

Protecting Yourself While You Protect Others: How to Avoid Liability as a Power of Attorney for Property and Personal Care

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In capacity litigation, we do not often identify the attorney for property and/or personal care² as the party requiring protection. However, attorneys are increasingly at risk of damage awards and the courts have consistently disallowed attorneys from recovering out of pocket expenses and ordered them to pay costs personally. The role of attorney is challenging: not only must attorneys deal with complex family relationships (second marriages, intergenerational conflicts, sibling estrangement); they often fail to understand their fiduciary duties and obligations. In addition, the attorney must contend with an underlying tension between the fiduciary obligation owed by the attorney to the grantor and accountability to third parties. This tension is most clearly seen when attorneys must balance the privacy rights of the incapable individual with disclosure and reporting requirements to third parties. Finally, in the interests of granting more autonomy to grantors with declining capacity, there is a push towards co decision-making as opposed to the traditional substitute decision-making model.

Due to an aging population, more people will be acting as attorneys for property and/or personal care than ever before. It is estimated that by 2031, 1.4 million Canadians will be living with Alzheimer's or other types of dementia.³ It is inevitable with the increase in the number of substitute decision-makers will also

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² While this paper focuses on attorneys for property or care who are appointed by a grantor pursuant to a power of attorney document, the commentary about attorneys applies equally to other substitute decision-makers, including guardians (whether statutory or court appointed).

³ *A new way of looking at the impact of dementia in Canada*. Alzheimer Society of Canada, 2012

come an increase in capacity litigation, possibly changing the current state of the law.

The first and best steps attorneys can take to protect themselves from liability are to educate themselves on their fiduciary obligations and legal duties. In general, attorneys must embrace transparency, open communication, and detailed record keeping. If engaged in litigation, attorneys must be flexible and strive towards early resolution. The courts have shown little appetite for managing capacity and family disputes, an attitude which is clearly reflected in their cost awards.

PART I – STATUTORY FRAMEWORK

The *Substitute Decisions Act*⁴ (“SDA”) governs the appointment and duties of attorneys for property and personal care. Section 32 (1) of the SDA provides that a guardian for property (and, by extension,⁵ an 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.” Section 66(1) of the SDA has a similar requirement that a guardian of the person (and, by extension,⁶ an attorney for care) is obligated to perform their powers and duties “diligently and in good faith.”

Attorneys must act in the best interests of the incapable person. While “best interests” is often subjective, section 37 of the SDA provides specific guidance to

⁴ 1992, S.O. 1992, c. 30, as amended

⁵ Section 38(1) of the SDA reads: 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.

⁶ Section 67 of the SDA reads: 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.

attorneys for property on what constitutes proper expenditures. For all other decisions, the legislature recognized that it is usually friends and relatives administering a grantor's property. As a result, the expected standard of care is one of "ordinary prudence."⁷ In other words, the attorney is required to be as careful and risk-averse in caring for the grantor's property, as he would be in the care and management of his own affairs.⁸

Sections 66(3) and 66(4) of the SDA provide guidance to attorneys of personal care. Attorneys for personal care are directed to base their decisions as much as possible on the known wishes of the grantor before they became incapable. Where the grantor expressed two contradictory wishes while capable, the later wish takes precedence over an earlier wish. A wish does not have to be in writing for the attorney to follow it. If the grantor's wishes are not known or applicable, the attorney is to base her decision on the best interests of the incapable person. "Best interests" are determined by looking at the values and beliefs held by the grantor while capable, the grantor's current wishes, as best known, and what course of action will improve the grantor's quality of life.

Whether the attorney is managing the health care or property of the grantor, the SDA encourages the attorney to consult with and foster a good relationship with the grantor as much as possible.⁹

An important but often overlooked duty of the attorney for property is to maintain full records of all financial decisions.¹⁰ Records should include all bank account statements, copies of invoices, cheques, bills, receipts, and correspondence.

⁷ Section 32(7) of the SDA reads: 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.

⁸ See *Barltrop v. Bensette et al*, 2012 ONSC 2196 (CanLII)

⁹ See sections 32 (3) to 32(5) and 66(6) of the SDA.

¹⁰ See sections 32(6), 42(1), and regulation 100/96 of the SDA.

The value of maintaining records become immediately apparent as soon as the attorney is sued – having complete records of all financial transactions and decisions means the attorney is able to explain and defend her decisions quickly and efficiently. The duty to maintain records also applies to attorneys for personal care, with necessary modifications.¹¹

Despite the attorney’s best intentions, it is not always clear what the “right” action is. Section 39(1) of the SDA allows an attorney for property to seek the direction from the court with respect to the management of the grantor’s property. However, the attorney cannot rely on this section simply to obtain the court’s rubber stamp of approval on a decision – there must be a genuine issue requiring the court’s direction.¹² Section 68(1) of the SDA is a similar provision that allows guardians or attorneys for personal care to seek direction from the court.

Relief from a Breach of Duty

As set out above, the legislature recognized that most attorneys are friends and family members of the grantor – they are not professional managers. As attorneys are often balancing their own work and family commitments with their duties to assist the grantor, mistakes may occur. The SDA provides a certain degree of protection to attorneys for the decisions they make. On the one hand, section 33(1) of the SDA states that an attorney for property is liable for damages resulting from a breach of duty. However, section 33(2) of the SDA offers relief from liability (all or part of the liability) if the attorney acted honestly, reasonably, and diligently despite the breach. Similarly, section 66(19) of the SDA provides immunity to an attorney for personal care from damages for actions/omissions made in good faith.

