

BUT MUM PROMISED ME THE HOUSE!

Benji was 44 years old and had lived with his mother all his life. He paid no rent and contributed no money towards the upkeep of the home. His older sister Esther was the capable child. When their mother planned for the future, she appointed Esther the Continuing Power of Attorney, but left the house to Benji in her will.

Some time later, Mother was diagnosed with a progressive type of dementia. She moved in with Esther. As the disease progressed, Mum would wander, get lost and become confused. It became dangerous because her health situation needed 24 hour a day 7 day a week care. Esther had a job, family and other obligations that did not allow her to adequately care for mum. She was placed in a nursing home and the costs were astronomical. The fees for the home alone were close to \$44,000 per year.

Esther consulted with the entire family including Benji. She suggested that they sell the house to pay for the costs of mum's care. Benji refused. He said that Mum promised him the house and he was not giving it up. Esther listed the house for sale and Benji took her to court.

Benji's lawyer argued that in trying to sell the house, Esther was in breach of her duties under the *Substitute Decisions Act* which governs Continuing Powers of Attorney. The law clearly provides that a guardian of property shall not sell property that she knows is subject to a specific testamentary gift in the incapable person's will. The lawyer said Esther's claim about the high costs of mother's care was bogus. There were less expensive and equally viable alternatives. There were cheaper nursing homes and if Esther wanted to keep her mother at home she could sponsor a domestic and pay minimum wage. There was more than enough money in Mum's account for that type of expense.



*Charles B. Wagner
Barrister & Solicitor*

Esther's lawyer pointed out that the proposed expenses for Mum's care exceeded her income. Furthermore, part of the problem was that Benji would not pay rent or contribute to the house expenses so there was no other way to meet the costs of care. She argued that selling the house was the only solution and noted that the *Substitute Decisions Act* permitted the sale of property if it was necessary to comply with the duties of the guardian. Those duties included dealing with Mum's property for her benefit.

In a very similar case (*Tatterall v Baker*), one Ontario court ordered the intended recipient of the house to move out in two months and the house to be sold with the proceeds applied to the care and benefit of the incapable person. While the courts and legislature place an emphasis on a guardian's responsibility to honour the will, there are times that the benefit of the incapable person must take priority.

Going to court 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.