Balancing Privacy Interests of an Incapable Person with the Responsibilities of Attorneys, Guardians and Section 3 Counsel

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INTRODUCTION

Everyone has a fundamental right of privacy. However, once a person becomes incapable of managing their own finances or health care decisions, their lives are inevitably made public to the person(s) stepping in to fill the role of decision-maker. Even for those not appointed a substitute decision-maker, it is common for family members and other loved ones to want to have access to the incapable person's medical and financial information out of a desire to protect and defend the incapable person's interests. Frequently, the decision whether to disclose the incapable person's private information is left up to the substitute decision-maker. These two responsibilities, privacy and protection, may be in conflict. The underlying statutory regime offers some guidance, but leaves a wide degree of discretion to the substitute decision-maker.

There are four general types of substitute decision-makers: a statutory (financial) substitute decision-maker (in Ontario, the Public Guardian and Trustee)[2]; attorneys for property or care, appointed by the grantor pursuant to a power of attorney document[3]; guardians of property or the person, appointed by the court[4]; and section 3 counsel, appointed pursuant to section 3 of the *Substitute Decisions Act.*[5] I collectively refer to all four types of substitute decision-makers as "fiduciaries" in this paper.

SUBSTITUTE DECISION-MAKERS

Ontario has a comprehensive regime that governs the appointment and role of substitute decision-makers in cases where incapacity is both confirmed or in dispute. Ontario's *Substitute Decisions Act* (SDA) governs the appointment of the four main types of substitute decision-makers, most importantly attorneys for personal care or property and court appointed guardians.

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[2] See sections15-21 of the *Substitute Decisions Act*, *supra.*
[3] See sections 7-14 and 46-54 of the *Substitute Decisions Act*, *supra.*
[4] See sections 22-30 and 55-65 of the *Substitute Decisions Act*, *supra.*
[5] *Substitute Decisions Act*, S.O. 1992, c. 30 [SDA]

The *Health Care Consent Act* (HCCA) governs who makes and how medical decisions are made in specific types of situations where a person cannot express their own medical wishes (such as in the case of a medical emergency or where a person lacks the capacity to make medical decisions). Together, these statutes offer guidance to substitute decision-makers in most situations.

In addition, these two statutes offer crucial guidance to fiduciaries on how to appropriately protect the privacy rights of the person(s) under their charge. However, there are many other statutes that may also be applicable, depending on the circumstances and the specific piece of information that is at issue.

PRIVACY RIGHTS OF THE INCAPABLE

Equal Rights Under the Law

The fact that persons with disabilities have equal rights under the law, and in particular privacy rights, is well established in Canadian law. Canada ratified the United Nation's *Convention on the Rights of Persons with Disabilities* (CRPD)[6] in March 2010. Article 22, titled "Respect for privacy," specifically requires the protection of privacy of persons with disabilities. Under the CRPD, an incapable person cannot be subject to "arbitrary and unlawful interference" with his or her privacy.

Privacy Legislation

In making decisions about privacy, the fiduciary must consider specific privacy laws, both federal and provincial. Ontario's *Personal Health Information Protection Act*[7] (PHIPA) deals with health care information. It regulates the use and disclosure of personal health information and protects the confidentiality of that information.[8] Persons falling under the jurisdiction of the HCCA often also fall within PHIPA.

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[6] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, GA Res 61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010) [CRPD].
[7] *Personal Health Information Protection Act*, S.O. 2004, c. 3 [PHIPA]
[8] *Ibid* at section 1

Uniquely, PHIPA contains detailed definitions of who is a substitute decision-maker for the purpose of the act. PHIPA broadly adopts the HCCA conventions as its own.[9] Section 25(1) of PHIPA specifically empowers substitute decision-makers to consent to the disclosure of personal information on behalf of the incapable person in any situation that the incapable person would have been able to consent if they were capable. This suggests that, at least under PHIPA, a fiduciary has complete authority and discretion to deal with an incapable person's personal information. Where there is ongoing or contemplated litigation, section 41(1) of PHIPA specifically deals with the procedure for disclosure. The provision authorizes disclosure to a "litigation guardian or legal representative." Where section 3 counsel has been appointed (for example, where a person's capacity is in dispute or where the appropriate attorney or guardian for the incapable person is at issue), then disclosure should be made to section 3 counsel rather than any putative guardian or attorney.[10]

Fiduciaries must also consider Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA). FIPPA regulates the access to information stored at provincial ministries, agencies, boards, and commissions, as well as at universities and hospitals. Federally, Canada's *Personal Information Protection and Electronic Documents Act* (PIPEDA) has provisions related to the disclosure of electronic information and covers information held at federally regulated banking institutions.

