TROUBLESOME ISSUES RELATING TO POWERS OF ATTORNEY FOR PROPERTY[1]

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The *Substitute Decisions Act, 1992* (the "*SDA*")[2], proclaimed into force on April 3, 1995, represented a vast improvement over the previous patchwork of statutory and common law governing the management of the property of incapable adults. While the *SDA* provided much needed clarity in many areas, a number of issues were not fully addressed, either in the legislation or in the case law (such as it is) which has considered the legislation since.

This paper considers three issues which grantors, attorneys for property and the solicitors who advise them frequently grapple with.

- What can and should an attorney for property do in circumstances where the grantor is still capable, but making financial decisions which are arguably not in their best interests? What duties are owed by the attorney for property in such circumstances?
- How and when beneficiaries of a grantor's estate can secure meaningful accountings from an attorney for property prior to the grantor's death?
- To what extent can an attorney for property undertake estate planning on behalf of an incapable grantor?

1. What Can or Should an Attorney for Property Do in Circumstances Where the Grantor is Capable of managing their Property but making Foolish Decisions?

Consider the following scenario.

Your client was appointed as the power of attorney together with her sister of her father's affairs. The client's father is in his late 80's and is likely capable of making his own property decisions. The father's wife (your client's mother) passed away a few years ago and he has been depressed and withdrawn. Your client has been assisting him with his banking and investment

[1] **DISCLAIMER**: The comments and opinions expressed in this paper are those of the author and are provided for informational purposes only. They do not constitute nor should they be relied upon as legal advice.

[2] S.O. 1992, c. 32 as amended.

affairs and has had regular access to his banking information via on-line banking. The client's father recently met and befriended a much younger woman who appears to be taking financial advantage of him. Your client has noticed that significant withdrawals have been made from the father's bank account. Your client's father admits that the monies have been gifted to his young friend, with whom he appears besotted. Your client and her sister are worried that their father's only significant asset, being his condominium, may be at risk. The bank has advised your client that her father has made inquiries about mortgaging the property. Your client and her sister have done almost everything within their power to protect their father. They have shared their concerns with him, which he dismissed out of hand. They have sought the assistance of their father's doctor, the Public Guardian and Trustee's Office, an elder abuse hotline, a caregiver's support group, the R.C.M.P. and their father's bank. No one has been in a position to assist them.

What advice should you give the client in these circumstances given that the client's father is, by all accounts, capable of managing his financial affairs? If the client does nothing, can she and her sisters later be criticized for failing to protect the father from his own foolishness?

Interestingly, the foregoing fact scenario was considered recently by Justice Fisher of the British Columbia Supreme Court in the case of *McMullen v. McMullen* [3]. The attorneys had, in fact, consulted with a lawyer in that case who had recommended that the sisters convey title to the father's condominium to their husbands (together as to a 99% interest) together with the father (as to a 1% interest) as tenants in common. They did not initially register the conveyance on title and did not tell their father what they had done, notwithstanding that the power of attorney document required them to account to their father for their dealings with his assets.

The father, Mr. McMullen, became enraged upon learning of the conveyance and commenced legal proceedings against his daughters seeking to set aside the conveyance of his condominium on the basis that they had acted in breach of trust. Justice Fisher granted Mr. McMullen's application and set aside the conveyance holding that the attorneys had breached

[3] [2006] B.C.J. No. 2900. See Article entitled "Protecting Elders from Financial Exploitation: The Limits of the Law" first published in the OBAO Deadbeat Newsletter in Spring 2007 attached as Schedule A.

their fiduciary duties contained in the power of attorney document, specifically the direction to account to their father for their dealings with his property. However legitimate the concerns or noble the daughters' motives, Justice Fisher held that they breached the fiduciary duties they owed to their father.

What then is a well-intentioned attorney for property to do in circumstances where the grantor (often a close family member or friend) while capable of managing their property is being financially exploited?

(a) The Statutory Framework in Ontario

The relevant provisions of the *SDA* are as follows and are all clearly designed first and foremost to protect a grantor from an unscrupulous attorney for property.

- Section 38(2) which states that duties relating to guardians of property (including the duty to account) apply, with necessary modification, to an attorney acting under a continuing power of attorney for property if:
  - (a) the grantor is incapable of managing property; or
  - (b) the attorney has reasonable grounds to believe that the grantor is incapable of managing property.
- Section 42(1) which provides that a Court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.
- Section 42(2) expressly provides that the grantor or any other person listed in subsection (4) may apply to pass the attorney's accounts.
- Section 42(4) provides that "any other person with leave of the Court" may apply to compel an attorney for property to pass their accounts.

Nothing in the *SDA* expressly empowers an attorney for property who has concerns about the possible exploitation of a capable grantor to take any steps in respect of the grantor's property with a view to protecting the grantor.

(b) The Case Law

At first blush, a review of the case law suggests that until a grantor becomes incapable of managing his/her property, the relationship between the grantor and the attorney is that of

principal and agent. It follows that the principles of agency law govern. While an agent owes his principal a duty to act with the scope of the agency agreement, nothing in the common law would appear to impose a positive duty on an attorney for property to ensure that a capable grantor is not financially exploited.

The duties owed by an attorney for property to a capable grantor appear to be rather limited; the principal duty being the duty to account for all transactions undertaken on behalf of the grantor. As Justice Valin stated in *Harris v. Rudolph (Attorney for)*[4] :

> "Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he undertakes for the grantor. The attorney is the one who has the information. … There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an on-going obligation and it should not be considered an imposition on the attorney if he has failed in that duty over a long period of time."

The recent decision of the Ontario Superior Court in *Fareed v. Wood*[5] suggests that the duties owed by an attorney for property to a capable grantor may well extend beyond the mere duty to account for transactions they undertake on the grantor's behalf. In fact, an attorney for property may owe a positive duty to a capable grantor to protect them from their own foolish financial decisions.

