CANT BUY ME LOVE: LESSON LEARNED FROM HIGH CONFLICT GUARDIANSHIPS IN ONTARIO

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INTRODUCTION

This paper is intended to offer readers a brief glimpse at several high conflict guardianship cases decided and reported in Ontario in recent years under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 as am. (hereafter, "the SDA"). The cases will be reviewed in detail in order to highlight a number of themes. It is hoped that this will facilitate a discussion of those themes and others that may emerge for the reader.

I believe that high conflict guardianship cases share some of the best and worst qualities of traditional family law litigation. Some of the themes are common as well. We have the opportunity to learn from some of the harder lessons which have emerged from decades of high conflict family law litigation. Here, as in family law, a guardianship judgment is often not the final chapter. It may do little to promote or heal family disharmony or dysfunction that sometimes has festered for years. Like lawyers who practice family law, elder law lawyers who are engaged by clients in high conflict guardianship litigation are alarmed at the intensity of the underlying conflict afflicting their clients. Parties may return over and over again to the court because of various events or in the evolution of the guardianship over years. We need to bear that in mind, not only because of the cost implications but also because the build-up to and attendances in Court can serve as flashpoints in the family.

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There are increasing efforts to resort to alternative dispute mechanisms that may afford resolutions more flexible and more acceptable to the clients and that minimize the contact with the formal judicial system which may unwittingly conspire in pitting family against each other at terribly high cost. We have the opportunity to draw on the years of experience underlying family law litigation and think more quickly perhaps about collaborative approaches or other forms of justice that may be useful to apply in guardianship cases.

Unlike many family law cases, guardianship litigation offers no severance of the ties borne of blood and no salve for dynamics that may have evolved over generations. But like family law conflicts that involve a child of a marriage, judges in guardianship cases are enjoined to keep the perspective and interests of the person who is the subject of the litigation as the core focus of their deliberations. In my view, such a focus must also be the core of alternative approaches to guardianship conflicts. We owe that respect to individuals who may have lost or are losing their ability to control decisions that affect their fundamental rights and everyday lives.

THE CASES

Ziskos v. Miksche[2]

This is a case about the affairs of a woman named Johanna Miksche (referred to hereafter as "Mrs. M"). Although I will return to this point later on, she died at age 78 after the case had been heard but before Madam Justice Spies released her decision. In this case, there were competing applications for guardianship of property and personal

[2] 2007 CarswellOnt 7162 (Ontario Superior Court of Justice, Spies J.) For related proceedings, see also Miksche Estate v. Miksche [2009] O.J. No. 4623 (S.C.J.) and Miksche Estate v. Miksche [2009] O.J. 5259 (S.C.J.).

care of Mrs. M. As Justice Spies noted in the opening paragraphs of her decision which spanned over 60 pages, "what constitutes reasonable and acceptable conduct for parties involved in a contested guardianship application and reasonable expectations for costs have become important issues in this matter."[3]

Perhaps some of the more notable features of the case are that there were four sets of lawyers involved, the applications were never heard on their merits and in fact not a single substantive motion was argued on the merits except for the motion concerning the legal costs. I say that these are notable features because it appears that they are not uncommon in many high conflict guardianship cases. Here, one group of parties claimed more than $1 million in legal costs and the total costs claims (which were about $1.175 Million) exceeded the entire value of Mrs. M's estate.

But before we look at the issues it is important to know who Mrs. M was, at least insofar as her early life history is briefly illuminated by the reported decision:

> "In the words of a long time family physician, Johanna Miksche was a woman who suffered profoundly negative life experiences in her youth; she was captured and held in a prisoner of war camp for four years, until 1949, when as one of the few survivors she came to Canada to function as a solid citizen, wife and ultimately caregiver to her dying husband, who died in 1997."[4]

A few years after Mrs. M's husband died she appointed two friends as her attorneys for property and personal care, signing powers of attorney with her lawyer on May 21, 2004. One of the friends was her handyman, the other a neighbour for many years. These two were Perry Friedrichs and Teresa Ziskos, respectively. Both of these individuals were beneficiaries under her will signed a number of months before the powers of attorney.

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[3] Ibid, para. 2.
[4] Ibid, para. 5.

