

## POWER OF ATTORNEY ABUSE – WHAT CAN AND SHOULD YOU DO?<sup>1</sup>

### Introduction

Our goal in this article is to provide some practical hands on advice to litigators dealing with allegations of attorney for property or attorney for personal care abuse. We will discuss different types of abuse and the various remedies available at law. But first, let's briefly review some background about the power of attorney ("POA").

In the context of a power of attorney over personal property, a POA is a document that allows the grantor to choose a representative who will have control over the grantor's property. It is sometimes put to use while the grantor has capacity and needs an agent to act on their behalf.<sup>2</sup> But, more often than nought it is triggered when the grantor loses capacity to manage his/her property. When assessing whether a POA's action or inaction has given rise to abuse one looks to the common law, agency law contract law, and the *Substitute Decisions Act*, 1992, S.O. 1992, c. 30 (the "SDA").<sup>3</sup> Whenever allegations of abuse arise a thorough review of the SDA is

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<sup>2</sup> When the power of attorney acts on behalf of a capable grantor the POA's responsibility is that of an agent. When the POA acts on behalf of an incapable grantor it is that of a fiduciary. For the different standards of responsibility required of a power of attorney for a capable grantor as opposed to when the grantor becomes incapable of managing their property we refer the reader to the seminal decision of Cullity J., called *Banton v. Banton* 1998 CarswellOnt 3423. In particular please see paragraph 151 where Cullity J. states,

"An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. *As an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property.* In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor and, pursuant to sections 32 and 38 of the *Substitute Decisions Act*, he or she is a "... *fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit*". The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the *Powers of Attorney Act* was amended in 1979 to permit the creation of such powers. It is now made explicit in the provisions of the *Substitute Decisions Act* I have mentioned and others including those dealing with the standard of care, the ability to seek the directions of the court, the court's power to remove the attorney, the right to compensation and the rules relating to the passing of accounts."

<sup>3</sup> A very good article on this topic was written by Kimberly Whaley of Whaley Estate litigation. It is called Power of Attorney Documents: Financial Abuse, Risks and Misuse. It is a very worthwhile read and available on line at [http://whaleystatelitigation.com/resources/WEL\\_Power\\_of\\_Attorney\\_Financial\\_Abuse\\_Risks\\_Misuse.pdf](http://whaleystatelitigation.com/resources/WEL_Power_of_Attorney_Financial_Abuse_Risks_Misuse.pdf)

recommended. In particular, we recommend looking to sections 32 and 38 of the *SDA* which are attached as Schedule “A” to the article.

### **Common POA Misconduct**

Generally speaking, POA misconduct can be divided into two broad categories. Misconduct can occur at the point of execution, resulting in a person wrongfully obtaining the authority granted by a POA. Secondly, misconduct can occur while holding the POA, even if the authority is validly obtained.

#### *Unlawfully Obtained POA*

Section 8 of the *Substitute Decisions Act, 1992* (“*SDA*”),<sup>5</sup> governs the capacity required for giving a power of attorney for property.<sup>6</sup> It should be noted that the test of competence for signing a power of attorney for property is less stringent than the test for being able to manage one’s own property. Section 9 of the *SDA* states that a Power Of Attorney for Property is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property. While under the *SDA*, there is a presumption of capacity for persons over eighteen years of age entering a contract,<sup>7</sup> “suspicious circumstances” of undue influence

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<sup>5</sup> SO 1992, c 30.

<sup>6</sup> Section 8 of the *SDA* states as follows:

**Capacity to give continuing power of attorney**

8. (1) A person is capable of giving a continuing power of attorney if he or she,
  - (a) knows what kind of property he or she has and its approximate value;
  - (b) is aware of obligations owed to his or her dependants;
  - (c) knows that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
  - (d) knows that the attorney must account for his or her dealings with the person’s property;
  - (e) knows that he or she may, if capable, revoke the continuing power of attorney;
  - (f) appreciates that unless the attorney manages the property prudently its value may decline; and
  - (g) Appreciates the possibility that the attorney could misuse the authority given to him or her. 1992, c. 30, s. 8 (1).

