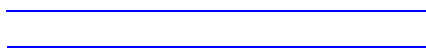


THE POWER OF ATTORNEY: ITS MISUSE, ABUSE AND FRAUD

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INTRODUCTION

In this paper, we raise concerns that the estate planning solicitor might consider when providing recommendations to clients on Power of Attorney documents. With an aging population, and increased life expectancy, incapacity is more than ever a part of life. As professional advisors, part of our service and obligation to our clients is to anticipate the consequences of estate planning on the family and to assist clients in tailoring their particular planning needs to their particular family dynamics, or where there is no family, making the individual's planning protection effective for the future. Careful, considered and creative planning equally will help to assist in planning protectively to avoid family conflict and, in turn, costly and senseless litigation. Solicitors can effectively assist their clients in avoiding litigation and in their protection when elderly, or incapable. Solicitors and planners, indeed the public at large, should be alert to the possibility of fraudulently obtained Powers of Attorney and the risk to the vulnerable, elderly, dependant, and incapable.

Solicitors seeking to provide their clients with the tools for conflict avoidance should consider Justice Cullity's remarks in *Stern v. Stern*¹ on the current realities of estate litigation prior to the death of an incapable person:

The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.²

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¹ 2003 CanLII 6193 (Ont. Sup. Ct.)

² *Ibid.* at para. 28.

POWER OF ATTORNEY DISASTERS

Certainly in our practice, we are seeing an ever-increasing number of POA disputes and complaints.

An overview of the sorts of issues we see arising in our practice concerning Attorneys, both for Personal Care and Property, are as follows:

- (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\incapacity, action\inactions, 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) Attorneys acting ultra vires their power to effect testamentary acts;
- (12) Incapacity of a grantor to grant a POA;
- (13) POA obtained from incapable or vulnerable grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances;
- (14) Fraudulently obtained Powers of Attorney;
- (15) Forged Power of Attorney documents;

- (16) Powers of Attorney used to perpetrate a fraud;
- (17) 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. In other circumstances, Powers of Attorney documents are procured purposely for fraudulent purposes.

GENERAL

The Power of Attorney Document:

The Power of Attorney (POA) is an instrument that facilitates the maintenance of control over one's affairs by planning before incapacity. Proper preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes.

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

Common Law Duties:

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. A fiduciary:

- (a) must use reasonable care in acting;
- (b) must not obtain secret profits;
- (c) must account;
- (d) must not allow personal interests to conflict with those of the principal;
- (e) cannot make, change or revoke a Will on behalf of the donor; and

- (f) cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.³

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

- (a) a specific, or limited authority;
- (b) general authority granting the power to do all that is permissible under the governing principles and legislation;
- (c) a continuing authority, meaning that it will survive subsequent incapacity; and
- (d) it can deal not only with property matters, but, also personal care matters as well.

In Ontario there are three types of Powers of Attorney:

- (1) A POA made in accordance with the *Powers of Attorney Act*⁴, which sets out the general form of a POA;
- (2) A Continuing POA for Property under the *Substitute Decisions Act, 1992*⁵ (the “SDA”); and
- (3) A POA for Personal Care under the *SDA*⁶.

A Continuing Power of Attorney for Property:

A Continuing POA for Property is defined in the *SDA* as such if,

- (a) it states that it is a continuing power of attorney; or
- (b) it expresses the intention that the authority given may be exercised during the grantor’s incapacity to manage property.”⁷

A Continuing POA for Property document drafted in accordance with the *SDA* may survive the mental incapacity of the grantor⁸, hence the terminology “continuing”.

³ Primarily from Theriault, Powers of Attorney, Some Fundamental Issues, [1999] 18 Estates, Trusts and Pensions Journal 229 at 230-231

⁴ *Powers of Attorney Act* R.S.O. 1990, c. P. 20

⁵ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7

⁶ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 46

⁷ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7(1)

The Continuing POA is effective immediately upon signing unless there is a provision or triggering mechanism in the document directing that it will come into effect in accordance with a specified date or event. For instance, incapacity may be the specifying event. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance.⁹

The *SDA* provides guidelines for execution¹⁰, resignation¹¹, revocation¹², and termination of a POA¹³.

Power of Attorney for Personal Care:

A POA for Personal Care was introduced as a result of legislative reforms which were brought into effect in 1992, including the *SDA*, the *Consent to Treatment Act*, 1992, the *Advocacy Act*, 1992, and the *Consent and Capacity Statute Law Amendment Act*, 1992, all of which registration came into force in 1995. There were, however, subsequent amendments.

The POA for Personal Care requirements are set out at s. 46 of the *SDA*. It should be noted that this type of document is more of a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so, and is often referred to as a “Living Will” which can contain advance directives for care.

The *SDA* governs the form and requirements of making Powers of Attorney for Property, for Personal Care, the affairs of incapable persons, the appointment of statutory guardians, and court appointed guardians.

In 1996 the *Health Care Consent Act*¹⁴ replaced the *Consent to Treatment Act* 1992, and the *Consent Capacity Statute Law Amendment Act*, 1992. The *Health Care Consent Act*, 1996

⁸ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7(1) and s. 14. Note: Powers of Attorney for Property made under the *Power of Attorney Act* prior to April 3, 1995, may survive the grantor’s incapacity if specifically provided.

⁹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 9

¹⁰ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 10

¹¹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 11

¹² *Substitute Decisions Act* S.O. 1992, C.30, as amended, 12(2)

¹³ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 12

¹⁴ *Health Care Consent Act*, S.O. 1996, C.2, Schedule A

governs health care issues in the areas of consent to treatment, treatment, admission to a care facility, Consent and Capacity Board reviews, and intervention and personal assistance services.¹⁵

The *Health Care Consent Act*, 1996 is concerned mainly with consent to specific treatment and other personal care decisions as well as the means for giving substitute consent where a patient is found to be incapable.

The *SDA* provides guidance regarding the execution of a personal care POA¹⁶, revocation¹⁷, resignation¹⁸, and termination¹⁹.

A POA for Personal Care is never used except in circumstances where the grantor is incapable of making a decision.²⁰ The *SDA* prohibits people who provide health care for compensation or residential social or support services to a grantor for compensation from acting as an Attorney for Personal Care except insofar as the person is the spouse, partner or relative of the grantor.²¹ The POA for Personal Care can cover decisions concerning health care, nutrition, shelter, clothing, hygiene or safety. Some health care decisions are covered by the *Health Care Consent Act* 1996.

LIMITATIONS PERIODS AND ISSUES TO CONSIDER

The new *Limitations Act 2002*²² was proclaimed in force on January 1, 2004. Under this Act, the basic limitation period is two years after the day on which the action was discovered.²³

However, the limitation period does not run during any time in which the person with the claim is incapable of commencing a claim due to her physical, mental or psychological condition *and* is not represented by a litigation guardian with respect to the claim.²⁴ Capacity is assumed

¹⁵ *Health Care Consent Act*, S.O. 1996, C.2, Part 1 General, s. 1(a)-(f)

¹⁶ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 48

¹⁷ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 50

¹⁸ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 52

¹⁹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 53

²⁰ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 49

²¹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 46(3)

²² *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B.

²³ *Ibid.*, s.4.

²⁴ *Ibid.*, s.7.

unless proven otherwise.²⁵ Section 9 of the Act addresses the appointment of a litigation guardian. The limitation periods described in the following Acts remain applicable: *Estates Act*, ss. 44(2), 45(2), 47 and the *Estates Administration Act*, s. 17(5).

It is worth noting that s.32(12) of the *Substitute Decisions Act*²⁶ provides that the *Trustee Act* does not apply to the exercise of a guardian's powers or the performance of a guardian's duties.

Also noteworthy is the fact that various provisions under the previous Limitations Act revealed a legislative intent to exempt claims for fraud or fraudulent breach of trust or conversion of trust property, from all limitation provisions. See: *Edwards v. Law Society of Upper Canada*²⁷. Under the new regime, however, estate proceedings or claims for fraudulent breach of trust relating to acts or omissions on or after the effective date are not subject to a limitation period. For a discussion of this, see Justice Greer's decision in *Bikur Cholim Jewish Volunteer Services v. Langston*.²⁸

Under the old statute, a six-year limitation period applied to claims for breach of contract or negligence. Also under the old regime, where a specific cause of action was not referenced in the statute, no limitation applied. It was on this basis that the courts had determined that there was no limitation period in Ontario for claims for breach of fiduciary duty.