After her husband died Mrs. M's health deteriorated. She was said to have suffered from depression and was addicted to alcohol and tobacco and she suffered a number of falls and was hospitalized a number of times before she was admitted to a long term care home where she lived until her death.

Once it became apparent that Mrs. M could no longer live on her own her attorneys sold her house. Within a month after the sale, her late husband's nephews Heinz, Johann and Hannes Miksche arrived in Canada to see Mrs. M from their home in Germany. Mrs. M's only other living relative was her sister, Ursula Lill who was 87 and lived in Germany also.

The nephews met with Mrs. M at the long term care home in the company of a woman named Alma Sachse who was represented as a friend of Mrs. M. She was a member of the Polten & Hodder law firm. During the course of that meeting, Mrs. M signed news powers of attorney in favour of her nephew Heinz and her sister Ursula. The nephews saw Mrs. M again shortly thereafter and had her sign a retainer of the Polten & Hodder law firm. Thereafter Mr. Polten (a lawyer) met with her briefly twice, a number of months later.

The guardianship litigation involved competing claims by Mrs. M's friends Friedrichs and Ziskos on the one hand and the nephews[5] on the other hand. Each side claimed authority to act as decision-makers for Mrs. M based upon their powers of attorney and as Justice Spies pointed out, the litigation quickly became extremely bitter and protracted incurring extraordinary costs.[6]

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[5] Ursula Lill, though formally a party, played no active role and was unable to leave Germany because of poor health.

[6] At para. 12, Spies J., characterized the costs claimed by the nephews as "scandalous", given what they and their lawyers knew early on in the litigation.

I will return to discuss this point later but note now that early on in the litigation one judge took on its case-management. He also appointed a trust company to manage Mrs. M's property pending further order of the court. Justice Spies later made declarations that Mrs. M was incapable of managing property and incapable of personal care decisions. She formally appointed that trust company as guardian of property and she formally appointed the Ontario Public Guardian and Trustee (hereafter, "the PGT") as guardian of the person.

The friends launched their court guardianship application in the spring of 2005 alleging that they had become concerned about the nephews' motives. They sought orders to invalidate the retainer of Mr. Polten's firm and to restrain his firm's communications with Mrs. M and those providing her care. The cross-application by the nephews was launched in the fall of 2005 and was premised on their allegation that Mrs. M was in fact still capable of decision-making. If that was so, then it could be said that she chose her nephews to act instead of her friends. The nephews also alleged that the friends had breached their fiduciary duties to Mrs. M and were motivated to maximize their inheritances under her will.

When the case first came to Court, an order was made on consent of the competing parties establishing some ground rules for the parties' communications with Mrs. M, dealing with the sharing of information and establishing time lines for the usual steps in the litigation (e.g. cross-examinations).

One of the next issues to rear up was Mr. Polten's assertion in the face of the appointment of a new lawyer to act solely for Mrs. M, that he had the right to continue to act as Mrs. M's lawyer. A number of court hearing dates were scheduled and adjourned,

all the while with Mr. Polten asserting his right to continue to represent Mrs. M, in the face of opposition from the PGT whose counsel noted that for Mr. Polten to represent the nephews as applicants for orders about Mrs. M on the one side and in the same case to purport to represent Mrs. M to respond to those claims was a conflict of interest and undermined Mrs. M's right to independent representation in order to ensure full protection of her rights in both court applications.

After the third time that the applications had returned to court with nothing of substance being heard, in large measure due to adjournments caused by the late filing of voluminous materials from Mr. Polten, a recommendation was made for case management, which was eventually implemented.

In the end, the issue of the appointment of a neutral guardian of property was easily resolved by Justice Spies. However a number of other issues continued to be problematic including, access to Mrs. M by the nephews. This was a huge issue as they alleged that the friends were treating Mrs. M as a prisoner and that they were attempting to maintain their influence over her to protect their own interests under her will. The question of who should be making personal care decisions was also unresolved, notwithstanding the admitted difficulties that such a role would pose for the nephews residing in Germany as they did. Another issue that seemed unable to lend itself to a reasonable resolution between the parties involved a proposal that Mrs. M travel to Germany to see her sister. A resolution could not be achieved notwithstanding a medical opinion that Mrs. M could not safely make such a trip because of her health. Finally, at a number of points in the case it became apparent that significant legal costs were mounting on all fronts. All of that set against the backdrop of Mrs. M's limited resources

led Justice Spies to conclude that the litigation proceeding posed a significant threat to Mrs. M's financial and personal security.