The applicant in *Fareed v. Wood* was the step-daughter of Ms. McLeod, who died in 1999. In 1992, Ms. McLeod executed a power of attorney for property in favour of her solicitor, Mr. Wood. She also appointed Mr. Wood as the executor of her estate pursuant to her last will and testament. By all accounts, Ms. McLeod maintained capacity to manage her affairs until the date of her death. She continued to deal with her own banking. Mr. Wood monitored her bank accounts, attended regularly at the bank personally and often transferred funds between Ms. McLeod's accounts. He also had meetings with Ms. McLeod.

It became clear after Ms. McLeod's death that there were insufficient assets in her estate to pay all of the legacies contemplated in her last will and testament including a $50,000 legacy

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[4] [2004] O.J. No. 2754.

[5] 2005 CarswellOnt 2572, [2005] O.J. No. 2610.

to be paid to Ms. Fareed. The evidence also disclosed that prior to her death Ms. McLeod had transferred a significant amount of monies to a third party, Ms. Paul, who was not a beneficiary under her will.

In the context of Ms. Fareed's application for an order, *inter alia*, compelling Mr. Wood to pass his accounts as attorney for property, Justice Gordon stated:

> "It is not uncommon for a grantor to retain the ability to attend to some functions while directing the attorney to perform others. In some respects, it allows for a transition period as the grantor adjusts to changes in life resulting from age. The separation of responsibilities can co-exist, however, the attorney assumes full responsibility of all financial activities once he or she assumes some duties. In my view, the attorney cannot avoid liability by simply saying the grantor paid or transferred his or her own funds to another. The attorney is responsible for the accounts from the outset". [6]

In granting Ms. Fareed's application, Justice Gordon directed that Mr. Wood account for all transactions during the period he was active as Ms. McLeod's attorney even if the transactions were carried out by Ms. McLeod herself. He also stated that Mr. Wood's duty obliged him to do more than simply record the payments. He also had an obligation to explain and justify the expenditures.

The fact that Justice Gordon found Mr. Wood wanting both as Ms. McLeod's solicitor and as the estate trustee of her estate clearly influenced his decision. There is no doubt that Justice Gordon was troubled by the fact that as a result of the questionable gifts made by Ms. McLeod during her lifetime to Ms. Paul, her estate was depleted to a point where her testamentary intentions as set out in her last will and testament could not be fulfilled. That said, it is still surprising that Justice McLeod suggested (without actually holding) that Mr. Wood might be financially liable to the beneficiaries of Ms. McLeod's estate for the transfers she made to Ms. Paul during her lifetime while capable.

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[6] *Fareed v. Wood*, at para. 38.

Justice Gordon's decision in *Fareed v. Wood* should be assessed in conjunction with the earlier decision of Justice Cullity in *Banton v. Banton* [7] where his Honour was highly critical of steps taken by attorneys for property to protect their father from perceived financial exploitation. The grantor in that case (then in his early 80's) had appointed his two sons as his attorneys for property. The document expressly provided that the attorneys were permitted to do anything on the grantor's behalf that could be lawfully done by an attorney. A few years after executing the power of attorney, the grantor befriended and later married a waitress in his retirement home more than 50 years his junior. The grantor's sons/attorneys became concerned after they were advised by CIBC of their father's attempt to withdraw significant amounts of money from his bank accounts. The attorneys met with bank employees to discuss how best to proceed and the bank referred them to a solicitor who had acted for certain of the bank's clients in the past. After reviewing the will, the solicitor recommended that the attorneys exercise their power of attorney to transfer a significant portion of their father's estate to an irrevocable trust pursuant to which the income and capital would be paid at the trustees' discretion to or for the grantor's benefit during his lifetime and the capital would be distributed in equal portions *per stirpes* among the grantor's issue on his death.

The issue, as characterized by Justice Cullity, was whether the *inter-vivos* trust ought to be set aside on the grounds that in exercising the power of attorney for property in the manner they did the attorneys breached their fiduciary responsibilities to their father. On that issue, his Honour held that they did. While it might have been reasonable to create a trust of some kind to protect the grantor's interests pending a determination of his competency, the gift of the remainder interests to the grantor's issue went beyond what was required for that purpose. Had the trust funds been payable to the grantor's personal representatives on his death in trust for his heirs, there would have been "far less violence to his rights while still having the practical effect" of preserving his assets pending a determination of his competency.

(c) Your Advice to the Client

Had you been approached by your client at an earlier stage, before there were any concerns about her father's activities, you would have alerted her to the fact that she and her

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[7] (1998), 164 D.L.R. (4th) 176.

sister have a duty during the period while their father is capable of managing his property to account to him, as agent, for their dealings with his property. Depending upon the nature of the work they were to undertake on their father's behalf, you would have encouraged them to provide regulars accountings to their father however informal. You would have pointed out that on their father's death or incapacity they might be called upon by the estate trustees, the Public Guardian and Trustee (the "PGT") and/or the beneficiaries of their father's estate, as the case might be, to account for their dealings with his assets. You would have encouraged them to maintain detailed books and records and, where appropriate, monitor their father's capacity level and his financial activities. You might have gone further and encourage the client to maintain a careful eye over her father's financial affairs, including those transactions that she was not directly involved with so that she would be in a position (at the very least) to account for those transactions.

Having come to you with specific concerns about whether her capable father is being financially exploited, you would necessarily take a different approach. Your client and her sister very clearly recognize they need to do something to protect their father, whatever their positive legal duties might be. Renouncing their attorneyship is not a realistic option. If there is any arguable issue as to their father's capacity to manage his own financial affairs, they should consider having him undertake a formal capacity assessment. If the assessment confirms he lacks capacity they can proceed to exercise the power of attorney for property to take steps to protect their father's interests in a relatively unencumbered manner.

However, if the client's father refuses to consent to an assessment, your client and her sister must take a different tack. They should consider making a request pursuant to section 16(1) of the *SDA* that an assessor perform an assessment of their father's capacity for the purpose of determining whether the PGT should become the statutory guardian of property. As per section 16(2), the request must state:

(a) the client and her sister have reason to believe that their father is incapable of managing his property;

(b) the client and her sister are appointed as their father's attorney for property but he has refused to participate in a capacity assessment;

(c) if found to be incapable of managing his property, the client and her sister intend to exercise their authority under the power of attorney for property.

