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THE INTERPLAY BETWEEN ATTORNEYS & EXTENDED FAMILY MEMBERS

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INTRODUCTION

The average estate litigator is retained by attorneys for property and personal care regularly. All too often, a well-intentioned attorney finds themselves caught between what they believe are their duties and powers as attorney, and the demands and expectations of the grantor's family and loved ones. How many of these "POA disputes" could have been avoided, or at least mitigated in the drafting stage of the relevant power of attorney documents, or by some form of intervention or education by the drafting solicitor before the situation turned to litigation?

As a significant and growing portion of our population faces incapacity, substitute decision-making is becoming a norm and necessary reality in many families. Caregivers, family members and formally appointed attorneys are more frequently seeking and in need of legal advice as they embark on this important role and try to navigate the murky waters of substitute decision making for aging family members. As many Ontarians are beginning to learn, those who do not seek legal advice in this area may do so at their own risk (and expense).

This paper aims to provide perhaps a novel perspective as to the estates solicitor's role in helping to guide attorneys and non-attorney family members as opposed to their client – the grantor, and offer insight into recurring issues dealt with by estates and capacity litigators. Here we provide tips, techniques and hopefully, incentives for estate solicitors to promote legal advice-seeking by attorneys for property and personal care *before* problems arise, and to prepare POAs that anticipate common problems and help attorneys address them proactively. We provide suggestions on how to do this through the POA drafting process, by offering a better understanding of how the law applies to fiduciaries acting pursuant to a POA, and by reviewing common examples where attorney and extended-family friction often arises. The authors of this paper encourage all estate solicitors to expand

their role when it comes to POA drafting to become educators and supporters of the attorney(s) in addition to their client, the grantor, at various stages of their retainer.

PART I – EDUCATING THE SDM THROUGH THE POA ITSELF

The majority of SDMs have little to no understanding of their duties and legal obligations. The lay person appointee may simply believe that the POA means that he/she or they are now "in charge" or "in control" of the incapable person's affairs. SDMs mistakenly believe that they are imbued with untouchable and complete decision-making authority with no appreciation of the applicable legal framework that shapes their conduct and the scrutiny (and, in certain cases, the resulting personal liability) that may lie ahead. With support from The Law Foundation of Ontario, and the University of Toronto, Factor-Inwentash School of Social Work, Institute for Life Course and Aging, CanAge[2] has launched a Powers of Attorney course series - a free online course for everyone on how to be an attorney for property and personal care. This will undoubtedly be an invaluable resource for the Canadian public. Education of the SDM is key, and the *timing* of this education in relation to the commencement of the SDM's duties is of great significance. Avoiding trouble is much easier and less costly than trying to repair the damage once it has been done. For example, there is little benefit to learning about the common-law duty to account as an attorney after already being served with a sibling's notice of application that seeks to compel a passing of accounts. One way drafting lawyers can help to prevent this unfortunate, and all-too common, scenario is if the POA itself contains helpful information (and in some cases, family-specific directions) on the attorney's duties. Adding instructive information directly into the POA, the source document for the attorney's authority, gives attorneys both a fair opportunity and encouragement to educate themselves before they commence acting. It also

[2]CanAge is Canada's national seniors' advocacy organization, working to improve the lives of older adults through advocacy, policy, and community engagement.

permits the attorney to point to the POA itself for authority on specific issues, and avoids guesswork about what the grantor really wanted to have happen in a given situation. This could be the much-needed insight into the attorney's powers and duties that sets the SDMs up for success and helps them to avoid conflict with concerned family members. This could also be the information/direction that the attorney can later rely on if their exercise of their powers and duties is questioned or challenged by family.

Consider the following:

i) Adding a link within the POA for Property or an appendix to the PGT Publication "Guidelines for guardians of property" https://www.publications.gov.on.ca/300633;

ii) Adding a link or appendix to the POAs to the CanAge –POA 101 Online Free Course described above;

iii) Being specific in the POA as to the duty to account and what that means:

Sample Clause:

> *"My Attorney for Property shall keep accurate and up-to-date accounts of any and all activities executed and authorized by him, her or them, on my behalf in respect of my assets, as my Attorney for Property may at any time be compelled to produce such records by way of a court order or on account of a Public Guardian and Trustee investigation."*

iv) Mandate informal reporting to a third-party by the attorney for property:

Sample Clause:

> *"If John Doe is acting as my Attorney for Property Attorney hereunder, then I direct that he shall provide an informal accounting of my assets under his management together with a summary of those transactions executed and /or authorized by him on my behalf, to my sister, Jane Doe, every May, September and January, for the four months prior or at anytime, at her request."*

Some would argue that mandating the informal accounting above is onerous and imposes a duty upon attorneys that may deter them from acting. Moreover, as the above will broaden the audience of the incapable person's personal financial information, this may not be a desired provision for those who value privacy over their affairs. These are considerations that should be discussed with the grantor and balanced against some of the benefits that an informal accounting can produce – like keeping the attorney accountable to *someone*, mitigating against financial abuse, and fostering transparency between the attorney and the grantor's family.

v) Authorize the attorney to seek legal advice upon the effective date, at the expense of the grantor's Estate.

