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Financial Abuse, Neglect and the Power of Attorney

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A. Introduction

An aging population combined with an increased life expectancy means that cognitive disorders, reduced functional abilities/decisional capacity and the consequent vulnerability associated therewith are, more than ever, a part of our world. These changing demographics render the law as it affects older individuals increasingly important. Older individuals can be and are particularly prone to legal abuses. Elder abuse, or the abuse of older adults, is often defined as any act or omission that harms a senior or jeopardizes his or her health or welfare. The World Health Organization defines abuse of older adults as "a single or repeated act, or lack of appropriate action, occurring in any relationship where there is an expectation of trust that causes harm or distress to an older person." Legal abuse of older adults can take many forms where the abuse of trust involves a legal instrument and construct.

The Power of Attorney document (the "**POA**") has long been viewed as one way in which a person can legally protect their various health and/or financial interests by planning for when they become ill, infirm or incapable of making decisions. The POA is also seen as a means to minimize family conflict during one's lifetime and prevent unnecessary, expensive and avoidable litigation. Often, however, it is the complete antithesis of this and causes a great deal of family disharmony. In our experience, we have seen attorneys use the powers bestowed upon them pursuant to POA documents as a means to provide the physical, emotional and financial care that their vulnerable loved ones need. We have also seen it used as a means of protection against predators, of which there is a very real risk.

That POAs are generally a good planning vehicle is a widely shared view. This is evident from the fact that, since 1994 and to this day, the Ontario Ministry of the Attorney General has distributed free POA kits to the public and solicitors have routinely recommended them as part of an estate plan. Unfortunately, however, if any study has been conducted with respect to the outcomes or success of the use of such kits, it is not publicly available. Nor is there a known comprehensive study determining the extent to which attorneys appointed pursuant to such documents are actually aware of the statutory principles which guide them (such as the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "***SDA***") or the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "***HCCA***")) or, if they are aware of such principles, whether they adhere to them.

While a POA document can be used for the good of a vulnerable adult or an incapable person, there can be a dark side to what is in fact a very powerful and far-reaching document. More often than not it becomes apparent that the grantor never fully understood and/or put much thought into the extent of the powers being bestowed, whether the chosen attorney truly had the ability to do the job and fulfill his/her duties, or whether the attorney chosen could truly be trusted to act in an honest and trustworthy manner. Consequently, there is an extremely high risk that a vulnerable older adult or incapable person may fall victim to abuse as a result of having a POA. Although a somewhat bleak assumption, given the many cases of abuse that come in and out of our offices, in our estimation there are very likely a high number of attorney-inflicted abuse cases that simply go unmonitored or unnoticed by our legal system. And, it is in this way that a POA can be used to the detriment of the very individual who granted the power.

B. What is a Power of Attorney?

Put summarily, a POA is an instrument that facilitates the maintenance or control over one's affairs by enabling the grantor of the power to plan for an extended absence, infirmity, and even incapacity. Proper, thoughtful, preparation allows the grantor of a POA to require an Attorney to take legal steps to protect the grantor's interests and wishes, within the confines of the governing legislation.

In Ontario, there are three types of POAs:

(1) the general form of a POA for property which is made in accordance with the *Powers of Attorney Act*, R.S.O. 1990, c. P. 20;

(2) the Continuing POA for Property (or "**CPOAP**"), pursuant to the provisions of the *SDA*; and

(3) the POA for Personal Care (or "**POAPC**") pursuant to the provisions of the *SDA*.

A POA for Property can be used to grant:

- a specific/limited authority;
- a general authority granting the power to do all that is permissible under the governing principles and legislation; and
- a continuing authority which survives subsequent incapacity.

A POA for Personal Care can be used to grant powers exercised during incapacity only.

C. Selecting the Right Attorney

In advance of drafting and ultimately granting a POA, the grantor must be made aware of the fact that there is a very real risk of fraud and abuse with respect to these documents. Indeed, the most important advice that we, as practitioners, can give to a potential grantor of a CPOAP or a POAPC is **to carefully choose their attorney(s).** In addition, much emphasis should be placed on the fact that the most important characteristics that a grantor should look for in a would-be attorney are: **honesty, integrity and accountability**.

D. The Continuing Power of Attorney for Property

A Continuing Power of Attorney for Property (or "**CPOAP**") is commonly used to ensure that the financial affairs of a person are looked after in circumstances where that person is unable to look after them on their own.

Pursuant to the *SDA*, a POA for Property is a CPOAP if:

(a) the document states that it is a continuing power for attorney; or
(b) the document expresses the intention that the authority given may be exercised during the grantor's subsequent incapacity to manage property.

A person is considered incapable of managing their property if they are unable to understand information that is relevant to making a decision in the management of their own property or unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. A CPOAP document can be limited to specific dates or contingencies and/or it can continue during the incapacity of the grantor, hence the name "*Continuing* Power of Attorney for Property."

To have a valid CPOAP, the Attorney needs to be appointed before the grantor becomes incapable of giving it. The legal test of capacity to give or revoke a CPOAP is different from that of capacity to manage property to the extent that the *SDA* specifically states that a person can be capable of giving or revoking a CPOAP even if he or she is incapable of managing property.

Much to the surprise of many older adults, the CPOAP is effective immediately upon signing *unless* there is a provision or "triggering" mechanism in the document which directs that it will

come into effect in accordance with a specified date or event, such as incapacity of the grantor. If the POA document specifies that the power does not become effective until incapacity, there should be a determining mechanism, failing which the *SDA* offers guidance.

The powers granted to an Attorney acting on behalf of an incapable person are extensive. An Attorney operating under a CPOAP has the power to do anything on behalf of the grantor that the grantor could do if capable, except make a Will. These powers are subject to the *SDA* and any court-imposed conditions.

Guidelines for the execution, resignation, revocation, and termination of a CPOAP can be found in the *SDA*.