If the client's father is found to be incapable of managing his property and the PGT is appointed as his statutory guardian of property, the client and her sister would then deliver an undertaking to act in accordance with the power of attorney. Upon delivery of the undertaking, the appointment of the PGT as statutory guardian would be automatically terminated pursuant to section 16.1(c) of the *SDA*.

The client and her sister may also want to consider putting certain safeguards in place. If there is a degree of urgency to acting, they may want to consider exercising the power of attorney to have themselves added as signatories to all bank accounts. They may also want to consider exercising the power of attorney to settle an *inter-vivos* (perhaps an alter ego trust) for the benefit of their father. If the trust is structured in the proper manner, it may serve the purpose of protecting their father's assets from the opportunistic friend. It should be stressed that the client and her sister have a common law (if not expressed) duty to disclose their actions to their father. They must recognize that if their father chooses to he can reverse the steps they have taken so long as he is capable of managing his property.

As a last resort, the client and her sister may wish to consider bringing an application pursuant to section 39(1) of the *SDA* for a declaration that their father is incapable of managing his property and for an Order approving the steps taken to protect their father's interests.

2. How and when can Beneficiaries of an Incapable Grantor's Estate secure an Accounting from an Attorney for Property?

Consider the following scenario.

You are approached by the daughter of a woman who may or may not be capable of managing her property. Your client advises you that her mother's financial affairs are being controlled by her brother, who appears to have been legitimately appointed as the mother's attorney for property. The power of attorney provides that in the event her brother cannot act, your client is to serve as the alternate attorney for property. The client has come to you because she believes her brother is using her mother's debit card to pay his own personal expenses. She has seen bank statements which suggest that her concerns are legitimate. She is concerned that

her brother may have undertaken further transactions involving her mother's property and that her mother's modest estate is being quickly depleted. She has not seen her mother's last will and testament but believes it provides for an equal division of the estate as between the client and her brother. The client refuses to discuss the concerns with her mother directly out of fear that her mother will question her motives and/or accuse her of meddling. Your client's brother insists that their mother is fully capable of managing her property and that he has undertaken all of the transactions with the mother's blessing.

What advice should you give your client?

(a) The Legislative Framework

The relevant provisions of the *SDA* are as follows:

- Section 42(1) provides that the Court may, on application order that all or a specified part of the accounts of an attorney for property be passed.
- Section 42(4) provides that the PGT and "any other person with leave of the Court" may apply pursuant to section 42(1).

(b) The Case Law

Under the old *Powers of Attorney Act*[8] , an attorney could not be compelled to pass their accounts during any period of time that a grantor was capable of managing their property. While an attorney clearly had a common law duty to account to their grantor as principal, there was not statutory basis for compelling them to account unless the grantor was shown to be incapable of managing their property.

In *Stickells Estate v. Fuller*[9], a case decided after the *SDA* came into force but relating to an attorneyship that spanned the period both before and after effective date of the legislation, Justice Lack confirmed that an attorney for property could not be compelled to pass her accounts for the period prior to April 3, 1995, being the date on which the *SDA* was proclaimed into force, in circumstances where the grantor was capable prior to that date.

[8] R.S.O. 1990, c. P. 20.
[9] (1998), 24 E.T.D. (2d) 25 (Ont.Ct. Gen.Div.).

The attorney for property in that case, Ms. Fuller, had brought a motion to set aside or vary an *ex parte* order which compelled her to pass her accounts as attorney for Ms. Stickells, then deceased. The order had been secured by the estate trustees of Ms. Stickell's estate. Ms. Fuller's solicitor argued that her client could not be compelled to pass her accounts for any period during which Ms. Stickell was capable of managing her property. It was agreed that Ms. Stickell was capable until June 1995 but incapable of managing her prior thereafter and until her death in October 1995.

In setting aside the order requiring Ms. Fuller to account from the date the power of attorney was executed, Madame Justice Lack held that the introduction of the *SDA* had the effect of broadening the Court's powers to compel an accounting and that as long as the power of attorney provided that it could be exercised during a period of the grantor's subsequent incapacity, an attorney for property could be compelled pursuant to section 42(1) of the *SDA* to pass their accounts regardless of the grantor's capacity.

While it is now clear that an attorney can be compelled to account regardless of the capacity of the grantor provided the power of attorney stipulates that it can be exercised during any period of subsequent incapacity, it remains to be seen who has standing to bring such an application.

The grantor of a power of attorney for property clearly has the power pursuant to section 42(2) of the *SDA* while capable of managing his property to compel his attorney to account for his dealings with the grantor's assets. It is also equally clear that on the death of a capable grantor the estate trustees of the grantor's estate step into the shoes of the grantor and can compel the attorney, as agent, to account for their dealings with the grantor's property during their lifetime.

The latter point was made by Madame Justice Haley in *Leung Estate v. Leung*[10]. The deceased grantor in that case, Mr. Leung, had given his son a general power of attorney approximately fifteen years before his death. Mr. Leung remained capable of managing his property right up until his death. There was no suggestion that Mr. Leung had improvidently

[10] (2001), 38 E.T.R. (2d) 226.

depleted his estate prior to his death. Following Mr. Leung's death, the estate trustees of his estate sought an accounting from the son. The issue to be determined, as characterized by Madame Justice Haley, was whether the son had a duty to account for his dealings with his father's assets from the time the power of attorney was signed until his death having regard to the fact that he remained capable of managing his property.

Characterizing the power of attorney given to the son as a "contract of agency", Madame Justice Haley held there was no doubt that the son had a duty to account for all transactions he undertook for his father from the date the power of attorney was signed. The only difficulty was whether the disclosure procedure can be done only by way of an action to account. In Her Honour's view, it was not necessary to exercise the Court's inherent jurisdiction to require an accounting. Rather, the estate trustees standing as they did in the shoes of the father could compel the son to account.

The PGT also clearly has standing pursuant to section 42(1) and (4) of the *SDA* to compel an attorney for property to account for their dealings with a grantor's assets regardless of capacity. Interestingly, the PGT's power to compel an accounting seems to extend to persons who deal with an incapable person's property even in circumstances where they were not formally appointed as an attorney for property.

