Decisions Act, 1992*, S. O. 1992, C. 30 ("SDA") and the *Health Care Consent Act, 1996*, S. O. 1996, C. 2 ("HCCA"). A hearing was held before the Consent and Capacity Board (the "CCB") and Ms. Koch was adjudged by the Board to be:

1. incapable of managing her financial affairs and property; and
2. incapable of consenting to placement in a care facility.

Ms. Koch sought a reversal of the CCB's decision. And, as stated by the Court, her cry was essentially thus: "My husband had me committed." The Court agreed with Ms. Koch and found the Board was found to have erred in law. Justice Quinn stated:

The assessor/evaluator must be alive **to an informant harbouring improper motives**. [The Assessor] should have done more than merely accept the complaint of the husband, coupled with the medical reports [...], before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.

(b) *Bishop v. Bishop*

In *Bishop v. Bishop*, 2006 WL 2583842, Justice O'Neill of the Superior Court found a POA granted to an elderly woman's son void ab initio based on medical evidence that she did not have capacity to grant a CPOAP to her son at the time that she did. Alma Bishop gave her son a CPOAP in 2005. The medical evidence included a score of 22/30 on the mini-mental health status test administered by her family physician and a diagnosis of mild Alzheimer disease. Allegations of fraud and abuse however were held to be unfounded.

(c) *Dhillon v. Dhillon*

The case of *Dhillon v. Dhillon* involved a wife and son who, while the husband/father was living in India, used a forged POA to sell residential property that the husband owned, and used another forged POA to

withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded a considerable amount in damages, including \$5,000 in punitive damages and special costs at 80 percent of solicitor-client costs. The B.C. Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son and substantially upheld the decision of the trial judge with respect to damages.

(2) POAs fraudulently-used, for the sole purpose of self-interest

(a) *Elford v. Elford*

In *Elford v. Elford*, the husband put certain property into his wife's name, with her knowledge and for the purpose of defeating his creditors. He had a general POA over his wife's property. A disagreement developed between them and the husband, using the POA, transferred the property into his own name. The wife sued to have the property re-transferred to her. The trial judge dismissed the action; the Court of Appeal reversed it and maintained the wife's action. The Supreme Court of Canada affirmed, finding that the transfer by the husband to himself "transgresses one of the most elementary principles of the law of agency." It was *ex facie* void and should not have been registered.

(b) *Burke Estate v. Burke Estate*

In *Burke Estate v. Burke Estate*, the husband used the POA granted to him by his wife to transfer Canadian savings bonds registered in the wife's name to their joint names. The Court held that the husband had acted in breach of the fiduciary duty to the wife. The bonds were deemed to be held on constructive trust and formed part of the deceased wife's estate.

(c) *Westfall v. Kovacec*

In the case of *Westfall v. Kovacec*, an attorney or guardian of property sought authorization to use certain monies of the incapable person for himself. He argued that it was a relatively small amount, that he really needed the money, that the incapable person didn't need it and that he was likely to eventually inherit it anyway. The Court refused to allow it. The only gifts or loans which are allowed are those to friends or relatives where there is reason to believe, based on intentions the incapable person expressed before becoming incapable, that he or she would make if capable.

(3) POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty

(a) *Chu v. Chang*

The case of *Chu v. Chang* involved an interesting, and somewhat unusual set of facts. The case revolved around Mrs. Chang, a then 98 year old woman, and the way in which her children and one of her grandchildren were involved in her care. The matter first came before the Court in December 2008 when

her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang's sons) and Lily's son, Dr. Stephen Chu.

Any family peace dissipated shortly thereafter and the parties went back and forth before the Court on countless occasions and in one endorsement the Court voiced concerns about Mr. Chang and Dr. Chu getting along and executing their duties appropriately. The Court warned all of Mrs. Chang's children that they should be guided by Mrs. Chang's wishes (found, in this case, in her affidavit) which were that she was happy when her children spent time with her and got along. The Court told the parties to "act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life."

Unfortunately, further proceedings ensued and Dr. Chu requested an urgent motion on the ground that he had been compelled to remove Mrs. Chang from her home on the basis of information he had received from Mrs. Chang's caregiver that she had been told "not to feed" Mrs. Chang. Notwithstanding the concerns about feeding (of which there was considerable debate), Justice Brown ordered Dr. Chu to return Mrs. Chang to her home the following day.

