RECENT GUARDIANSHIP CASES – A CRITICAL ANALYSIS

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Guardianship or power of attorney disputes are never pleasant. Unfortunately, such disputes usually involve family members and often drag up long standing, unresolved issues between family members. Litigants can quickly lose perspective, disregard the best interests of the incapable person, and engage in scorched earth litigation. As the population ages and lives longer, such family fights are not uncommon. However, the Courts have not remained silent. The Courts have become more proactive in managing such litigation, focusing with laser precision on the best interests of the incapable person, and using cost awards to either discipline litigants or rein in frivolous or fruitless litigation. Before embarking on a full fledged guardianship fight, a party must carefully consider what is in the best interests of an incapable person and whether there are other less corrosive means to protect the wellbeing and interests of an incapable person.

In this chapter, a number of recent guardianship cases are canvassed, focusing primarily on disputes over the appointment of and actions by guardians. This chapter then finishes with a brief summary of cases demonstrating an increasing unwillingness on the part of the court to grant costs out of an incapable person's assets absent evidence that the incapable person benefitted from the litigation.

Applications to Become or Remove Guardians

Frequently, guardianship applications arise in circumstances in which vulnerable individuals are at risk of financial or physical harm, but lack the judgment to see it that way themselves. Guardianship applications require judges to carefully balance individual autonomy against safeguarding the interests of the vulnerable, balancing freedom of choice against protection from harm. It is no wonder this area of law is therefore fraught with ethical challenges. A few recent cases are particularly illustrative of the court's approach to achieving this balance.

The facts in *Salzman v. Salzman*[1] were particularly troubling. In that case, a son sought to become guardian of personal care and property for his 93 year old mother. The elderly mother had been engaged in a relationship with Mr. Balak, a man 30 years her junior who had been convicted of sexual interference involving a four year old girl. Mr. Balak had been engaging in sexual intercourse with the elderly mother and exploiting her financially.

The son brought a guardianship application and sought to have his mother declared incapable of managing her finances and of making personal care decisions. He also sought a restraining order to prevent Mr. Balak from communicating with his mother or coming within 100 metres of her. The evidence from Ms. Salzman's doctor was that she did not possess the cognitive abilities to insightfully consent or refuse sexual activity and that she lacked insight to understand the potential risks of any sexual behavior such as infectious diseases or trauma. The son was appointed guardian of property and personal care for his mother. The court granted the restraining order, with leave to Mr. Balak (who did not appear on the application) to seek to vary the order on notice to the affected parties.

One interesting and contentious aspect of this case was the issue of Ms. Salzman's communications with her counsel. Section 3 of the SDA allows a judge to order the Public Guardian and Trustee ("PGT") to appoint counsel for a person whose capacity is at issue. Where counsel is so appointed, the client is deemed to be capable of providing instructions to his or her appointed counsel. This allows section 3 counsel to provide a voice for the allegedly incapable person and to convey his or her wishes and preferences to the court, even though the individual may not possess the requisite capacity to instruct counsel.

Section 3 counsel appointed by the PGT for Ms. Salzman met with her to speak about the issues in the case. Unbeknownst to either Ms. Salzman or her counsel, their conversation was being monitored by Ms. Salzman's caregivers, who kept a baby monitor in Ms. Salzman's room. The caregivers reported

what they heard to the son, who then relayed the conversation to his own counsel. The son's counsel sought to rely on the evidence obtained from the baby monitor conversations to show that Ms. Salzman did not understand who her lawyer was, why he was there, and that she wanted him to leave. The Court found that this evidence was probative of Ms. Salzman's capacity and that its probative value was not outweighed by its prejudicial value. Nonetheless, the court found that "assuming (but not determining) that the evidence in question should not be admitted because of the violation of solicitor-client, privilege…the outcome of the application is unaffected."[2] As a result, the judge declined to determine whether the baby monitor evidence was admissible or not. Rather, because the other evidence of incapacity was so substantial, nothing turned on the baby monitor evidence and it was not necessary to determine the issue.