E. Power of Attorney for Personal Care

A POAPC enables the (capable) grantor to appoint a person or persons to make personal care decisions on their behalf in the event that they are found to be incapable of being able to do so on their own. A person/grantor is considered incapable of their personal care if unable to understand information relevant to health care, nutrition, shelter, clothing, hygiene, or safety, or if unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision respecting same. As with the different legal criterion for testing capacity for managing property and giving or revoking a CPOAP, the *SDA* also provides a the criterion required for the capacity to make personal care decisions and give or revoke a POAPC. Again, the *SDA* specifically provides that a person may be capable of giving or revoking a POAPC even if he or she is mentally incapable of making personal-care decisions.

There are limitations on who a grantor may appoint as their attorney pursuant to a POAPC. The *SDA* prohibits a person who provides health care, or residential, social, training or support services to the grantor *for compensation* from acting as an Attorney for Personal Care, unless the Attorney is the spouse, partner or relative of the grantor, in which case they are permitted to act.

When making decisions on an incapable person's behalf, the Attorney for Personal Care is required to make those decisions in accordance with the *SDA*. Further guidance respecting consent to treatment decisions is also found in the HCCA. In addition, an Attorney must use

reasonable efforts to act in accordance with the wishes or instructions of the incapable person (ascertained while capable) or otherwise act in the incapable person's best interests guided by the HCCA, SDA and common law. To act in the incapable person's best interests, the attorney must consider the values and beliefs of the grantor in question, their current incapable wishes, if ascertainable, whether the decision will improve the grantor's standard and quality of life or otherwise either prevent it from deteriorating or reduce the extent or rate at which the quality of the grantor's life is likely to deteriorate, and whether the benefit of a particular decision outweighs the risk of harm to the grantor from alternate decisions.

A POAPC is generally considered a flexible vehicle for assisting the grantor with personal care decisions when and if it becomes necessary to do so. Indeed, it is increasingly viewed as a planning tool for the end of a person's life.

The downside of the POAPC is that all too often the document does not contain detailed-enough instructions or, alternatively, the instructions provided are far too detailed, such to cause confusion. Attorneys for personal care should be informed that written wishes and oral wishes have equal weight, and that later capable wishes take precedence over earlier wishes. It is at this juncture that discussion with family members can be beneficial, noting of course, that the attorney must ensure that the incapable person's independence is fostered. The attorney must also assist in choosing the least restrictive or intrusive courses of treatment or action. It is important to understand that an Attorney for Personal Care is not a care provider; rather, a decision maker.

Guidance regarding the execution, revocation, resignation, and termination POAPCs can be found in the *SDA*.

F. Duties of Attorneys

An Attorney is a fiduciary who is in a special relationship of trust with the grantor. A fiduciary has the power to alter the principal's legal position. As a result of this special relationship, the common law imposes obligations on what an attorney acting as a fiduciary may do. Thus, in addition to any specific duties that may have been set out by the grantor in the POA document itself, the common law has also imposed the following duties upon an attorney:

- The attorney must stay within the scope of the authority delegated;
- The attorney must exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his or her own affairs; if being paid the attorney may be held to the standard applicable to a professional property or money manager);
- The attorney must not make secret profits;
- The attorney must cease to exercise authority, if the POA is revoked;
- The attorney must not act contrary to the interests of the grantor or in a conflict with those interests;
- The attorney must account for dealings with the financial affairs of the grantor, when lawfully called upon to do so;
- The attorney must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney cannot make, change or revoke a Will on behalf of the donor; and
- The attorney cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

Notably, in situations where a *capable* grantor appoints an Attorney to deal with property, the Attorney is considered to be an *agent* of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). Though the fiduciary standard or expectation is lower in such a relationship, an Attorney in this position is still a fiduciary with a duty only to the grantor and should, therefore, keep written documentation of instructions and act diligently and in good faith.

The Specific Duties of an Attorney for Property

All of the duties of the CPOAP are set out in the *SDA*. In the case of *Banton v. Banton*, Justice Cullity discussed many of the principles regarding an Attorney's performance of responsibilities before and after the grantor loses capacity as well as the differences between an Attorney and a trustee. According to the Court, Some of the specific duties and obligations of an Attorney for Property include the following:

(1) Manage a person's property in a manner consistent with decisions for the person's personal care;

(2) Explain to the incapable person the Attorney's powers and duties;

(3) Encourage the incapable person's participation in decisions;

(4) Consult with the incapable person from time to time as well as family members, friends and other Attorneys;

(5) Determine whether the incapable person has a Will and preserve to the best of the Attorney's ability the property bequeathed in the Will; and

(6) Make expenditures as reasonably required for the incapable person or the incapable person's dependants, support, education and care while taking into account the value of the property of the incapable person, including considerations as to the standard of living and other legal obligations.

The Attorney for Property must consider whether a given transaction is in the best interests of the individual for whom he is acting, and also has discretion to make optional expenditures, including gifts, loans and so on, in accordance with the guidelines in the *SDA.* The Attorney must keep detailed records of all transactions as well as ongoing list of assets, details of investments, securities, liabilities, compensation and all actions taken on behalf of the incapable person, including details of amounts, dates, interest rates, the wishes of the incapable person and so on. An Attorney for Property must be prepared to keep accounts for the passing of such accounts, in the event it is required.

The Specific Duties of an Attorney for Personal Care

The Attorney for Personal Care must exercise powers diligently and in good faith. As with an attorneyship for property, attorneys for personal care are required by law to foster the incapable person's independence, to encourage the incapable person to participate in personal-care decisions to the best of his or her ability and to consult with the incapable person's supportive family and friends and with the persons who provide personal care to the incapable person. Attorneys are required to keep thorough and detailed records of any and all decisions taken, including a comprehensive list of health care, safety, shelter decisions, medical reports or documents, names of persons consulted, dates, reasons for decisions being taken, record of the incapable person's wishes, and so on.

G. Attorney Disasters: What Can Go Wrong

POA documents often create suspicion, which frequently and inevitably bring the Attorney's actions, motives and conduct into question, whether warranted or not. In our practice, we are seeing ever-increasing numbers of POA disputes, complaints and attendant to this, guardianship disputes.