¹¹ See section 66(4.1) of the SDA.

¹² See for example *Kaufman Estate v. Wilson*, [2015] O.J. No. 6025, 2015 ONSC 6962.

Health Care and Consent Act

The *Health Care and Consent Act*¹³ (“HCCA”) works in conjunction with the SDA and *Mental Health Act* to govern substitute decision-makers (which includes attorneys for personal care) making health care decisions for another person. In particular, sections 8 to 37.1 of the HCCA provide guidance to substitute decision-makers when making treatment decisions.

Sections 21 and 42 of the HCCA set out the principles a substitute decision-maker must follow when giving or refusing consent to medical treatments or admission into a care facility. The criteria is similar to that set out in the SDA: the substitute decision-maker must follow the incapable person’s prior known wishes, failing which the substitute decision-maker is to act in the best interests of the incapable person. A substitute decision-maker who violates sections 21(1) or 42(1) of the HCCA, acting against the known wishes of the incapable person, can face a fine of up to \$10,000.¹⁴

If consent to a treatment is refused on an incapable person's behalf by his substitute decision-maker, and if the health practitioner who proposed the treatment is of the opinion that the substitute decision-maker did not comply with the principles for giving or refusing consent set out in section 21 of the HCCA, the health practitioner may apply to the Consent and Capacity Board (the “Board”) for a determination as to whether the substitute decision-maker complied with section 21 of the HCCA. If the Board determines that the substitute decision-maker did not comply with section 21, the Board may substitute its opinion and give directions.

An attorney for personal care can apply to the Board for assistance if the attorney wishes to depart from a previous expressed wish made by the grantor or

¹³ S.O. 1996, c. 2 as amended, ss. 66(2.1), 66(3).

¹⁴ See Section 84 of the HCCA.

requires interpretation of that wish. Prior wishes are not absolute and are applied in the context of the relevant circumstances¹⁵.

Criminal Code of Canada

Where an attorney misuses a continuing power of attorney for property, she contravenes the Canadian *Criminal Code*.¹⁶ Section 331 of the *Criminal Code* reads:

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.

While not a common charge, criminal prosecution for the misuse of a power of attorney for property carries serious consequences. For theft under \$5,000, an attorney faces up to two years in prison. For theft over \$5,000, an attorney for property faces up to ten years in prison¹⁷.

Law Commission of Ontario

The *Law Commission of Ontario* (“LCO”) is currently reviewing Ontario’s legal capacity laws including the SDA and HCCA. On January 11, 2016, the LCO released an interim report, *Legal Capacity, Decision-making and Guardianship*¹⁸ that includes

¹⁵ *Conway v. Jacques*, 2002 CarswellOnt 1920 (Ont.C.A). at paragraph 31 “... Prior capable wishes are not to be applied mechanically or literally without regard to relevant changes in circumstances. Even wishes expressed in categorical or absolute terms must be interpreted in light of the circumstances prevailing at the time the wish was expressed.

¹⁶ R.S.C., 1985, c C-46, s. 331.

¹⁷ Please see *R v. Hooyer*, 2016 ONCA 44. The Court of Appeal upheld a two-year prison sentence and a restitution order.

¹⁸ <http://www.lco-cdo.org/capacity-guardianship-interim-report.pdf>

draft proposals for changes to capacity litigation. Suggestions include requiring that attorneys deliver notice when they begin to manage the grantor's property and sign a statement acknowledging their legal responsibilities. It also included a push towards "co decision-making/supported decision-making" instead of substitute decision-making.

The report acknowledges that there remains unresolved issues surrounding "supported decision-making," including who will bear the legal responsibility for group decisions and who has the ultimate authority to make decisions affecting the incapable person when a group is put in charge. There are also concerns that a supported decision making process may make incapable people vulnerable to third party abuse or subject to coercion. Practically, it is unclear how group decision-making would function under the current health care regime. It will be interesting to see how the final report attempts to resolve these concerns. The LCO is also reviewing Ontario laws with respect to end of life care and improving the last stages of life.

Medical Assistance in Dying-Bill C-14

Bill C-14¹⁹ does not provide for advance consent to a medically assisted death. The Bill restricts medically assisted death to mentally competent adults. It has no provision for a substitute decision-maker to provide consent to this procedure. Whether or not, advance directives should be included in the legislation continues to be debated.

¹⁹ House of Commons of Canada, First Session, 42nd Parliament, 64-65, Elizabeth, 2015-2016

PART II – POWERS OF ATTORNEY

Avoiding Litigation over Competing Powers Of Attorney

The seemingly straightforward and benign decision to revoke an existing power of attorney and appoint a new attorney is often the catalyst for litigation. While the decision may be viewed on one hand as a practical, business-like decision, it may also be viewed (whether rightly or wrongly) as the outcome of a larger power struggle and a symbol of who is most favoured. The grantor's capacity to revoke the prior power of attorney is often questioned, especially where the grantor is known to have fluctuating capacity and/or was assisted by someone in a conflict of interest when creating the new power of attorney document. In such circumstances, it is not immediately clear which power of attorney document is valid.