<sup>7</sup> *SDA*, section 2.

surrounding the execution of a POA will shift the burden of proof for capacity to the grantee of the POA. We will be dealing with the substantive remedies open to someone who wishes to challenge the validity of a power of attorney for property later on in the paper. At this juncture, it is important to point out that there are a number of grounds under which a challenge can be launched:

1. **Formalities of execution.** The *SDA* specifies that the POA shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness. It also specifies who may not be witnesses. But, it is important to remember that while noncompliance renders the POA ineffective, a court may declare it to be effective if the court is satisfied that it is in the interests of the grantor or his or her dependants to do so.<sup>8</sup>
  
2. **Combine challenge of validity with alternate relief – termination of POA.** While a litigant may have valid grounds to challenge the validity of a power of attorney it may make sense to seek, as an alternative form of relief, to terminate that power of attorney for property and seek to appoint a guardian of property for the grantor under section 22. It is important to remember that in order to appoint a Guardian of Property the *SDA* requires a declaration of incapacity. If the allegedly incapable person declines to be assessed, seeking to compel that assessment can be difficult<sup>9</sup>. The key here is “the best interests of the grantor” so that even if the power of attorney is valid one might argue that it should be terminated because it is in the best interests of the grantor to do so.<sup>10</sup>

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<sup>8</sup> See section 10 of the *SDA*.

<sup>9</sup> We refer the reader to *Abrams v. Abrams*, [ 2008] O.J. No. 5207 (S.C.J.). Strathy J. identified the key interests at stake on an application under section 79(1) of the *SDA*: “In considering whether to order an assessment, whether on motion or on its own initiative, a court must balance the affected party’s fundamental rights against the court’s duty to protect the vulnerable. The appointment of an assessor to conduct what is essentially a psychiatric examination is a substantial intervention into the privacy and security of the individual. As Mr. Justice Pattillo said in *Flynn v. Flynn* (December 18, 2007), Doc. 03-66/07 (Ont. S.C.J.): “[a] capacity assessment is an intrusive and demeaning process.”

<sup>10</sup> For a basic step by step outline on how to have a guardian of property appointed we refer the reader to the Law Society of Upper Canada link at <http://www.lsuc.on.ca/with.aspx?id=2147491150#s1> . It sets out preliminary considerations before seeking this relief, the requirements for such an application, Sample management plans, relevant statutes and case law for your consideration.

The concept of undue influence refers to a person's dominance over another person's will by exercising a pervasive influence on him or her, whether through manipulation, coercion, or outright abuse of power.<sup>11</sup> An example of this type of abuse can be found in the case of *Nguyen-Crawford v Nguyen*.<sup>12</sup> In *Nguyen*, a mother who spoke very little English executed a power of attorney in favour of her daughter, NC. The powers of attorney were prepared by the mother's English-speaking lawyer and written entirely in English. NC provided the only translation of the document and of the lawyer's advice. The court found the following facts to show that the execution of the POA was obtained by fraud: (a) The mother was dependent on NC; (b) NC provided the only translation of the POA which conferred on her extensive powers to act on her mother's behalf, and of the legal advice given to the mother; (c) NC and her husband used the mother's funds as if they were their own.<sup>13</sup> On this basis, the POA was found to be invalid.

### *Breach of Attorney or Guardian Duties*

#### i) Fiduciary Duties

There are strict duties imposed upon attorneys or guardians by the common law and legislation. Firstly, the Canadian courts have stated that it is now usually taken as a given that where there is a power of attorney, there exists a fiduciary relationship between the attorney and the donor.<sup>14</sup> In Ontario, the fiduciary role for attorneys and guardians is set out in the *SDA*.<sup>15</sup> The effect of the fiduciary role is such that in addition to any duties stipulated in the POA document, the attorney also has the duty to exercise reasonable care, not make secret profits, not act contrary to the interests of the donor, and not exercise the power of attorney for his or her personal benefit unless authorized to do so by the document, or unless the attorney acts with the full knowledge

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<sup>11</sup> *Kavanagh v. Lajoie*, 2014 ONCA 187, at para 19.

<sup>12</sup> 2010 CarswellOnt 9492 (Ont SCJ).

<sup>13</sup> *Nguyen*, at para 106.

<sup>14</sup> *Egli (Committee of) v. Egli*, 2004 BCSC 529, at para 76.

<sup>15</sup> See section 32(1) of the *SDA* setting out the fiduciary role of a Power Of Attorney for Property and Guardian of Property. See section 66(1) of the *SDA*, which sets out that Guardians of the Person and Attorneys for Personal care shall be exercised and performed diligently and in good faith.

and consent of his or her principal.<sup>16</sup> While an attorney acting under a continuing power of attorney is always a fiduciary, the scope of the attorney's fiduciary duties depends on whether the donor of the power is incapable at the relevant time. If the donor is mentally incapable, the attorney's position approaches that of a trustee. If the donor is capable, the relationship is akin to one of agency.<sup>17</sup>

The *SDA* sets out an extensive list of duties for attorneys and guardians for property<sup>18</sup> and for the person.<sup>19</sup> This includes the duty to account<sup>20</sup> and keep records.<sup>21</sup> These duties are further elaborated in the regulation to the *SDA* concerning accounting.<sup>22</sup> Misconduct by an attorney or guardian will often involve a breach of a duty discussed above. The case law illustrates some examples of misconduct and provides context for how the court looks at an attorney's duties.