An unfortunate emerging trend is the aptly named "predatory marriage," a term generally applied to marriages in which there exists an obvious imbalance in power and marriage is used as a means to financially exploit a vulnerable party. The case of *Ontario (Public Guardian and Trustee) v. Harkins*[3] is an example of such a "predatory marriage" case. In it, the PGT stepped in and applied to become guardian of property for Lila Harkins. Lila had been living in a retirement residence when she met Gregory Harkins one day on the street in 2006. They married soon after they met. After their marriage, Lila named Greg as her attorney for personal care and property. Greg lost no time in exercising his power over Lila's affairs. At the time of their marriage, Lila had over $823,000. By the time the application was heard, she had almost no assets left.

The PGT sought to remove Greg as attorney for property and to be appointed as Lila's guardian of property in his place. The Court had little difficulty in concluding that Greg was "manifestly unsuitable"[4] to act as Lila's guardian given his serious breaches of fiduciary duty as her attorney for property. Although a formal finding of incapacity did not occur until 2009, there was evidence that before that

date Lila had diminished capacity and was vulnerable. In deciding to replace Greg as Lila's attorney for property, the Court was particularly unimpressed that Greg had taken control of all of Lila's assets knowing that she trusted and relied on him completely. This, together with her diminished capacity and vulnerability, placed him in a fiduciary position to Lila. Greg had breached his fiduciary duty to Lila when he had spent all her money.

Greg's defence that he had only been doing as Lila wanted was found to be without merit: "It is no answer for Greg to say that he was only following Lisa's wishes. First, as a fiduciary, it was his responsibility to see to Lila's best interests regardless of her wishes."[5] Second, with respect to alleged gifts from Lila to Greg, the Court found that even if Lila was competent to provide these gifts, it was a conflict of interest for Greg to accept them. The court held that "his acceptance of these gifts [to himself] seriously and materially undermined Lila's long-term financial needs and interests."[6]

In *Ontario (Public Guardian & Trustee) v. Somberg*[7], the PGT applied for guardianship in order to assist a man suffering from mental illness to access the benefits to which he was entitled. The man was living in a homeless shelter. His employer, the Canadian Security Intelligence Service, contacted the PGT's office and advised that if he were to undergo an Occupational Health Assessment Report, he would qualify for a disability pension from CSIS. The man, however, refused to complete the necessary occupational assessment that would qualify him for benefits. He also refused to undergo a capacity assessment.

The PGT's application for guardianship proceeded in two stages. At the initial return of the application, the Court ordered an assessment of Mr. Somberg's capacity to manage property. Interestingly, the judge at the first return date ordered the capacity assessment to take place at the homeless shelter where Mr. Somberg resided. He was found incapable of managing his property.

On the second return date, the PGT sought an order appointing it as guardian of property and an order that Mr. Somberg complete the necessary occupational assessment at a hospital. An ancillary order was

also sought to require the police to apprehend Mr. Somberg, if necessary, in order to complete the in-hospital occupational assessment. The judge declined to make this order. Since the capacity assessment seemed to have proceeded smoothly when it took place at the homeless shelter, the judge directed the occupational assessment to take place at the homeless shelter as well. The judge reasoned that s. 79(4) of the SDA provided that a capacity assessment should be performed, if possible, in the person's home, and that a similar approach should be used to carry out the occupational assessment. The judge declined to make any orders for police involvement but said that the PGT could re-attend if Mr. Somberg refused to cooperate with the occupational assessment. This decision reflects the overall legislative intent of the SDA – the protection of vulnerable people using the least intrusive means.

The case of *Consiglio v. Consiglio*[8] is instructive as to what the court will consider when called upon to choose between two competing guardianship applications. Following the death of matriarch Rosa Consiglio, a dispute ensued among her nine surviving children regarding who should become guardian of property and personal care for the youngest of the nine children, Pioretta. Pioretta had Down Syndrome and, the court found, was incapable of making decisions regarding her personal care and property.