As a general matter, it should be noted that if there were a limitation period under the old act, the following would happen: If it expired before 2002, then a claim cannot be brought (24(3)). If it did not, and if no limitation period under the new Act would apply were the claim

²⁵ *Ibid.*, s.8.

²⁶ 1992, S.O. 1992, c. 30.

²⁷ (1998), 39 O.R. (3d) 10 at p.6.

²⁸ 2007 CanLII 2664 (Ont. Sup. Ct.); this decision is under appeal.

based on an act or omission that took place on or after the effective date, there is no limitation period (24(4)).

TAKING PRECAUTIONS

Exercise Caution:

The granting of a POA must be carefully considered. 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.²⁹ In other words, an Attorney could mortgage or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the Power granted.

A grantor should consider carefully the choice of Attorney, if there should be more than one Attorney, and be cognizant of any potential for undue influence.

Part of avoiding POA conflicts and litigation is to think through the family dynamics of a particular situation or indeed, the lack of family, and to implement safeguards from abuse based on the financial life circumstances of the grantor. Tailoring the POA document to the grantor's needs necessarily includes discussion of the family's circumstances, the age of the proposed Attorney, a possible substitute Attorney, and whether it is appropriate that there be more than one Attorney. What exactly does the grantor want? Who can be trusted to act as the grantor's Attorney? What compensation will the Attorney receive? How is the compensation to be calculated? Is the grantor familiar with the *SDA* legislation? Is the Attorney sufficiently familiar with the *SDA* legislation?

A great deal of POA litigation, particularly amongst siblings could be avoided if Attorneys were properly advised as to their very strict fiduciary duties, obligations and limitations. Quite often Attorneys are not aware of their statutory obligations in acting in accordance with the guidelines provided by the *SDA*.

²⁹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7(2)

Accountability may, in certain situations, be better achieved where there are two or more jointly appointed Attorneys. Of course, this is dependent on the circumstances of the particular grantor, but would provide a “checks and balances” system, so to speak, so as to help to avoid abuse where there might be a vulnerability to it.

Similarly, as a solicitor, when taking instructions from a grantor giving a POA, it is prudent to take the time to assess whether or not there are any family members who might be more appropriately suited to assuming the role of an Attorney, particularly where there is a friend, neighbour or caregiver that has taken steps to obtain the POA of a particular person.

Consideration should be given as to whether or not a capacity assessment should be conducted. The issue of incapacity necessarily raises the question of exploitation of vulnerable persons. Many elderly people 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. Where a fiduciary relationship between two persons exists in the legal sense, the relationship of trust or confidence gives rise to an equitable duty of faithfulness, fidelity and loyalty.

In a British Columbia Supreme Court of Canada case, *Hodgkinson v. Simms*³⁰, the dissenting Judges, Sopinka and McLachlin, considered the notion of “vulnerability” in the context of fiduciary relationships. This lengthy case raises issues concerning whether a fiduciary duty arises and what it entails. I refer you to the Judgment for comprehensive review of the law of fiduciaries. According to Sopinka and McLachlin JJ at pg. 136, referring to the judgment of Wilson J, in *Frame v. Smith*³¹, the meaning of vulnerability is,

“the scope for the exercise of...discretion or power” in the fiduciary and to the power of the fiduciary to “unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests”.

Wilson J. also referred to the beneficiaries as,

³⁰ *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377

³¹ *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136

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

Justice Wilson in *Frame v Smith* identified the following typical characteristics of a fiduciary relationship:

- (1) The fiduciary has scope for the exercise of some discretion or power;
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests;
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary power.

The decision in *Re Koch*³² is a clear illustration of how “vulnerability” may arise in respect of physical, rather than mental, circumstances. The decision also illustrates that “vulnerability” can exist whether or not there is a fiduciary relationship. *Re Koch* is an appeal case from the Consent and Capacity Board. An excerpt from Justice Quinn’s decision at para.69:

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

The physical impairment suffered by Ms. Koch in these proceedings was Multiple Sclerosis. Vulnerability is not necessarily limited to the elderly or those with physical or mental impairments but can also arise as a result of other circumstances. There are a whole host of other cases which can be referenced in this regard.

³² *Re Koch* (1997), 33 O.R. (3d) 485.

Assessing Mental Capacity:

The *SDA* sets out stringent guidelines regarding requirements for capacity to grant Powers of Attorney, which are discussed below. There are different assessments, or tests and requirements for capacity depending on the required task. For instance, the capacity required to prepare a Will is different than that to prepare a POA. Mental incapacity is often sought by fraudsters as a tool instrumental in abuse.

The solicitor drafting a Will, POA or testamentary document, has a legal obligation to make some assessment of a client's mental capacity. Lawyers, however, for the most part are not trained to undertake such tasks and this is particularly so in cases where incapacity is not obvious.

In *Hall v. Bennett*³³, the defendant solicitor was found negligent by the trial judge for failing to draft a will because he was unsure that there was the requisite capacity. Speaking for the Ontario Court of Appeal, Charron J.A. (as she then was) concluded at para. 12 that the trial judge's approach to liability was flawed:

...the relevant question with respect to testamentary capacity was not whether Bennett [the deceased] in fact was capable of making a will but whether a reasonable and prudent solicitor in Federick's [the solicitor's] position could have concluded that he did not. As it turned out, this crucial question...was never addressed by the trial judge. Hence, as I will explain, it is my view that the trial judge's mischaracterization of the issues led him into error.

The Court also found that the absence of a retainer will usually be determinative with respect to the question of whether a duty of care is owed:

...there can be no liability in contract for the negligent performance of services that a solicitor never undertook to perform...insofar as [tortious liability] is concerned, in the absence of a retainer there would have to be other circumstances that gave rise to a duty of care...there is no suggestion of the reliance [being] foreseeable and reasonable...insofar as potential liability and negligence to a third party is concerned, the existence of a duty of care, will depend on the presence of both foreseeability and proximity...absent exceptional circumstances, it is my view that there would be insufficient proximity between the parties to give rise to a duty of care...

³³ *Hall v. Bennett Estate* (2003), 227 D.L.R. (4th) 263.

Aside from issues of capacity, solicitors should also be aware of questions of suspicious circumstances and undue influence that can apply equally to POA situations as well as the drafting and execution of Wills.³⁴ However, as the Ontario Court of Appeal recently affirmed in *Knox v. Burton*, 2004 CanLII 35099, the presumption is in favour of capacity. That is, in the absence of suspicious circumstances, the onus is on the one asserting incapacity to prove this on a balance of probabilities.

The Substitute Decisions Act – Procedures and Peculiarities:

As already noted, the *SDA* sets out the framework within which decisions regarding the management of property, and personal care can be made. The *SDA* is a collection of statutory duties for Attorneys and is codified in such a form as to prescribe the rules, so to speak, for the Attorney. Attorneys as well as those granting the POA should be familiar with this Act.

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

The duties and responsibilities are similar for property and personal care, but differences do exist. The *SDA* divides care for incapable persons into two parts: those decisions involving property, and those decisions involving personal care. The same person, whether an Attorney, or a court appointed guardian or statutory guardian, may be appointed to look after both aspects of an incapable person's affairs.

FIDUCIARIES DUTIES OF THE ATTORNEY FOR PROPERTY

Turning specifically to the duties of an Attorney for Property, an individual who manages the property of an incapable person can be an Attorney under a Continuing POA³⁵ or a guardian

³⁴ *Banks v. Goodfellow*, (1870), L.R. 5 Q.B. 549; *Scott v. Cousins*, [2001] 37 E.T.R. (2d) 113, [2001] O.J. No. 19 (Ont. S.C.J.); *Ostrander v. Black* [1996] O.J.; *Vout v. Hay* [1995] 2 S.C.R.; *Banton v. Banton* (1998), 164 D.L.R. to name but a few

³⁵ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 38(1)

of property,³⁶ either court appointed,³⁷ or by statute. The last is referred to as the Public Guardian and Trustee.³⁸

The POA for Property documents are commonly used to ensure that the financial affairs of a person are looked after in either their absence, or during a period of incapacity to act on one's own behalf.