Under those circumstances, in an unusual step, the PGT consented to being appointed guardian for personal care of Mrs. M so as to end the conflict over decision-making and bring the litigation to its end.

It is fair to say that more than fifty pages of Justice Spies' Judgment are devoted to dealing with the outstanding costs claims between the parties. Of note was her finding that the competing parties knew from the outset that Mrs. M's assets were modest and that most of her income was needed to pay for her ongoing living expenses.[7] And an important finding by Justice Spies was that she had the legal authority to deal with the costs claims notwithstanding that the applications themselves were never decided on their merits and she had no ability to make findings of fact on contested evidence because no cross-examinations were held.[8]

Justice Spies noted that despite arguments to the contrary, mostly by Mr. Polten, there were no "winners" in this litigation, a typical factor in assessing costs claims. She reviewed critically the conduct of the parties. She stated:

> "…it can no longer be said in estate matters, and in this regard I would include matters under the SDA, that parties and their counsel can reasonably expect all of their costs to be paid for by the assets or in this case now from the estate…The trend for some time now has been to examine the nature of the dispute and the conduct of the parties. Although in most cases it is also possible to consider which party is the "successful" party, that is not as significant a factor in these types of cases *provided it can be said that the parties are properly motivated by the best interests of the person under a disability and are acting reasonably*."[9] [emphasis added]

[7] Ibid, paras. 40-41.
[8] Ibid paras. 42-44.
[9] Ibid, para. 56.

Justice Spies spent a lot of time analysing the principles applicable to court-ordered costs awards in Ontario, including the increasingly important principle of "proportionality", noting that: "… in cases like this where the competency and guardianship of a vulnerable elderly person is in issue, that there can often be issues that transcend monetary values, counsel and their clients must always keep a proper perspective."[10]

One of the areas Justice Spies identified as contributing to the protraction of the litigation was the nephews' and Mr. Polton's refusal to acknowledge the overwhelming independent clinical evidence that Mrs. M lacked capacity to make property and personal care decisions. Justice Spies noted that Mr. Polten went so far as to suggest that the views of the bar should trump those of the healthcare professionals and the court. Justice Spies remarked:

> "This is a preposterous and startling proposition and as Ms. Spencer pointed out, an extremely dangerous one. Courts are not equipped to make assessments of someone's capacity to manage property or make personal care decisions without the assistance of qualified professionals. Often when assessments are done, all concerned accept the opinions of those professionals and there is no need for involvement of the courts. In those cases where there is an issue, the court makes the ultimate decision. In all cases, however, the courts have regard to the opinions of experts who are suitably qualified. Where there are conflicting opinions, the court must choose which one to accept…."

Justice Spies went so far as to observe the exploitive nature of Mr. Polten's conduct in the name of defending Mrs. M's competence under the guise of protecting her rights in the face of overwhelming evidence to the contrary.[11]

I will not be reviewing the many further helpful and careful statements made by Justice Spies in her lengthy decision. She articulates the appropriate costs principles to

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[10] Ibid, para. 61.
[11] Ibid, at para. 145-146.

be applied in these types of cases and she helpfully (in my view) articulates the proper and limited role of the PGT's office in such cases. But another point bears emphasis in my view:

> "As I have already said Ontario's statutory scheme to protect adults made vulnerable through incapacity is grounded in and dependent upon, the involvement of supportive friends and relatives. Those friends and relatives cannot be expected to retain counsel and where necessary bring issues to the court if they must necessarily cover the attending legal costs. As friends of Johanna Miksche Ms. Ziskos and Mr. Friedrichs exposed themselves to significant legal costs. There is absluately no basis upon which I should impose such a cost sanction against Ms. Ziskos or Mr. Friedrichs unless I conclude that they conducted the case in an unreasonable manner that led to unnecessary costs."[12]

In my view very few reported cases involve a dynamic between friends and distant family and this decision of Justice Spies shows the application of the tremendous patience and immense common sense, two qualities that should be used in liberal doses in guardianship litigation.