Issues that frequently arise with respect to Attorneys for Personal Care and for Property:

(1) Disputes and accounting discrepancies concerning the specific dates upon which the POA document became effective; the date of incapacity of the grantor; and the extent of the Attorney's involvement;

(2) Disputes regarding whether it was the grantor, or the Attorney, who was acting at any given stage;

(3) Whether the Attorney has made unauthorized, questionable or even speculative investment decisions, or decisions or decisions lacking in diversity;

(4) Whether the Attorney has taken into consideration the tax effects of the Attorney's action or inaction;

(5) Whether the Attorney has acted in a timely fashion in attending to financial matters which may have contributed to unnecessary expenses, or damages from inaction;

(6) Whether the Attorney has sought professional advice where deemed necessary or appropriate;

(7) The Attorney's treatment of and dealings under jointly held assets or accounts;

(8) Attorney disputes between siblings regarding the capacity, action/inaction, of a parent\grantor;

(9) Attorney disputes among step-children, children of prior relationships, subsequent spouse/partner;

(10) Attorney misappropriation of grantor's assets;

(11) Incapacity of a grantor to grant a POA and/or POA secured by a predator with mal-intent;

(12) POA obtained from a vulnerable or physically dependent grantor by an individual with improper motives, seeking personal gain, as a result of the exerting of undue influences, or suspicious circumstances; and

(13) Disputes where one or several Attorneys have acted without the knowledge or approval of the others either under a Joint, or Joint and Several, POA.

Some of these issues arise as a result of the Attorney giving such issues secondary attention. However, an Attorney's inattention to the sorts of duties and responsibilities expected can cause a multitude of problems later on, particularly in an area where family emotions run high.

H. Attorney Abuse:

As mentioned, a POA is an extremely powerful document which enables an attorney to do virtually anything on the grantor's behalf in respect of property that the grantor could do if capable, except make a Will. Consequently, there are a number of ways in which a POA document can be used to the detriment of a grantor. Three common scenarios in which a POA can be used to the detriment of an older adult who is vulnerable or dependent are:

1. POAs fraudulently procured, for the sole purpose of abuse;
2. POAs fraudulently used, for the sole purpose of self-interest; and
3. POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty.

The use of fraudulently obtained POAs is an increasing concern and vulnerable elderly individuals are highly susceptible to such fraud. The most common forms of "title fraud" or "mortgage fraud" involve fraudsters using stolen identities or forged documents to transfer a registered owner's title, legally, without the registered owner's knowledge. The fraudster then obtains a mortgage on this property and once the funds are advanced on the mortgage, he or she disappears. In the POA context, an Attorney appointed pursuant to a fraudulently-obtained CPOAP could mortgage or sell a grantor's home without the grantor's knowledge or consent, notwithstanding any fiduciary duty attached to the Power granted.

Fraud can also be the product of validly executed powers of attorney. Many older adults are predisposed to vulnerability if they are dependent on another for certain necessities of life. Such dependence may be attributable to physical or mental disability, or simply to the overwhelming task of suddenly managing all of their own affairs. The issue of incapacity necessarily raises the question of exploitation of vulnerable persons.

I. Real-life Examples Extracted from Our Growing Collection of Case Law

(1) POAs fraudulently-procured, for the sole purpose of abuse

(a) *Re Koch*[1]

Although not a POA case *per se*, the case of ***Re Koch*** provides an example of a situation where one person may have an ulterior motive when seeking an assessment of a vulnerable person, particularly an assessment which results in a determination of incapacity. In this case, Ms. Koch had suffered from multiple sclerosis for fifteen years. She was confined to a wheelchair, although able to walk short distances with a walker. Ms. Koch and her husband separated in January 1996. Each retained lawyers and negotiations commenced with a view to resolving the usual property and support issues. On April 23rd, 1996, her lawyer forwarded a draft separation agreement to the husband's lawyer. Apparently, the terms of the separation agreement were not acceptable to the husband. In or about May 1996, the husband complained to the necessary authorities that his wife was demonstrating an inability to manage her finances. This complaint triggered the formidable mechanisms of both the SDA and the HCCA. A hearing was held before the Consent and Capacity Board (the "**CCB**") and Ms. Koch was adjudged by the CCB to be:

1. incapable of managing her financial affairs and property; and
2. incapable of consenting to placement in a care facility.

Ms. Koch sought a reversal of the CCB's decision. And, as stated by the Court, her cry was essentially thus: "My husband had me committed." The Court agreed with Ms. Koch and found the CCB to have erred in law. Justice Quinn stated:

[1] *Koch, Re*, 1997 CarswellOnt 824, (Ont. Gen. Div.); Additional reasons in: *Koch, Re*, 1997 CarswellOnt 2230 (Ont. Gen. Div.).

> The assessor/evaluator must be alive **to an informant harbouring improper motives**. [The Assessor] should have done more than merely accept the complaint of the husband, coupled with the medical reports [...], before charging ahead with his interview of the appellant. Since the parties were separated and represented by lawyers, Higgins must have realized that matrimonial issues were in the process of being litigated or negotiated and that a finding of incapacity could have significant impact on those procedures. He should have ensured that the husband's lawyer was aware of the complaint of incapacity. More importantly, Higgins should not have proceeded to interview the appellant without securing her waiver of notice to her lawyer.[2]

(b) *Bishop v. Bishop*[3]

In ***Bishop v. Bishop***, Justice O'Neill of the Superior Court found a POA granted to an elderly woman's son void ab initio based on medical evidence that she did not have capacity to grant a CPOAP to her son at the time that she did. Alma Bishop gave her son a CPOAP in 2005. The medical evidence included a score of 22/30 on the mini-mental health status test administered by her family physician and a diagnosis of mild Alzheimer disease. Allegations of fraud and abuse however were held to be unfounded.

(c) *Dhillon v. Dhillon*[4]

The case of ***Dhillon v. Dhillon*** involved a wife and son who, while the husband/father was living in India, used a forged POA to sell residential property that the husband owned, and used another forged POA to withdraw funds from the husband's RRSP and bank account. The wife used the proceeds from the sale of the first house to purchase two subsequent houses. At trial, the wife and son were found jointly and severally liable for the sale of the first house, and the wife was found liable for withdrawals from the husband's accounts. The husband was awarded a considerable amount in damages, including $5,000 in punitive damages and special costs at 80 percent of solicitor-client costs. The B.C. Court of Appeal affirmed the trial judge's finding of fraud on the part of a wife and son and substantially upheld the decision of the trial judge with respect to damages.