A person is considered incapable of managing property if unable to understand information that is relevant to making a decision in the management of one's own property, or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.³⁹

The validity of a POA is dependent on the grantor having the capacity to give a POA. The POA document can either be a Continuing POA, for example if it is called such, or if it provides that it is to continue during incapacity. By the same token, the POA document can be limited to specific dates or contingencies.

To have a valid Continuing POA, the Attorney needs to be appointed before the grantor becomes incapable of giving a POA⁴⁰.

Similarly, a person is capable of revoking a Continuing POA if he or she is capable of giving one.⁴¹ The powers granted to an Attorney acting on behalf of an incapable person are

³⁶ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 31(1)

³⁷ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 22(1)

³⁸ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 15 and s. 16

³⁹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 6

⁴⁰ *Substitute Decisions Act* S.O. 1992, C.30

8(1) Capacity to give continuing POA. – A person is capable of giving a continuing POA if he or she,

- (a) knows what kind of property he or she has and its approximate value;
- (b) is aware of obligations owed to his or her dependants;
- (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the POA;
- (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.

extensive. An Attorney operating under a Continuing POA has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will.⁴² These powers are subject to the *SDA* and any court imposed conditions.⁴³

In *Egli v. Egli*,⁴⁴ the British Columbia Court of Appeal considered the question of where to draw the line between capacity and incapacity to grant a POA. Justice Hall, speaking for the Court, found that while it may not be necessary for the test for capacity in granting a POA to be the same as the standard for testamentary capacity, “the donor must have a general appreciation of the enabling power he or she is bestowing upon the donee of the power. The donor must be cognizant of the circumstance that the donee is being granted a broad power to deal with the property of the donor”. It was also held that the capacity of the donor is always a factual determination to be made by the trial judge.

Recently, in *PIPEDA Case Summary #278*⁴⁵, the privacy commissioner found that a bank’s request that an individual acting as a power of attorney produce the entire power of attorney document was not an attempt to collect more information than necessary and was in compliance with Principle 4.4 of PIPEDA.

Section 31 of the *SDA* is being considered for modification to clarify an Attorney’s ability to change a beneficiary designation on an RRSP. In *Desharnais v. Toronto Dominion Bank*, (2002), the B.C. Court of Appeal commented on the unfortunate absence of available guidance where the duty of care owed by a bank faced with transfer documents was concerned.⁴⁶ Most recently the British Columbia Supreme Court ruled that an Attorney did not have authority to change an RRSP beneficiary designation. The court found that the change in a designated

⁴¹ *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 8(2)

⁴² *Substitute Decisions Act* S.O. 1992, C.30, as amended, s. 7(2), s. 31(1), s. 38(1)

⁴³ **Powers of guardian – s. 31(3)**

(3) The guardian’s powers are subject to this Act and to any conditions imposed by the court
Attorney under continuing power of attorney – s. 38(1) – Section 32, except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property.

⁴⁴ 2005 BCCA 627, at para. 33.

⁴⁵ 2004 CanLII 52847 (P.C.C.).

beneficiary amounted to a testamentary disposition and therefore that an Attorney under the B.C. *Power of Attorney Act* is not permitted to exercise a testamentary power.

The *Trustee Act*⁴⁷ does not apply to the exercise or performance of an Attorney's duties.

An Attorney for a grantor who is not incapable to deal with property 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, nevertheless, an Attorney in this position is still a fiduciary with a duty only to the grantor and should therefore keep written documentation of instructions.

In *Banton v. Banton*⁴⁸, Justice Cullity discusses many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. 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;⁴⁹
- (2) Explain to the incapable person the Attorney's powers and duties;⁵⁰
- (3) Encourage the incapable person's participation in decisions;⁵¹
- (4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;⁵²
- (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;⁵³

⁴⁶ *Desharnais v. Toronto Dominion Bank* (2002), 9 B.C.L.R. (4th) 236 at para. 32.

⁴⁷ *Trustee Act*, R.S.O. 1990 c. T.23

⁴⁸ *Banton v. Banton*, 164 D.L.R. (4th) 176.

⁴⁹ **Personal care – s. 31(1.2)** – A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions.

⁵⁰ **Explanation – s. 32(2)** – The guardian shall explain to the incapable person what the guardian's powers and duties are.

⁵¹ **Participation – s. 32(3)** – A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property.

⁵² **Family and friends – s. 32(4)** – The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.

Consultation – s. 32(5) – The guardian shall consult from time to time with,

- (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and
- (b) the persons from whom the incapable person receives personal care.

- (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.⁵⁴

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*.⁵⁵

⁵³ **Will – s. 33.1** – A guardian of property shall make reasonable efforts to determine,

- (a) whether the incapable person has a will; and
- (b) if the incapable person has a will, what the provisions of the will are

Disposition of property given by will – s. 35.1(1) – A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.

Application – s. 35.1(2) – Subsection (1) does not apply in respect of a specific testamentary gift of money.

Permitted dispositions – s. 35.1(3) – Despite subsection (1),

- (a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties; or
- (b) the guardian may 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.

⁵⁴ **Required expenditures – s. 37(1)** – A guardian of property shall make the following expenditures from the incapable person's property;

1. The expenditures that are reasonably necessary for the person's support, education and care.
2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.
3. The expenditures that are necessary to satisfy the person's other legal obligations.

Attorney under continuing power of attorney – s. 38(1) – Section 32, except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property.

(2) **Authority under subs. 37(5)** – An attorney under a continuing power of attorney shall make an application to the court to obtain the authority referred to in subsection 37(5).

⁵⁵ (2) **Guiding principles** – The following rules apply to expenditures under subsection (1);

1. 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.
2. Expenditures under paragraph 2 may be made only if the property is and will remain sufficient to provide for expenditures under paragraph 1.
3. Expenditures under paragraph 3 may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2.

(3) **Optional expenditures** – The guardian may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts.

(4) **Guiding principles** – The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).
2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.
3. Charitable gifts may be made only if,

The Attorney under a Continuing POA has the option at any time to request direction or assistance from the Court on any question concerning the management of property, including perfecting the effectiveness of the POA document if necessary.⁵⁶

The Attorney for Property is required to keep a record of all transactions and 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. All of the duties of the Power of Attorney for Property are set out at sections 32 through 38 of the *SDA*.

An Attorney for Property must be prepared to keep accounts for the passing of such accounts if required.⁵⁷ The specific form of accounts and records is set out in section 2 of Regulation 100/96.

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- i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or
 - ii. there is evidence that the person made similar expenditures when capable.
 4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.
 5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.
 6. The total amount or value of charitable gifts shall not exceed the lesser of,
 - i. 20 per cent of the income of the property in the year in which the gifts are made, and
 - ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable.
 - (5) **Increase, charitable gifts** – The court may authorize the guardian to make a charitable gift that does not comply with paragraph 6 of subsection (4),
 - (a) on motion by the guardian in the proceeding in which the guardian was appointed, if the guardian was appointed under section 22 or 27; or
 - (b) on application, if the guardian is the statutory guardian of property.
 - (6) **Expenditures for person’s benefit** – Expenditures made under this section shall be deemed to be for the incapable person’s benefit.

⁵⁶ **Directions from court – s. 39(1)** – If an incapable person has a guardian of property or an attorney under a continuing power of attorney, the court may give directions on any question arising in the management of the property.

⁵⁷ **Accounts – s. 32(6)** – A guardian shall, in accordance with the regulations, keep accounts of all transactions involving a party.

Attorney under continuing power of attorney – s. 38(1) – Section 32, except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property.