Chu v. Chang[13]

This is a case about a ninety-plus year old grandmother whose name is How Seem Chang (hereafter, "Chang"). According to the facts disclosed in the reported decisions, some might say she is fortunate in that she was surrounded by sons and daughters and grand-children. She was living in her own home in central Toronto and in addition to her family she had two caregivers assisting her in her home. The applicant Lily Chu is one of her daughters and in late 2008 as a result of conflict amongst the siblings, she brought

[12] Ibid, at para. 254.
[13] Reported decisions, all by the Superior Court of Justice unless otherwise noted, may be found at [2009] O.J. No. 4989 (S.C.J.); [2009] O.J. No. 5229; [2010] O.J. No. 189; [2010] O.J. No. 1204; [2010] O.J. No. 2724.

an application to court to have herself declared the sole substitute decision-maker for property and personal care for her mother. The request was opposed by her siblings and competing claims for guardianship ensued.

Early on an order was made on consent of all of the parties that resulted in various directions being given to the parties and that appointed Chang's son Kin Kwok Chang and Chang's grandson Dr. Stephen Chu (a dentist and Lily Chu's son) as her joint guardians of property and personal care. The guardians were ordered to deliver the required written plans for future decision-making[14] and the parties were ordered to bring the matter back to court a few months hence.

At first blush, it appeared that the major issues had been resolved with a minimum of judicial intervention and largely by an agreement that reflected the assertions of all involved family members that their sole concern was for the best interests of Chang. The joint guardianships appointed representatives from either side of the apparent factions (Lily Chu and her son Dr. Chu on the one side and all of Lily's other siblings on the other side) to act together to further Chang's interests. But as is often the case, the devil is in the details.

Soon afterward a dispute arose about the implementation of the first order and the parties sought judicial clarification about the nature of their appointments, about arranging clinical assessments of Chang's capacity to make her own property and personal care decisions and about how to implement the guardianship orders going

[14] Unlike attorneys selected by the person in power of attorney documents where there is no requirement to develop formal decision-making plans for the person in advance, Ontario law requires guardians of property to act in accordance with a written management plan for the property of the incapable person. Guardians for personal care are required to act in accordance with a written guardianship plan for personal care decision-making: SDA ss. 32(10) [property] and 66(15) [personal care]. The forms for the plans may be found at O. Reg. 26/95 as am., made under the SDA, Forms 2 and 3, respectively.

forward.[15] And thus began a downward spiral of the litigation. The capacity assessments were conducted some five to six months after the original order and appeared to have been not entirely consistent with each other. While both assessors appear to have opined that Chang was incapable of making decisions about managing property, they differed on the extent of her incapacity regarding her personal care decision-making notwithstanding consensus about Chang's cognitive impairments and memory loss.[16]

Further rifts erupted about the written plans for Chang's decision-making fuelled by the differences of professional opinions regarding capacity and the parties ended up back in Court pointing fingers at each other's perceived lack of cooperation. A fight brewed about the caregivers and the extent to which they reported to or took direction from the joint guardians. Not surprisingly, there were allegations about the appropriateness of the care actually being received by Chang.

Mr. Justice Brown noted that the lengthy competing affidavits had markedly different recollection of certain events and in the absence of cross-examinations that might afford him some insight into credibility of the witnesses, he wisely focused on what evidence he considered to be solely about Chang's best interests, including an affidavit sworn by Chang which he clearly felt was important and reproduced in full in his decision as follows:

> "[1] I love my children and my grandchildren. I don't want them to fight.
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> [2] My children Kin Kwok Chang, Kin Wah Cheung, Kin Keung Chang, Mandy Lam and Peggy Wu take turns visiting me and cooking food for me.
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> [3] Lily and Stephen have dropped by to visit me and I am happy to see them.

[15] See the description of this history contained in the decision of Mr. Justice Brown reported at [2009] O.J. No. 4989, paras. 5 – 13.
[16] Ibid, as described in paras. 7 – 9.

> [4] I am happy with my live in caregiver Xiao He Wang. I enjoy her food and she listens to me.
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> [5] I am happy with the arrangement now, my children caring for me."[17]

As to the complaints by Dr. Chu relating to Chang's care which were described as potentially life-threatening, Justice Brown patiently reviewed each in detail.[18] With the limited hindsight as reader of the written decisions, it is suggested that one allegation by Dr. Chu which related to his belief that his grandmother was not being properly nourished, would be the seed of further misconduct down the road. But Justice Brown found that the allegation was not supported by the independent observations of one of the capacity assessors regarding Chang's appearance or by photographs of her.