Sample Clause:

> *At any time after the Effective Date, I authorize my Attorney for Property/Personal Care to speak with a lawyer to obtain advice as to the rights, duties and obligations associated with acting as an attorney for property/personal care as prescribed by statute, common law, and pursuant to this Power of Attorney document and I hereby authorize that such reasonable fees for so doing shall be a valid charge and expense to my estate.*

PART II – THE SDM AS YOUR CLIENT: BEST PRACTICES AND PROACTIVTY REGARDING FAMILY MANAGEMENT

Attorneys that seek legal advice and guidance on the execution of their role, either prior to acting or during their tenure, will certainly be better off for it. Advance education and advice will help ensure the SDM is equipped to handle the complexities of the job and to navigate points of friction that may arise between them and the grantor's family. This will be especially important as the grantor's circumstances change over time since the SDM must adapt to suit those changes. These changes include both internal forces (e.g. age, illness, injury, religious or philosophical beliefs, etc..) and external forces (e.g. financial windfall/ruin, changes affecting the grantor's dependants, successes and

failures of their business ventures, extended family relations, etc..) acting on the grantor, their property, their family, etc.. Estate solicitors, and likewise estate litigators, can be useful resources to SDMs in this regard – and most useful prior to the commencement of a legal proceeding. We *should* be developing our practices in this area for the greater good – being to further the protection of vulnerable, incapable persons. In the paragraphs that follow, we will discuss some of the more common questions that attorneys have as they take on their important role for an incapable person – and how lawyers can and should be guiding them in an effort to keep their actions in line with their duties and obligations imposed both by statute and the common law.

SDM Question 1:

How do I know when to start acting as attorney?

An attorney for property is a fiduciary. They must exercise their powers and duties diligently, with honesty and integrity and in good faith, for the incapable grantor's benefit.[3] To exercise their duties and powers for the incapable grantor's benefit, the attorney must constantly stay vigilant of the grantor's capacity to make their own decisions. Whether the grantor is capable of making their own decisions in the management of their property, or whether the grantor's capacity/incapacity to make those decision is even clear or not, is the starting point for an attorney and their management of the incapable grantor's property and personal care.

Many Continuing Powers of Attorney for Property are both effective during the grantor's capacity (i.e. when the grantor remains capable of making their own property decisions), and on the date of execution. This means that an attorney named in such a POA can act immediately on behalf of the grantor and their power to act is not dependent on whether the grantor requires substitute decision

[3] *Substitute Decisions Act*, 1992, SO 1992, c 30 ("*SDA*"), s. 32(1).

making. In such circumstances, the court has found the attorney to be acting in the capacity of an agent for the grantor, carrying out the capable instructions of the grantor rather than making any substitute decisions for them. In this case, the attorney as agent may still have a duty in common law and under the S*ubstitute Decisions Act*, 1992, c. 30 ("*SDA*") to maintain records and account, but their conduct will likely be evaluated as someone in an agency relationship with the grantor, not as a substitute decision maker. It is when the attorney becomes an SDM, or when the transition from agent to SDM begins (or it is unclear as to whether it has begun), that the attorney's duties to the grantor will change. This is also the time when the attorney can expect the grantor's family members to become more actively involved in/concerned about the grantor's property management if that has not happened already.

As the grantor's capacity diminishes, the attorney will owe the grantor an even higher duty of loyalty when managing their property under the power of attorney.[4] In this case, the attorney should also expect a higher level of scrutiny from the grantor and their dependents and children[5]. It is common for family members of the grantor to have a different impression than the attorney of when the grantor became incapable (or started to show signs of incapacity) of managing their property. This can become quite a contentious situation if there are significant property management decisions undertaken at or around the time when the grantor's capacity is diminishing or if there is a disagreement between the attorney and the grantor's family about the grantor's level of capacity. An example where this may arise is in the context of any gifts or other benefits such as loans, loan forgiveness, or commitments for future support that the grantor makes during this period of capacity uncertainty, and especially where the

[4] *Richardson Estate v. Mew*, 2009 ONCA 403 (CanLII), at para 48 <https://canlii.ca/t/23jqf>.
[5] See Greaves v Nigro, 2016 ONSC 44 (CanLII), <https://canlii.ca/t/gmvlw>; Lehtonen v. Neill, 2013 ONSC 1497 (CanLII), <https://canlii.ca/t/fwjr8>; and Fica v. Dmytryshyn, 2018 ONSC 2034 (CanLII), <https://canlii.ca/t/hr90f>.

attorney has already taken any steps to manage the grantor's property[6] This may seem to some like a more remote scenario, but it is not. In some cases, the grantor (or the grantor's family members, or the attorney) may seek to make these types of transactions for the very reason that they appreciate their capacity/the grantor's capacity to manage property is changing.

The statutory duties and powers of an attorney acting under a continuing power of attorney for property apply if: (1) the grantor is incapable of managing property; or (2) the attorney has reasonable grounds to believe that the grantor is incapable of managing property.[7][8] Depending on the circumstances, and the attorney's relationship with the grantor, the attorney may prefer to refrain from acting under the POA before arranging a capacity assessment to confirm the grantor's incapacity. This may be important where the cause of the grantor's suspected incapacity is complicated, where the particular area(s) of incapacity is important to clarify, and where the attorney anticipates their substitute decision making will be challenged by the grantor's family. The attorney in this case should be mindful, however, of the extent of the delay needed to obtain a capacity assessment, the need for the grantor to consent to the capacity assessment (unless the POA provides otherwise) and the potential harm the delay could cause to the grantor. Excessive delay could result in the grantor's family members calling for the attorney to renounce their role for failing to act.

There are many situations where it will be uncertain if the grantor has capacity to manage their property. Some examples include:

- The grantor suffers a serious injury or illness (e.g. motor vehicle accident, illness, stroke/heart attack, etc..);
- The grantor experiences notable cognitive decline associated with age; and

[6] Fica v. Dmytryshyn, 2018 ONSC 2034 (CanLII), <https://canlii.ca/t/hr90f>.
[7] *SDA* s. 38(1).
[8] This may not apply in practice if the POA itself states that additional criteria must be met before the attorney can commence acting.