The best way to avoid competing powers of attorney litigation is to address potential problems from the outset (if made aware of the grantor's request to act as the new attorney). Steps to take include:

- The proposed attorney should not be present when the new power of attorney is signed.
- The grantor should obtain independent legal advice (unless the grantor already has an existing relationship with the lawyer, the lawyer should not have a relationship with the proposed attorney for property).
- Where it is possible that the grantor's capacity to appoint a new attorney will be questioned (especially if it is known that the grantor has fluctuating capacity), the grantor should be assessed at the time the new power of attorney document is signed.
- Language barriers are also considered when power of attorney documents are challenged, so make sure the grantor is able to

communicate effectively with the lawyer or a neutral, independent party acts as interpreter.²⁰

Once the new power of attorney has been signed, the prior attorney should be notified immediately that their role has come to an end or the grantor has revoked the previous power of attorney. The grantor's other family members should also be advised of the new appointment.

The failure to advise family members of the change in appointment had unexpected consequences in *Wercholoz v. Tonello*.²¹ In that case involving competing powers of attorney, the court criticized the grantor's daughter for not informing her brother that their mother had executed a new power of attorney appointing her as attorney for property and personal care. The court did not give weight to the daughter's argument that she did not need to notify her brother since he was largely absent from their mother's life for the four prior years. The attorney's lack of communication with her brother was cited as one of the reasons the court did not order full indemnity costs from the applicant.

Review the Document

The recent decision in *Carter v Canada (Attorney General)*²² has increased awareness about personal care decisions and opened up a dialogue about end of life care. Financial elder abuse concerns has also increased in recent years. With this awareness comes the likelihood that more people will tailor their power of attorney

²⁰ See for example *Grewal et al. v. Brar et al.*, 2012 MQBQ 214 (CanLII), *Covello v. Sturino*, [2007] O.J. No. 2306, 158 A.C.W.S. (3d) 314, *Barbulov. Cirone*, [2009] O.J. 1439,176 A.C.W.S. (3d) 1156 and *Nguyen-Crawford v. Nguyen*, 2010 ONSC 6836 (CanLII), in which a power of attorney was found to be invalid due, in part, to language concerns.

²¹ 2013 CarswellOnt 2462, 2013 ONSC 1106

²² [2015] 1 SCR 331, 2015 SCC 5

documents to set out their wishes in these respects, with the effect that even boilerplate documents will become more nuanced.

A detailed power of attorney document is a double-edged sword. On the one hand, it may provide greater certainty to the attorney and even help shield him from liability (it is harder to criticize an attorney for acting on the grantor's express wishes). On the other hand, detailed documents may nevertheless be ambiguous, be more confusing than helpful, and fuel suspicion that the wishes are a result of the attorney's influence. They may also impose unreasonable expectations on the attorney. Often, in high-conflict families, a detailed document that attempts to address anticipated family grievances might only serve to fan the flames of mistrust. Additionally, some advocates do not see the value of a detailed power of attorney for personal care as wishes are not absolute or the Board impose its own decisions.²³

Whether the power of attorney documents is detailed or boilerplate, it is crucial that the attorney take the time to review the document carefully. Attorneys have to familiarize themselves with any restrictions or specific wishes set out in the document. It may also be necessary to review the document with a lawyer; for example, a layperson may not grasp the difference being appointed jointly (in which case, you must act together and unanimously) or jointly and severally (in which case, the attorneys may act alone or together). If document is silent, the power is held jointly. Is there a majority rule clause? What restrictions are contained in the document?

The easiest and best way for an attorney to ascertain the wishes of the grantor is to have an open discussion well before the grantor becomes incapable and the attorney begins acting on the power of attorney. A discussion between grantor and attorney could be beneficial to both parties; it will force the grantor to

²³ In the well-known case from British Columbia, *Bentley (Litigation Guardian of) v. Maplewood Seniors Care Society*²³, the grantor had explicitly told her family her wishes for her medical treatment but those wishes could not be carried out.

reflect on issues not previously considered, and increase the attorney's knowledge of the grantor's wishes and values.

Lack of knowledge by both the attorney and the grantor about the attorney's obligations is often cited as the reason for a breach of fiduciary duty. Having a discussion with the grantor before starting to act on a power of attorney will at least help ensure the attorney does not act contrary to the grantor's wishes. It may also highlight for the proposed attorney that she is not comfortable taking on the role, giving the grantor time to appoint another person. This type of discussion is rare. A 2014 poll commissioned by the Canadian Medical Association, found that while 95 per cent of Canadians think that talking about death with loved ones is important, only 30 per cent have done so and only 16 per cent had taken action (i.e. prepares an advance directive) as a result of the discussion."²⁴

If the attorney did not have the opportunity to discuss the grantor's wishes with her before she became incapable, the attorney must rely on other evidence he has of the grantor's wishes. For example, did the grantor attend religious services? If so, did the grantor express disagreement with the tenants of that faith? Did the grantor make donations to certain moral or political causes? The attorney should also consult with the grantor's other family members – the attorney should become aware of any consistent views expressed to family members.

Attorney Compensation

The SDA explicitly allows attorneys for property to pay themselves compensation unless the document appointing them provides otherwise.²⁵ In *Nystrom v. Nystrom*,²⁶ the court declined to award compensation because the power

²⁴ *End-of-Life Care: A National Dialogue*, June 2014, Canadian Medical Association, p. 7.

²⁵ Section 40 of the SDA.

²⁶ [2007] O.J. No. 668, 155 A.C.W.S.

of attorney for property prevented the payment of compensation. The attorney should be warned: by taking compensation, she may be held to a higher standard of care than an unpaid attorney.²⁷ However, the higher standard does not automatically apply because compensation is claimed. ²⁸

The SDA does not address compensation for attorneys for personal care. While the courts have nevertheless awarded attorneys for care compensation in some circumstances, the process of determining the amount of compensation is expensive, time consuming, and uncertain.