Justice Brown concluded on the detailed evidence before him that Chang's care-giving arrangements were in her best interests and that the caregivers were providing her with appropriate care.[19]

Justice Brown took the opportunity to clarify what appeared to him to be a misconception by Dr. Chu about the nature of his role as follows:

> "Courts are interested in the best interests of the incapable person, not the "rights" of a guardian. Indeed, guardians labour under duties to the incapable person. Their position does not vest them with independent "rights" which a court will protect; their position affords them certain powers which they must exercise solely for the benefit of the incapable person. Put more bluntly, any guardian of an incapable person must check his or her ego at the door and focus all efforts in securing the best interests of the incapable person. A person who cannot do so should decline to act as a guardian."[20]

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[17] Ibid, para. 17.
[18] Ibid, paras. 18 – 25.
[19] Ibid.

[20] Ibid, para. 26.

It is suggested that Dr. Chu's misconceptions about his "rights" as a guardian are all too common.

In the course of this decision, Justice Brown voiced his reservations about the co-guardianship arrangement between the son Chang and his nephew Dr. Chu. Their evidence was replete with indicia of their inability to act cooperatively, including Mr. Chang's conduct regarding the written management plan, which was criticized. Justice Brown strongly cautioned the co-guardians to work together to make decisions in the best interests of Chang else they might find themselves removed.

Justice Brown similarly cautioned the guardians in respect of decisions concerning Chang's personal care and he enjoined the family in the following terms:

> "All members of the family should go back to paragraph 17 of this endorsement and re-read what their mother/grandmother said about her family. FOLLOW HER WISHES. And when you find yourselves disagreeing, pull out your mother's affidavit, read it out loud together, put aside your differences, and act like adults to enable her to enjoy the twilight years of her life."[21]

Justice Brown attempted to end the litigation and he refused to order a trial about Chang's capacity to make her own personal care decisions. He confirmed that Dr. Chu and his uncle Mr. Chang were to act as joint guardians for personal care in respect of Chang's health care only[22] as the least restrictive approach to satisfying Chang's decision-making needs in accordance with the principles articulated in section 55 of the *Substitute Decisions Act, 1992*.

That however was not the end of the story. Approximately six days after Justice Brown released his Judgment described above, counsel for Dr. Chu wrote to him

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[21] Ibid, para. 35.

[22] The only domain of personal care where both assessors concluded Chang was mentally incapable of decision-making.

requesting an urgent motion, which Justice Brown accommodated and give similarly urgent directions regarding evidentiary filings in advance of the hearing. Upon receiving and reviewing the affidavits, he was so stunned that he released an interim order despite being out of town at the time. Here is what happened according to his order. On the very day Dr. Chu's lawyer asked for the urgent hearing, Dr. Chu removed his grandmother from her home and took her to an undisclosed location. He refused to divulge her whereabouts to any other family members, including his co-guardian. He claimed he was acting on information given to him by one of Chang's caregivers some six weeks earlier. Worse yet, he had previously asserted to Justice Brown that his inability to communicate with the caregivers in Cantonese was grounds for replacing the caregivers, whereas he now had provided the court with transcripts of lengthy conversations he held with one of the caregivers in Cantonese. Dr. Chu also claimed to have involved the PGT's investigations unit and he intimated that he had been encouraged in his decision to exercise this 'self-help' remedy by the PGT's investigator. Justice Brown ordered Dr. Chu to return his grandmother to her home within a day.[23]

Following the hearing of the urgent motions in which both factions sought to remove the other joint guardian, Justice Brown released two very detailed endorsements.[24] Although I will highlight aspects of each of these, the reader is well-advised to read the endorsements in full. Essentially, Chu defended his actions concerning the surreptitious removal of his grandmother from her home on the grounds that he claimed one of the caregivers told him that the other side of the family had

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[23] [2009] O.J. No. 5229.