The first guardianship application was brought by Pioretta's brother, Tony. At the time the application was heard, Tony was living with Pioretta in the childhood home where Pioretta had lived for virtually her entire life. Tony's guardianship plan contemplated that this living arrangement would continue. He urged the Court to consider the importance of leaving Pioretta in familiar surroundings. Tony was unmarried and, although historically employed in construction and as a martial arts instructor, he had given up employment to care for Pioretta following their mother's death. Justice Perrell questioned whether Tony's plan to remain in the family home was realistic, given his precarious employment situation.

The second guardianship application was brought by Pioretta's sister, Cathy. Cathy was married and both she and her husband had good jobs and were financially stable. The most significant feature of Cathy's guardianship plan was her proposal that Pioretta move in with Cathy's family.

Tony led evidence that his late mother's wish and desire was for Pioretta and two of her unmarried brothers without homes of their own to move into the family home. The court found that the mother's wishes and aspirations were not determinative and were, in fact, largely irrelevant, save to the extent that they coincidentally aligned with what was in Pioretta's best interests.

The SDA requires the Court to consider (a) whether the proposed guardian is an attorney under a power of attorney (b) the incapable person's current wishes, if they can be ascertained and (c) the closeness of the applicant's relationship to the incapable person. Despite finding that Pioretta wished to stay with Tony and that Tony was "her favourite", the Court had no difficulty concluding that Pioretta would be better off with Cathy as her guardian for personal care and property. The decision was largely based on Cathy's experience and success as a mother. In weighing the benefits to Pioretta of both guardianship options, Justice Perrell found that the benefits of Cathy's parenting experience far outstripped the benefits of perhaps being able to remain in her family home with her favourite big brother.

Application to Replace PGT as Statutory Guardian

In *Osadet v. Ontario (Public Guardian and Trustee)*,[9] the Court took a purposive approach to evaluating a guardianship application and declined to grant guardianship to a close relative who planned to pursue what the Court considered to be "fruitless litigation." In 2005, Stefan Osadet was admitted to a long term care facility with brain injury and dementia. After his admission, Stefan's wife arranged to pay Stefan's expenses, transferred certain assets to herself, and then moved to Romania.

Stefan's daughter-in-law Margaret was upset by the wife's actions. Margaret commenced litigation in Stefan's name against the wife, a lawyer retained by the wife, and the long term care facility where Stefan resided for having been "complicit" in the wife's actions.

One of the defendants to the litigation brought a motion to require Stefan, as a party under disability, to be represented by a litigation guardian, as required by Rule 7 of the *Rules of Civil Procedure*. Rule 7 requires that the litigation guardian must, among other things, assume personal liability for the costs of the litigation. Although she had initiated the court action, Margaret did not seek to be the litigation guardian on the motion. As a result, the PGT was appointed as litigation guardian for Stefan. The PGT proceeded to settle Stefan's claims for an amount that Margaret felt was too low. The settlement was approved by the court over Margaret's objections. She did not appeal the order approving the settlement.

In anticipation of settlement funds flowing to Stefan, the PGT became statutory guardian for Stefan. Section 16 of the SDA sets out a process by which a person can have the PGT appointed as statutory guardian: by filing a request for an assessment in the prescribed form, then seeking to have an individual assessed for his ability to manage property. The prescribed form requires the applicant to state that (1) he has reason to believe that the subject is incapable of managing property, (2) he has made reasonable inquiries to determine whether the subject has a valid continuing power of attorney for property, and (3) he has no knowledge of a spouse, partner or relative who intends to make a guardianship application under section 22 of the SDA. If the assessor issues a certificate of incapacity in the prescribed form, the PGT automatically becomes the statutory guardian. Section 17 of the SDA permits an application to replace the PGT on certain grounds, including the existence of a valid power of attorney.

Margaret brought an application to remove the PGT and to become guardian of property for Stefan. Her management plan included plans to sue the PGT for improvidently settling Stefan's claims against the wife and to commence divorce proceedings on Stefan's behalf against the ex-wife.[10]

Despite the closeness of the relationship between Stefan and the applicant and her obvious devotion to him, the court denied her guardianship application on the basis of her "apparent willingness to dissipate Stefan's limited remaining financial resources on speculative, fruitless litigation."[11] Margaret appealed. In a very short endorsement (five paragraphs), Margaret's appeal was dismissed by the Ontario Court of Appeal.[12]

On another front, two recent cases illustrate the intersection of family law and capacity litigation: when divorcing parents fight over who should have guardianship of an adult child with a disability.