PART III – ATTORNEY’S DUTIES

Report to the Incapable Person

The SDA confirms the attorney’s duty to explain to the grantor the attorneys’ powers and obligations.²⁹ In addition, the attorney must be prepared to account to the grantor at any time for the decisions he has made in managing the grantor’s finances/care. If the attorney refuses to provide an informal accounting of his actions, recourse may be had to the courts pursuant to s. 42 of the SDA. On such an application, the court may order the attorney to bring a formal application to pass his accounts. As set out earlier, this is where detailed record keeping comes in handy.

²⁷ Compare ss. 32 (7) and (8):

(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. [emphasis added]

(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. [emphasis added]

²⁸ See for example *Garonsky (Committee of) v. Brown*, [2002] O.J. No. 880 (S.C.) and *Villa v. Villa*, 2013, ONSC, 2202 (CanLII)

²⁹ Ss. 32(2) a) of the SDA

Is There a Duty to Intervene to Prevent Financial Exploitation?

If the grantor is capable, the attorney must account directly to the grantor. This implies that an attorney is not liable for financial decisions made by the grantor unless the grantor loses capacity. However, the court has suggested that attorneys have an obligation to insure the grantor's testamentary intentions are fulfilled and may have a duty to monitor financial decisions of a capable grantor³⁰.

In a case from British Columbia, *McMullen v. McMullen*³¹ the grantor's children, fearing financial exploitation, began acting on the power of attorney without their father's knowledge. The attorneys believed their father's actions were depleting his assets. In an effort to protect him, they consulted with a lawyer who helped them convey title to their father's condominium to their husbands – their husbands were registered on title as 99% owners as tenants in common, with their father retaining 1% ownership interest. Upon finding out about the conveyance, the father commenced legal proceedings to set aside the transfer on the basis of breach of trust. The court found that the well-intentioned attorneys had breached their fiduciary duties by not accounting to their father and title to the condominium was ordered to be re-conveyed to the grantor.

Faced with potential financial exploitation of a grantor who is capable, an attorney may not have much recourse to address the issue but may wish to protect themselves by documenting their attempts to monitor the grantor's capacity, discussions about financial matters with the grantor, and seeking instructions from the grantor to discuss the matter with other family members.³²

³⁰ *Fareed v. Wood*, [2005] O.J. 2610 (S.C.J.), also [2005] O.J. No. 4106, 14 A.C.W.S (3d) 743

³¹ [2006] B.C.J. No. 2900

³² See Melanie Yach's *Troublesome Issues Relating to Powers of Attorney for Property*, November 12, 2007 for further insight into problematic situations involving attorneys.

If the grantor has become incapable, she will not be able to start court proceedings on her own. In that case, the SDA lists the other people entitled to apply for an order requiring the attorney to pass her accounts:

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

Most often, the incapable person's close family members will be given leave if they have an interest in the incapable person's estate or are able to demonstrate that there is good reason to believe the attorney is acting improperly. Obtaining leave is not difficult if the attorney has been involved with the grantor's assets and the applicant raises a significant concern about the grantor's property.³³

The Duty To Foster Personal Contact between the Incapable and Supportive Family Members

Section 32 (4) of the SDA reads: "The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person." A similar obligation is imposed on guardians of care at section 66(6). Although there is ambiguity in this provision (namely, what it means to "foster" a relationship and what it means to be a "supportive" family

³³ *McAllister v. Hudgin* (2008), 42 E.T.R. (3d) 313

member), the courts have attempted to give meaning to this provision based on the specific facts of each case.

In *Zhang v. Wu*³⁴, the applicant's wife had suffered devastating injuries in a car accident and required around the clock care, which was provided to her by her parents (her mother was also her guardian of care and property). The husband brought an application against his mother-in-law, seeking to replace her as guardian. In particular, he sought to establish regular visitations with his wife, as he had been prevented from seeing her for the last two years.

In justifying her decision to prevent the husband from seeing his wife, the guardian filed an affidavit outlining the applicant's bad character, including criminal activity. The guardian further claimed that, prior to the accident, her daughter was estranged from the applicant and was seeking a divorce.

The court held that it was unacceptable that the husband had been prevented from seeing his wife for over two years. Although the court held that both sides had filed self-serving and unreliable affidavits, the court rejected the guardian's hearsay evidence about the supposed estrangement. The court also rejected the guardian's expert report finding that the wife did not currently wish to see her husband as flawed due to outside influence.

Nevertheless, the court declined to remove the mother as guardian. However, it did order that the husband be allowed to visit his wife and set out the conditions for how the visits were to be conducted (namely, away from third party influence). Tellingly, each party was ordered to bear its own costs; no costs were payable from the incapable person's property.

³⁴ 1999 CarswellOnt 4218, 33 E.T.R. (2d) 320, 93 A.C.W.S. (3d) 747

The Duty to Consult with Supportive Family Members

Attorneys are obligated to consult with the incapable person's supportive family members when making decisions. Section 32(5) reads:

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.

Section 66 (7) imposes a similar duty on guardians of care. The reason why a guardian of property should consult with the care provider is obvious – the care provider's decisions will impact the incapable person's finances (the two must work together to ensure the incapable person is receiving the best care they require at a level they can afford). It is less clear when and to what extent a guardian must consult with the incapable person's family members about other decisions. Nevertheless, a guardian may be criticised for a lack of transparency in her actions, even to third parties.