- The grantor is diagnosed with a type of progressive dementia or other medical diagnosis that results in progressive but inconsistent cognitive and psychological changes.

Capacity is not static and may fluctuate over time. A person can have the capacity to make a certain decision one day but not another. A person can retain the capacity to make certain types of decisions but not others. Attorneys must understand this when determining whether they can make a substitute decision on behalf of the grantor in the management of their property or personal care.

The attorney should be careful to routinely address this issue by re-assessing the grantor's capacity as often as is required, and seeking legal advice on this question when necessary. When assessing and re-assessing the grantor's capacity, the attorney should be mindful of affording the grantor the time, resources, and accommodations needed to support the grantor's specific needs. Examples of this include if there are assistive devices that a grantor relies on for support (e.g. updated prescription eyeglasses, functioning and calibrated hearing aids, access to physical or electronic records, etc..), the grantor has a preferred language to communicate in, or there is a time of day where the grantor is more lucid. The attorney should make themselves knowledgeable of these factors and ensure they are available or in place when the attorney is assessing capacity.[9]

The test to determine capacity is a legal test, not a medical test, though medical evidence can be used to support a conclusion on capacity. When in doubt, the attorney should seek legal advice on whether they can commence acting under a power of attorney, when the commencement of their role as an SDM for the grantor should be assumed, and how to assess and re-assess the grantor's capacity. This information, and the decision to proactively share some or all of this information with the grantor's family, may assist with attorney with managing allegations that the attorney began acting a substitute decision maker much earlier, or later, than they should have. This is particularly relevant for

[9] Hillier v. Milojevic, 2010 ONSC 4514 (CanLII), https://canlii.ca/t/2c37r.

attorneys/SDMs when they may be faced with an application challenging their actions and suitability as attorney, and applications to compel them to pass their accounts.

SDM Question 2:

What is meant by managing property for the benefit of an incapable person? Do I have free reign over all expenditures?

Once it is clear the attorney is or should be acting as SDM for an incapable grantor, the SDM cannot rely on the grantor's instructions and the relationship of agency to justify their decisions. This is because the agency relationship between attorney and grantor requires the grantor to have capacity to instruct the attorney. The attorney must now make decisions in accordance with the common law and statutory duties of a fiduciary and attorney, which includes making decisions in the grantor's best interests. It is not always clear how an attorney should make property management decisions as those decisions can be unique to the grantor's situation. There is often opportunity, and sometimes cause, for the incapable grantor's family and the attorney to disagree about the attorney's decisions.

In *Zimmerman v McMichael Estate*[10], the court confirmed various duties an attorney for property must comply with as a fiduciary. These duties concern the practical management and accounting of the grantor's property, as well as factors to assess any given property decision. They are summarized by the court in *Tarantino v. Galvano*[11] and include:

1. A fiduciary has a duty not to commingle trust funds with the attorney's property, and to provide an accounting if they are commingled (this is in addition to the general duty to account);
2. a fiduciary must not make a profit or put themselves in a position where their interests and duty conflict unless the POA expressly provides it is permissible to do so (an attorney for property is not entitled to exercise that power for their own benefit unless the POA expressly authorizes it); and

[10] *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (CanLII),
[11] *Tarantino v. Galvano,* 2017 ONSC 3535 at para 47.

3. the fiduciary bears the onus of establishing that the management and disbursement of funds is consistent with the terms of the power of attorney.

The duty not to comingle is something many well-intentioned attorneys struggle with and too-often run afoul of. Commonly, this can be when an attorney moves the grantor's property into an account held in the name of the attorney, or when the attorney makes themselves a joint owner of the grantor's account. This may be done out of a sense of convenience or perhaps on the receipt of bad advice. In either case, it is a bad practice and should be avoided entirely. If nothing else, it will open the attorney up to suspicion and may require the attorney to produce their own personal accounts as part of their duty to account concerning the grantor's property.

The duty not to profit and be in a position of conflict with the grantor is also not well understood by attorneys. Even if the potential profit/conflict arises under innocent circumstances, it will likely breach the attorney's fiduciary duty unless the POA specifically permits such action, and the action is still done in the best interests of the grantor. This situation will also raise suspicion about the attorney's motivation in managing the grantor's property. That suspicion can permeate into seemingly irrelevant decision making throughout the entire time the attorney acts. It runs the risk of tainting all of the attorney's decision making.

The *SDA* outlines the attorney for property's required expenditures and informs those directions with helpful guiding principles. They are:

> **Required expenditures**
>
> **37** (1) A guardian of property shall make the following expenditures from the incapable person's property:
>
> 1. The expenditures that are reasonably necessary for the person's support, education and care.

2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.

3. The expenditures that are necessary to satisfy the person's other legal obligations. 1992, c. 30, s. 37 (1).

Guiding principles

(2) The following rules apply to expenditures under subsection (1):

1. The value of the property, the accustomed standard of living of the incapable person and his or her dependants and the nature of other legal obligations shall be taken into account.

2. Expenditures under paragraph 2 may be made only if the property is and will remain sufficient to provide for expenditures under paragraph 1.