Two competing motions were then heard within which each guardian sought to have the other removed. In light of all the evidence, Justice Brown terminated *both* guardianships on the basis that the two sides could not work together. As for Dr. Chu, Justice Brown wrote: "*It is difficult to find words to describe adequately his misconduct. Suffice it to say, by, in effect, kidnapping his grandmother Dr. Chu demonstrated that he was not prepared to work within the legal framework of a guardianship.*" Although Mr. Chang's misconduct was not found to be as serious as Dr. Chu's, he too had showed he was obstructive in the process and not a suitable candidate to act as a guardian of property (he had refused to sign a court-imposed management plan). The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company.

Mrs. Chang's youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang's personal care. However, Peggy was reminded of her duty to consult family members regarding her personal care decision-making, pursuant to the *SDA*, as well as her statutory obligation to foster contact between Mrs. Chang and those family members considered "supportive family members"—of which Lily was not considered one. The court held that given the history of high conflict in the family, restrictions on access by Lily and her son would be in Mrs. Chang's best interests, and stipulated both by the times and the conditions under which visits would occur. Peggy was, however, required to provide fresh information about Mrs. Chang's medical condition in the event of significant developments.

(b) *Abrams v. Abrams*

The case of ***Abrams v. Abrams***, concerned a contested guardianship application. The parties were Ida and Philip Abrams (respondents) and two of their three children — the applicant, Stephen, and the respondent, Judith Abrams. At the date of the endorsement, Ida was about 87 years old and Philip 92 years old. Philip had "accumulated a tidy fortune". Although the family had got along reasonably well, in the fall of 2005, a major dispute arose about what the parents should leave to their children. In January 2007, Ida executed a Continuing Power of Attorney for Property and Power of Attorney for Personal Care naming her husband, Philip, as her attorney, with her daughter, Judith, as an alternate attorney. Ida subsequently signed a number of other POAs. In January 2008, Stephen brought a guardianship application seeking his appointment as guardian for Ida and more than two years later, the proceedings had not been resolved. That failure led to this endorsement, which warned that a failure to abide by the timetable therein would lead to costs consequences not only for the parties but as against counsel, personally. The context of the endorsement is the fact situation of the Abrams guardianship application and also contested guardianship applications, in general, where as Justice Brown put it, "the parties have lost sight of the key issue", which is always the best interests of the incapable person. The case shows that although the *Substitute Decisions Act* sets out a mechanism for addressing incapable person's needs, it is clear that it is imperfect, and still allows for matters to be dragged out while family disputes continue.

(c) *Teffer v. Schaefers*

The case of ***Teffer v. Schaefers***, 2008 CarswellOnt 5447, is one that concerned the use of an invalid power of attorney. The victim in that case was Mrs. Schaefers, who was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24 hour nursing care in her home. She had been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed.

There was considerable evidence which supported the view that she did not have capacity to assign a POA at the end of April 2006, despite the fact that Mr. Verbeek, a lawyer and the attorney named in Mrs. Schaefers Powers of Attorney for Property and Personal Care dated December 4, 1998 and April 27, 2006. While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on or about April 27, 2006 and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for Property should be terminated. The Court

found that Mrs. Schaefer's best interests were not being met and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as comply with disclosure requests or proceed with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary and the duties and responsibilities of an attorney are significant. Thus, if Mr. Verbeek was too busy as a sole practitioner to discharge his duties as an attorney for the property of Schaefer's then he should be relieved of those responsibilities.

(d) *Fiacco v. Lombardi*

Fiacco v. Lombardi was a case involving an elderly woman named Maria Lombardi who suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

The children did not act jointly as their mother wished. Instead, in 2008 they engaged in contested guardianship litigation regarding their mother. By order dated January 23, 2009, Cameron J. declared Maria incapable of managing property and incapable of personal care, and he appointed Carmella Fiacco and Antonio Lombardi as her joint guardians of property and of the person. The Order contained several additional provisions which required, among other things, that Giovanni Lombardi and Guiseppina Lombardi account for their dealings with their mother's property and deliver the keys to her home to the applicants. Although the court noted that the Order should have been a simple one to implement, it found that the guardians encountered difficulties in obtaining information from their brother and sister about the assets of their mother they controlled.