Guardianship Disputes Involving Children of Marriage

In *Cole v. Cole,*[13] the Court heard two competing guardianship applications: one by the mother and one by the father. Both the mother and the father sought a declaration pursuant to the *Substitute Decisions Act* that their son was incapable of managing his property and personal affairs. Each sought appointment as guardian of personal care and property. An existing custody order had granted custody to the father. A threshold question arose as to whether the son, although 18, was still a "child of the marriage" within the meaning of the *Divorce Act*. The *Divorce Act* defines child of the marriage as a child of two spouses or former spouses who, at the material time,

a) is under the age of majority and who has not withdrawn from their charge, or

b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.[14]

Applying the *Divorce Act,* the Court found that the custody order was still in effect and had not been extinguished on the child's eighteenth birthday as both parties had apparently believed. The father consequently withdrew his application under the SDA for property guardianship. The mother, however, refused to withdraw her SDA application. She made a novel argument that to treat an adult child as a child of the marriage violated his rights as a disabled person under the United Nations Convention on the Rights of Persons With Disabilities. Describing the mother's argument as "most interesting and worthy of consideration",[15] the judge nevertheless dismissed the mother's SDA application, finding that it would be untenable to allow the possibility of conflicting decisions under the *Divorce Act* and SDA.

Similarly, in his admittedly difficult and provocative decision in *Perino v. Perino*,[16] Justice Corbett also grappled with what he described as an area requiring some much-needed adjustments to the law:

> Custody and access cases involving adult disabled children come up rarely, but regularly. There ought to be a clear regime in place, so lawyers, judges and the parties know how to proceed. The biggest stumbling block in this case is balancing respect for Marisa Perino, as a person of adult years, and protecting Marisa Perino, as a vulnerable person. Both of these values deserve protection, and the legal response should be nuanced and balanced.[17]

The subject of the custody dispute was Marisa Perino, who had an intellectual disability. At trial, Justice Corbett found that following the marriage breakdown, the father had poisoned Marisa against her mother.

In an earlier motion in the proceeding, Marisa's lawyer (who the father arranged and paid for) had Marisa added as a party to the divorce proceedings and submitted on behalf of Marisa that she should live with her father. The mother complained that Marisa was being manipulated by her father. The mother therefore sought to have Marisa examined by a medical professional pursuant to section 105 of the *Courts of Justice Act* and have the PGT appointed as Marisa's litigation guardian.

While it is not entirely clear from the decision, it seems that the mother also sought to have the PGT appointed as guardian of property for Marisa under the SDA. However, the PGT took the position that because the issues of capacity and access were already before the court in divorce proceedings, it would not be appropriate to appoint the PGT as a guardian for Marisa. The PGT reasoned that the need for alternative decision making must always be met by the least intrusive means possible (this is mandated by the SDA). A guardianship application would have necessarily required a declaration of Marisa's incapacity. As she did not consent to be medically examined, such an order would be extremely intrusive. In this case, there was no need for a guardianship order, reasoned the PGT, because Marisa's Ontario Disability Support Payments were already held in trust and there were pre-existing divorce proceedings that would determine what living arrangements would be in Marisa's best interests. The Court agreed with the PGT's position, and held that where pre-existing divorce proceedings already "occupied the field" of determining Marisa's best interests, a guardianship order would be inappropriate.[18]

In response to the wife's motion to appoint a litigation guardian for Marisa, Marisa's lawyer successfully moved to have Marisa removed as a party. This left the court with no jurisdiction to order a medical examination against Marisa's wishes because the Court's jurisdiction to order an assessment under section 105 of the *Courts of Justice Act* is limited to people who are parties to proceedings. Once Marisa was removed as a party, a medical examination under section 105 of the CJA was no longer available. The Court also found that that section 105 of the CJA is not intended to provide the Court with jurisdiction to order a medical examination of a child of the marriage in custody proceedings under the *Divorce Act*. [19]

Judicial Review of Guardian Actions

Aragona v. Aragona (Guardian of)[20] is a typical example of disputes that arise on a passing of accounts by a guardian whose financial handling of the incapable's affairs are finally made transparent. The Ontario Court of Appeal upheld the trial Court's decision (except for one small variance) requiring Mr. Aragona to re-pay his mother's estate funds that had been depleted while he acted as her guardian of property. The Court of Appeal also upheld the lower court's decision to order the appellant to personally pay certain legal expenses that he had paid with his mother's funds.