A. Passing of Accounts – a means of unveiling a fraud

While an Attorney is required to keep accounts, an Attorney is not required to pass the accounts maintained. The court may, however, order that all or a specified part of the accounts of an Attorney be passed.⁵⁸ The accounts are filed in the court office and the same procedure as the passing of estate accounts is followed.⁵⁹ Although a passing of accounts may not be required, it may still be advisable to do a Passing, because once the accounts have been passed, they have received court approval and cannot be questioned at a later date by persons having notice of the passing of accounts (except in the case of fraud or mistake).

Prior to the enactment of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, which came into force on April 3, 1995, an attorney could not be ordered by the court, under the provisions of the *Powers of Attorney Act, R.S.O. 1990*, to pass his or her accounts, except in the case where the grantor of the power had become incapable, in which case the attorney could be required to pass accounts for the period of the grantor's incapacity. In *Stickells Estate v. Fuller*⁶⁰, Lack J. ordered an attorney to pass her accounts for the period commencing with the coming into force of the Act, namely, April 3, 1995. In *Rogers Estate v. Leung*⁶¹, Haley J. considered the nature of an attorney's duty to account as well as to whom this duty is owed:

Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he undertakes for the grantor. The attorney is the one who has the information. An estate trustee stands in the shoes of the grantor for the enforcement of their duty owed by the attorney as agent to the deceased as principal. There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation and should not be considered an imposition on the attorney if he has failed in that duty over a long period of time.

⁵⁸ **Passing of Accounts – s. 42(1)** – The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.

supra Note 45 at 38(1). Note: This would be done by way of Notice of Application

⁵⁹ **Filing of Accounts – s. 42(6)** – The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators' accounts and *Rules of Civil Procedure*, R. 74.16-74.18

supra Note 45 at 38(1)

⁶⁰ [1998] O.J. No. 2940.

⁶¹ [2001] O.J. No. 2171 at para. 10.

The issue of an attorney's duty to account was addressed most recently by the Ontario Superior Court in *Strickland v. Thames Valley District School Board*⁶². The proceedings in that case were a contested passing of three sets of accounts pursuant to the order of a motions judge. In that case, Justice Ross held that the accounts ordered were for a period that commenced and ended well before the coming into force of the *Substitute Decisions Act*, such that the order was in conflict with the decision in *Stickells Estate*. However, since the motions judge had jurisdiction to hear the motion for the order and the order was not appealed, Justice Ross held that the order compelling the attorney to account was protected by the rule against collateral attack.⁶³

Attorneys for Property are statutorily entitled to compensation pursuant to the *SDA*.⁶⁴

The compensation taken should be in accordance with the prescribed fee schedule. Section 40 of the *SDA* sets out the applicable guidelines for Attorney compensation. Where the POA itself is silent on the question of Attorney compensation, the Regulations to the *SDA*, s. 40(1) provide as follows:

An attorney may take annual compensation from the property of:

- 3% of capital and income receipts,
- 3% on capital and income disbursements, and
- 3/5 of 1% on the annual average value of the assets as a care and management fee.⁶⁵

⁶² 2007 WL 2884417 (Ont. Sup. Ct.), 2007 CarswellOnt 6248.

⁶³ *Ibid.* at para.s 45-46.

⁶⁴ **Compensation – s. 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.

O. Reg. 26/95, amended by **O. Reg. 159/00**

⁶⁵ **Compensation – s. 40(3)** – The guardian or attorney may take an amount of compensation greater than the prescribed 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.

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

Attorneys are not permitted to disclose any information contained in the accounts and records, unless required to do so in circumstances, but accounts or records must be reproduced to the incapable person, the incapable person's other attorneys and the Public Guardian and Trustee if required.⁶⁶

A Continuing Power of Attorney terminates upon the execution of a new one unless the document provides for multiple Powers of Attorney to exist. Therefore, care should be taken in the case of drafting a Power of Attorney where one already exists for property in another jurisdiction. The new document may revoke the existing document in the other jurisdiction. Similarly, the problem is not overcome by providing for the new Power of Attorney document to simply cover "worldwide assets" since such assets may not be covered by the Ontario Power of Attorney, and therefore, when drafting the new POA care should be taken so that it co-exists with the POA document in the foreign jurisdiction.

B. Standard of Care of an Attorney under a Continuing Power of Attorney for Property

The standard of care that a POA for Property must exercise in managing the property to an extent depends on whether or not compensation is being taken or received. Where no compensation is taken the Attorney is required to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.⁶⁷ The

⁶⁶ **Guardian's accounts – s. 42(3)** – A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.

Others entitled to apply – s. 42(4) – The following persons may also apply;

1. The grantor's or incapable person's guardian of the person or attorney for personal care.
2. A dependant of the grantor or incapable person.
3. The Public Guardian and Trustee.
4. The Children's Lawyer.
5. A judgment creditor of the grantor or incapable person.
6. Any other person, with leave of the court.

supra Note 45 at 38(1)

⁶⁷ **Standard of care – s. 32(7)** – 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.

supra Note 45 at 38(1)

standard of care increases where the attorney receives compensation. An Attorney in this case would be required to exercise a degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.⁶⁸

C. Liability

Generally speaking, a POA for Property is liable for damages resulting from a breach of duty.⁶⁹ The Attorney for Property may be relieved from all or part of this liability from breach of duty if the court is satisfied that the Attorney nevertheless acted honestly, reasonably and diligently.⁷⁰

ATTORNEY FOR PERSONAL CARE

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

A person is considered incapable of her own personal care if she is unable to understand information relevant to health care, nutrition, shelter, clothing, hygiene, or safety, or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.⁷¹

A person may therefore have personal care decisions made on his or her behalf by an Attorney, or Attorneys acting under a POA for Personal Care which is again, as with the Attorney for Property, executed at a time when such person has a capacity to give such a POA, or alternatively, under a court appointed guardian of the person, or statutory guardian, who is

⁶⁸ **Standard of care – s. 32(8)** – 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.

supra Note 45 at s .38(1)

⁶⁹ **Liability of guardian – s. 33(1)** – A guardian of property is liable for damages resulting from a breach of the guardian's duty.

supra Note 45 at 38(1)

⁷⁰ **Liability of guardian – s. 33(2)** – If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability.

supra Note 45 at 38(1)

⁷¹ **Incapacity for personal care – s. 45** – 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.

normally a guardian of last resort (note s. 46(2) – The Public Guardian and Trustee may be Attorney if consent is obtained in writing before the POA is executed.)

The Attorney for Personal Care is required to make decisions on the incapable person's behalf in accordance with the *SDA*, and some guidance can be further obtained from the *Health Care Consent Act, 1996*.⁷²

Where neither Act applies, the Attorney acting under a POA must also have regard to the known wishes or instructions of the incapable person, expressed at a time when the person had capacity. Similarly, such an Attorney must use reasonable efforts to act in accordance with the wishes or instructions of the incapable person or otherwise act in his or her best interests. To do this, the Attorney must consider the values and beliefs of the individual in question, current wishes, if ascertainable, general standard in quality of life, and whether the benefit of the decision outweighs the risk of harm to the person from alternate decisions.⁷³

⁷² **Decisions under *Health Care Consent Act, 1996* – s. 66(2.1)** – The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act 1996* applies in accordance with that Act.

Other decisions – s. 66(3) – The guardian shall make decisions on the incapable person's behalf to which the *Health Care Consent Act, 1996* does not apply in accordance with the following principles:

1. 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.
2. The guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.
3. A later wish or instruction expressed while capable prevails over an earlier wish or instruction.
4. 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.

Duties of attorney – s. 67 – Section 66, except subsections 66(15) and (16), applies with necessary modifications to an attorney who acts under a power of attorney for personal care.

⁷³ **Best interests – s. 66(4)** – In deciding what the person's best interests are for the purpose of subsection (3), the guardian shall take into consideration,

- (a) the values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;
- (b) the person's current wishes, if they can be ascertained; and
- (c) the following factors:
 1. Whether the guardian's decision is likely to,
 - i. improve the quality of the person's life,
 - ii. prevent the quality of the person's life from deteriorating, or
 - iii. reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate.
 2. Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision.