The duty to consult means the sharing of information, both financial and medical, with the grantor's family. It is a fine balance between protecting the privacy interests of the grantor and sharing information in order to facilitate discussions about what to do with the grantor's property or how to proceed with medical treatment. Where there is evidence that the family members are not particularly supportive, the attorney may not be required to consult at all.³⁵

The level of reporting required by an attorney is a grey area. In *Sitko v. Gauthier Estate*³⁶ the court held it was a breach of the attorney's duties to have not

³⁵ *Robb Estate v. Robb*, [2010] O.J. No. 2288, 2010 ONSC 3089

³⁶ 2014 ONSC 5671 (CanLII)

informed his sister (the attorney for care) that he transferred money from his incapable father's account into his own account. While this decision seems to suggest a high level of financial reporting to family members, it is more likely that the decision reflects the court's reluctance to allow an attorney to hide his malfeasance from other family members under the guise of protecting the incapable person's privacy.

Acting unilaterally without consultation from family members invites criticism from the court. In *Scalia v Scalia*,³⁷ the attorney removed assets from a joint account the grantor held with his second wife (the attorney's stepmother). While the attorney has a duty to preserve the grantor's property, this action led to family disharmony. Interim support was ordered for the wife and a personal cost award against the attorney. In a similar case from British Columbia, *Sommerville v Sommerville*³⁸ the court described the attorney's actions as premature. The attorney removed funds from a joint account the grantor held with his second wife (her stepmother) and redirected his pension income to a bank account the stepmother had no access to. The court noted that the grantor trusted his wife to manage the joint account and allowed her access to his pension income while capable. There was no anticipated shortfall in paying his care costs and no reason to deprive his wife of his pension income or other assets.

Seeking Directions from the Court

Given the difficulties inherent in the role of attorney, the SDA allows attorneys to seek direction from the court.³⁹ However, an attorney should not apply to the court for directions as a means of avoiding having to make controversial or difficult decisions. The court has warned attorneys that it will not micromanage an

³⁷ 2015 ONCA 492 (CanLII)

³⁸ [2014] B.C.J. No. 2445

³⁹ See sections 39(1) and 68(1) of the SDA.

attorney's actions – the court will help determine a legal question, resolve ambiguity, or break an impasse between co-attorneys,⁴⁰ but it will not alleviate an attorney from having to exercise her discretion.⁴¹

In *Kaufman Estate v. Wilson*,⁴² the attorneys for property and personal care brought an application for the opinion, advice, and direction of the court as to whether they should make payments to the grantor's son and for a determination on whether he was the grantor's dependant. While capable, the grantor and her son had a difficult relationship. The grantor had advised her attorneys that she did not want to offer any financial support to her son. However, the son was the main beneficiary of his mother's estate and the attorneys, who were also named executors of the grantor's estate, anticipated criticism by the son as soon as the grantor passed away.

The court declined to provide any guidance on the issue of whether the attorneys should make payments to the son. It held that it is up to the attorneys to decide whether to give gifts or loans. The court reminded the attorneys that under section 32(1) of the SDA, attorneys are protected from liability if they act honestly and with due care. It was not appropriate for attorneys to seek protection from the court for their discretionary decisions.

Justice Brown (as he was then) articulated the attorney's duty clearly in *Chu v. Chang*.⁴³ It is a breach of an attorney's fiduciary duty to advance a position before the court in proceedings brought under the SDA that are not solely motivated by concern for the incapable person and in her best interests. As such, seeking

⁴⁰ See for example *Neill v. Pellolio* 2001 Carswell 4158 (Ont CA) and *Walter Burnat v. Mary Bosworth et al*, 2016, ONSC 2607 (S.C.J.)

⁴¹ See for example *Sly v. Curran*, 2008 CarswellOnt 4301 (ON SCJ)

⁴² *Kaufman v. Wilson*, note 12

⁴³ 2010, ONSC 1816 (S.C.J.)

direction about making payments or asking for the court's blessing for a proposed controversial act is not proper, as it only protects the attorneys.

Consent and Capacity Board

In addition to applying to the court for directions, an attorney for personal care may apply to Board for assistance where the attorney desires to depart from the known wishes of the incapable person. The attorney may also apply to the Board if he needs assistance interpreting the incapable person's wishes.⁴⁴ The Board will not assist joint attorneys who cannot agree to a course of action but rather obtain consent from the Public Guardian and Trustee or another substitute decision-maker.

PART IV – BREACHES OF FIDUCIARY DUTIES

Property Management Must be in Grantor's Best Interest

Based on the number of cases in which this issue arises, it is very common for an attorney to try to "protect" the grantor's property by transferring all of the grantor's assets to themselves. The attorney may act in this way in reaction to the grantor's perceived "irresponsible" financial decisions, or as a way of thwarting other family members from pressuring the grantor from "gifting" assets to them. Despite the attorney's best placed intentions, the court has consistently found that it is not in the best interests of the grantor to have all of her assets transferred to the attorney.

In *Sworik (Guardian of) v. Ware*,⁴⁵ the attorney for property liquidated all of her mother's assets into a numbered company. Unfortunately, the result of the transfer was that her mother's assets declined in value. The attorney's motivation for making the transfer was to protect the mother's assets from her siblings. The

⁴⁴ HCCA, ss. 35 to 36

⁴⁵ 2005 CarswellOnt 3549, [2005] O.J. No. 3404, 141 A.C.W.S. (3d) 871

court found that the attorney had breached her fiduciary duties by depleting her mother's assets through mismanagement of her property and gifts to herself. In addition, the court held that it was not imperative that the attorney transfer assets away from her siblings' control.