The foregoing point was made by Madame Justice Greer's decision in *Re Simmons Estate*[11]. The PGT in that case had been put on notice by persons interested in Ms. Simmon's welfare that she was incapable of managing her affairs. At the time, Ms. Simmons was living with a friend, Mrs. Brown, and her husband and children. The investigations undertaken by the PGT suggested that Mrs. Brown had been actively involved in Ms. Simmons' financial affairs for some period of time. The evidence also clearly supported a conclusion that Ms. Simmons was incapable of managing her property and had been for some time. Ms. Brown led no evidence that suggested Ms. Simmons was capable of managing her property. Madame Justice Greer went on to declare that Ms. Simmons was a person incapable of managing her financial affairs. She appointed the PGT as guardian of Ms. Simmon's property and ordered that Ms. Brown provide an accounting to the PGT of all monies she had received from Ms. Simmons.

[11] [1995] O.J. No 1650 (Ont. Ct. (Gen.Div.).

What ability does a beneficiary of the grantor's estate have to compel an accounting of an attorney for property given that until the death of the grantor, their interest in the estate is arguably contingent?

A contingent beneficiary's ability to challenge steps undertaken by an attorney for property appears to depend upon the status of the grantor at the relevant time. If the grantor is capable of making property decisions a contingent beneficiary has no legal basis for compelling an attorney for property to account.

However, if the grantor is alive but permanently incapable of making property decisions, Mr. Justice Sheard's decision in *Weinstein v. Weinstein (Litigation Guardian of)*[12] ("*Weinstein*") suggests that the beneficiaries of the incapable person's estate (whether pursuant to a will or on an intestacy) have standing to compel an attorney for property to pass their accounts.

In *Weinstein*, five grandchildren who were contingent beneficiaries of their incapable grandmother's estate pursuant to her last will and testament were not notified of an application brought by their grandmother's husband for an equalization of net family property pursuant to the *Family Law Act*. The making of the equalization payment would have had the effect of reducing their ultimate inheritance by half. Two of the five grandchildren brought a motion requesting notice of the application.

Relying in part upon the direction contained in section 33.1 of the *SDA* which requires an attorney for property to make reasonable efforts to determine whether an incapable grantor has a will and what the provisions of that will are (a provision which His Honour felt indicated the importance legislators attach, appropriately, to the will of an incapable person), Justice Sheard held that the terms of Mrs. Weinstein's will coupled with the fact that she lacked the mental capacity to change her will conferred on the grandchildren what amounted to a vested interest in her estate. Being persons "manifestly affected" by the proposed equalization order they should have been given notice of the application.

[12] (1997), 35 O.R. (3d) 229, 19 E.T.R. (2d) 52, 30 R.F.L. (4th) 116 (Ont. C.J.)

The reasoning in *Weinstein* was followed by the Ontario Superior Court in *Nystrom v. Nystrom* [13] and cited as the basis for granting Mrs. Nystrom's daughter leave to compel the attorney for property to pass their accounts from the date of Mrs. Nystrom's incapacity. In Justice Shaw's words:

> "Ms. Nystrom's incompetence has the same result, as stated by Sheard J., as if the parties were entitled to a remainder interest after life interests. Section 33.1 of the *SDA* provides that a guardian of property shall make reasonable efforts to determine whether the incapable person has a will and, if so, what the provisions of that will are. ….The Applicant, in my opinion, has standing to bring an action to protect her vested interest under the permanent will of an incapable person." [14]

Justice Shaw also dismissed the Respondents argument that the daughter's proceeding was premature given that she would have no interest in the estate if she pre-deceased her mother. Having a vested, not a contingent interest, the daughter was entitled to take steps to protect that interest.

If the grantor of the power of attorney has died the case law and, in particular, Justice Ross' decision in *Strickland v. Thames Valley District School Board* [15], suggests that the beneficiaries of the testatrix's estate do not have standing to challenge steps taken by the attorney or to compel an accounting. The estate trustee is the proper party to compel an accounting.

Strickland v. Thames Valley District School Board involved the passing of accounts of Mr. Strickland in both his capacity as attorney for property of the deceased, Mr. Brooks, and in his capacity as estate trustee of his estate. An ancillary issue considered by Justice Ross in that case was whether the School Board, one of the beneficiaries of Mr. Brooks' estate, had "status" to compel Mr. Strickland to pass his accounts as attorney. The suggestion was that the School Board lacked such status. However, Justice Ross noted that the order secured by the School Board directing Mr. Strickland to pass his accounts had not been appealed and refused to allow a collateral attach on that order on the passing of accounts.

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[13] (2006), 25 E.T.R. (3d) 297 (Ont. S.C.)

[14] Interestingly, Justice Shaw goes on to say that the daughter's proceeding to protect her interest in her incapable mother's estate is best brought as an action.

[15] 2007 CarswellOnt 6248 (Ont.S.C.).

As to the nature of the accounting that must be provided by an attorney in respect of periods where the grantor is capable of managing their property, Justice Langdon's decision in *Fair v. Campbell Estate*[16] should be noted insofar as he held in that case that the duty to account by an attorney for property where a grantor is *sui juris* is quite different from than if the attorney has been appointed as a guardian of property for a mental incompetent. In that case, three great-grandsons of the deceased, Mrs. Campbell, brought an application following their great grandmother's death for an accounting of her attorneys for property, being their grandmother and grandfather (Mrs. Campbell's daughter and son-in-law). The undisputed evidence was that Mrs. Campbell was capable of managing her property until her death.

On the issue as to whether or not the attorneys for property could be compelled to account in such circumstances, Justice Langdon held that while an attorney is a fiduciary, section 38(1) of the *SDA* suggests that there are different duties to account depending upon the capacity of the grantor. Section 32 provides that the duty to keep accounts applies if the grantor is incapable of managing property or if the attorney has reasonable grounds to believe the grantor is incapable of managing property. He went on to say:

> "If the grantor is *sui juris*, he makes the decisions. He is not obliged to involve the attorney in all or any of them. He is not obliged to ask the attorney to help him to implement all or any of his decisions. Where the grantor is *sui juris*, imposition of a duty to account can cast an impossible burden on the attorney. He could be required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part."