The POA for Personal Care is increasingly viewed as a planning tool for the end of life, which should arguably include the involvement of a grantor's family and/or close friends. While the POA document assists the grantor of the POA in extensively setting out the grantor's wishes with respect to personal care if so desired, quite often the document does not contain detailed instructions. Here, discussion with family members can be beneficial.⁷⁴ At the same time, the Attorney must also facilitate the incapable person's independence and assist in choosing the least restrictive or intrusive courses of treatment or action.⁷⁵ Specifically, the Attorney for Personal Care must not use any means of confinement, monitoring devices, restraint, detention of the incapable person physically, or through the use of drugs, and shall not consent on the incapable person's behalf to the use of such measures, unless specifically used to prevent personal harm, or harm to another. Additionally, the use of electric shock treatments should not be given or consented to on the incapable person's behalf unless in accordance with the *Health Care Consent Act*.⁷⁶

It is crucial to realize that an Attorney for Personal Care is not a care provider, but rather a decision maker. As with the duties of an Attorney for Property, an Attorney for Personal Care must also explain the Attorney's powers and duties to the incapable person and encourage participation in decisions.⁷⁷

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

supra, Note 59 at s. 67

⁷⁴ **Family and friends – s. 66(6)** – The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.

⁷⁵ **Independence – s. 66(8)** – The guardian shall, as far as possible, seek to foster the person's independence.

Least restrictive course of action – s. 66(9) – The guardian shall choose the least restrictive and intrusive course of action that is available and is appropriate in the particular case.

⁷⁶ **Confinement, restraint and monitoring devices – s. 66(10)** – The guardian shall not use confinement or monitoring devices or restrain the person physically or by means of drugs, and shall not give consent on the person's behalf to the use of confinement, monitoring devices or means of restraint, unless,

(a) the practice is essential to prevent serious bodily harm to the person or to others, or allows the person greater freedom or enjoyment.

⁷⁷ **Explanation – s. 66(2)** – The guardian shall explain to the incapable person what the guardian's powers and duties are.

Similarly, an Attorney for Personal Care may request the direction or assistance of the court on any issue arising under a POA either on behalf of the incapable person or that person's dependants.⁷⁸

A personal care Attorney is required to keep extensive records of 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.⁷⁹

The Attorney for Personal Care also must exercise powers diligently and in good faith.⁸⁰

A. Compensation:

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

*Re Brown*⁸¹ addresses the issue of payment for the provision of personal care services. Justice McDermid, speaking for the Ontario Superior Court in that case, concluded that while compensation for personal care is sound in principle, there must be some evidentiary foundation to support the claim for compensation.

In the 2004 case of *Cheney v. Byrne*⁸², the Ontario Superior Court, relying upon *Re Brown*, held that while it is clear that the Legislature has not provided for the compensation of Attorneys for Personal Care, or fixing the manner in which it is to be calculated, this does not

⁷⁸ **Directions from court – s. 68(1)** – If an incapable person has a guardian of the person or an attorney under a power of attorney for personal care, the court may give directions on any questions arising in the guardianship or under the power of attorney.

⁷⁹ **Records of decisions – s. 66(4.1)** – The guardian shall, in accordance with the regulations, keep records of decisions made by the guardian on the incapable person's behalf.

O. Reg 100/96

supra, Note 60 at s. 66(4)

⁸⁰ **Duties of a guardian – s. 66(1)** – The powers of a guardian of the person shall be exercised and performed diligently and in good faith.

⁸¹ *Re Brown* (1999) 31 E.T.R. (2d) 164

⁸² *Cheney v. Byrne*, [\[2004\] O.J. No. 2773](#).

prevent the Court from awarding and fixing such compensation. The Court also affirmed the following test set out in *Re Brown* at p. 167:

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. ... There must be an evidentiary foundation to support the claim for compensation.

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

B. Standard of Care and Liability of a Power of Attorney for Personal Care:

An Attorney for Personal Care is required to exercise and perform his or her powers and duties diligently and in good faith.

No proceedings for damages shall be commenced against an Attorney for Personal Care for anything done or admitted in good faith in connection with the Attorney for Personal Care's powers and duties under the *SDA*.⁸³

C. Costs:

Where POA litigation arises, most litigants assume that costs of POA disputes are paid out of the funds of the grantor. This is not necessarily the case. If you represent the Attorney, you should be aware of the possibility your client may not be awarded costs, and that costs could even be awarded against your client. In an effort to discourage perceived unnecessary litigation, the court may require the parties to bear their own costs.

In litigation, the usual rule of costs is that "costs follow the result." However, for decades, estate litigation has been viewed by the courts as distinct from other forms of litigation when dealing with the issue of costs.

⁸³ *supra* note 67.

Immunity – s. 66(19) – No proceeding for damages shall be commenced against a guardian for anything done or omitted in good faith in connection with the guardian's powers and duties under this Act.

Traditionally, in the vast majority of estate litigation cases, the courts ordered that all, or most, of the costs of the parties be paid out of the estate. This position arose out of a desire to protect certain policy concerns such as that costs should not prohibit individuals from legitimately seeking guidance in the administration of estates. However, this interest must also be balanced against an interest in not encouraging unfounded litigation.

On January 1, 2002, a new costs grid was introduced, but was promptly abolished in July 2005. Currently, costs are awarded according to the guidelines in Rule 57 of the *Rules of Civil Procedure*.

A number of relatively recent cases provide examples of what may be a growing reluctance on the part of the courts to grant unsuccessful parties to estate litigation impunity with respect to cost consequences flowing from the proceedings. In two recent decisions involving will challenges, the court refused to grant the unsuccessful party costs out of the estate and held them personally liable for costs of the successful parties. In *Re Prasada Estate*⁸⁴, the court set aside a will. The unsuccessful propounders were held not only responsible for their own costs but were ordered to pay the solicitor and client costs of the successful challenging parties. Furthermore, the executor who was not a beneficiary and who was the party propounding the will was held liable for costs, in addition to the beneficiary under the impugned will. In *Schweitzer v. Piasecki*⁸⁵, the court ordered costs against the parties challenging the validity of the will where they had abandoned their case on the eve of trial. In *Re Marshall Estate*⁸⁶, an unsuccessful challenger to the validity of the will was denied costs out of the estate and ordered to pay part of the executrix's costs.

*Wilson v. Wilson*⁸⁷ provides a comprehensive review of the issue of costs in the context of fiduciary disputes. In this case, an Attorney was ordered to personally pay costs on a solicitor and client basis of the Public Guardian and Trustee. The Attorney in this case did everything possible to avoid providing an accounting as well as causing deprivation to the assets of the grantor. The court, therefore, also ordered that the Attorney personally pay the costs of one of

supra, Note 59 at s. 67

⁸⁴ (March 30, 1998), Doc. 5116/93 (Ont. Gen. Div.)

⁸⁵ (1998), 20 E.T.R. (2d) 233 (Ont. Gen. Div.)

⁸⁶ (1998), 17 C.P.C. (4th) 46 (Ont. Gen. Div.)

the respondents on a solicitor and client basis as well. Traditionally, when representing children of the grantor, it is important to warn such individual or individuals of the risk as to costs.

The role of statutory guardian or the Public Guardian and Trustee as guardian has not been addressed in detail within this paper. While the duties and responsibilities are similar, some difference do exist, particularly where capacity is concerned. In this regard, the *SDA*, which also sets out requirements for management plans and other requirements particular to statutory guardians or court appointed guardians, including guardianship plans. Of particular note are sections 24(2.1) and 57(2.2) regarding when the Public Guardian and Trustee shall be appointed.

RESIGNATIONS, REVOCATIONS AND OTHER REMEDIES

What do you do when you have an Attorney under a Continuing POA for Property, or a POA for Personal Care, and you want to challenge the power granted?

Section 11 of the *SDA* deals with the Resignation of an Attorney.

Similarly, the resignation of an Attorney for Personal Care is addressed with in section 52 of the *SDA*.