A new piece of legislation has been proposed that may reduce some of the stricter protections of privacy legislation. The *Digital Privacy Act*[11] is proposed legislation intended to allow banks and other organizations to notify the appropriate officials or a client's next of kin if they suspect an elderly client is the victim of financial abuse. The proposed *Digital Privacy Act* will amend PIPEDA to waive the requirement that a person (or a person's fiduciary) must give consent to the release of personal information. The aims of the *Digital Privacy Act* may be laudable, but elder protection groups, senior estates and trusts lawyers, and the Elder Law Section of the Canadian

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[9] Noela J. Inions, "Substitute Decision-Makers in Privacy Legislation that Affects Health Information in Alberta" 14:1 Health Law Review 26 – 41

[10] See Clare Burns, "Litigating Power of Attorney for Property and Personal Care: A Potpourri of Issues" 16th Annual Estates and Trusts Summit: Day One at Tab 2

[11] An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, S-4, 41st Parliament, 2nd Session. As of the date of this paper, this proposed act has been passed by the Senate and has been referred to review by a committee before a second reading in the House of Commons.

Bar Association have all raised concerns about the draft legislation that it may too easily allow for the release of private information.[12]

FIDUCIARIES' RIGHTS AND OBLIGATIONS

Fiduciaries' Rights of Access

The SDA only grants guardians, and not attorneys or section 3 counsel, the power to access the personal information of the incapable person. Sections 31.1 and 59.1 of the SDA grant a guardian of property and personal care, respectively, with the right to access the personal information of an incapable person to the same extent that the incapable person would have been able to if he or she were capable. The provision specifically includes access to health information and records. Notably, there is no corresponding provisions for attorneys of property or personal care. Instead, such a power must be found in the power of attorney document itself.

The Ministry of the Attorney General offers a template for power of attorney for property documents. The draft document contains broad language that would extend to the attorney the power to access personal information ("I AUTHORIZE my attorney(s) for property to do on my behalf anything in respect of property that I could do if capable of managing property").[13] Similar language exists in the Ministry of the Attorney General's template for personal care documents ("I give my attorney(s) the AUTHORITY to make any personal care decision for me that I am mentally incapable of making for myself"). Should such language be found in the power of attorney document, the attorney is likely authorized to access the incapable person's health and/or financial records.

The limited statutory provisions for section 3 counsel provide no instructions regarding section 3 counsel's right to obtain the incapable person's personal information. Instead, prospective section 3 counsel should be alive to this concern and seek to have the authority to obtain personal information set out in the endorsement or court order appointing them.

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[12] See Graham Webb, "Comments on the Digital Privacy Act," (Fall 2014) 11:2 ACE Newsletter 8. Online: <http://www.advocacycentreelderly.org/appimages/file/ACE_Fall2014_Newsletter_v11n2_CFO2.pdf>

[13] Online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>

Under sections 59(2)(d) and 59.1(3) of the SDA, a guardian of the person (whether appointed with full or limited decision making powers) is entitled to "consent to the release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or power."[14] In *Azzopardi v. Potomski*,[15] the court agreed that this statutory provision allowed the guardians of an incapable woman to consent to the release of hospital records to the Public Guardian and Trustee to facilitate an investigation into the leaking of a previous PGT investigation by a hospital staff member.[16] It seems that the release of an incapable person's personal information to the PGT to assist in an investigation of the misdeeds of the son of the incapable person would require a much lower threshold to meet than other cases. Unfortunately, there is little guidance on the nature of this entitlement or how it functions beyond the case of *Azzopardi v. Potomski*.