(c) Your Advice to the Client

Returning to the scenario outlined above, you will need more facts before you will be in a position to provide meaningful advice to your client. You will need to determine whether the mother is capable of managing her property or not as that fact more than any other will determine the appropriate strategy.

If the client's mother is clearly capable of managing her property, the client would be well advised to sit down with her mother, share her knowledge and express her concerns

[16] (2002), 3 E.T.R. (3d) 67 (Ont. S.C.J.). See also *Craig Estate v. Craig Estate (Trustee of)* 2007 CarswellOnt 395.

regarding her brother's activities. She should encourage her mother to make her own inquiries and to seek legal advice if necessary. She should point out to her mother that she has the power to revoke the brother's appointment as attorney and to compel him to account for his dealings with her assets if she feels it is appropriate. If the mother rejects the client's concerns out of hand (which is entirely possible), the client can do little more than put her brother on notice that she will hold him accountable in due course and maintain a documentary record of her concerns in the meantime. While nothing would preclude her from approaching the PGT and asking it to undertake an investigation, as a practical matter the PGT will only get involved if there is evidence that the mother is incapable of managing her property and that her property is at risk.

If there are legitimate concerns relating to the client's mother's capacity to manage her property and the client has compelling evidence that her brother is abusing his power of attorney for property, the client may want to notify the PGT of her concerns. An attempt should also be made to force the brother to informally pass his accounts. If the brother agrees to provide an accounting (which is somewhat unlikely), the client should review the accounting carefully and satisfy herself that he has been acting in their mother's best interests. If the brother refuses to provide an accounting (which is more likely), the client should consider bringing an application pursuant to section 42 of the *SDA* for an order compelling the brother to formally account. In order to succeed on such an the application the client would need:

(a) a copy of her mother's last will and testament confirming her status as a contingent beneficiary of the estate;

(b) clear evidence of her mother's incapability to manage her own property (something which may be difficult for her to secure); and

(c) evidence that her brother is dealing with her mother's property in some manner.

3. To What Extent Can an Attorney for Property Undertake Estate Planning?

Consider the following scenario.

You are retained by an attorney for property to provide them with advice as to their duties as attorney for property of the elderly father, then 85 years of age. The client's father was diagnosed with progressive dementia four years ago and is arguably incapable of managing his

property. The client has four other siblings. He has a will which provides for a gift over of the whole of the residue to his second wife (not the mother of your client or his siblings) if she survives him. If the client's step-mother does not survive the client's father, the will provides that his estate is to be divided in equal shares among your client and his four siblings. The father holds a significant amount of his wealth (in excess of $10 million) in a private company which carries on an active business, employing more than 100 people. The shares have significant unrealized capital gains and a large tax liability will have to be paid on the death of the survivor of the father and the step-mother. The client has secured advice from his personal accountant who has recommended that the client undertake an estate freeze of the private company shares in order to crystallize and plan for the tax liability. He has now sought your advice as to whether he can undertake the proposed estate freeze and, if so, how it should be undertaken.

What advice should you give him?

(a) The Legislative Framework in Ontario

The relevant provisions of the *SDA* are as follows:

- Section 7(2) provides that authorizes the attorney "to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will";
- Section 32 provides that the attorney must exercise their powers with honesty, integrity and good faith and for the incapable person's benefit; Section 35 provides that an attorney can make a gift of property to the person who would be entitled to it under the will if the gift is authorized by section 37;
- Section 37 sets out the principles for making gifts and loans and as a general statement permits the making of gifts and loans provided the grantor's remaining property is sufficient to satisfy their requirements and there is reason to believe, based on the intentions the person expressed before becoming incapable, that he or she would make them if capable (Emphasis added).

The term "will" is not defined in the *SDA*. As a result, Ontario Courts have looked to the definition of "will" contained in the *Succession Law Reform Act* (the *"SLRA")*[17] where the term is defined in section 1 to include "(a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in exercise of a power, and (d) any other testamentary disposition".

[17] R.S.O. 1990, c. S.26 (as amended).

The term "testamentary disposition" is not defined in either the *Substitute Decisions Act, 1992* or the *SLRA*, however.

(b) Designating a Beneficiary in Respect of Life Insurance, RRSP, RRIF or Pension Benefits is Akin to Making a Will

As a general statement, Canadian Courts have held that the act of designating a beneficiary in respect of life insurance proceeds[18], pension and other work related benefits[19] or a registered retirement savings plan ("RRSP")/registered retirement income fund ("RRIF")[20] is a "testamentary disposition". In accordance with section 7(2) of the *SDA*, an attorney for property is prohibited from making or changing a beneficiary designation on behalf of an incapable grantor in respect of such assets. [21]

The decision of the British Columbia Supreme Court in *Desharnais v. Toronto Dominion Bank* [22] illustrates the approach the Courts will take in defining "testamentary disposition". That case dealt the liability of two financial institutions in respect of a transfer of an incapable grantor's Registered Retirement Savings Plan (an "RRSP") from one institution to the other pursuant to a power of attorney for property where the transfer had the effect of changing the beneficiary designation from the attorney/spouse to the incapable grantor's estate. On the issue of beneficiary designations, Justice Clancy held that the making of a beneficiary designation in respect of an RRSP was a testamentary disposition. In reaching his decision, his Honour referred to a report published by Legal Education Society of Alberta in 1991 entitled "*Enduring Power of Attorney; Dependent Adults; Living Wills*" which contained the following statement:

> "It is questionable whether a donor may designate a beneficiary of a pension, insurance policy or Registered Retirement Savings Plan. In the absence of statutory authority to designate a beneficiary, these acts would be testamentary in nature, since they would be "dependant upon the death for its vigour and effect"".

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[18] See *Fontana v. Fontana* (1987), 28 C.C.L.I. 232 (B.C.S.C.), *Stewart v Nash* (1988), 30 E.T.R. 85 (Ont. H.C.J.).

[19] See *Tamblyn v. Leach* (1981), 10 E.T.R. 178 (Man Q.B.) and *Gagnon v. Sussey* (1992), 45 E.T.R. 309 (Ont. Ct. (Gen.Div.)), affd 2 E.T.R. (2d) 318 (C.A.)