3. Expenditures under paragraph 3 may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2.

It is important that an attorney for property review and understand these are provided in the *SDA* in graduated steps. The attorney for property must make the expenditures from the incapable person's property with the first category being the top priority, and the second and third categories of expenses only being made if the grantor's property will remain sufficient to provide for expenditures in the preceding category. In making these decisions, the attorney is challenged with balancing the value of the grantor's property, the grantor's, and their dependants', accustomed standard of living, and the nature of incapable grantor's other legal obligations.[12] If the incapable grantor's property decreases

[12] *SDA* at s37.1

over time, as is commonly the case, and their expenses and legal obligations increase, the attorney may fall under greater scrutiny from the grantor's family in their decision-making. Disagreements about their management of the incapable grantors' property in accordance with the required expenditures outlined in the *SDA* may arise and can quickly result in court proceedings if not managed well. Making informed decisions based in research and review of the grantor's property information will help allay allegations of improper or insufficient allocation of property toward the two lower priority categories. It requires the attorney to duly inform themselves of the incapable grantor's assets and expenses, and also evidence concerning 'accustomed standard of living'. Establishing detailed evidence on the grantor's and their dependants' accustomed standard of living may become of great importance for an attorney acting for a grantor with family members who historically relied on the grantor for support. If one of the grantor's family members believes the attorney has gotten the allocation of funds between the 'required expenditures' wrong, the attorney will almost certainly hear about it.

This issue arose in litigation between an incapable grantor's SDM, a lawyer court-appointed as interim guardian of property, and the grantor's capable spouse in the case *Cherry v. Cherry*[13]. The incapable grantor's spouse brought proceedings under section 37 of the *SDA* for greater financial support from her incapable spouse's property. She challenged the SDM's determination concerning the sufficiency of the incapable grantors' property to satisfy his own support and care needs, and thus, the sufficiency to support hers. The Court began its analysis by looking at section 37(1) and 37(2) set out above. The court required the incapable's grantor's attorneys for personal care and his interim guardian of property to ascertain the following information: (1) the long-term level of expenditures needed for the grantor's care; (2) confirmation of the extent of the grantor's assets and liabilities; and (3) resolution of the surrounding family law factors affecting the grantor's support obligations to his spouse (in particular,

[13] Cherry v. Cherry, 2011 ONSC 4574.

application of a Domestic Contract was at issue). This decision in *Cherry* shows the importance of the SDMs duty to engage fully in the grantor's specific situation and to become informed by both historical information about the grantor, but also current predictions about the trajectory of the grantor's needs. Depending on the complexity of the issues and the quantum as stake, opinions from third party doctors or long-term care specialists may be warranted.

As seen in *Cherry*, complexity arises when the grantor's property, expenses, and needs are intertwined with their spouse or another person. This occurs in the more common case of spouses owning their family home and other real property together (i.e. as joint tenants or tenants-in-common), co-owning bank accounts, investments, and any other property. Whether or not the grantor's spouse similarly requires an SDM to make decisions for them (which can add an even greater layer of complexity depending on whether the grantor and their spouse have named the same attorneys), the grantor's SDM may find it difficult to understand what their role is and how far they must go in their duties to the grantor when the SDMs decision will significantly affect the grantor's spouse. This is another area of substitute decision making which is ripe for family conflict as one spouse, or their SDM, may not agree with the conclusions reached about expense decisions concerning the other. It can be difficult to predict in advance what decisions the SDM will be faced with and what, if any effect, changes to their property and expenses will have on any broader estate, debt/creditor, and tax planning goals the grantor and their spouse may have tried to arrange. For example, how the SDM chooses to liquidate the grantor's investments can be of significance if the SDM inadvertently frustrates tax efficiency planning that could have taken place but for the SDM's decision. In almost all cases, advance investigations into the grantor's property and any estate plans they have arranged will put the SDM in an informed position if and when a decision is required. This information can also help the attorney set the stage for a productive meeting with the grantor's spouse (or the spouse's SDM, or the entire family) to increase transparency over the decision-making process. The SDM will also be well situated to seek legal and

professional financial/tax advice *before* making decisions that could have irreversible effects on the grantor and their spouse, and which could open up the SDM to criticism and litigation.

In dealing with these delicate and complicated situations, the attorney must not lose focus of their overriding duty to the grantor. The SDM cannot fall into the trap of weighing the interests of other family members in equal measure alongside the needs of the grantor when making decisions. The attorney's guiding principle and duty is to the grantor to the exclusion of all others (subject to the statutory provisions discussed above). In some families, this is easier said than done, and litigation may ensue when the grantor's children, spouse, or others involved perceive their inheritance or source of support is being depleted by 24-hour care expense or residence fees for a private assisted-living home.

Attorneys should be comforted, however, by the knowledge that the common law and the *SDA* provide attorneys with a measure of protection against the grantor's disgruntled family. Attorneys are granted protection from liability for their decisions if they exercise their discretion honestly and with due care[14] and if in the exercise of their discretion they exercise their powers and perform their duties diligently, with honesty and integrity and in good faith, for the grantor's benefit. [15] In one example, the case of *R. v. Bruyns*[16], the Court found an attorney failed to exercise and perform her fiduciary powers and duties diligently, with honesty and integrity and in good faith, for the benefits of the grantor, and further found her guilty of criminal breach of trust. Ms. Bruyns was attorney for property and personal care of her father. She exercised a power found in her father's POA which permitted gifts and loans to friends and relatives. The provision provided that the attorney could make a loan if: "[the attorney has] reason to believe that [the grantor] would have made such gifts or loans if [the grantor] were capable of doing

[14] *Re Fulford* (1913), 29 O.L.R. 375 (H.C.).
[15] Keller v. Wilson, 2015 ONSC 6962 (CanLII), <https://canlii.ca/t/gm4qp> at para 29.
[16] *R. v. Bruyns*, 2016 ONCJ 207.

so personally." Relying on that provision, she loaned herself money to pay her own bills. The attorney relied on the fact the grantor, her father, had made similar loans to her when capable, and that helping herself financially with the loan was in her father's best interests as it would permit her to remain in her role as attorney and take care of her father. The Court agreed that the attorney acted with a genuine belief that she was empowered by the POA to make a loan to herself, but that her actions were not be consistent with the terms of the POA. The Court found that because the loan put the grantor in debt, and jeopardized the care he received at the long-term care home which he was a resident, that there was no reason for the attorney to believe her father would have made the loan if capable of doing so.