The Court found the respondents' behavior unacceptable and in contravention of the Order and the SDA. As stated by the Court: "The Order could not have been clearer - the respondents were required to account for their dealings with Maria Lombardi's property. The SDA is equally clear- the property of an incapable person must be delivered to a guardian "when required by the guardian"." The respondents were ordered to comply with the previous Order and had costs awarded against them. The Court made the further comment that the respondents may think the result harsh, but added that to fix costs against them in a lesser amount would result in the incapable person having to pay for their misconduct and that would not be just. Paramount to the Court's decision was the view that the respondents could have avoided the motion had they cooperated with the guardians as required by law and by prior Order of the Court.

(e) *Woolner v. D'Abreau*

In ***Woolner v. D'Abreau***, Norah D'Abreau executed a Continuing Power of Attorney for Property in favour of the applicant, Robert Woolner, a lawyer, as well as another person, under which Mr. Woolner began to

manage Ms. D'Abreau's property and financial affairs. Ms. D'Abreau subsequently retained another lawyer, Mr. Marcovitch, who began to ask Mr. Woolner questions about how he was handling Ms. D'Abreau's financial affairs.

Mr. Woolner suggested that Ms. D'Abreau undergo a capacity assessment; Mr. Marcovitch communicated that Ms. D'Abreau saw no need to do so. Ms. D'Abreau then appointed Mr. Marcovitch as her attorney, whereupon Mr. Woolner brought this application to compel Ms. D'Abreau to submit to a capacity assessment. Mr. Marcovitch then retained Mr. Koven as litigation counsel for Ms. D'Abreau. Mr. Koven recommended that she undergo an assessment. Ms. D'Abreau did so, and the assessment found her to be capable of managing her own affairs. According to the Court, counsel then debated the issue of costs of the application for the better part of half a year, which led to no costs being ordered due to collective loss of proportionality.

A hearing under Rule 57.07(2) of *Rules of Civil Procedure* was held with respect to the possibility of disallowing any costs as between client and her counsel and costs were disallowed beyond what had already been paid for in the earlier portion of litigation. According to the Court, as the legal services provided up to the costs dispute had contained value for their clients, counsel were entitled to compensation for them. However, as the Court found that the parties could have settled costs simply by re-attending court with little expense and that the evidence adduced had not established, on balance of probabilities, that Mr. Marcovitch clearly informed his client as to the risks and potential costs of the litigation strategy employed or that he received informed instructions to proceed with that strategy. The Court found that the strategy was unreasonable, disproportionate to what was at stake, and provided no value to the client. As such, Mr. Marcovitch was not entitled to compensation beyond the \$6,250, already paid. Mr. Koven's fiduciary obligation required that he ensure the client understood the nature and risk of litigation, and no documentation indicated that he had done so. Similarly, the Court found that the legal work provided by Mr. Koven referable to the costs dispute provided no value to the client and resulted in costs being incurred without reasonable cause. As such, Mr. Koven was not entitled to recover any costs incurred for the costs dispute stage of the litigation.

J. Awareness & Prevention

Solicitors, planners, legislators, health care practitioners and the public at large, must be alert to the possibility of fraudulently obtained and fraudulently used POA documents and the risks to the older adult and to the cognitively impaired, the vulnerable, the dependent, and incapable. Fraudulently obtained or fraudulently used documents can wreak havoc for grantors and third parties alike. To that end, we advise everyone when dealing with powers of attorney to be cautious, vigilant, to make enquiries and to be constantly aware of both the risks and benefits that attach the preparation and use of a power of attorney document.

K. Checklists

It is our view that checklists can be of assistance to grantors and attorneys throughout the attorneyship. For this reason, we have provided to you both a checklist for legal duties and obligations associated with a Continuing Power of Attorney for Property as well as a checklist for the legal duties and obligations associated with a Power of Attorney for Personal Care.

L. Resources

- The Advocacy Centre for the Elderly
- Whaley Estate Litigation (***see Elder Law and Elder Abuse Links***)
- The Toronto Police Community Mobilization Unit, Vulnerable Persons Issues
- The Public Guardian and Trustee
- The Ontario Network for the Prevention of Elder Abuse (Senior Safety Line)
- **Checklists**

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

Current as updated in June, 2010

Whaley Estate Litigation