[20] *National Trust Co. v. Robertshaw* [1986] 5 W.W.R. 695 (B.C.S.C.).

[21] For a useful overview of these cases, please see Sweatman, "Guide to Powers of Attorney", supra at pages 72 to 79.

[22] (2001), 42 E.T.R. (3d) 192, 110 AC.W.S. (3d) 145 varied on appeal (2002), 175 B.C.A.C. 32, 8 B.C.L.R. (4th) 236 (C.A.).

(c) Settling or Varying an *Inter-Vivos* Trust

As outlined above, the act of designating a beneficiary to receive an asset upon a grantor's death clearly constitutes a "testamentary disposition" and is *ultra vires* an attorney for property. It is less clear, however, whether an attorney for property has the power in the absence of a clear and specific power in the power of attorney to settle or vary an *inter-vivos* trust after the grantor becomes incapable of managing his/her property.

The issue was specifically addressed by *Banton v. Banton* [23], referenced above. Interestingly, Justice Cullity did not question whether the attorneys had the power to create an *inter-vivos* trust, which he indicated they had. His analysis focused instead upon the structure of the *inter-vivos* trust settled by the attorneys on Mr. Banton's behalf. In holding that the attorneys had breached the duties they owed to their father, Mr. Banton, Justice Cullity stressed that the structure of the trust did not interfere with Mr. Banton's property to the least extent possible insofar as it had the effect of gifting the remainder interests in the trust to the grantor's issue. As outlined above, had the trust funds been payable to the grantor's personal representatives on his death in trust for his heirs, Justice Cullity appears to have been prepared to let the trust stand.

Decisions relating to inter-vivos trusts settled by a grantor may, in certain circumstances, constitute testamentary dispositions and as such are *ultra vires* an attorney for property. The attorney for property in *Bank of Nova Scotia Trust Co. v. Lawson*[24]., for example, purported to consent to the variation of an *inter-vivos* trust (settled by the grantor and her husband while they were both capable) on behalf of an incapable grantor. If valid, the variation would have had the effect of changing the manner in which the capital of the *inter-vivos* trust was to be distributed on the grantor's death. Looking at the trust agreement as a whole, Justice McLean stated it (by that we presume he meant the trust) was clearly a disposition "in the sense that a disposition connotes a perceived plan, an orderly arrangement'. The question was then whether the disposition was testamentary in nature. Justice McLean went on to hold that because the document clearly dealt with the disposition of the settlor/grantor's estate on her death, the trust agreement was a "testamentary" document and the purported variation invalid.

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[23] (1998), 164 D.L.R. (4th) 176.
[24] (2005), 22 E.T.R. (3d) 198, 25 CarswellOnt 7263.

(d) Effecting an Estate Freeze

The Ontario Courts have yet to specifically consider whether in the absence of a prohibition to the contrary an attorney has the power to effect a freeze of part or all of the grantor's estate after the grantor becomes incapable of managing his property.

The decision of the B.C. Court of Appeal in *O'Hagan v. O'Hagan* [25] offers some guidance and is therefore worth noting. The grantor in that case, Mr. O'Hagan, was 89 years of age and had suffered from Alzheimer's disease for many years. One of Mr. O'Hagan's three sons was appointed as committee of his very large estate (valued at close to $11,000,000). In his capacity as committee, Mr. O'Hagan's son sought tax advice and was encouraged to undertake a freeze of certain of Mr. O'Hagan's assets. The proposed transaction offered significant tax benefits for Mr. O'Hagan. Equally importantly, the plan posed no real disadvantage to Mr. O'Hagan during his life time. The plan provided that he would continue to hold the share representing the value of his companies and would be in a position to regain control of the company if he miraculously recovered capacity. As importantly, the plan did not deviate from what was contemplated in Mr. O'Hagan's will.

Before acting upon the legal and tax advice he secured, the son in his capacity as committee brought an application to approve the proposed estate plan. The Public Trustee opposed the application arguing that in cases where no prior intention to carry out a proposed transaction has been expressed by an incapable person, that person's committee must demonstrate the transaction is "necessary in the traditional sense". The Public Trustee also argued that given the possibility that a grantor might recover capacity to manage his/her property, a committee should not generally be empowered to dispose of or change the nature of the grantor's assets "to a form which may not, on his recovery, appeal to the patient".

The B.C. Superior Court dismissed the son's application in the first instance and the son appealed. The Court of Appeal allowed the son's appeal stating that the standard to be applied when considering whether to carry out a proposed act is whether a reasonable and prudent business person would think that the transaction or transfer in question would be beneficial to the grantor and his family, given the circumstances that are known at the time and the possibilities

[25] [2000] 3 W.W.R. 642, 31 E.T.R. (2d) 3, 182 D.L.R. (4th) 30, 72 B.C.L.R. (3d) 100, B.C.A.C. 104.

that might arise in the future. The Court went on to say that in making such a decision, the grantor's interests, present and future, must be given paramount importance.

On the issue of estate freezes, the decision of the British Columbia Court of Appeal in *Callender v. Callender Estate*[26] should be noted. In that case, the daughter of an incapable woman sought an order removing a trust company as committee on the basis that the committee was refusing to pursue a claim in respect of a freeze of certain of the grantor's assets while she was incapable. The Court refused to grant the relief sought by the daughter on the basis that committee had acted properly in entering into the estate freeze and in deciding not to pursue the litigation on behalf of the incapable person as the litigation would be costly and have little chance of success. The Court's decision was not surprising given the fact that the estate freeze in question had been blessed on an earlier Court application.

(e) Your Advice to the Client

You will need better information regarding the client's father's capacity before you will be in a position to give meaningful advice to the client. You should encourage the client to have his father's capacity assessed. If it turns out the father has capacity to manage his property, he can decide for himself whether he wants to undertake the proposed estate freeze.