In *Covello v. Sturino*,⁴⁶ concerned that his mother was depleting her assets by making large cash gifts to his siblings, a son took steps to take over the management of his mother's finances. First, he took his mother to his own lawyer to have her create a power of attorney appointing him as her attorney for property. He then transferred her real properties to him, essentially depleting her estate. He also discouraged his sisters from having any contact with their mother.

In reaching its decision to set aside the power of attorney that appointed her son and replace him with the grantor's daughters as guardians, the court took into account that the grantor did not speak or write English. She received no independent legal advice, nor was she sent for a medical assessment prior to giving away her property. Before the son began acting under the power of attorney in a self-serving manner, it appeared that grantor treated all her children equally. In particular, all her children were equal beneficiaries under her will. The court held that it was illogical for the son, out of concern for how his mother was managing her property, to respond by gifting himself his mother's most significant assets. Given his self-dealing actions and violations of his mother's prior wishes, the son was not an appropriate guardian.

⁴⁶ *Covello v. Sturino*, *supra*, note 19

PART V – ORDER FOR DAMAGES

Where an attorney breaches his duty of care, the court will order damages against him. The amount of damages is most often calculated based on the value of the benefit received by the attorney or the amount of the loss to the grantor.

Past Actions Not Enough to Protect from Liability

*Testa v. Testa*⁴⁷ involves a dispute between four brothers. The attorney moved in to help his mother, the grantor, as her capacity declined. His mother eventually had to move into a long-term care facility. The monthly costs of the long-term care facility exceeded her monthly income. All four brothers agreed to mortgage the grantor's house, invest those funds in private mortgages, and keep the income from those mortgages in a trust for the grantor. This allowed the attorney and one of his siblings to remain in the house essentially rent-free while generating income for the grantor's care and the expenses of maintaining the house.

The attorney justified his actions by arguing that he was only managing his mother's property in the way she would have done. However, the court was not persuaded; it held that it did not matter that the grantor would never have charged her children rent while they lived in her house. As soon as she became incapable, the attorney had a duty to maximize his mother's assets, either by charging rent or selling the house. The court also held that it did not matter that no one objected to the two brothers living in the house rent-free until after her death. The court stated that it is not up to third parties to ensure the attorney is acting according to his fiduciary obligations.

The court decided that the decision to mortgage the house and create a trust was not in the mother's best financial interests, such that the attorney breached his fiduciary duties. As a result, the attorney was ordered to pay damages to his mother's estate. The sum of damages was calculated by estimating the amount the

⁴⁷ [2015] O.J. No. 1797, 2015 ONSC 2381, 10 E.T.R. (4th) 192

attorney benefited from his mother while managing her property (for example, the attorney (along with another brother) were ordered to pay back to the grantor's estate all of the grantor's money that went towards the upkeep of the house during this period). The attorney was also responsible for paying the principle on the mortgage he placed on her home. Interest was calculated from the date of the estate's distribution. Additionally, the court refused to award the attorney any compensation due to his breach of his fiduciary duties by creating an inter vivos trust that worsen the grantor's financial situation.

Inter Vivos Gifts to an Attorney

If an attorney accepts gifts from a grantor, the onus is on the attorney to prove the grantor had the capacity to make those gifts. Failure to meet the burden of proof means the attorney will be ordered to repay those sums to the grantor or the grantor's estate.

In a case from Saskatchewan, *Kessler v. Kessler*,⁴⁸ an attorney depleted her father's assets through expensive gifts to herself. She argued that her father directed her to make those gifts to herself and her family. However, as she was unable to prove her father's capacity at the time, she was unable to rebut the presumption of resulting trust⁴⁹ and was ordered to pay the money back to her father's estate.

The court held that although the attorney had been advised of her duties by the grantor's solicitor at the time of her appointment, the attorney likely felt free to gift herself large sums of her father's money by the fact that her brother resided in another province and had not seen the grantor for over six years before his death (once again highlighting the importance of the duty to consult with family members).

⁴⁸ [2015] S.J. No. 628

⁴⁹ *Pecore v Pecore*, [2007] 1 SCR 795, 2007 SCC 17

As no records were kept of the sum of gifts, the court calculated damages by adding the grantor's assets on the date the attorney took over the management of the grantor's property and the estimated grantor's income for the period. The court then subtracted known and allowable expenses, including caregiver fees and reimbursements for expenses she could prove that she paid on the grantor's behalf. Despite having ordered damages, it was uncertain that the estate would recover those funds; the attorney's brother anticipated that the attorney would bring a claim for bankruptcy.

Return of Pre-Taken Compensation

An attorney for personal care who unilaterally acts contrary to an agreement with co-attorneys may be found to have breached their duty as attorney for personal care. In *Barberi v. Triassi*⁵⁰, an attorney for personal care was required to act jointly with her two brothers to make personal care decisions. Without consultation, she removed her mother from a long-term care home and moved her into her own home. After her mother's death she sought a claim for compensation for the period she cared for her mother at her own house as a set-off to funds she had taken from her mother's property. The court found that she breached her fiduciary duties to the grantor by acting without consultation. There was no agreement to provide her with compensation. The court declined to order compensation and the attorney had to return funds to the estate.

PART VI – COSTS

Cost awards principles in capacity disputes continue to evolve. The traditional approach, where costs are paid from the incapable person's property, gave way to the modern approach. Court now follows the "loser pays" principle and

⁵⁰ 2010, ONSC 3734, (CanLII), supplementary cost decision at 2010 ONSC 4910

guidelines set out in rule 57 of the *Rules of Civil Procedure*. However, a new, blended approach to costs is beginning to emerge.