The *SDA* is silent as to the formalities required for the execution of Resignations of Powers of Attorney for both Property and Personal Care. The execution requirements of a Continuing POA for Property and POA for Personal Care in accordance with s. 10⁸⁷ and s. 48⁸⁹

⁸⁷ *Wilson v. Wilson*, [2000] O.J. No. 2068.

⁸⁸ **Execution – s. 10(1)** – A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as a witness.

(2) Persons who shall not be witnesses – The following persons shall not be witnesses:

1. The attorney or the attorney's spouse or partner.
2. The grantor's spouse or partner.
3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
4. A person whose property is under guardianship or who has a guardian of the person.
5. A person who is less than eighteen years old.

(3) repealed

(4) Non-compliance – A continuing power of attorney that does not comply with subsections (1) and (2) is not effective, but the court may, on any person's application, declare the continuing power of attorney to be effective if the court is satisfied that it is in the interests of the grantor or his or her dependants to do so

⁸⁹**Execution – s. 48(1)** - A power of attorney for personal care shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as a witness.

(2) Persons who shall not be witnesses – The persons referred to in subsection 10(2) shall not be witnesses:

(3) repealed

respectively, shall be executed in the presence of two witnesses, each of whom shall sign the POA.

There is no prescribed form in accordance with the *SDA* for resignations. However, it is my practice to have Resignations executed in the presence of two witnesses.

The Revocation of a POA for Property is governed by s. 12(2)⁹⁰ of the *SDA*. The Revocation of a POA for Personal Care is governed by s. 53(2)⁹¹. Revocations for Powers of Attorney for both Property and Personal Care must be in writing and shall be executed in the same way as a POA for Property and Personal Care. The formalities for execution are as set out at sections 10 and 48 consecutively.

I have set out within this paper the requirements of s. 8 of the *SDA* concerning the capacity to give a Continuing POA for Property. A person is capable of revoking a Continuing POA if he or she is capable of giving one.⁹²

A Continuing POA is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.⁹³

The Continuing POA remains valid even if after executing it, the grantor becomes incapable of giving a Continuing POA.⁹⁴

If the Continuing POA provides that it comes into effect when the grantor becomes incapable of managing property, but does not

(4) Non-compliance – A power of attorney for personal care that does not comply with subsections (1) and (2) is not effective, but the court may, on any person’s application, declare the power of attorney for personal care to be effective if the court is satisfied that it is in the grantor’s interests to do so.

⁹⁰ **Execution of revocation – s. 12(2)** – The revocation shall be in writing and shall be executed in the same way as a continuing power of attorney.

⁹¹ **Execution of revocation – s. 53(2)** – The revocation shall be in writing and shall be executed in the same way as a power of attorney for personal care.

⁹² **Capacity to revoke – s. 8(2)** – A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

⁹³ **Validity despite incapacity – s. 9(1)** – A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.

⁹⁴ **Validity despite incapacity – s. 9(2)** – The continuing power of attorney remains valid even if, after executing it, the grantor becomes incapable of giving a continuing power of attorney.

provide a method for determining whether that situation has arisen, the POA comes into effect when,

- (a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
- (b) the Attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*.⁹⁵

The revocation must be in writing and must be executed in the same way as a Continuing POA for Property with the grantor who is revoking signing the Revocation in the presence of two witnesses who also sign the Revocation in the presence of the grantor and each of the others.

As a solicitor, keep in mind that if you are approached to effect a resignation or revocation from someone other than your client, you should likely recommend independent legal advice to protect your client.

CAPACITY ASSESSMENTS

"The Capacity Assessment can be an effective tool to undue a fraud where a Power of Attorney has been procured, and later misused. Was the grantor capable?

If there is a suspicion that a POA document has been obtained from an incapable person, a capacity assessment should be obtained in accordance with sections 22 and 55 of the *SDA*. It is important to consider the date upon which the POA document was executed in conjunction with the timing of the capacity assessment. If the two dates are close in time is an increased probability that the grantor of the POA may not have capacity to grant the POA in accordance with the requirements of sections 8 and 47 of the *SDA*. However, it should be noted that capacity and/or incapacity is not static and may fluctuate based on a particular individual's circumstances. Timing, place of assessment, and a number of other factors are to be considered. In order to challenge the validity of the POA document, proceedings must be brought before the court.

⁹⁵ *Substitute Decisions Act, 1992*, s. 9(3)

The *SDA* does not direct who should assess the capacity of a person to give a Continuing POA for Property. Section 9 of the *SDA* states that a Continuing POA for Property is valid if the grantor, at the time of executing it, was capable of giving it, even if he or she was not capable of managing property. A solicitor assisting the grantor in preparing a Continuing POA for Property, should be satisfied that the grantor is mentally capable for this purpose.

The solicitor assisting the grantor in entering into the POA should keep detailed notes on file. The notes should include references to who was present when the POA was executed and why the solicitor assisting believed that the grantor was mentally capable. The notes should follow the definition of capacity to give a Continuing POA for Property as set out in the *SDA*.

If there is a belief that the capacity of the grantor may be challenged, it is advisable to get an assessment either before, or commensurate with the execution of, the continuing POA. This can serve as a preventative and/or protective measure. Assessments are not covered by OHIP; your client should be advised as to the costs of the assessment process and the legal implications. There is a great discrepancy in costs depending on the Assessor whose services are engaged.

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

If there is a POA document in existence and questions are raised with respect to whether or not the POA is valid, an assessment may be conducted under sections 22 and 55, and the assessment could then be used in order to make application to the court for a guardianship order for property and personal care of the incapable person. Where no POA is in existence, a section 16 assessment is also an option and can be requested regarding the capacity to manage property. A finding of incapacity would result in the automatic appointment of the Office of the Public Guardian and Trustee as the statutory guardian. Careful attention should be paid to sections

16(1) and 16(2)⁹⁶ and Regulation 90.⁹⁷ When a request is made of an assessor it must be in the prescribed form. Otherwise, the assessment could be declared a nullity on the basis of procedural irregularity. The appointed capacity assessor should not conduct an assessment without completion of this form. An approved capacity assessor knows to follow the stringent requirements of the *SDA*.

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

Pursuant to s. 16 of the *SDA*, any person can request an assessment of another person's capacity to manage property as an "assessor" under the Act.⁹⁸ Assessors are physicians, psychologists, social workers, occupational therapists, nurses or another who has successfully completed a training course for assessors which is given or approved by the Attorney General. The Capacity Assessment Office of the Ministry of the Attorney General publishes a list of capacity assessors who are available on a fee for service basis.⁹⁹

If the assessor concludes that the person is incapable, the Public Guardian and Trustee automatically becomes the person's statutory guardian of property.¹⁰⁰

⁹⁶ **Assessment of capacity for statutory guardianship – s. 16(1)** – A person may request an assessor to perform an assessment of another person's capacity or of the person's own capacity for the purpose of determining whether the Public Guardian and Trustee should become the statutory guardian of property under this section.

Form of Request – s. 16(2) – No assessment shall be performed unless the request is in the prescribed form and, if the request is made in respect of another person, the request states that:

- (a) the person requesting the assessment has reason to believe that the other person may be incapable of managing property;
- (b) the person requesting the assessment has made reasonable inquiries and has no knowledge of the existence of any attorney under a continuing power of attorney that gives the attorney authority over all of the other person's property; and
- (c) the person requesting the assessment has made reasonable inquiries and has no knowledge of any spouse, partner or relative of the other person who intends to make an application under s. 22 for the appointment of a guardian of property for the other person.

⁹⁷ **O. Reg. 90**

⁹⁸ **O. Reg. 293/96**

⁹⁹ *supra* Note 67.

¹⁰⁰ **Statutory guardianship – s. 16 (5)** – As soon as he or she receives the copy of the certificate, the Public Guardian and Trustee is the person's statutory guardian of property.