[2] 1997 CarswellOnt 824, at par. 69.
[3] 2006 CarswellOnt 5377.
[4] 2006 CarswellBC 3200 (B.C. C.A.).

(2) POAs fraudulently-used, for the sole purpose of self-interest

(a) *Elford v. Elford*[5]

In ***Elford v. Elford***, the husband put certain property into his wife's name, with her knowledge and for the purpose of defeating his creditors. He had a general POA over his wife's property. A disagreement developed between them and the husband, using the POA, transferred the property into his own name. The wife sued to have the property re-transferred to her. The trial judge dismissed the action; the Court of Appeal reversed it and maintained the wife's action. The Supreme Court of Canada affirmed, finding that the transfer by the husband to himself "transgresses one of the most elementary principles of the law of agency."[6] It was *ex facie* void and should not have been registered.

(b) *Burke Estate v. Burke Estate*[7]

In ***Burke Estate v. Burke Estate***, the husband used the POA granted to him by his wife to transfer Canadian savings bonds registered in the wife's name to their joint names. The Court held that the husband had acted in breach of the fiduciary duty owed to the wife. The bonds were deemed to be held on constructive trust and formed part of the deceased wife's estate.

(c) *Westfall v. Kovacec*[8]

In the case of ***Westfall v. Kovacec***, an attorney or guardian of property sought authorization to use certain monies of the incapable person for himself. He argued that it was a relatively small amount, that he really needed the money, that the incapable person didn't need it and that he was likely to eventually inherit it anyway. The Court refused to allow it. The only gifts or loans which are allowed are those to friends or relatives where there is reason to believe, based on intentions the incapable person expressed before becoming incapable, that he or she would make if capable.

[5] 1922 CarswellSask 162 (S.C.C.).
[6] 1922 CarswellSask 162 (S.C.C.) at par. 22.
[7] 1994 CarswellOnt 442.
[8] [2001] O.J. No. 3942 (Ont. S.C.J.).

(3) POAs imprudently used and/or used in a way that constitutes a breach of fiduciary duty

(a) *Chu v. Chang*[9]

The case of ***Chu v. Chang*** involved and interesting, and somewhat unusual, set of facts. The case revolved around Mrs. Chang, a then 98 year old woman, and the way in which her children and one of her grandchildren were involved in her care. The matter first came before the Court in December 2008 when her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang's sons) and Lily's son, Dr. Stephen Chu.

Any family peace dissipated shortly thereafter and the parties went back and forth before the Court on countless occasions and in one endorsement the Court voiced concerns about Mr. Chang and Dr. Chu getting along and executing their duties appropriately. The Court warned all of Mrs. Chang's children that they should be guided by Mrs. Chang's wishes (found, in this case, in her affidavit) which were that she was happy when her children spent time with her and got along. The Court told the parties to "act like adults to enable [Mrs. Chang] to enjoy the twilight years of her life."[10]

Unfortunately, further proceedings ensued and Dr. Chu requested an urgent motion on the ground that he had been compelled to remove Mrs. Chang from her home on the basis of information he had received from Mrs. Chang's caregiver that she had been told "not to feed" Mrs. Chang. Notwithstanding the concerns about feeding (of which there was considerable debate), Justice Brown ordered Dr. Chu to return Mrs. Chang to her home the following day.[11]

Two competing motions were then heard within which each guardian sought to have the other removed. In light of all the evidence, Justice Brown terminated *both* guardianships on the basis that the two sides could not work together. As for Dr. Chu, Justice Brown wrote: "It is difficult to find words to describe adequately his misconduct. Suffice it to say, by, in effect, kidnapping his grandmother Dr. Chu demonstrated that he was not prepared to work within the legal framework

[9] *Chu v. Chang* (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.); *Chu v. Chang*, 2010 CarswellOnt 246, (Ont. S.C.J. Jan 12, 2010); *Chu v. Chang*, 2010 CarswellOnt 1765, (Ont. S.C.J. Mar 26, 2010).
[10] Chu v. Chang (2009), 2009 CarswellOnt 7246 (Ont. S.C.J.) at par. 35.
[11] 2010 CarswellOnt 246

of a guardianship."[12] Although Mr. Chang's misconduct was not found to be as serious as Dr. Chu's, he too had showed he was obstructive in the process and not a suitable candidate to act as a guardian of property (he had refused to sign a court-imposed management plan). The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company.

Mrs. Chang's youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang's personal care. However, Peggy was reminded of her duty to consult family members regarding her personal care decision-making, pursuant to the *SDA*, as well as her statutory obligation to foster contact between Mrs. Chang and those family members considered "supportive family members"—of which Lily was not considered one.[13] The court held that given the history of high conflict in the family, restrictions on access by Lily and her son would be in Mrs. Chang's best interests, and stipulated both by the times and the conditions under which visits would occur. Peggy was, however, required to provide fresh information about Mrs. Chang's medical condition in the event of significant developments.

On January 6, 2010, the parties attended before his Honour to deal with the matter of costs of bringing their respective motions and, on March 26, 2010, Justice D. M. Brown[14] released his costs endorsement. In their submissions, the respondents had sought full indemnity costs in the amount of $82,591.25 payable by Dr. Chu. It was their position that Dr. Chu's reprehensible conduct, including misleading the Public Guardian and Trustee, removing his grandmother from her home, surreptitiously filming his uncle in the courthouse, and filing affidavits that raised irrelevant attacks on the respondents warranted an award of full indemnity costs. The PGT also sought costs against Dr. Chu in the amount of $8,347.50 on the basis that it was required to file affidavits with the court in order to correct misleading information provided to the court by Dr. Chu. Dr. Chu took the position that as there was mixed success on the motion—the court removed both co-guardians, appointed an institutional guardian suggested by Dr. Chu and appointed another relative as Mrs. Chang's guardian of the person—this signaled that each party should bear its own costs or, alternatively, Dr. Chu should pay the respondents costs of $4,266.96.