SDM Question 3:

What is the Interplay Between Attorneys for Property and Personal Care?

If a person has made a continuing power of attorney for property, it's likely they also made a power of attorney for personal care. An attorney named in a continuing POA for property should determine if they or someone else is named as the grantor's attorney for personal care. This is important because the attorney for property has property management duties that intersect with the grantor's personal care and, where there is one, must deal with the attorney for personal care. If there is no attorney for personal care, the attorney for property should ascertain the appropriate SDM pursuant to the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A ("*HCCA*").

The *SDA* requires that if attorneys for property acting for an incapable person make decisions that will have an effect on the grantor's personal comfort or well-being, the attorney must consider that effect in determining if the decision is for the incapable person's benefit.[17] Further, the attorney for property must manage the grantor's property in a manner consistent with decisions concerning the grantor's

[17] *SDA* s. 32(1.1).

personal care as made by the person with authority to make such decisions, subject to an adverse consequence arising in respect of the grantor's property that significantly outweighs the benefit in respect of the grantor's personal care.[18] An attorney for property's suitability to remain acting in that role may be compromised where their decisions limit or restrict personal care needs without proper justification.[19]

Even if an attorney for property and personal care are in agreement, experience shows that the incapable grantor's family members may seek to challenge their decisions when the grantor's personal care needs have increased significantly (usually due to near-end-of-life supervision and attendant care needs increasing) and the grantor's property is diminishing at a high rate. A common example of this issue is arising in the context of older grantors who live alone or with their spouse in a family home. Many older couples and individuals in Ontario and the Greater Toronto Area hold most of their wealth in the equity of their home. Depending on the age, health condition, and needs of the grantor, the grantor's SDMs may be faced with the difficult decision of whether the grantor can continue to live in their family home. Common factors the attorney may have to weigh and balance when making this decision includes:

> (1) is it safe for the grantor to live at home?;
>
> (2) what, if anything, can the attorney do to make the grantor's home a safe environment for them, and can the grantor's property sustain those expenses in both the short-term and long-term?;
>
> (3) what are the grantor's options if they can no longer afford to live in their home?; and
>
> (4) what duty does to the grantor have to consider the wishes and needs of the grantor and the grantor's spouse who may be a co-owner of the house?

[18] *SDA* s. 32(1.2) and 32(1.3).
[19] *Corewyn v. McCulloch*, 2015 ONSC 6039 at para 25.

SDM's may be faced with a myriad of other questions and factors that make this significant decision even more difficult. Commonly, the grantor's family and contingent beneficiaries of the grantor's estate may have an opinion about whether the grantor should stay in their home and what reasonable expenses should be incurred to achieve that goal.

Similar to the advice given in the section above, the attorney's ability to avoid conflict and litigation with concerned family members (and the grantor's attorney for personal care) may be strengthened by obtaining objective information and advice concerning the grantor to support their decisions. Additionally, they must exercise the patience and willingness to meet and consult with the grantor's concerned and supportive family and consider discussing these decisions and exploring options together. Relying only on the authority of the POA without regard for the non-SDM family members will likely create problems for the attorney and the grantor that could have been avoided.

SDM Question 3:

Am I bound to act in accordance with prior capable wishes of the incapable person?

We know that attorneys are fiduciaries and that fiduciaries are required to make decisions that are in the best interest of the person to whom they owe that duty. The duties of an attorney for personal are different, however, than the attorney for property in their exercise of the 'best interests' decision making. Attorneys for personal care must consider the best interests principle in the context of their duty to first make decisions in accordance with the grantor's prior capable wishes. Though a 'best interests' analysis may become necessary, attorneys for personal care must not fall into the trap of turning to it too soon. Whether a personal care decision is covered by the *HCCA* or not, the grantor's

prior capable wishes must prevail as the primary guiding principle over and above whatever the attorney believes to be in the incapable grantor's best interest.[20]

An incapable grantor may have expressed prior capable wishes that are not what their attorney or a reasonable person may consider to be prudent. An attorney cannot use their power as a substitute decision maker to overrule or ignore them. The prior capable wish can take many forms[21] and should be followed. A later wish expressed by the grantor while capable shall prevail over an earlier wish.[22]

Attorneys may face a personal care decision which is informed and guided by the grantor's prior capable wish, but where a strict or literal application of the wish may not achieve the spirit of the wish. There may also be a case where the attorney believes the strict application of the prior capable wish would produce a result that is not consistent with how the incapable grantor would make a decision if they could appreciate the current circumstances. The Ontario Court of Appeal in *Conway v. Jacques* stated that: "…prior capable wishes are not to be applied mechanically or literally without regard to relevant changes in circumstances. Even wishes expressed in categorical or absolute terms must be interpreted in light of the circumstance prevailing at the time the wish was expressed." Prior capable wishes have also been suggested to be viewed as 'philosophical guidelines' rather than hard and fast rules.[23]