[24] The first endorsement found at [2010] O.J. No. 189, dealt with the substantive issues arising on the motion. Key among them was the consequences of Dr. Chu's precipitous actions. The second endorsement although it was styled as about costs, really says much more and may be found at [2010] O.J. 1204.

directed the caregivers not to feed Chang. While Dr. Chu detained his grandmother, he had her undergo a barrage of tests, not only to verify his belief that she was being starved but apparently also to re-assess her capacity to make personal care decisions. He submitted various professional reports to the court, all of which Justice Brown found to lack credibility. One report found that Chang had low vitamin B12 levels and another seemed to suggest Chang's nutritional decline if she did not receive assistance with feeding. Taking no chances, Justice Brown ordered that Chang be examined by a doctor who was acquainted with her so that an independent opinion could be provided to the Court. The doctor's opinion was that Chang was in good health and showed no signs of malnutrition.

From the other side of the family for the co-guardian Mr. Chang and his siblings, the story appears to have been that the feeding directions were misinterpreted or distorted. Their direction to the care-giver had essentially been not to force feed Chang but to allow her to feed herself, which the evidence seemed to show she continued to be able to do.

Having returned Chang to her home, Justice Brown finally terminated the joint guardianships between Dr. Chu and Mr. Chang. While he was most critical of Dr. Chu's conduct, he nevertheless found that Mr. Chang continued to erect barriers in the co-management of decision-making with Dr. Chu, despite being ordered to cooperate. He refused to sign necessary banking papers and he refused to sign the written management plan for decision-making in direct contravention of Justice Brown's previous order. Justice Brown appointed a trust company to manage Chang's modest estate and he appointed her daughter Peggy Wu as her sole guardian for personal care. He ordered a

strict regime of access as he was satisfied that the risk of more conflict between the siblings and Dr. Chu must be avoided in the best interests of Chang. And he took the unusual step of giving Ms Wu directions limiting the scope of her duty to consult with Lily Chu or Dr. Chu as "supportive family members".[25] In fact he found that neither were entitled to be consulted in the context of decision-making but he did order Ms Wu to keep Lily Chu informed about changes in her mother's health condition.[26]

The other order made by Justice Brown deals with the legal costs arising as a result of the urgent motions by both factions to remove the other co-guardian. He summarized his pertinent findings about the conduct aptly, noting that two choices made by Dr. Chu had caused much trouble, notably Dr. Chu's decision to allege that the siblings were directing Chang's caregivers not to feed her and his decision to kidnap his grandmother and remove her from her home. I will quote liberally from the endorsement: "It is difficult to find words to describe adequately his [Chu's] misconduct" (para. 5); "I give no effect to Dr. Chu's allegations that the respondents were seeking to deprive Mrs. Chang of food she required" (para. 9); "Dr. Chu had "misled the court by filing an affidavit for the September hearing that clearly indicated he could not communicate effectively in Cantonese" whereas it transpired that he could. (para. 6)"[27]

Justice Brown took the opportunity to (as he put it), "…repeat the essential points, in real simple terms, so that all can understand.":

> "A guardian of property or the person must exercise his powers and duties diligently, with honesty, integrity and in good faith **for the incapable person's benefit**: *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ss. 32 and 66. While I would not go so far as to say that a court-appointed guardian acts as an officer of

[25] See SDA, ss. 66(7).
[26] [2010] O.J. 189, at paras. 28 – 32.
[27] [2010] O.J. No. 1204, at para. 8.

> the court, certainly his fiduciary duties of honesty and integrity require him to approach the court with only the cleanest of hands.
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> It is a breach of a guardian's fiduciary duties to the incapable person to invoke the process of the court to make baseless allegations against others.
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> It is a breach of a guardian's fiduciary duties to misrepresent the true state of affairs to the court.
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> It is a breach of a guardian's fiduciary duties to attempt to advance a position before the court in proceedings under the *SDA* which is not motivated **solely** by a concern, **objectively-based**, for the best interests of the incapable person but, instead, to initiate proceedings under the *SDA*, including proceedings for directions, which reflect merely an effort by one side of the family to lever the court process to obtain some tactical advantage against the other side: *Abrams v. Abrams*, 2010 CanLII 1254 (Ont. S.C.); *Fiacco v. Lombardi*, 2009 Can LII 46170 (Ont. S.C.), para. 36.
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> Substantial indemnity costs may be awarded where a party has made serious allegations of misconduct against another which were unfounded and misused the court's process:…[references omitted] that is what happened here. Dr. Chu breached his fiduciary duties by misleading the court, making baseless allegations against his co-guardian and other relatives and then, incredibly, resorting to self-help by kidnapping his grandmother. At the same time as he was instructing his counsel to seek an urgent hearing from the court, Dr. Chu removed his grandmother from her home, took her to an undisclosed location, kept her sequestered from her children who had seen her virtually daily up until that point, and did not return his grandmother until ordered to do so by the Court.
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> …Dr. Chu has not been motivated by an *objectively-based* concern for the welfare of his grandmother, but by a desire to improve the position within the family of the interests of his mother, the applicant, and himself. I cannot emphasize strongly enough that to use *SDA* proceedings for such a purpose amounts to an attempt to subvert the whole purpose of the *SDA*."[28]