The SDA is silent on whether guardians of property retain the same authority to consent to the release of personal information as guardians of care.

Fiduciaries' Responsibility

Under section 32 of the SDA, a guardian of property (and by statutory extension per section 38(1), a power of attorney for property) is obligated to perform his or her powers and duties "diligently, with honesty and integrity and in good faith, for the incapable person's benefit." Similarly, section 66(1) requires a guardian of person (and by extension per section 67, an attorney for personal care) is obligated to perform their powers and duties "diligently and in good faith." The guardian is also obligated, when making a decision not regulated by the HCCA, to consider the wishes of the incapable person. If the incapable person's wishes are not known, then the guardian is to make a decision with regards to the incapable person's best interests.[17]

Section 66(7) of the SDA imposes a duty on an attorney or guardian for personal care to consult with the incapable person's supportive family members, friends, and care providers. A similar provision applies to guardians and attorneys of property.[18] While judges have referred to this

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[14] E.g., *Azzopardi v. Potomski*, 2008 CarswellOnt 917 (Ont. S.C.J.) at para. 28
[15] *Ibid.*
[16] *Ibid*.
[17] SDA section 66(3) and (4)
[18] SDA section 32(5)

section in informing their decisions for access and guardianship orders, there has not been a decision that considers the privacy implications of the provision or what exactly the nature of the consultation should be. It should be noted, however, that where there is evidence that family members or others are not particularly supportive, then the attorney/guardian may not be required to consult at all.[19]

A recent case of the Ontario Superior Court of Justice suggests that the fiduciary is under some type of obligation to disclose financial decisions to family members. In *Sitko v. Gauthier Estate,*[20] the court held that it was a breach of a the attorney for property's duty to transfer money from his incapable father's accounts into a PayPal account controlled by him without informing his sister as required by section 32 of the SDA. However, this decision was made in the context of the fiduciary having used the money to make inappropriate purchases for his own benefit and arbitrarily taking compensation. It seems unlikely a court would be swayed by an argument that a fiduciary's improper conduct should be hidden from other family members because of privacy concerns. However, it is less clear whether a fiduciary, if performing his duty properly, would be required to disclose private financial information to family members without good cause.

BALANCING ACT

When acting as a fiduciary, a person must carefully weigh a number of factors before disclosing an incapable person's private information. Particularly where an incapable person has previously appointed an attorney for personal care/property and made her privacy wishes known, a fiduciary should be attuned to the desires of the grantor in deciding whether to invoke privacy rights in refusing to disclose certain information. A power of attorney document rarely explicitly contemplates what sorts of disclosures the attorney should make or in what circumstances. Instead, the usual power of attorney document confers a broad discretion on the fiduciary to decide.

Because a fiduciary usually has few, if any, restrictions on her ability to disclose private information, her only guidance may be the duty imposed under the SDA to act in the "best

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[19] *Robb Estate v. Robb*, 2010 ONSC 3089, 2010 CarswellOnt 3599
[20] 2014 ONSC 5671, 2014 CarswellOnt 13532

interests" of the incapable person. In addition, section 66(3) of the SDA offers four principles a guardian of the person and an attorney for personal care must keep in mind when making decisions not covered by the HCCA:

> 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.
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> 2. The guardian shall use reasonable diligence in ascertaining whether there are such wishes or instructions.
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> 3. A later wish or instruction expressed while capable prevails over an earlier wish or instruction.
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> 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.[21]

Once again, the fiduciary is reminded to follow any wishes expressed or ascertainable from the incapable person (in other words, to act as the incapable person would have acted). Absent such direction from the incapable person, the fiduciary is guided only by a consideration of the incapable person's best interests.

Section 66(4) of the SDA sets out how to determine the incapable person's best interests. Section 66(4) reads:

> In deciding what the person's best interests are for the purpose of subsection (3), the guardian shall take into consideration,
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> (a) the values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;
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> (b) the person's current wishes, if they can be ascertained; and
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> (c) the following factors:
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> 1. Whether the guardian's decision is likely to,
>
> i. improve the quality of the person's life,

[21] SDA, s. 66(3).