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

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

Assessments are governed by s.78 of the *SDA*. Clearly section 78 gives an individual the right to refuse to be assessed. A person being assessed must specifically be advised of this right, along with the purpose, significance and effect of the assessment before it takes place. Where a person refuses to be assessed, section 79 of the *SDA* provides the court the discretion to order an assessment where a person's capacity is in issue in a proceeding under the *SDA* and the court is satisfied that there are reasonable grounds to believe that the person is incapable. Similarly, s. 105 of the *Courts of Justice Act* gives the court authority and discretion to order an assessment.¹⁰¹

If a person is found to be incapable by virtue of a section 16 assessment, such person can request a further assessment under section 20.1 and can apply to the Board for a review of the finding of incapacity under section 20.2. The court is also given supervisory jurisdiction over a guardian's actions under the *SDA*.

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

*Re Koch*¹⁰² is a decision which considers rights advice under both the *Health Care Consent Act* and the *SDA*. The *Health Care Consent Act* does not require a warning before a capacity assessment is conducted, however, section 17 of the *Health Care Consent Act* requires

¹⁰¹ *Courts of Justice Act*, R.S.O. 1990 c. C.43

¹⁰² *supra* Note 23

the health practitioner to provide information to the individual concerned regarding the consequences of the findings.

The *Health Care Consent Act* also provides for an assessment by an “evaluator” to determine whether the person is capable of consenting to admission to a care facility¹⁰³ and of consent to personal assistance services¹⁰⁴. There is no statutory requirement that any advice must be given to an individual about the evaluation either before it is conducted or afterwards.

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

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

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

¹⁰³ *Health Care Consent Act, 1996*

Consent on incapable person’s behalf – s. 40(1) – If a person’s consent to his or her admission to a care facility is required by law and the person is found by an evaluator to be incapable with respect to the admission, consent may be given or refused on the person’s behalf by his or her substitute decision-maker in accordance with this Act.

(2) Opinion of Board or court governs. – If a person who is found by an evaluator to be incapable with respect to his or her admission to a care facility is found to be capable with respect to the admission by, the Board on an application for review if the evaluator’s findings, or by a court on an appeal of the Board’s decision, subsection (1) does not apply.

¹⁰⁴ *Health Care Consent Act, 1996*

Decision on incapable recipient’s behalf – s. 57(1) – If a recipient is found by an evaluator to be incapable with respect to a personal assistance service, a decision concerning the service may be made on the recipient’s behalf by his or her substitute decision-maker in accordance with this Act.

(2) Opinion of Board or court governs – If a recipient who is found by an evaluator to be incapable with respect to a personal assistance service is found to be capable with respect to the service by the Board on an application for review of the evaluator’s finding, or by a court on an appeal of the Board’s decision, subsection (1) does not apply.

- (c) a finding of capacity to give instructions or directions to a lawyer;
- (d) a finding of capacity to make admission to long-term care facility decisions;
- (e) a finding of capacity to grant a POA for Property;
- (f) a finding of capacity to grant a POA for Personal Care;
- (g) a finding of capacity to submit to personal assistance services; and
- (h) testamentary capacity.

Assessments under the Mental Health Act, R.S.O. 1990, c. M.7, should also be considered and the corresponding Forms under the Mental Health Act respecting capacity assessments.

In many situations, a capacity assessment provides a kind of “insurance policy” against future litigation.

THE POA DISPUTE: RETAINER ON THE ROCKS? KNOW YOUR PROFESSIONAL DUTIES!

Sometimes in POA disputes you will be contacted by a friend or family member of what is likely to be a prospective client. In cases such as this it is essential to determine whether it is appropriate for you as a lawyer to meet with the person calling you or the prospective client. Be aware that a conflict situation is likely and make it clear to the person that you will take instructions and act on behalf of the client, which may not be the person contacting you. In my experience, I have not always refused to meet with a client simply because they have not personally contacted me. It will all depend on the specific circumstances with which I am confronted. Often an elderly or incapable person who requires assistance may be unable to make appointments themselves. In situations such as this, though I may agree to meet with a friend or relative either alone or together with the prospective client initially, thereafter my view is that it is prudent to meet with the prospective client alone to get instructions. Quite often you will discover that what the friend or relative has expressed as the “wants or needs” of the prospective client, are not his or her actual “wants and needs”.

Quite often the lawyer will be called by one of many siblings of the grantor of a POA who may explain that the grantor is having problems with the particular Attorney. In these circumstances you must consider whether or not it is appropriate to meet with the sibling, or whether or not you should more appropriately be meeting with the grantor of the POA. **Rule 2.02(6)** of the *Rules of Professional Conduct* states as follows:

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

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

With POA’s as with all other matters, lawyers should also be constantly vigilant of their professional duties with respect to client confidentiality and the avoidance of conflicts of interest. The lawyer must be alert to issues of capacity, undue influence and must be probing of their clients where suspicion is raised and investigation warranted.

FRAUD AND POWER OF ATTORNEY

The use of fraudulently obtained POAs is an increasing concern. Elderly individuals in particular are highly susceptible to such fraud. Identity theft and hence fraud arising as a result is also on the rise. Fraudsters seeking monies from scams are also seeing our elderly and most vulnerable targeted. The incidence of mortgage fraud by means of fraudulent POAs has risen sharply in recent years.

The most common forms of title fraud involve fraudsters using stolen identities or forged documents to transfer a registered owner’s title to himself or herself 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. This type of fraud is also sometimes referred to as a “mortgage fraud.”

However, fraud can also be the product of validly executed powers of attorney. You should always ensure that your client knows the duties and responsibilities under a Power of Attorney. That is, once a Power of Attorney is signed, the chosen Attorney has immediate ability to sign the grantor's name and make financial decisions for him or her.

In the U.S., 80,000 cases of Financial Fraud with respect to elderly victims were reported in 2005.¹⁰⁵ More than two thirds of the victims were defrauded by someone close to them. In the United States, Congress is currently considering versions of a comprehensive bill called the Elder Justice Act, which would fund public education, better data collection, and training for law enforcement and elder care professionals to combat the problem of elder fraud. Some states already have programs that work closely with social service agencies and banks to teach individuals how to recognize fraud and report it. In addition to ensuring that a lawyer drafts a carefully worded POA agreement excluding any provisions for the attorney to make gifts to him or herself where appropriate, enlisting the help of the elder individual's financial institution can also prove helpful. A local bank branch is often uniquely positioned to notice suspicious activity early on. Financial advisor, or accountants are also often well placed to be alerted to those issues as well.

Fraud and the Land Titles Act

In the fall of 2006, the provincial government introduced Bill 15, which proposed updates to Consumer protection. This Bill received royal assent on December 20th, 2006. Accordingly, the *Land Titles Act* has now been amended to help ensure that ownership of a property cannot be lost as a result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of

attorney. The amendments made by 2006, c. 35, Sched. C, s. 58 came into force on August 20th, 2007.

The *Land Titles Act*, R.S.O. 1990, c. L.5 defines a “fraudulent instrument” as an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; (“acte frauduleux”)

The Act now entitles an individual to compensation from the Assurance Fund where s/he has been wrongfully deprived of some estate or interest in land and has done his or her due diligence as specified by the Direction (s.4). However, there is no compensation where the claimant was negligent or where the person knowingly participated in or colluded in the fraud (s.59). According to s.15, if it appears to the Director of Titles that a registered instrument may be fraudulent, the Director of Titles may of his or her own accord and without affidavit enter a caution to prevent dealing with the registered land. The Act also now creates an exception such that a registered instrument **is not deemed** to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register **if** it is a fraudulent instrument registered on or after October 19, 2006 (s.78 (4.1)). Subject to the Act, a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner (s.155). According to s. 156, a person is guilty of an offence if the person fraudulently procures or attempts to fraudulently procure a fraudulent entry on the register, an erasure or deletion from the register or an alteration of the register. The penalty for

¹⁰⁵ Business Week, June 2006, http://www.businessweek.com/magazine/content/06_23/b3987113.htm.

fraud under this section is a fine of not more than \$50,000 or imprisonment for a term of not more than two years less a day, or both, if the person is an individual; and a fine of not more than \$250,000, if the person is a corporation.

Fraud and the Criminal Code

Section 331 of the Canadian Criminal Code provides as follows:

331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

R.S., c. C-34, s. 291.