It should come as no surprise that Dr. Chu was ordered to pay the costs of the parties that flowed from his ill-fated approach to his grandmother's care.[29]

[28] Ibid, paras 9 – 15.
[29] Ibid, paras. 16 – 24.

DISCUSSION OF THEMES

In my view it is crucial that we keep our focus on the rights of the person who is the subject of guardianship litigation and on questions about what those person's interests are. In my view it is critical to our efforts to maintain the balance between autonomy and protection that underscore the SDA, that the person who is alleged to be mentally incapable have a voice in a legal proceeding that so fundamentally affects his or her rights. Formal recognition of that is enshrined in SDA section 3 enabling the court to appoint counsel to represent the person directly, notwithstanding the challenge to his or her decisional capacity. That flows too from the important rights protections underlying the presumption of capacity set out in section 2 of the SDA.

Where evidence of the person's wishes is available to a Judge and to the parties, it should be a core consideration to guide choices in the appointment of a guardian and in any directions that a Court may give to the guardian to guide specific decision-making.[30]

In Miksche, Justice Spies spent considerable time analyzing the proper role of a lawyer representing a vulnerable person. It is mystifying to most readers of the decision that Mr. Polten was apparently unable to see that acting for Mrs. M's nephews and for Mrs. M posed an irreconcilable conflict of interest, quite aside from the risk of conflict of interest that he fell afoul of by not putting Mrs. M's interest above his own financial interests under his retainer. In Chang, Justice Brown underscored the importance of Mrs. Chang's views in his difficult deliberations on her behalf. He repeatedly returned to what

[30] See SDA ss. 24(5) [property] and 57(3) [personal care] requiring consideration of the incapable person's wishes in the appointment process. See also the role of the person's wishes in the guardian's decisions as reflected in SDA ss. 66 (3) and (4) regarding personal care and the role of past conduct as expressions of intentions relating to the making of gifts or loans from the property of the incapable person as referred to in ss. 37(4).

were her wishes and what he saw as in her interests in attempting to impose to order on those who were involved in her care and purporting to make decisions on her behalf.

One of the sad factors about adult guardianship law is that all too often the fight shows no signs of abating after the death of the person who was the subject of the litigation. That certainly proved true in Miksche. Indeed often it seems to be the case that the family conflicts giving rise to the guardianship litigation have long preceded the court process under the SDA, are not quelled at all during the course of the court process and then seem to continue well beyond the death of the person in the guise of more traditional estate litigation.

Unlike other civil litigation where a Judgment or one's "day in court" may be the end result of a sometimes lengthy dispute between competing parties, guardianship litigation often takes on a life of its own and at times, the appointment of a guardian for a person who is declared incapable of making their own financial or personal care decisions may be only the beginning. Guardians may need to return to the court for a myriad of directions on any number of aspects of decision-making. They may be required to pass their accounts periodically throughout the life of the person under guardianship. Perhaps the most important point is that the guardians remain under the supervision of the courts and their conduct may be scrutinized and subject to sanctions.[31]

In both cases reviewed here, early on the judges gave directions about communication between the parties and the person alleged to be incapable, communications with third parties and information-sharing between the parties and with

[31] The SDA recognizes this and contains a number of formal mechanisms whereby an attorney or guardian may return to the court or taken to court by other parties: See SDA, ss. 26 [property] and 61 [personal care] to vary a guardianship order. Directions may be sought from the court under s. 39 [property] and s. 68 [personal care], in addition to formal financial accountings that may be ordered under s. 42.

others. As well, early on in both cases the judges tried to provide a sensible framework about visitations with the person who was the subject of the dispute in order to minimize the extent to which the conflict might play out in the person's presence and cause additional upset.