[12] 2010 CarswellOnt 246 at par. 5.
[13] 2010 CarswellOnt 246 at par. 29.
[14] *Chu v. Chang*, 2010 ONSC 1816.

In reaching his decision on costs, Justice D. M. Brown gave little weight to the offers to settle that were made by both parties primarily on the basis that both guardians had requested that the other resign and both ended up being removed and replaced by his Honour. The Court did not accept Dr. Chu's submission that the success on the motions was mixed. Instead, his Honour focused his attention on the fiduciary duty owed by guardians of the property as set out in the *SDA*—that being to exercise their powers and duties diligently, with honesty and integrity and in good faith **for the incapable person's benefit**—and the consequences of a guardian of the property and/or person breaching his/her fiduciary duties [emphasis by his Honour].[15] His Honour opined that 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. And, according to Justice D. M. Brown, "that is what happened here." His Honour stated:

> 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.[16]

In light of the forgoing, the Court concluded that at paragraph 15 that Dr. Chu was not 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, and, in the Court's view, to use SDA proceedings for such a purpose amounted to an attempt to subvert the whole purpose of the SDA. As, in the Court's view, Dr. Chu's misconduct stood at the extreme end of the scale, the Court concluded that it was appropriate in this case to award costs against him on a substantial indemnity scale. The Court fixed the PGT's substantial indemnity costs to $8,000.00, inclusive of disbursements and GST and fixed the respondents' costs at $35,000.00, inclusive of GST and ordered Dr. Chu to pay those costs personally. At paragraph 24, the Court noted that "while some might raise an eye-brow when they see an award of close to $45,000.00 in costs for a one-day motion," the following was worth repeating:

[15] 2010 CarswellOnt 1765 at par. 10.
[16] 2010 CarswellOnt 1765 at par. 14.

> Dr. Chu's initiation of the post-November 20, 2009, litigation was baseless, a breach of his fiduciary duties as a guardian, motivated by self-interest, and a misuse of the scheme of the SDA. When viewed in that light, I regard the resulting costs award as temperate in the circumstances.[17]

(b) *Abrams v. Abrams*[18]

The case of ***Abrams v. Abrams***, concerned a contested guardianship application. The parties were Ida and Philip Abrams (respondents) and two of their three children — the applicant, Stephen, and the respondent, Judith Abrams. At the date of the endorsement, Ida was about 87 years old and Philip 92 years old. Philip had "accumulated a tidy fortune". Although the family had got along reasonably well, in the fall of 2005, a major dispute arose about what the parents should leave to their children. In January 2007, Ida executed a Continuing Power of Attorney for Property and Power of Attorney for Personal Care naming her husband, Philip, as her attorney, with her daughter, Judith, as an alternate attorney. Ida subsequently signed a number of other POAs. In January 2008, Stephen brought a guardianship application seeking his appointment as guardian for Ida and more than two years later, the proceedings had not been resolved. That failure led to this endorsement, which warned that a failure to abide by the timetable therein would lead to costs consequences not only for the parties but as against counsel, personally. The context of the endorsement is the fact situation of the *Abrams* guardianship application and also contested guardianship applications, in general, where as Justice Brown put it, “the parties have lost sight of the key issue”, which is always the best interests of the incapable person.[19] The case shows that although the *Substitute Decisions Act* sets out a mechanism for addressing incapable persons’ needs, it is clear that it is imperfect, and still allows for matters to be dragged out while family disputes continue.

(c) *Teffer v. Schaefers*[20]

The case of ***Teffer v. Schaefers*** is one that concerned the use of an invalid power of attorney. The victim in that case was Mrs. Schaefers, who was 87 years old at the time the case was heard. She had been diagnosed with Alzheimer's disease and relied on the assistance of 24

[17] 2010 CarswellOnt 1765 at par. 24.
[18] *Abrams v. Abrams*, 2008 CarswellOnt 7786 (Ont. S.C.J. Dec 19, 2008); Additional reasons in: *Abrams v. Abrams*, 2009 CarswellOnt 524 (Ont. S.C.J. Feb 03, 2009); affirmed by: *Abrams v. Abrams*, 2009 CarswellOnt 3618, 2009 ONCA 522 (Ont. C.A. Jun 25, 2009).
[19] 2010 CarswellOnt 1135 at par. 38.
[20] *Teffer v. Schaefers*, 2008 CarswellOnt 5447, 93 O.R. (3d) 447 (Ont. S.C.J. Sep 12, 2008); Additional reasons in: *Teffer v Schaefers*, 2009 CarswellOnt 2283 (Ont. S.C.J. Apr 06, 2009).

hour nursing care in her home. She had been assessed by a professional medical assessor and found to be incapable of managing her property and making decisions regarding her personal care – a fact the Court confirmed.

There was considerable evidence which supported the view that she did not have capacity to assign a POA at the end of April 2006, despite the fact that Mr. Verbeek, a lawyer and the attorney named in Mrs. Schaefers Powers of Attorney for Property and Personal Care dated December 4, 1998 and April 27, 2006. While the Court found that there were no capacity issues with respect to the 1998 Power of Attorney for Property, it found that Mrs. Schaefers did not have the capacity to give a Power of Attorney for Property on or about April 27, 2006 and, therefore, the document was not valid and could not stand. The Court concluded that Mr. Verbeek ought to be removed as attorney.

There was strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Mrs. Schaefers as set out in the 1998 Power of Attorney for Property should be terminated. The Court found that Mrs. Schaefers' best interests were not being met and that Mr. Verbeek's conduct clearly demonstrated an inability to understand and perform his duties diligently (such as complying with disclosure requests or proceeding with a passing of accounts), even in the face of two Court Orders requiring him to do so. The Court concluded that an attorney for property is a fiduciary and the duties and responsibilities of an attorney are significant. Thus, if Mr. Verbeek was too busy as a sole practitioner to discharge his duties as an attorney for the property of Mrs. Schaefers then he should be relieved of those responsibilities.

(d) *Fiacco v. Lombardi*[21]

Fiacco v. Lombardi was a case involving an elderly woman named Maria Lombardi who suffered from dementia and lived in a nursing home. In 2003 Mrs. Lombardi executed a POAPC and CPOAP appointing her four children, Carmela Fiacco and Antonio Lombardi, and the respondents, Giovanni Lombardi and Guiseppina Lombardi, as her attorneys. They were required to act jointly and to make decisions on her behalf, if the need arose.