For public policy reasons, an attorney who acts reasonably should not bear the costs of resolving issues they did not create. It stands to reason that if the testator (or grantor) was responsible for creating the problems giving rise to litigation, his or her estate should bear those costs.⁵¹ However, where the attorney or trustee could have taken some action to avoid the litigation, the court may award costs against her personally.

Conduct During Litigation may Result in Personal Cost Awards

The court will consider the conduct of the parties when determining the cost awards. In *Scalia v Scalia*⁵², the court of appeal upheld a cost award payable personally by the attorney. The court of appeal noted that while the attorney's actions did not meet the threshold for bad faith conduct, he was unnecessarily adversarial, refused reasonable settlement offers, and his conduct prolonged the litigation. The cost award was upheld even though that on appeal, the attorney was successful in recovering assets for the grantor's estate.

In *Wercholz v. Tonello*,⁵³ the applicant brought a suit against his sister and nephew over their mother's decision to replace him as attorney for property and personal care. The mother was found capable of appointing an attorney for personal care, but not of making any other decisions. The parties reached a private settlement, so the matter was largely unheard in the court. The matter of costs remained unresolved. The applicant requested full indemnity costs for both parties be payable from the grantor's property. The respondents requested their full

⁵¹ See *Sawdon Estate v. Sawdon*, 2014 ONCA 101 for a review of the evolving approach to cost awards.

⁵² *Supra*, note 51

⁵³ *Supra*, note 52, see also *Zikos v. Miksche*. [2007] O.J. No. 4276

indemnity costs from the applicant but that the grantor's assets cover any shortfall. The combined costs of both sides would amount to 1/3 of the grantor's assets.

In ordering costs against the applicant, the court took into account the fact that the applicant failed to contact his siblings prior to bringing litigation and that he further refused to attend a family meeting shortly after commencing his application. In contrast, the court found that the respondents had acted reasonably throughout the litigation, working towards an early settlement of the matter. As soon as the application was started, they offered to attend mediation, made multiple settlement offers, and showed flexibility in the litigation. However, the respondents were not entirely blameless: the court found that the respondents did not consult with the applicant when the grantor obtained a new power of attorney, which led directly to the litigation.

The court adopted the blended approach to awarding costs. It apportioned legal fees that were reasonably spent for the grantor's benefit. In the result, the court ordered that the applicant receive \$8,300.00 from the grantor's property (he sought \$85,729.98) and the respondents receive \$8,000.00 from the grantor's property (they sought \$80,447.75). Additionally, the applicant was ordered to personally pay the respondents \$40,000.00 in costs.

If unsuccessful in litigation, an attorney for property and personal care will not necessarily be ordered to pay the costs of the opposing side but may not look to the grantor's assets for indemnity. In *Lisowick v. Alvestad*,⁵⁴ an attorney's application for guardianship brought against her sister, a co-attorney, was settled outside of court, largely in favour of the respondent. While describing the guardianship application as misguided, the court declined to order the applicant pay costs personally to the respondent. The court noted that the applicant brought the application in her capacity as attorney for property and personal care and for the

⁵⁴ [2015] O.J. No. 3408

well being of her father. The court ordered the respondent receive \$50,000 from the grantor's estate (she was seeking \$93,683.31 from the applicant). The applicant received nothing from the grantor's assets.

Litigation Not in the Incapable Person's Best Interests

In *Fiacco v. Lombardi*,⁵⁵ Justice Brown (as he then was) noted that cost claims in capacity litigation should reflect the basic purpose of the SDA to protect the property of the incapable and to insure that such property is managed wisely. If costs are requested to be payable from the grantor's assets, the court has to examine whether the incapable person derived a benefit from the legal work the grantor is being asked to fund.

In *Zhang v. Wu*, described above, the parties were each ordered to bear their own costs. The incapable had limited funds and the litigation was the result of animosity between son-in-law and mother-in-law, not anything the incapable person had done. In addition, the evidence tendered in the litigation on both sides was described as self-serving. In the circumstances, the court declined to award any costs out of the incapable person's assets.

In *Korczak v. Soltyka et al*⁵⁶ the court described the proceedings, siblings with competing powers of attorneys, as unnecessary. The court ordered each party to bear their own costs. Additionally, each party was ordered to equally pay their father's costs for section 3 counsel.

Attorneys who delay in providing accounts or keep poor accounts may be ordered to personally pay the other side's costs⁵⁷ or, at the very least, the attorney

⁵⁵ 2009 CarswellOnt 5188 (Ont S.C.J.)

⁵⁶ 2015 ONSC 5868 (CanLII)

⁵⁷ See *Wilson v. Wilson*, [2000] O.J. No. 2068

will not be fully indemnified out of the incapable person's assets for the costs of bringing the application pass accounts.⁵⁸

The court will refuse to indemnify an attorney for payments, which do not benefit the incapable person. For example, in *Sworik*, the court refused to allow the attorney to reimburse herself for payments for professional advice. The court held that the professionals were retained not in consideration of the best interests of the grantor, but rather to protect the attorney. In addition, the attorney was ordered to repay legal fees for personal advice she received.⁵⁹

Payable by the Objector

In an application to pass accounts, if the court determines that the attorney has acted in good faith, the court can order that costs be payable by the person who sought the accounting from the attorney. However, it is usually necessary to show some misconduct or improper motive of the party who sought the accounting. As Justice Langdon wrote in *Fair v. Campbell*, "Given the plaintiffs' mindsets, I doubt that anyone could [have] either satisfied or placated them. I see no reason why Margaret's estate should be required to pay costs. I see every reason why [the] plaintiffs should pay to the estate substantial indemnity costs."⁶⁰

In *Re: Bedont Estate*,⁶¹ the estate trustees passed their accounts and provided answers to all reasonable enquiries made by the objector. The court held that while a beneficiary is entitled to review accounts and to file objections, doing so opens herself up to the risk of a costs award. If the beneficiary makes unreasonable

⁵⁸ *York Estate, Re* [1998] CarswellOnt 2184, [1998] O.J. No. 3200, 81 A.C.W.S.