A related theme is the need for creative and early judicial file or case management in any case where the pleadings or conduct of the parties hint at the prospect that conflict among the players will take hold of the litigation and drive it in directions that are likely to undermine the very people that the SDA is designed to protect.

While entire treatises can be written on the subject, readers are referred to Mr. Justice Brown's recent review of the inherent power of the judges of the Superior Court to manage the cases before them. That review was written in the context of another high conflict guardianship case: Abrams v. Abrams.[32] The Abrams litigation continues at the time of writing this paper.

A lot of the high conflict guardianship litigation is "fact-driven not law-heavy".[33] But because much of the litigation is time-sensitive it seems to frequently be the case that it is missing those hallmarks of traditional litigation where the relevant evidence is carefully tested either before the matter gets in front of a judge (via cross-examinations on affidavits) or by the judge as the trier of fact at a hearing where oral evidence is presented and credibility can be assessed. There are many cases where as Justice Spies noted in Miksche, the court hearings are concluded for all practical purposes without any

[32] See in particular the decision of Brown J., at 2010 ONSC 2703, leave to appeal dismissed by Ferrier J., 2010 ONSC 4714. The issue was also canvassed by Sachs, J., in Bessie Orfus Estate, 2010 ONSC 5204 (Div. Ct.), where she referred favourably to Justice Brown's decision at para 8.
[33] A phrase used by Mr. Justice Brown in Chang, supra 2010 O.J. 1204, para. 20.

issues having been decided on their merits or any conclusions being reached as a result of the traditional mechanisms for evaluating the conduct of the parties.

As such, and bearing in mind the principle of proportionality and some of the unique features of guardianship litigation, it is suggested that parties should attempt at the earliest opportunity to narrow the issues about which no agreement is possible. In some cases the person's mental capacity may not be the issue at all. Arguably where mental capacity is really an issue or where the person's health status is in dispute, it is crucial for the court to have access to unbiased expert evidence. Both Justice Spies and Justice Brown commented on those issues.

Wherever possible, mediation outside of the court process should be canvassed as an alternative and potentially less destructive process in terms of the ongoing family relationships. And as should be evident from the review of both cases here, it is a fool's game to argue about issues which should reasonably be conceded or for a party to act with wilful blindness and then walk into a courtroom to seek judicial assistance. This is especially true in guardianship litigation because of the court's need to focus on the interests of the person and the special duties that are imposed on those who wish to act as substitute decision-makers. As noted above, Justice Brown emphasized in Chang that a fiduciary must come to the court with the cleanest of hands. Lawyers should counsel their clients that those seeking to be appointed as decision-makers of others would be well-advised to do likewise.

CONCLUSION

I have reviewed the reported decisions of several high conflict guardianship cases played out in the Ontario Superior Court of Justice over the last few years. Themes and hallmarks have been emphasized in order facilitate ongoing discussion of how we as elder law lawyers can best serve our clients and promote the important values underscoring the SDA. In another of his decisions in Abrams, Mr. Justice Brown has taken judicial notice of the greying of the baby boom and the risks inherent in high conflict guardianship litigation in the following terms:

> "Canada's population is aging. As a consequence we are witnessing an increase in guardianship litigation under the *Substitute Decisions Act*. At least in the Toronto Region, a significant number of guardianship applications arise out of disputes amongst siblings about who should manage a parent's property or personal care as the aging parent enters the realm of incapacity, involving both "battles of competing powers of attorney" and efforts to invalidate POAs…."
>
> "Proceedings under the *SDA* are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only one focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the Legislature in the *SDA*, should not and will not tolerate family factions trying to twist *SDA* proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues."[34]

In my view we should heed the wise reminders and the warnings to clients contained in these and other reported guardianship cases. We should strive to give our clients careful advice to steer clear of the pitfalls that can befall them in the litigation process. As I mentioned in the opening paragraphs of this paper, we should draw on lessons learned in high conflict family law litigation to the extent that they may assist us to find innovative and restorative approaches that nonetheless keep the focus on the person who is at the center of the conflict and keep their interests in the fore. We should

[34] Abrams v. Abrams [2010] O.J. No. 787, at paras. 31 and 35.

actively explore ways in which to minimize the risk that family conflict will derail the focus of the parties and the court from the rights of persons who may be losing or may lack mental capacity to make decisions for themselves.