Sections 386-388, which cover fraud may also be applicable in certain instances.

Relevant Recent Case law

In the recent case of *Dhillon v. Dhillon*¹⁰⁶ the B.C. court of appeal affirmed the trial judge's finding of fraud on the part of a wife and son. In that case, while a husband was living in India, his wife and son used a forged power of attorney to sell residential property that the husband owned, and used another forged power of attorney 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 damages in the amount of \$75,324.91 for the sale of house A payable jointly and severally by the wife and son, \$15,226.78 for the sale of house B payable jointly by wife and son, constructive trust in house C, and \$12,540.77 for RRSP

withdrawals. The husband was further awarded \$5,000 in punitive damages, and special costs at 80 percent of solicitor-client costs. The Court of appeal found that the trial judge did not overcompensate the husband by failing to limit his award to extent of his loss. They found that the trial judge did not err by ordering punitive damages against the wife and son nor in exercising his discretion to make an order for special costs in addition to an award of punitive damages. The court did, find however that a stay of execution on remedies granted for unjust enrichment was appropriate given that the trial judge did not consider the division of family assets and debts pursuant to Family Relations Act.

In *Bishop v. Bishop*¹⁰⁷ Justice O’Neill of the Superior Court found a power of attorney granted to an elderly woman’s son *void ab initio* based on medical evidence that she did not have capacity to grant a continuing power of attorney to her son at the time that she did. Alma Bishop gave her son a continuing power of attorney 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.

In *CIBC Mortgages Inc. v. Chan*¹⁰⁸, Ontario Superior Court Justice Thea Herman ruled that “once registered” the two mortgages were “effective and can be relied on”, that is, they are enforceable where the lender was unaware of the fraud. In that case, the defendants were a husband and wife who were joint tenants of home. The wife forged the husband's signature on a power of attorney while the husband was out of country and used the POA to obtain lines of credit from the plaintiff lenders secured by mortgages on the home. The mortgages were

¹⁰⁶ 2006 BCCA 524.

¹⁰⁷ 2006 WL 2583842.

¹⁰⁸ (2004), 6 R.F.L. (6th) 73.

registered pursuant to the *Land Titles Act*. When the mortgages went into default, the lenders brought action against the husband and wife for principal and interest due, as well as possession of the home. The husband and wife brought a counterclaim on the basis that mortgages based on a forged power of attorney were void. Justice Herman granted the lenders' motion for summary judgment and the husband's and wife's motion for summary judgment was dismissed. It was held that, once registered, mortgages were effective and could be relied on as they were given for valuable consideration and without notice of fraud. This decision was based on Justice Herman's interpretation of the application of ss.155 and 78(4) of the Land Titles Act. The Ontario Court of Appeal affirmed her decision in *Household Corp. Realty and Liu and Chan v. CIBC*, 261 D.L.R. (4th) 679.

However, in the recent decision of *Lawrence v. Maple Trust Company*¹⁰⁹, Justice Gillese speaking for the court found that the result in *Household Realty*, at least in respect of the husband's interest in the property, was inconsistent with the theory of deferred indefeasibility preferred by the court. It was further held that the language in *Household Realty* failed to recognize that the Land Titles Act gives statutory effect to the theory of deferred indefeasibility. For these reasons, the court found both the reasoning and the result in *Household Realty* to be incorrect.

Instead, the Ontario Court of Appeal in that case held as follows at para. 67:

The theory of deferred indefeasibility accords with the Act and must be taken into consideration in an analysis of s. 155 and its relationship with other provisions in the Act. Under this theory, the party acquiring an interest in land from the party responsible for the fraud (the "intermediate owner") is vulnerable to a claim from the true owner because the intermediate owner had an opportunity to avoid the fraud. However, any subsequent purchaser or encumbrancer (the "deferred owner") has no such

¹⁰⁹ 2007 ONCA 74.

opportunity. Therefore, in accord with s. 78(4) and the theory of deferred indefeasibility, the deferred owner acquires an interest in the property that is good as against all the world.

Looked at in combination, these recent decisions suggest that where a power of attorney is fraudulently or otherwise improperly obtained (for example, where the grantor is found incapable at the time that the POA is given), the innocent individual is not without recourse. The Ontario Court of Appeal's decision in *Maple Trust v. Lawrence* supports the deferred indefeasibility doctrine and affords protection to the claim of the true owner of property even in the face of an innocent intermediate owner. Where the true owner has been wronged by the operation of a fraudulent or improperly obtained power of attorney, the law may provide some protection. Of course anyone alleging this would still face the burden of proving the initial fraudulent or improper power of attorney.

Future Legislative Directions

Alan Silverstein, a bencher with the Law Society of Upper Canada and a certified specialist in real estate law, wrote in the Law Times earlier this year that mortgage fraud should be made a specific criminal offence with a mandatory minimum penalty and restricting access to Ontario's land titles registry. According to him, "We have very specific laws under the Criminal Code against branding cattle fraudulently and obtaining food and lodging fraudulently. If we can protect cattle and innkeepers, why can't we protect homeowners?" Silverstein has noted that under the Georgia Residential Mortgage Fraud Act, a person commits an offence, "with the intent to defraud," if he or she makes, uses, or facilitates the use of a "deliberate misstatement, misrepresentation, or omission during the mortgage lending process" to mislead lenders or borrowers; "receives any proceeds or any other funds in connection with a residential mortgage

closing" resulting from the above; or files with the official registrar of deeds of any county in the state "any document such person knows to contain a deliberate misstatement, misrepresentation, or omission." Anyone convicted of such fraud affecting one residence faces imprisonment with a minimum term of one year to a maximum of 10 years, or a fine not to exceed US\$5,000 fine, or both.

It is worthwhile noting that the U.K. has certain safeguards in place with respect to the granting of POAs that do not exist in Canada:

It appears to me from a comparison of the English legislation considered in *Re K* and the B.C. statute that the English legislative regime contains more safeguards than is the case with our legislation. As Hoffman J. observed, "the exercise of the power is thus hedged about on all sides with statutory protection for the donor". But under our statute, the power can continue indefinitely, even after mental incapacity is present, and will only terminate when a committee is appointed. The possibility of abuse by a donee is then greater than would seem possible under the English legislation. For that reason, I think it would be appropriate to be cautious in considering English precedents such as *Re K*.¹¹⁰

In October 2007, The New Court of Protection was established as a result of the Mental Health Capacity Act, 2005. The Court of Protection Rules, 2007, also came into effect in October 2007. The Mental Health Act, 2007, received Royal Assent July 19, 2007. The regime includes an Independent Mental Capacity Advocate Service, Code of Practice, and The Criminal Offences of ill-treatment and neglect. It will be interesting to watch whether this new regime succeeds in decreasing the abuses arising concerning, the elderly and incapable.

¹¹⁰ *Egli v. Egli*, *supra* note 38 at para. 32.

The U.K. also saw the repealing of the Enduring Powers of Attorney Act 1985, and the coming into force of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

Careful study of the new case law arising out of this new legislation may give us an indication of the success achieved.

The model is certainly worth considering in light of the foregoing problems and issues which are now endemic in our society.

The implementation of a similar regime in Canada might be a useful avenue for exploration.

CONCLUDING REMARKS

Coping properly with your professional duties is often difficult when POA disputes arise. Offer clients information sheets and checklists summarizing the Power of Attorney documents and legislation. Keep careful notes.

We should all also be vigilant about the fraudulent possibilities that attach to powers of attorney. We should ensure that our clients are clear on all the duties and responsibilities that attach to the granting of a power of attorney. If there is any reason to suspect that a certain individual may make for an inappropriate attorney, this should be discussed with your client. In the case of fraudulently obtained powers of attorney, the police should be notified and involved once you have evidence of such fraud.

POA disasters are all too prevalent today. As advisors we must be aware of the far reaching consequences of this area, the potential minefield of things that can go wrong, as well as ensuring familiarity with the legislation and case law in order to competently advise our clients. These concerns apply to us whether we are solicitors addressing a client's concerns at first instance, or barristers litigating after the fact.

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

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