If the client refuses to have his father assessed or the assessment confirms the father is incapable, you should warn the client that undertaking an estate freeze of his father's corporate interests in the face of a finding that his father is incapable of managing his property is risky. In the absence of a Court order blessing the estate freeze, the client runs the risk of having the plan challenged; whether by his father, upon regaining capacity, or by the beneficiaries or estate trustees of his father's estate (being his siblings). The costs of any such challenge would be significant and the client must appreciate that it would be within the Court's discretion to order that he pay some or all of those costs personally. You should recommend to the client that they seek prior Court approval especially if there is any possibility that one or more of his siblings might later object. You should specifically recommend that he bring an application pursuant to section 39(1) of the *SDA* for an Order approving the proposed plan. With an Order in hand, the

[26] (2001), 40 E.T.R. (2d) 198, 200 D.L.R. (4th) 462.

client cannot later be criticized either by his father, in the event he regains capacity, or by the estate trustees or beneficiaries (see *Callender v. Callender Estate* referenced above).

You can advise the client that the Court would likely approve the proposed estate freeze if:

- The power of attorney does not expressly prohibit estate planning or expressly allows for estate planning after the grantor becomes incapable.
- The client's father will be adequately provided for after the freeze is implemented.
- The advantages (financial and otherwise) of proceeding with the estate freeze are meaningful if not significant.
- The estate freeze benefits the client's father (or at least is neutral) and not just the beneficiaries of his estate.
- The client's father could resume control over the property if he regained his capacity.
- The proposed plan is consistent with the clients father's last will and testament or at least is not contrary to it.
- The client's father expressed an intention or wish to undertake the estate freeze contemplated while he was capable of managing his property (Not a critical aspect, but of assistance. It may be enough to lead evidence that the client's father was one to engage in tax planning strategies).
- The proposed freeze interferes with the father's property to the least possible extent.
- A reasonable and prudent business person would undertake an estate freeze in respect of his or her own property if capable. [27]

(f) Suggestions for a Solicitor Advising a Grantor and Drafting the Power of Attorney for Property

Of course, the costs associated with bringing the foregoing application could have been avoided had the solicitor drafting the power of attorney for the client's father in the first instance specifically addressed the issue of estate planning in the power of attorney.

[27] See Sweatman, Guide To Powers of Attorney, supra at p. 72.

As a solicitor advising a grantor and drafting a power of attorney for property, you should specifically raise the issue of estate planning and ensure that your client understands the implications of giving his attorney such a power and the implications of prohibiting such activities. You should make it clear that while the client's attorney cannot "make a will" nor designate a beneficiary in respect of life insurance, an RRSP, a RRIF (arguably) or pension benefits, they can otherwise do anything that the grantor can legally do. You should confirm whether the grantor wishes to empower the attorney to implement an estate freeze, settle or vary an *inter-vivos* trust or re-register title to property in joint tenancy with a right of survivorship, among other things.

If the grantor is content to allow their attorney to undertake estate planning in appropriate circumstances on their behalf, you should ensure that that fact is clearly expressed in the power of attorney. For example, you may want to consider including the following provision:

> "My attorneys shall be authorized in the administration of my property hereunder, to take such steps as they consider prudent to minimize tax payable on my death, including, without limitation, a reorganization or reorganizations of my property to effect, *inter alia*, an estate freeze." [28]

Having regard to the reluctance of some third parties to act upon instructions from an attorney for property where they view those instructions as being potentially invalid, you may also want to consider including an indemnity in the power of attorney in favour of third parties which reads as follows:

> "I HEREBY INDEMNIFY from any liability to me, my estate or any third party, any person who, in reliance on this Power of Attorney, acts in accordance with the instructions of my Attorney or my substituted Attorney in any circumstance including a circumstances where the Attorney has in interest in the transaction".

Conclusion

Each of the three scenarios outlined above occurs more frequently than one might expect, albeit with slight variations in the underlying facts. As a solicitor advising clients in this

[28] Histrop, Lindsay, "Estate Planning Precedents: A Solicitor's Manual" (Thomson Carswell: Toronto: 2006 Release 2)at p. 5.1-3.

circumstances, you should recognize both the limits of the *SDA* and the lack of clarity in the Canadian case law. A conservative approach is arguably the best; one which protects both the concerns and interest of the attorneys on the one hand and the rights of the grantors and the beneficiaries of their estates on the other .

Schedule A

Protecting Elders from Financial Exploitation: The Limits of the Law

Case Comment for OBA "Deadbeat" Newsletter on *McMullen v. McMullen* [2006] B.C.J. No 2900 (Fisher J.)

Overview

As our society ages, incidents of elder abuse and, in particular, financial abuse will become more prevalent. Despite growing awareness of the vulnerability of the elderly in our society, a recent decision of the British Columbia Superior Court highlights the inability of existing laws to address elder abuse in circumstances where an elder may act imprudently but has legal capacity to manage their financial affairs.

The Facts

The applicant in *McMullen v. McMullen* was an 86 year old widower who commenced an application against two of his three daughters, who held his power of attorney. Mr. McMullen sought a declaration that a conveyance effected by the attorneys of 99 % of his interest in a condominium to their husbands was null and void. The attorneys, concerned about their father's ability to manage his affairs, opposed the application and sought an order requiring him to submit to a medical examination before an order was made regarding title to the condominium.

Mr. McMullen had granted a general power of attorney to his three adult children in September 2001. The power, granted in accordance with the *Power of Attorney Act* in British Columbia, authorized any two of the attorneys acting together to do on Mr. McMullen's behalf anything that he could lawfully do by an attorney. The power stipulated that the attorneys were to provide Mr. McMullen with a regular accounting whenever they assisted him with his financial affairs. The document was immediately effective.

In February 2002, Mr. McMullen's wife of 60 years passed away. The loss of his wife had a profound effect upon Mr. McMullen. He began relying upon his children and their families for emotional support and financial advice. At or about that time, Mr. McMullen allegedly expressed concern as to whether he could afford to continue to live in his condominium. After reviewing his financial situation with him, one of Mr. McMullen's daughters (an attorney)

concluded that Mr. McMullen would be able to retain the condominium provided he was careful about his finances. At or about the same time, the same daughter began assisting Mr. McMullen with his internet banking, paying bills on his behalf.