In the 2017 decision of the Consent and Capacity Board ('CCB') *LD (Re)*, an incapable woman's physician applied to the CCB for a determination on the existence of her prior capable wish, and if the substitute decision makers could deviate from it. The effect of deviating from the prior capable wish would be to remove a life-sustaining feeding tube. The CCB confirmed that a prior capable wish must

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[20] *SDA* at s. 66(3) and *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A ("*HCCA*") at s. 5(2).
[21] *HCCA*, s. 5(2).
[22] *HCCA* s. 5(3).
[23] *Re MF*, 2003 Canlii 54897.

be 'applicable to the circumstances.' In this case, the incapable woman's prior consent to the insertion of a gastric feeding tube did not amount to a prior capable wish that the feeding tube remain in place indefinitely. The CCB went even further to say that had maintaining a feeding tube indefinitely been a prior capable wish, the changing circumstances were so significant that the prior 'prior capable wish' would no longer be applicable.

Prior capable wishes concerning life-and-death decisions may not arise every day for attorneys for personal care, but the same analysis may still be needed for more common personal care decisions. Shelter decisions is one such example. It is an area of substitute decision making that can lead to significant disagreement and is often informed by prior capable wishes about remaining in the family home or refusing to be 'put in a home'. Careful and advance consulting with supportive family members could go a long way toward avoiding panic and the onset of litigation when deviation from a prior capable wish is necessary.

SDM Question 4:

Can I claim compensation? If so – how much?

Another source of contention and scrutiny of an SDM is that of attorney compensation – which for property attorneys is both legislated and regulated.

Section 40(1) of the *Substitute Decisions Act*, 1992, c. 30 ("*SDA*") provides:

> *"A guardian of property or attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale."*

The fee scale is set out in Ontario Regulation 26/95, section 1 which states:

An Attorney for Property shall be paid:
3% on capital and income receipts;
3% on capital and income disbursements; and
3/5 of 1% of the annual average value of the assets under administration as a 'care and management fee

The prescribed fee scale is subject to any specific instructions with respect to compensation that may be contained in the POA document itself.

The duties of an attorney for property can be onerous. When carried out diligently, honestly, and in good faith, the benefit the incapable grantor receives can be great and should not be diminished by suggestions from family members that the attorney's compensation is too high or unwarranted. This is especially troubling in the case where an attorney has acted for several years, or has acted a great deal in a short amount of time, only to find themselves on the receiving end of the threat of a court challenge by the grantor's family members to reduce or eliminate their compensation.

In some situations, the challenge to reduce or eliminate compensation is framed in what is essentially a difference of opinion about the decisions the attorney made and whether those decisions were truly made in the grantor's best interests. In other cases, there may be allegations that the attorney was self-dealing or otherwise benefitted unduly from actions or influence during or immediately before their tenure as attorney. This came up in the *McMichael Estate* decision discussed earlier in this paper. In that case, the attorney's conduct was found to fall well below the standard of an attorney due in large part to evidence of woefully insufficient accounting, comingling of personal and trust assets, and instances of unjustified self-dealing and benefit received by the attorney and his family at the expense of the grantor's property. In the *McMichael Estate* case, the attorney was required to pay back hundreds of thousands of dollars in compensation with interest. The *McMichael Estate* case is somewhat of an extreme example, but it highlights the importance of the attorney's duty to preserve records and account for the management of an incapable person's property.

An attorney, or the grantor themself, may have a good idea whether the grantor's family will eventually challenge a claim for attorney compensation. One way to try and avoid expensive litigation challenging compensation is to build in transparency and regular accounting practice into the attorney's property management. This can be done at the drafting stage by making appropriate investigations about the grantor's unique family dynamics. The POA can be clear about who is entitled to review interim accounting, as well as the manner, extent, and frequency of the accounting, If no such provisions are included in the POA, the attorney can seek advice on this after commencing to act. Transparency can of course invite unwarranted and even abusive questions and criticisms, and so some thought should be given to how to limit or appropriately resolve any contention borne out of the voluntary interim accounting.

POA Compensation Personal Care

Claims for compensation by attorneys appointed under POAs for personal care are not as straight-forward because a prescribed fee scale simply does not exist. Rather, in determining an award of compensation for an attorney for personal care, the court is guided by the overarching principles of reasonableness and proportionality.[24] In *Re Brown*[25,] the court held that compensation for legitimate services may be awarded, provided there is sufficient evidence about the nature and extent of the services provided and the reasonableness of compensation is adjudged on a case by case basis, bearing in mind, among other things, the need for the services, the nature of the services provided, the qualifications of the person providing the services, the value of such services, and the period over

[24] *Re Brown*, [1999] O.J. No. 5851 (ONSC) at para. 4(g) ("*Re Brown*").
[25] Ibid. at para 4d.

which the services were furnished. In other words, there must be an evidentiary foundation to support claims for compensation for attorneys for personal care.

In the recent Ontario Superior Court case, *Sasso v. Sasso*[26] ("Sasso"), Raffaele Sasso, one of two sons of the late Vincenzo Sasso sought from the Estate, *inter alia*, compensation in the amount of $198,850 for time he alleged to have spent providing personal care services to his father. Raffaele's admitted that he kept no log of the time he spent caring for his father and kept no records with respect to the decisions he made as an attorney for personal care in accordance with the *SDA*, s. 66(4.1). In her decision, Dietrich J. was not convinced that Raffaele's claim could succeed both on the evidentiary record, but also on account of the reasonableness of his ask. At paragraph 51 of her decision, her Honour stated: "Based on the evidentiary record, I am not satisfied that Raffaele provided caregiving services for his father in excess of what a loving son living with his father, on a rent-free basis, in his father's residence, would have provided out of natural love and affection. Raffaele's services were not gratuitous, in the sense that Raffaele has lived in the Deceased's residence for over fifty years without ever paying rent."