At the appeal, the appellant argued that he had not been given a fair trial because he had been led to believe by counsel for the respondent at the outset of the hearing below that disbursements (such as legal fees) were not going to be an issue. Mr. Aragona claimed that he was then taken by surprise when certain legal disbursements were challenged. The Court of Appeal pointed out that Mr. Aragona's counsel had not objected when Mr. Aragona was asked questions at the hearing about the impugned disbursements. These questions, together with the written objections to his accounting, should have reasonably led Mr. Aragona to know that the legal fee disbursements were being questioned. The Court of Appeal concluded that the hearing below was fair and that:

> The appellant's fairness argument should be considered in the light of his statutory obligations. Pursuant to the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, a guardian of property has a fiduciary obligation to carry out his or her obligations with honesty and due care and attention. The core of these obligations includes the duty to be in a position at all times to prove the legitimacy of disbursements made on behalf of the estate: Widdifield on Executors and Trustees, 6th ed. (Scarborough, ON: Thomson Carswell, 2002) at p. 13-1. The history of the appellant's conduct demonstrates that he managed his mother's property in blatant disregard of his obligations as guardian.[21]

The Court of Appeal found ample evidence in the record of the applicant's "failure to keep proper accounts and of his indifference to his fiduciary obligations."[22] On appeal, Mr. Aragona argued that he had not been made aware that legal expenses were not proper estate expenses. This case is a good reminder that ignorance of one's fiduciary obligations is unlikely to succeed as a defence to breach of fiduciary duty.

A Pox on Both Your Houses: Costs in Contested Guardianship Applications

"It is evident that these parties are not finished their fight. Sometimes the Court can't do much after it has cursed the parties by calling for a pox on both their houses."[23] So begins Justice Flynn's costs decision in *Smith v. Ahonpa.* The *Smith* decision joins a growing list of recent cases expressing judicial impatience at the high costs sought by parties engaged in fights over who should manage the affairs of an incapable loved one. Noting that the incapable estate was worth only $58,000, the Court found that the legal costs sought by the successful party ($46,940.80 plus $6,469.25) were "excessive in the extreme" and that "there ought to be a sense of proportionality in costs claims like these."[24]

Expressing displeasure at how both sides conducted the litigation, the court required both sides to absorb their own legal costs, with the exception that the loser was required to pay $10,000 in costs to the winner. No costs were allowed out of the incapable person's assets, other than the cost of the capacity assessment in the amount of $1,508.55. The court warned that "parties in estate litigation involving an incapable person should not expect as a matter of course that their legal costs will be borne by the estate of that incapable person."[25]

This is true whether the dispute revolves around control of an incapable person's money or control over medical decisions. In *Olivieri v. Colangelo*,[26] the co-guardians for personal care for Dr. Olivieri[27] had reached an impasse. There was no dispute that Dr. Olivieri was no longer capable of making decisions on his own behalf. His co-guardians were his wife and two daughters, one of whom was also a

physician. The daughters disagreed with the mother over their father's medical care. An application by the two daughters resulted in a consent order by which a family friend was named as a fourth co-guardian. The fourth guardian's role was to cast a deciding vote in the event of future stalemates among the co-guardians for personal care. Unfortunately, the addition of the fourth co-guardian did not end the disharmony and the next two years produced "interminable litigation"[28] over Dr. Olivieri's care and treatment and who should make treatment decisions on his behalf. Dr. Olivieri died before the litigation ended.