[21] 2009 CarswellOnt 5188.

The children did not act jointly as their mother wished. Instead, in 2008 they engaged in contested guardianship litigation regarding their mother. By order dated January 23, 2009, Cameron J. declared Maria incapable of managing property and incapable of personal care, and he appointed Carmella Fiacco and Antonio Lombardi as her joint guardians of property and of the person. The Order contained several additional provisions which required, among other things, that Giovanni Lombardi and Guiseppina Lombardi account for their dealings with their mother's property and deliver the keys to her home to the applicants. Although the court noted that the Order should have been a simple one to implement, it found that the guardians encountered difficulties in obtaining information from their brother and sister about the assets of their mother they controlled.

The Court found the respondents' behavior unacceptable and in contravention of the Order and the *SDA*. As stated by the Court: "The Order could not have been clearer - the respondents were required to account for their dealings with Maria Lombardi's property. The SDA is equally clear- the property of an incapable person must be delivered to a guardian "when required by the guardian.""[22] The respondents were ordered to comply with the previous Order and had costs awarded against them. The Court made the further comment that the respondents may think the result harsh, but added that to fix costs against them in a lesser amount would result in the incapable person having to pay for their misconduct and that would not be just. Paramount to the Court's decision was the view that the respondents could have avoided the motion had they cooperated with the guardians as required by law and by prior Order of the Court.

(e) *Woolner v. D'Abreau*[23]

In ***Woolner v. D'Abreau***, Norah D'Abreau executed a Continuing Power of Attorney for Property in favour of the applicant, Robert Woolner, a lawyer, as well as another person, under which Mr. Woolner began to manage Ms. D'Abreau's property and financial affairs. Ms. D'Abreau subsequently retained another lawyer, Mr. Marcovitch, who began to ask Mr. Woolner questions about how he was handling Ms. D'Abreau's financial affairs.

[22] 2009 CarswellOnt 5188 at par. 14.
[23] *Woolner v. D'Abreau*, 2009 CarswellOnt 664 (Ont. S.C.J. Feb 10, 2009); Leave to appeal allowed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6480 (Ont. Div. Ct. Aug 10, 2009); AND Reversed by: *Woolner v. D'Abreau*, 2009 CarswellOnt 6479 (Ont. Div. Ct. Sep 29, 2009).

Mr. Woolner suggested that Ms. D'Abreau undergo a capacity assessment; Mr. Marcovitch communicated that Ms. D'Abreau saw no need to do so. Ms. D'Abreau then appointed Mr. Marcovitch as her attorney, whereupon Mr. Woolner brought this application to compel Ms. D'Abreau to submit to a capacity assessment. Mr. Marcovitch then retained Mr. Koven as litigation counsel for Ms. D'Abreau. Mr. Koven recommended that she undergo an assessment. Ms. D'Abreau did so, and the assessment found her to be capable of managing her own affairs. According to the Court, counsel then debated the issue of costs of the application for the better part of half a year, which led to no costs being ordered due to collective loss of proportionality.

A hearing under Rule 57.07(2) of *Rules of Civil Procedure* was held with respect to the possibility of disallowing any costs as between client and her counsel and costs were disallowed beyond what had already been paid for in the earlier portion of litigation. According to the Court, as the legal services provided up to the costs dispute had contained value for their clients, counsel were entitled to compensation for them. However, the Court found that the parties could have settled costs simply by re-attending court with little expense and that the evidence adduced had not established, on balance of probabilities, that Mr. Marcovitch clearly informed his client as to the risks and potential costs of the litigation strategy employed or that he received informed instructions to proceed with that strategy. The Court found that the strategy was unreasonable, disproportionate to what was at stake, and provided no value to the client. As such, Mr. Marcovitch was not entitled to compensation beyond the $6,250, already paid. Mr. Koven's fiduciary obligation required that he ensure the client understood the nature and risk of litigation, and no documentation indicated that he had done so. Similarly, the Court found that the legal work provided by Mr. Koven referable to the costs dispute provided no value to the client and resulted in costs being incurred without reasonable cause. As such, Mr. Koven was not entitled to recover any costs incurred for the costs dispute stage of the litigation.

(f) *Down Estate v. Racz-Down*[24]

In December of 2003 William and Marion, then in their late 70s, entered into a marriage contract that established a regime of separate property. The couple had cohabited for some time before they married. William executed a will under which he made Marion his executor, along with children from a previous marriage. Under the will, the revenue from William's estate was to be paid to Marion, while the children were beneficiaries of the estate on her death. In January of

[24] *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J. Dec 14, 2009); additional reasons in *Down v. Racz-Down*, 2010 CarswellOnt 3662, 2010 ONSC 2575 (Ont. S.C.J. May 03, 2010).

2004, William began treatment for dementia. There was evidence to show that Marion was aware of this and that she had in fact attended with him at his various doctor appointments when the diagnosis was made. In July, William added Marion as a joint account holder on his primary bank account. The judge made a point of noting that Marion never reciprocated with any of her own bank accounts, by making them joint. The Court found that Marion made significant unexplained withdrawals on their shared account. It also noted that while in August and September of 2004, the account balance on the shared account was $739,224.36, on May 26, 2009 when William died, the account had dwindled away to $72,438.16. The Court found that most of the transactions could be traced to Marion's separate accounts. The plaintiffs in the action, William's children, brought an action against Marion for damages for conversion and breach of fiduciary duty, alleging misappropriation. Marion defended her actions on the basis of joint ownership of the account.