Albeit not prescribed by the *SDA* itself, there is clearly an avenue for attorneys for personal care and guardians of the person to be awarded compensation for the time and efforts spent in providing care for an incapable person but this topic is rarely approached at the drafting stage of the Power of Attorney for Personal Care. In the absence of a prescribed fee scale for attorney compensation for care, arguably, it is the grantor that should be setting out what (if any) compensation they are comfortable paying to their SDM directly in the POA document. Consider, the rate, the interval of payment and what (if any) time logs or reporting may be required to support the remuneration. Irrespective of an authority to take compensation pursuant to a POA, attorney should be reminded however that they are not completely

[26]2021 ONSC 3259, 2021 CarswellOnt 7094.

safeguarded against claims and objections and should maintain some form of evidentiary basis in support of services they have rendered.

SDM Question 5:

When, if ever, am I required by law to deal with the grantor's family?

Section 32 (5) and Section 66 (7) of the *SDA* imposes a fiduciary duty upon SDMs of both property and personal care to (a) consult with "supportive" family members and friends of the incapable person who are in regular contact with the incapable person, and (b) from those who the incapable person receives personal care.

This duty to consult at first glance may appear to be quite onerous, however, based on the common law, it does not in actuality require the attorney to agree with the supportive people consulted.[27] The decision-making power remains with the SDM. Instead, it may be construed as more of a duty to inform the supportive persons of the 'big' decisions made on behalf of the incapable person. This requires a balancing of privacy considerations of the incapable person against the duty to consult or inform supportive family members and friends of larger decisions being made. A sample clause to address this in an POA may include:

If any one of my said children is acting as my Personal Care Attorney hereunder, it is my expectation that my children will take reasonable efforts to consult with one another in respect of decisions being made regarding my personal care, notwithstanding the authority given by me to any one of them (from time to time).

This duty to consult must always take into consideration the best interest of the incapable person. Given this, if there are family members that are not supportive and possibly hostile or combative with the

[27] *Scalia v Scalia 2015 ONCA 492 (CanLII).*

SDM, they may be said to be working contrary to the best interests of the incapable person. In this situation the SDM is not required to consult at all with these family members or friends.[28]

Both an attorney for property and attorney for personal care are under a statutory duty to seek to foster regular personal contact between an incapable grantor and the grantor's supportive family members and friends.[29] The court has placed considerable importance on this duty.[30] In some cases, substitute decision making litigation commences or is significantly exacerbated by issues concerning access and visitation of an incapable grantor.[31]

There are legitimate reasons why an attorney might restrict access/visitation to an incapable grantor. The incapable grantor's health may warrant it. This may result in a narrow window of opportunity each day for the grantor to have safe or meaningful personal contact. Once contact with the grantor becomes limited, the attorney may have to make decisions about prioritizing and restricting access/visitation so that it is done with the grantor's best interests in mind. This could include restricting telephone/video calls to certain ideal windows of time during the day to accommodate the grantor's sleep schedule, or other similar considerations. This can quickly become a point of contention with supportive family and friends. Physical distance, competing time commitments, and challenging interpersonal relationships between supportive friends and family can all work to complicate creating a system that works for the grantor and the supportive friends/family. An attorney should be mindful of these challenges and spend appropriate effort to develop a fair and reasonable visitation/access schedule or protocol. They should engage with the supportive family and friends when doing this and resist the urge to unilaterally determine the plan.

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[28] *Robb Estate v. Robb*, [2010] O.J. No. 2288, 2010 ONSC 3089
[29] *SDA* s. 32(4), 32(5), and 66(6) and 66(7).
[30] See Wong v The Office of the Public Guardian and Trustee, 2017 ONSC 268 (CanLII), https://canlii.ca/t/gwt8h at para 6.
[31] *Carey v. Carey*, 2018 ONSC 4564 (CanLII), https://canlii.ca/t/ht68r, at paras 5, and 67(1).

A recent 2020 Ontario Superior Court decision, *Aiello v. Bleta*[32] considers a caregiver restricting access to an incapable person living at her home. The elderly grantor had named her son as primary attorney for personal care. The applicant was seeking to replace him and become her substitute decision maker for personal care. One of the factors the court considered was that the applicant had refused the grantor's son from visiting his mother at the applicant's home where she lived. She explained her decision to refuse the son's visit as a decision to avoid the grantor being exposed to the "bad blood" between the applicant and the son.[33] The court found this an acceptable reason to deny the son's visit but highlighted the importance of offering reasonable alternatives for personal contact.

There are situations where the 'bad blood' is not between the attorney and a supportive family member or friend, but between the grantor and a supportive family member or friend. These situations can be more complicated and difficult for an attorney to navigate. For some grantors, their own interest or desire to have personal contact with supportive family and friends may change over time. This can be for a variety of reasons. For some, this change may be drastic, and the grantor may no longer want any contact with people they previously had regular contact with. In some extreme cases, an incapable grantor may experience significant distress, anger, or fear when in the presence of (or in contact with) a previously supportive person. What is important is how the attorney should think about dealing with such a situation. The attorney's duty to foster personal contact may now be competing with their other duty to make decisions in accordance with the incapable person's prior capable wishes and best interests. Attorneys should be particularly cautious when dealing with these situations. It is not uncommon for those previously favoured friends and family to presume that the grantor's new negative attitude toward them is the result of undue influence by the attorney. This can put the attorney in a

[32] *Aiello v. Bleta*, 2020 ONSC 62 (CanLII), https://canlii.ca/t/j4vg6.
[33] Ibid at paras 23, 31, 44.

difficult position as they consider their competing duties to the grantor and the competing risks of making a decision one way or another.