Enter the opportunist!!! Less than 4 months after Mrs. McMullen's death, Mr. McMullen struck up a "friendship" with a woman 40 years his junior while on a trip to Hawaii. Mr. McMullen's friendship with the woman, Ms. Spiros, continued upon his return to British Columbia. After reviewing certain of their father's emails, family members soon suspected that he was sending money to Ms. Spiros. They were concerned that their still grieving father was being taken advantage of and began monitoring his email and banking activity.

By all accounts Mr. McMullen was smitten, if not obsessed, with Ms. Spiros. He made a further extended trip to Hawaii in the Fall of 2002, missing Christmas (his first following his wife's death) and several family gatherings. He returned to Canada in the Spring of 2003 and shortly thereafter his family discovered that he had depleted some of his investments and incurred debt; actions out of character for a man generally regarded as being financially cautious. At or about that time, Mr. McMullen told his daughter to stop accessing his bank accounts by computer and to stop paying his bills.

As Mr. McMullen's debts grew, so to did the McMullen family's concern about the nature and extent of Ms. Spiros' involvement in their father's life. Determined to protect their father, they sought the assistance of Mr. McMullen's family doctor, the Public Guardian and Trustee's Office, an elder abuse hotline, a caregiver's support group, the R.C.M.P., the Florida State Police (where Ms. Spiros was living at the time) and, ultimately, Mr. Mc Mullen's bank. No one appeared to be in a position to assist them. They ultimately consulted a lawyer as to how best to protect their father's interests. On the apparent recommendation of that solicitor, the attorneys conveyed a 33 % interest in Mr. McMullen's condominium to one of the attorney's husbands and a further 66 % to the other of the attorney's husbands, leaving Mr. McMullen with a 1 % interest. The attorneys did not register the conveyance on title at the time nor advise Mr. McMullen of the fact of the conveyance on the basis that it would have caused their father too much emotional upset.

In the Fall of 2003, Mr. McMullen approached his family members with a proposal that they invest in a scheme involving Ms. Spiros. Convinced the scheme was foolhardy, Mr. McMullen's family confronted him about his relationship with Ms. Spiros and expressed concern for his welfare. They also disclosed that they had been monitoring their father's banking activities and email. An angry Mr. McMullen denied that he was giving money to Ms. Spiros.

In the Spring of 2004, Mr. McMullen approached his children with a further proposal that they invest significant amounts of money in an investment scheme involving Ms. Spiros. By this point, Mr. McMullen's family was convinced that Ms. Spiros was exploiting their father and that the exploitation was not likely to end. They resolved to register the conveyance on title. Mr. McMullen received no consideration for the conveyance and was not told. He only became aware of the conveyance when he attempted to secure further financing from his bank.

Throughout the relevant period, there was no evidence that Mr. McMullen lacked legal capacity to make financial decisions. In fact, the evidence adduced confirmed he did have capacity. A geriatric specialist who examined him in February 2004 concluded that while he had significant depression, there were no overt cognitive concerns. Mr. McMullen's family doctor (who examined Mr. McMullen at the request of the family in September 2004) reached a similar conclusion in the Fall of 2004.

<u>The Decision</u>

Mr. McMullen's attorneys denied they had committed a breach of trust maintaining that they had conveyed 99 % of their father's interest in the condominium to their respective husbands in order to protect their father from Ms. Spiros and that the property continued to be held in trust for him. They further asserted that their acts were within the trust provisions of the power of attorney.

At the outset of his reasons, Justice Fisher reiterated that an attorney acting under a power of attorney is bound by the duties enunciated on the face of the instrument containing the power. While Mr. McMullen's power of attorney provided that it could be exercised during periods of capacity and mental infirmity, his attorneys had a duty to provide their father with regular accountings any time they assisted him in managing his financial affairs. However legitimate their concerns and noble their motives, the attorneys failed to account to their father for their

dealings with his property and in doing so breached the fiduciary duties they owed to him. Justice Fisher ultimately directed that title to the condominium be re-conveyed to Mr. McMullen, expressly rejecting the attorneys' submission that title should not be re-conveyed unless and until there was "sufficient and reliable" expert evidence that he was "able to manage his assets in his own best interests and that his mental condition does not render him prone to financial manipulation and exploitation of others".

As to whether Mr. McMullen could be compelled to under go a further capacity assessment, counsel for the respondent attorneys had urged the Court to "fill the gap" in the law by exercising it *parens patriae* jurisdiction in order to protect Mr. McMullen from being abused and exploited by others. Justice Fisher refused to do so noting as follows:

> "The issues involved in filling the gap in the law are complex and controversial. Principles of personal autonomy conflict with principles of protection for vulnerable individuals. Legislation dealing with incompetent persons, such as the *Patients Property Act* and the *Mental Health Act*, R.S.B.C. 1996, c. 288 provide blunt instruments to address problems of incapacity. There are few tools which address the issue of exploitation of vulnerable adults. The *Adult Guardianship Act* seeks to fill some of the gaps, but parts of it are not yet in force. Given this complex arena, it is not for this Court to fill the legislative gap, particularly given the evidence of [this] case."

<u>What is an Attorney for Property To Do?</u>

McMullen v. McMullen suggests that a Court will respect the autonomy of a capable grantor to make decisions regarding their property, even in circumstances where they are clearly being exploited. It also suggests that an attorney will be held liable for losses, including costs, associated with any attempt to protect a capable grantor's interests without first securing the grantor's consent. However, the decision (which is not binding upon the Ontario Superior Court) should be read together with *Fareed v. Wood* [2005] O.J. 2610 (Sup.Ct.). Justice Gordon in that case was extremely critical of an attorney for property who failed to adequately monitor (and presumably act upon) gifts made by a capable grantor to a third party under highly suspicious circumstances. In Justice Gordon's view, the attorney for property assumed full responsibility for all of the grantor's financial activities once he assumed some of the duties. He could not

avoid liability by simply saying that the grantor paid or transferred funds to a third person. He was responsible from the outset and accountable to the grantor and the grantor's estate.

Which begs a somewhat rhetorical question – What is a well-intentioned attorney for property to do in circumstances where the grantor is capable of managing their property but clearly being financially exploited????