The costs hearing took place after Dr. Olivieri's death. The applicants sought costs of over $116,000.[29] The applicants submitted that they consistently acted in their father's interests throughout the final years of his life and that by their advocacy he received life-saving blood transfusions, private duty nursing care (which they personally paid for) and the correct medication and treatment. The applicants had visited their father almost every day and, in their view, their father benefitted from their vigilance with respect to his health care. The respondents submitted evidence from Dr. Olivieri's health care team that the applicants' interventions into their father's health care were over-diligent and had become intolerable to the point of negatively impacting the ability of the heath care team to deliver care.

The Court held that, when faced with a costs claim against the estate of an incapable person, it must examine what benefit, if any, the incapable person derived from the legal work. In the words of Justice Turnbull, "Courts must scrutinize rigorously claims made against an estate to determine if such claims are justified by reference to the best interests of the incapable person."[30] In *Olivieri,* a review of the entirety of the file led Justice Turnbull to conclude that the daughters' "so called advocacy was excessive and unduly confrontational."[31] Accordingly, no costs were awarded to the applicants.

Similarly, costs were not awarded to the applicant in *Nguyen-Crawford v. Nguyen,*[32] despite the applicant's partial success in the litigation. The applicant's siblings had prevented her from seeing their mother due to their concerns over how she had been managing their mother's money. Through her court application, the applicant had successfully re-gained access to her mother. The applicant had also successfully avoided having to account for her management of her mother's money, as had been sought by her siblings. Finally, her siblings' accusations of fraud had not been proven against her. The applicant sought costs on a substantial indemnity scale in the amount of $67,379.31 payable by her siblings. However, the judge found that success was better characterized as "divided," and therefore awarded no costs to either side. The judge reasoned that if the applicant had simply sought access to her mother, she would have been entitled to her legal costs. However, the applicant persisted in unsuccessful efforts to continue to control her mother's money. Accordingly, "the costs she incurred must be regarded as the heavy price she paid for unwisely persisting in her effort to continue asserting financial control over mother."[33]

Even a completely successful litigant in a contested guardianship case cannot safely assume that (s)he will be fully indemnified for legal fees. The costs sought must be reasonable and proportionate to the amount at issue. In *Brown v. Brown-Campbell*,[34] two parents whose marriage had broken down engaged in contested litigation over who should act as guardian of property for their disabled adult daughter. Their daughter sustained brain injuries as an infant for which she received settlement funds on an annual basis. The court noted that the costs sought by the successful mother (almost $74,000[35]) exceeded the amounts payable to the disabled daughter on an annual basis and the costs were therefore "more than is reasonable for an unsuccessful litigant to pay."

It seems clear from recent decisions that the emerging trend of hard-fought and lengthy battles over who should control a vulnerable person's finances is at odds with the aspirations of the legislature and

the expectations of the judiciary. When utilized appropriately, the SDA can be a powerful tool to assist and protect the vulnerable. However, litigants who wish to use SDA proceedings to battle for control over an incapable person's assets should not expect to be rewarded with full indemnity costs out of an incapable person's assets. Justice Brown's comments in *Re: Baranek Estate*[36] perhaps best illustrates this sentiment:

> The so-called "battle of competing powers of attorney" is emerging as a growing area of litigation. This is a most unhealthy development. I suspect that when the Legislature passed the *Substitute Decisions Act* back in 1992, it intended to put in place a legal framework which would protect the affairs of the vulnerable elderly, not spawn a new breed of litigation which would see the hard-earned money of the vulnerable exposed to claims for the payment of legal fees incurred by those whom they had appointed to protect their interests….Indeed, I think the time may have arrived for the Legislature of this province to look into this problem of litigation involving competing powers of attorney, especially subsequent powers of attorney made during the latter periods of a person's life when they are vulnerable to pressure, in order to see whether new protections are required to ensure that the assets of the vulnerable are used for one purpose only – the satisfaction of the needs of the vulnerable elderly while they are alive.[37]