> 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.[22]

For example, where a guardian thinks that revealing the incapable person's medical information to her children would improve the quality of the incapable person's life, then it would be perfectly reasonable to disclose that information. On the other hand, a fiduciary should not disclose the incapable person's personal information if that information is of a minor nature and the incapable person had never previously informed her children of minor medical problems. This would be the case even if the incapable person's children stridently pursued such a disclosure.

A guardian or attorney of property may face similar requests to disclose personal information. However, in these cases, a guardian or attorney of property is not granted the same explicit statutory authority to disclose information under the SDA as is given guardians of care. This suggests that the legislature was less sympathetic to the release of financial information as medical information. This makes intuitive sense. It is easy to think of situations where it would be important for an incapable person's family members to be aware of her medical needs, such as allergies, treatment routines, and medication. On the other hand, there are fewer reasons why the incapable person's family members (at least those who are not directly involved in managing her finances) need to know her personal and private financial information. However, where the release of private financial information is indeed in the incapable person's benefit, the release of that information may be authorized under section 32(1) of the SDA (duty to act for the incapable person's benefit). As always, such decisions should be made carefully. In circumstances where the incapable person routinely hid her financial information from her family members and other (for example, in situations where a secret trust was employed), the fiduciary should be particularly reluctant to release this information.

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[22] SDA, s. 66(4).

When there is contested litigation involving an incapable person, it is unclear what authority a non-fiduciary party may have to compel disclosure of medical records if the fiduciary elects to protect the privacy of the incapable person.[23] In contrast, it is more common to see orders for disclosure of financial information where some financial abuse is being alleged. Also, where there is significant animosity between the guardian and family members, the duty to consult may not be present.[24]

CONCLUSION

Undoubtedly, fiduciaries are faced with difficult decisions when they have to decide between sharing information with interested family members and loved ones on the one hand, and their obligations to protect the incapable person's privacy on the other. There is little judicial guidance on the appropriate balance. The SDA in particular provides a high degree of discretion to the fiduciary. It may simply be that the manner, method, and extent of disclosure is highly fact-specific. As a result, a fiduciary should follow the statutory provisions on decision making as far as possible, including having respect for the incapable person's known wishes and previous habits, and maintain the privacy and dignity of the incapable person unless the best interests of the incapable person clearly suggests otherwise.

Further Issues

The difficulties of balancing the interests of privacy versus the duties of fiduciaries is a complicated and underdeveloped topic in trusts and estate litigation. One subject that may one day reach the courts is how the tort of intrusion of privacy applies among litigating family members.[25] In power of attorney or guardianship disputes, a concerned family member may collect sensitive private information of the incapable person in order to support a claim that the fiduciary acted inappropriately. It is not clear whether the impugned fiduciary could offer as a full defence that her actions were undertaken with the best interests of the incapable person at heart. It is also unclear whether the guardian or attorney would be able to advance a claim for

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[23] Note that a party may be able to convince a court when there are reasonable grounds to suggest the granting of the power of attorney was done when the person was incapable under the *parens patriae* jurisdiction of the court: *Temoin v. Martin* 2011 BCSC 1727; 2012 BCCA 250

[24] *Palin v. Elbrecht*, 2000 CarswellOnt 344 (Ont. S.C.J.)

[25] See Bianca V. La Neve, "Jones v. Tsige" Estates Law News 2012-03

invasion of privacy on behalf of the incapable person. Litigating family members should surely be aware of this possible area of liability.

Judicial Trends

Also of note is a growing trend toward protecting private information that is filed with the court. A recent article in the *New York State Bar News* reported that lawyers in New York will be required to redact social security numbers, children's full names, and other personal identifiers from all documents which are filed in state Supreme Court and county courts.[26] Since documents filed with the court are public records and accessible by any interested party, there is good reason to restrict public access to certain information. New York attorneys were already subject to stricter redaction rules in the Court of Appeals and Surrogate Courts, the recent changes extended it further. If there is a trend, it appears to be towards more privacy, not less. How this trend will extend to the protection of personal information of incapable persons has yet to be seen.

[26] Lise Bang-Jensen, "Redaction mandated in two more courts" 57:1 New York State Bar Association State Bar News, January/February 2015