Consulting with other supportive family and friends, and medical or other experts who are familiar with the grantor's needs, may be an important step the attorney should take before making decisions on these matters.[34] The attorney should be cautious about seeking directions from the court in such a situation. The court has limited the types of matters it will provide opinion, advice, and direction on, and will not readily exercise an attorney's discretion for them.[35]

PART III - WHEN MULTIPLE ATTORNEYS DISAGREE & WHEN TO CONSIDER SEEKING DIRECTIONS FROM THE COURT

There are two general approaches to appointing more than one SDMs under a power of attorney document: jointly, or jointly and severally. The first approach requires that all decisions made on behalf of the grantor must be made unanimously amongst the SDMs, while the latter allows the SDMs to make decisions together or individually.

When a grantor appoints multiple SDMs with joint and several powers, it is often granted with the intention of allowing flexible decision-making by the SDMs. In this case, we often see one SDM taking the lead with most of the decision-making and record-keeping duties while other SDMs take a less active position.

[34] This does not apply where the attorney for personal care must use confinement, monitoring, or restrain the grantor where it is essential to prevent serious bodily harm to the grantor or to others, or allows the person greater freedom or enjoyment – see s. 66(10) of the *SDA*.

[35] See *Sly v. Curran*, 2008 CanLII 36518 (ON SC), https://canlii.ca/t/1zmdv. and *Chu v. Chang*, 2010 ONSC 1816 (CanLII), https://canlii.ca/t/28wkd.

However, joint and several appointments may increase the risk of conflict and litigation amongst SDMs and modern drafting solicitors do not use this joint and several terminology for the following reasons:

1. It incentivizes certain SDMs to neglect their duties when others have already taken on the brunt of the work;
2. It allows individual SDMs to abuse his or her power without the oversight of the other SDMs;
3. It exposes third parties to potential conflicting directions provided by the SDMs and having to choose between directions provided when all SDMs have been granted equal authority to make decisions.

In practice, we often see conflicts amongst joint and severally appointed SDMs. The less active SDM suddenly discover a decision made by the active SDM that is not in line with their values, or in worse cases, when it is discovered that the active SDM has abused his or her power to personally benefit from the grantor. Additionally, third-party institutions that have carried out the direction of the active SDM in such cases were under no obligation to notify or seek the other SDMs' input.

In contrast, when a grantor appoints multiple SDMs with joint and not-several powers, the SDMs must make all agree before a decision is made. When the SDMs cannot agree with one another, it is their duty to work out a solution either amongst themselves, to seek professional guidance or the directions of the court. Third-party institutions will also be held responsible for carrying out directions made by one SDM without the unanimous consent of others.

While the joint and not-several appointment of SDM powers lacks the flexibility in decisions making compared to joint and several appointments, it mandates oversight, the collaboration between the SDMs, and provides a safeguard against potential abuse.

If there are ongoing disputes between the SDMs, the power of attorney document should be reviewed in case there is a built-in dispute resolution mechanism that may help the SDMs reach a solution amongst themselves. Drafting lawyers may guide the grantor to avoid potential conflicts between attorneys by considering the following:

- clauses that urge SDMs to seek legal advice upon their power coming into effect;
- clauses that indicate the grantor's wishes, although not legally binding, may act as a guide to certain decisions made by the SDMs;
- imposing upon the SDMs, a duty to report and consult with the grantor's family members; and,
- including conflict resolution strategies such as majority rule provisions, where applicable.

The SDMs may also consider other private, timely, and more cost-effective dispute resolution mechanisms such as seeking the opinions of qualified professionals to opine on the decision to be made, seeking legal support from wills and estates counsels, and retaining qualified mediators to assist with dispute resolution.

When dispute resolution attempts between SDMs come to an impasse, the Public Guardian and Trust may be invited to mediate the dispute pursuant to section 88 of the *Substitute Decisions Act*. Additionally, the PGT may give medical consent or make decisions regarding the Grantor's personal assistive services in the SDMs' stead pursuant to sections 20(5) and 58(c) of the *Health Care Consent Act*.

In the case of urgency or when all other dispute resolution mechanisms have proven to be ineffective, the SDMs also have the option to seek directions from the Court pursuant to sections 39 and 68 of the *Substitute Decisions Act*.

IN CLOSING

Substitute-Decision Makers for incapable persons very quickly learn to appreciate that the role is much more than what it may seem. It can be tedious, arduous, time-consuming, difficult, laborious and for lack of a better term, scary. So why would anyone want to do it? The reality is that many SDMs feel obligated to act once appointed because it is usually a parent, spouse or loved one that has become incapable. So while the role may not be in any way glamourous or rewarding for the SDM, there is a sense of commitment to the incapable person and a duty to look out for them upon any incapacity during his or her lifetime. As we hope this paper has conveyed, by drafting more informative and instructive POA documents, by offering consultative and advisory services to SDMs, and with more publicly available education and resources, SDMs can act within a supportive framework designed to protect them from liability and disputes, and more importantly designed to help them honour their duty to the incapable grantor.