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[1] (2011), 2011 ONSC 3555, 214 A.C.W.S. (3d) 637, [2012] W.D.F.L. 2764, 77 E.T.R. (3d) 301 (Ont. S.C.J.) ("*Salzman*")
[2] *Salzman* at paragraph 18.
[3] (2011), 216 A.C.W.S. (3d) 1039, 2011 CarswellOnt 7097 (ON SCJ). ("*Harkins*")
[4] *Harkins* at paragraph 37.
[5] *Harkins* at paragraph 31.
[6] *Harkins* at paragraph 34.
[7] (2012), 2012 ONSC 3078, 215 A.C.W.S. (3d) 995, 2012 CarswellOnt 6543 (ON SCJ). ("*Somberg*")

[8] (2012), 2012 ONSC 4629, 219 A.C.W.S. (3d) 986, 2012 CarswellOnt 9887 (ON SCJ). ("*Consiglio*")
[9] (2011), 2011 ONCA 269, 67 E.T.R. (3d) 198, 2011 CarswellOnt 2293 (ON CA). ("*Osadet*")
[10] The Court accepted the PGT's submission that guardians of property are prohibited from commencing divorce proceedings under the SDA.
[11] *Osadet v. Ontario*, at paragraph 46.
[12] *Osadet v. Ontario* (Public Guardian and Trustee), 2011 CarswellOnt 2293, 2011 ONCA 269, 67 E.T.R. (3d) 198.
[13] (2011), 2011 ONSC 4090, [2011] W.D.F.L. 4812, 215 A.C.W.S. (3d) 534, 2011 CarswellOnt 7129 (ON SCJ) ("*Cole*").
[14] *Divorce Act,* R.S.C. , c 3 (2nd Supp), at section 2.
[15] *Cole,* at paragraph 7.
[16] *Perino v. Perino*, 2012 ONSC 328 (Canlii).
[17] *Perino v. Perino*, 2008 ONSC 11048, 52 R.F.L. (6th) 341.
[18] *Supra* note 16 at paragraph 27.
[19] *Supra* note 17, at paragraph 42.
[20] *Aragona v. Aragona (Guardian of)*, 2012 ONCA 639, 80 E.T.R. (3d) 167 ("*Aragona*").
[21] *Aragona*, at paragraph 21.
[22] *Aragona*, at paragraph 35.
[23] *Smith v. Ahonpa*,2012 ONSC 1415, 213 A.C.W.S. (3d) 31 at paragraph 2 ("*Smith*")
[24] *Smith* at paragraph 13
[25] *Smith* at paragraph 15
[26] (2012), 2011 ONSC 3549, 217 A.C.W.S. (3d) 536, 2012 CarswellOnt 7719 (ON SCJ). ("*Olivieri"*)
[27] Curiously, the decision records that "on December 16, 2006, Victoria [the mother], Nancy and Ann [the daughters] were appointed as the Co-Guardians for Property and Personal Care by Fernando [the incapable]." This would seem to be in error – an individual, while capable, can appoint an attorney for property and/or personal care; however, only a Court can appoint a guardian of property and personal care.
[28] *Olivieri*, at paragraph 14.
[29] The Court noted that one of the applicants had already been reimbursed for approximately $60,000 in legal expenses from the guardianship estate in 2009. The additional $116,000 sought related to costs incurred after April 21, 2009 until the costs hearing on December 6, 2011 (Dr. Olivieri died in August 2011 but the litigation continued after his death).
[30] *Olivieri,* at paragraph 28.
[31] *Olivieri*, at paragraph 38.
[32] *Nguyen-Crawford v. Nguyen*, 2012 ONSC 1337, 214 A.C.W.S. (3d) 32, [2012] W.D.F.L. 5244.
[33] *Nguyen*, at paragraph 34.
[34] (2011), 2011 ONSC 4653, 2011 CarswellOnt 15189 (ON SCJ).
[35] This amount did not include legal fees incurred while the mother was represented by her former lawyer. It seems that prior to switching counsel, the mother had engaged in some unhelpful mud-slinging against her husband. By contrast, her new counsel "gave excellent advice and prompted resolution." The mother therefore only sought indemnification in respect of her new counsel's fees and sought no reimbursement for the fees she incurred while represented by her former counsel.
[36] *Re: Baranek Estate*, 2010 ONSC 6375 (CanLii)("*Baranek")*.
[37] *Baranek*, at paragraph 6.