The issue before Justice Gordon was whether to maintain a previous order which granted a Mareva injunction which restrained Marion from disposing of certain real and personal property, including the funds in her account. Justice Gordon found that the plaintiff children had met the test for the injunction. In the Court's view, not only had the plaintiffs shown a strong prima facie case, but, in his view, "the case is overwhelming." As stated by the Court at paragraphs 88 to 93:

> 88 The spousal relationship, William's vulnerable state and the circumstances pertaining to finances establish a fiduciary relationship. Marion owed William a duty of utmost good faith and trust. The power of attorney was required on the sale of the condominium. Marion had direct access to the joint bank account. Marion had a discretion, indeed a unilateral ability, in dealing with the funds.
>
> 89 In exercising her discretion, Marion was required to have regard for the provisions of the marriage contract and William's will.
>
> 90 The gratuitous transfers from the joint account to Marion's sole bank account are unexplained. There was no reason or purpose for the transfers that could be justified. A resulting trust results from the fiduciary relationship. No evidence was tendered in rebuttal.
>
> 91 The exclusion in Section 14, *Family Law Act*, at best, applies at the time of William's death. It does not justify gratuitous inter vivos transfers, nor does it negate the common law principles regarding fiduciaries and resulting trust in all circumstances involving spouses.

> 92 The marriage contract established a regime of separate property. The will granted Marion a life interest in William's estate. Marion's transfer of funds defeats the obvious intent of both documents.
>
> 93 The plaintiffs have established a prima facie case. Indeed, on the evidence presented, in my view, the case is overwhelming.[25]

The Court found that the remaining components of the test for Mareva injunction had been met: there would irreparable harm to the plaintiffs if the injunction was not granted, and damage award would not suffice; there was a risk that Marion would remove/dissipate what minimal assets remained in her possession; and the balance of convenience favoured the plaintiffs. Justice Gordon ordered that the order granting the injunction would continue until trial or further order.

(g) *Zimmerman v. McMichael Estate*[26]

The deceased were husband and wife and founders of extensive Canadian art collection (the McMichael Collection) donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executors of their estates. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made. The husband died on November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her will. The trust deed contained terms that differed from will, including a provision that on Mrs. McMichael's death the property

[25] *Down Estate v. Racz-Down*, 2009 CarswellOnt 8128 (Ont. S.C.J.).
[26] *Zimmerman v. Fenwick*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).

was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were a granted certificate of appointment of estate trustee with will.

The niece and her husband successfully brought an application for a declaration that the power of attorney and the trust were void and an order that required Mr. Zimmerman to account for his dealings with the trust property. Mr. Zimmerman was ordered to his pass accounts, but failed to do so and was removed as trustee on March 9, 2009. The niece and her husband made many objections to his accounts and Mr. Zimmerman failed to respond and made an application to pass his accounts for the property and the trust. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit verifying the accounts were inadequate, incomplete and in many respects false. The accounts contained no statement of the compensation claimed by Mr. Zimmerman in connection with the discharge of his responsibilities under the Trusts. In fact, it was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners not while, but after visiting Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home. There was a dearth of evidence and/or explanation as to how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the *SDA*. Although the trust deed impliedly permitted pre-taking, the court found that the authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: he failed to properly account; he made improper and unauthorized payments and loans to himself, or for his benefit out of the Trusts; he mingled Trust property with his own property and he used the two interchangeably for his own purposes; he paid himself compensation of almost $450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And, there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs.

(h) *Jurgen Fritz Zimmerman (Criminal Proceedings)*

This case came through to our offices from an article in the Hamilton Spectator. The case involved a man named Jurgen Fritz Zimmerman, who was 64 years old, who had been appointed his father's attorney pursuant to a power of attorney for property in 2007 after both his father and stepmother were hospitalized. The couple was later placed in a long-term care facility. Using the power of attorney, Jurgen Zimmerman withdrew almost all of the couples' life savings from their various bank accounts, which savings amounted to over $394,000 Canadian dollars as well as $12,000 US dollars, and sold the couples' home to his own son. It was the couples' grandchildren that eventually reported the matter to the police.

Jurgen Zimmerman who was given a nine-month conditional sentence, including six months of house arrest and a three-month curfew (he is required to wear an electronic-monitoring bracelet), after pleading guilty to attempting to appropriate his parents' life savings pursuant to a power of attorney. Jurgen Zimmerman was also ordered to pay $51,805.00 within ten (10) days. Jurgen Zimmerman's lawyer was quoted as saying that Jurgen Zimmerman, a retired truck dispatcher, was not very knowledgeable about this role as an attorney acting pursuant power of attorney.

(h) *Bosch v. Bosch*[27]

Michael Bosch was married to Maria Bosch and they had two children, Alan and Charlotte. Michael, the father, had resided in a nursing home since 2005. Maria had acted as his guardian of property and his attorney for personal care. However, in 2009, Alan commenced two applications seeking orders declaring Maria incapable and appointing him as her guardian of property and personal care, and appointing him as father's guardian of property and personal care. At mediation, the parties entered into settlement agreement resolving litigation, subject to court approval. Pursuant to that agreement, the first application would be dismissed without costs and the second application would be settled by appointing mother and son as joint guardians of father, and on other terms. As well, Maria would seek court approval of the settlement and her reasonable costs of the motion for approval would be paid by Michael's estate on a full indemnity basis.

Maria brought her motions for court approval of settlement. However, Justice D. M. Brown was not prepared to approve the settlement on the materials filed, due to several reasons, the first of which is important and is as follows (at paragraph 4):

> (i) I have significant reservations about appointing two competing litigants as joint guardians for Michael's personal care. How, might I ask, will Michael's best interests be served by appointing as his joint guardians two persons who have engaged in litigation against each other? If there is a history of lack of co-operation between son and mother, I do not see how appointing them as joint guardians will suddenly change their relationship into one of harmony and co-operation. Absent clear evidence of the unalterable willingness of two disputing persons to put their personal differences to one side and to act together only with a view to the best interests of an incapable person, joint guardianship can become a minefield, with the incapable person the loser: *Chu v. Chang* [2009 CarswellOnt 7246 (Ont. S.C.J.)], 2009 CanLII 64816 para. 30; and 2010 ONSC 294 (Ont. S.C.J.) (CanLII), para. 4;

As can be seen, his Honour cited *Chu v. Chang* as support for this position. The other reasons were as follows: (ii) Maria and Alan did not file a joint Guardianship Plan signed by each; (iii) evidence of Michael's incapacity with respect to personal care decisions was not included in the motion records seeking approval of the settlement; and, (iv) Maria did not file any evidence about the costs of the motion to approve for which she seeks payment from Michael's estate,

[27] 2010 ONSC 1352.

and neither party advanced any reasons why Michael's estate should pay for the legal costs of their dispute.

