

PUT YOUR OWN INTERESTS ASIDE - POA

Sherrell was the only one of the four siblings who lived near her mother. She took care of Mom and helped administer the finances. To facilitate the process Mom gave a Power of Attorney for property in favour of Sherrell. The lawyers were called in when Mom died and certain financial transactions came to light.

There were numerous issues in the court case. This article addresses the Power of Attorney and its use to transfer some money. One month prior to her mother's death, using the Power Of Attorney, Sherrell transferred \$35,000 from her mother's account to her own. The lawyer for the brothers claimed the transfer of money was an unauthorized withdrawal and should be returned to the Estate.

Sherrell testified that the money was transferred from the account at Mom's instructions so as to set up an RESP for her children. Sherrell had no evidence in writing of her mother's instructions. Her brothers cried foul.

Upon reviewing the evidence, the court was skeptical of the claim that Mom wanted to gift to Sherrell \$35,000, but stopped short of making a determination that Mom did or did not give those instructions. Instead Justice Marchand focused in on the common law duty of a fiduciary and the obligations of an attorney for property under sections 32 and 38 of the *Substitute Decisions Act*.



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In *Jacobs v. Hershorn*, the court noted that Sherrell's transfer of the \$35,000 was a clear breach of her fiduciary duty as an attorney for property. ".....It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside." According to this Ontario Superior Court Justice, as a fiduciary, it was Sherrell's duty to *not use* the Power of Attorney to benefit herself. The transfer of the money was for her own benefit and to the detriment of the estate and in contravention of her obligation as a fiduciary under the *Substitute Decisions Act* to act diligently, with honesty and integrity, and in good faith for the donor's benefit. It is unclear what impact, if any, there would have been if there was clear uncontroverted evidence that the transfer was taking place on the instructions of Mom.

This case raises many questions. A person acting under the authority of a Power of Attorney whose actions benefits him/herself, at the expense of the grantor, raises red flags for the estate litigator and poses difficulties for those drafting powers of attorney. Imagine a husband and wife appointing one other as the other's power of attorney. What happens when one becomes terribly ill and the incapable spouse tells her husband to buy

himself a new suit and some groceries? Has the husband breached his fiduciary been breached? Would it make a difference if she told him to buy an expensive car?

Going to court to can be very complicated. Despite the temptation to jump to conclusions, it would be a mistake to substitute this case review for substantive legal advice. For those considering this option, there is no replacement for hiring a competent solicitor whose own research, analysis and judgment should be canvassed prior to going to court.

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