⁵⁹ *Supra*, note 44 at paras. 76-80

⁶⁰ *Fair v. Campbell Estate*, (2002), 3 E.T.R. (3d) 67 (Ont. S. C. J).

⁶¹ 2004 CarswellOnt 2107, also at [2004] O.J. No. 4267, 2004 CarswellOnt 1930, O.J. No. 2015

objections and provides no basis for her objections, costs will be awarded against her.

In *Greaves v. Nigro*,⁶² the attorney brought a formal application to pass his accounts on the insistence of the applicants, his sisters. The attorney was able to answer all of their objections in full. The court found no wrongdoing on the part of the attorney. Nevertheless, the sisters sought costs against the applicant for not providing them with information when they first asked for it, leading them to bring a court application to require him to pass his accounts. The attorney also sought his costs, alleging that he had answered the sisters' questions as best he was able to well before the litigation began. In his defence, the attorney relied on the grantor's instructions not to share financial information with his sisters. While the grantor was alive, the attorney directed his sisters to ask their father (the grantor) directly about questions they had regarding his assets.

The court held that the grantor was partially to blame for the application given his directions to the attorney not to share information about his assets. The grantor also had a history of changing attorneys, which led to mistrust within the family. The sisters' had an expectation that they would be equal beneficiaries of their father's estate and naturally had an interest in how the grantor's property was being managed. They also had a genuine concern about the welfare of their father, as they were initially sought participation in their father's care. As a result, the court held that it was reasonable for them to have brought the application.

In the circumstances, the court made a blended costs award: it awarded the applicants their costs from the grantor's estate on a substantial indemnity basis for the period starting from when their application was drafted to the date a formal passing of accounts was ordered. The attorney was also entitled to his substantial indemnity costs from the estate for the same period. However, for the period after

⁶² [2016] O.J. No. 119, 2016 ONSC 44

the attorney brought his passing of accounts application, the court found the sisters delayed the proceedings by making repeated requests for information. Once the application to pass accounts was started, the attorney was the more successful party. He was therefore entitled to a cost award.

Nevertheless, the court only awarded partial costs payable by the sisters. The court faulted the attorney for not immediately providing his sisters with a copy of the power of attorney. The judge also suggested that the attorney should have done more to reason with his father to provide his sisters with financial information. As such, the attorney was awarded partial indemnity costs payable by the applicants for the period the accounting was produced until the end of litigation. The portion not recoverable from the applicants was payable from the grantor's estate.

Modest Costs Payable from the Estate

Courts are vigilant about the possibility of depleting a grantor's assets. As a result, even when costs are awarded from a grantor's property, the attorney may find herself out of pocket for her expenses and personally responsible for paying legal fees.

Proportionality is a key factor. In *Sitko v. Gautheir Estate*, the court ordered \$5,000 in costs to the largely successful objector (the objector sought \$88,000). While the attorney mismanaged funds and breached his duties, the issues at stake amounted to \$25,000 in mismanaged funds and did not warrant a five-day trial.⁶³

When an estate is modest, cost awards run towards the modest side. In *H (L) Re*⁶⁴, the legal invoices of the attorneys were heavily scrutinized. The court held that

⁶³ *Supra*, note 35

⁶⁴ 2000CarswellOnt 3672, [2000] O.J. No. 3816, 100 A.C.W.S (3d) 379, 36 E.T. R. (2d) 89

solicitor could not charge her usual billing rate for non-legal work. The legal fees were further reduced in part because the incapable had a modest estate.

In *Nystrom Estate v. Nystrom*, described above, an attorney's accounts were passed, but the court declined to award any compensation. The attorney, who was almost completely successful on the application, was awarded \$2,000 plus disbursements for costs. His sister, the objector, was awarded costs of \$1,000 from their mother's estate. In the result, the parties were out of pocket for their other costs and the remainder of their legal fees

PART VII – CONCLUSION

If an attorney breaches her fiduciary duties, but acted with honesty, reasonably, and with diligence, the court may relieve her from liability. The standard expected is not one of perfection. However, the court will award damages and cost sanctions where the attorney has failed to conduct herself to that standard.

To avoid personal liability, an attorney has to be as transparent as possible and communicate frequently with the grantor's support network. An attorney is well advised to keep excellent records. If inundated with accounting request, the attorney should consider retaining a professional to keep accounts in proper format with costs initially coming from the grantor's property.

To protect against a personal cost award, the attorney should seek early resolution and make reasonable offers to settle. Prior to litigation, if necessary, the attorney should reach out to an impartial mediator to assist with family disputes or document attempts to resolve issues before going to court. Becoming entrenched in one position or using the court to obtain leverage against a third party will result in significant cost awards. It is never in the best interests of the grantor or incapable person to have their assets depleted through litigation.