His Honour required further evidence on all of the issues and, therefore, adjourned the motions *sine die*. Of note, His Honour concluded at paragraph 5 that, "If Alan and Maria wish a court to consider their request for a joint guardianship, they must each file affidavits which demonstrate that they will stop arguing, start co-operating, and focus their efforts solely on the best interests of Michael."[28]

(h) *Ziskos v. Miksche*[29]

Johanna Miksche had no living relatives save an 87-year-old sister (Ursula Lill) and nephews who lived in Germany (Heinz, Johann, and Hannes). Until her death, she spent her later years living in a long term care centre. She appointed her friends Perry and Teresa as her attorneys for personal care and property and, when it became apparent to them that she was no longer capable of living independently, they sold her house. Shortly thereafter, her nephews visited her in the company of a lawyer of the law firm of Polten & Hodder, where Mrs. Miksche signed powers of attorney for property and personal care in favour of one nephew and her sister. The nephews also had her sign a retainer, retaining the law firm to act on her behalf, as well as theirs. Mrs. Mikshche later retained an alternate solicitor, Mr. Silverberg, who served a notice of change of solicitors in late November 2005.

Competing applications for guardianship of Mrs. Miksche's personal care and property ensued. The proceedings were case managed and the disputed matters were resolved on either consent or unopposed basis, save for the issue of costs. Applications for costs were brought by Mrs. Miksche's nephews and sister, her legal counsel (Mr. Silverberg), and the public guardian and trustee. The June 29, 2007 decision of *Ziskos v. Miksche* disposed of the claims and cross claims for costs, which claim for costs together totaled almost $1.175 million and exceeded the total value of Mrs. Miksche's estate. The court found astonishing the fact that the claim for costs of one group of parties (the nephews) was for more than $1 million—an amount that was almost 90% of the total costs claimed by all four sets of counsel, notwithstanding the fact that the within applications were never argued on the merits and, in fact, not a single motion was argued on

[28] 2010 ONSC 1352 at par. 5.
[29] 2007 CarswellOnt 7162.

the merits saved for the motions on costs. The court characterized the amount claimed by the nephews as "scandalous," particularly given the circumstances known to the nephews and their counsel early on in the litigation.

In the result, the nephews and sister were awarded $35,500 to be paid by the estate, Perry and Teresa were awarded $54,480 to be paid by the estate, Mrs. Miksche's lawyer was awarded $30,173 in costs, and the public guardian and trustee was awarded $11,034. However, the nephews were ordered to personally pay costs in the amount of $28,000 to Perry and Teresa, $10,000 to the deceased's lawyer (Mr. Silverberg), and $3,100 to the public guardian. According to the Court, most of the work done by the nephews' counsel could not be justified. Moreover, as noted by the Court, "there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance."[30]

In support of its cost award, the Court noted that the nephews conducted the litigation in an oppressive manner by making unreasonable demands on the other parties and that both the nephews and the law firm ignored credible medical evidence that the deceased lacked capacity. As well, they maintained the unreasonable position that the deceased remained in the care facility against her will, and, consequently, incurred unnecessary costs. Resultantly, the Court found that the nephews were to be responsible for the unnecessary costs incurred by Perry and Teresa, which costs were the result of the nephews' conduct. In addition, the court found that there was no basis on which to challenge the retainer of the deceased's solicitor (Mr. Silverberg), and it was accepted that deceased's solicitor spent at least 50 per cent of his time dealing with unreasonable claims and positions taken by the nephews. It was also found that the allegations made by the nephews against the public guardian and trustee were serious and required considerable response.

An additional hearing took place before Justice D. M. Brown on September 19, 2009.[31] The key issue to be determined on the application for directions brought by the Estate Trustee of the estate of the late Johanna Miksche was whether the law firm of Polten & Hodder could, under the guise of seeking to enforce a facially-accepted offer to settle, obtain, in effect, a charging

[30] 2007 CarswellOnt 7162, at par. 74.
[31] 2009 CarswellOnt 6770.

order against the interests of one of the beneficiaries, Ursula Lill, the deceased's sister and formerly their client. In his judgment of November 4, 2009, Justice Brown admonished the conduct of the law firm, Polten & Hodder, stating: "The conduct of the law firm, and in particular of one of its principals, Eric Polten, has been scandalous and in breach of their duties as officers of this court."[32] Justice Brown described the costs of Polten & Hodder as "staggering" and made a costs order in the matter. However, since the costs were being sought pursuant to Rule 15.02 (4), as well as because of the conduct of the proceedings by Polten & Hodder for costs of the proceedings, including those before the Court of Appeal, Justice Brown adjourned the issue of costs to oral submissions and directed the law firm to engage independent counsel to represent them at the hearing.

J. Awareness & Prevention

Solicitors, planners, legislators, health care practitioners and the public at large, must be alert to the possibility of fraudulently obtained and fraudulently used POA documents and the risks to the older adult and to the cognitively impaired, the vulnerable, the dependant, and incapable. Fraudulently obtained or fraudulently used documents can wreak havoc for grantors and third parties alike. To that end, we advise everyone when dealing with powers of attorney to be cautious and vigilant, to make enquiries and to be constantly aware of both the risks and benefits that attach the preparation and use of a power of attorney document.

K. Checklists

It is our view that checklists can be of assistance to grantors and attorneys throughout the attorneyship. For this reason, we have provided to you both a checklist for legal duties and obligations associated with a Continuing Power of Attorney for Property as well as a checklist for the legal duties and obligations associated with a Power of Attorney for Personal Care.

L. Resources

- The Advocacy Centre for the Elderly
- Whaley Estate Litigation (***see Elder Law and Elder Abuse Links***)
- The Toronto Police Community Mobilization Unit, Vulnerable Persons Issues
- The Public Guardian and Trustee
- The Ontario Network for the Prevention of Elder Abuse (Senior Safety Line)
- **Whaley Estate Litigation Checklists**

[32] 2009 CarswellOnt 6770, at par. 2.