In *Richardson Estate v. Mew* (“*Richardson Estate*”),<sup>23</sup> the Ontario Court of Appeal discussed the attorney's duty to refrain from acting for his or her personal benefit. In *Richardson Estate*, the wife of the deceased who had been assigned Power Of Attorney For Property argued that she could have (and would have) used her power to change the designated beneficiary of a life insurance policy, if she had known that the beneficiary was the former wife of the deceased. The Court of Appeal replied to this argument by stating that changing the beneficiary designation would have contravened the prohibition against using the power of attorney for her own benefit, as the deceased had not expressly consented to such a change.

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<sup>16</sup> The leading case on this principle is *Egli (Committee of) v Egli*, 2004 BCSC 529. At paragraph 82 of *Egli*, the court states “It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage ... The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor (Citing: Robertson, *Mental Disability and the Law in Canada*, at 183).”

<sup>17</sup> *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Gen Div) at p. 239.

<sup>18</sup> See sections 32, 33.1 and 35.1 of the *SDA*.

<sup>19</sup> See section 66 of the *SDA*.

<sup>20</sup> Section 32(6).

<sup>21</sup> Section 66(4.1).

<sup>22</sup> See, *Accounts and Records of Attorneys and Guardians*, O Reg 100/96.

<sup>23</sup> (2009), 96 OR (3d) 1143.

## ii) Gifts to Attorney or Guardian

It is common for claims of misconduct to flow from a gift made to a power of attorney. A gift will be set aside where it was the result of undue influence used by the donee for the purpose of obtaining the gift, or where the relationship between the donor and donee raises the presumption that the donee had influence over the donor. The case of *Christmas Estate v Tuck*,<sup>24</sup> shows how the court will look at this issue. In *Christmas Estate*, a daughter held a power of attorney for her sick mother. The daughter and her husband decided to buy a house in which they would take care of the mother. The daughter used her POA to remove money from the mother's account which was used to buy the home. Title to the house was held by the daughter and her husband, and not by the mother. The judge, Justice Eberhard, found no evidence of undue influence and no evidence to suggest that the mother did not intend the gift to the daughter. It was found that it was not unnatural for the mother to wish to benefit the daughter, and not unnatural for the mother to wish to ensure her own care and accommodation outside of a hospital or nursing home. While the gift in this case was upheld, the case is a representation of how the court will analyze these transactions.

## iii) Accounting

The standard of care for an attorney to account will differ depending on whether or not the attorney is being paid.<sup>25</sup> The duty to account will also differ based on whether the donor is mentally competent or not.<sup>26</sup> For example, in *Coupland Estate (Re)*,<sup>27</sup> the court accepted the accounts presented by a wife who had held a power of attorney during her deceased's husband's

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<sup>24</sup> 1995 CarswellOnt 1121 (Ont Gen Div).

<sup>25</sup> If an attorney is being paid, he or she is held to the same standard of care that is expected of trustees, which is to act as a reasonable and prudent business person would act. Where an attorney is not being compensated, the standard of care and diligence is that of a person of ordinary prudence in managing his or her own affairs. See sections 32(7) and (8) of the *SDA*.

<sup>26</sup> When the donor has capacity, the attorney owes fiduciary duties to the donor (duties of an agent), which are said to "pale in comparison" to those duties of an attorney holding a continuing power when the donor has lost capacity (duties of a trustee). See *Banton v Banton* (1998), 164 DLR (4th) 176 (Ont Gen Div) at p. 239.

<sup>27</sup> 2005 CarswellOnt 8868 (Ont. SCJ).

life. The accounting provided was from reconstructed materials and no records were kept by the wife as attorney. The court held that these accounts were acceptable as the deceased had always been mentally capable and there was uncontradicted evidence that the wife accounted to her husband for all her dealings with his property.

## **Remedies**

Each case of attorney or guardian misconduct will require a different approach. Below is a sample of common remedies to look to when faced with attorney misconduct.

### *Termination/Appointment of Guardian*

A common remedy, particularly in cases concerning the misconduct of an attorney for personal care, is the termination of the power of attorney document and the appointment of a guardian. Removing an attorney is a challenging endeavour, as the court is not eager to interfere with a person's choice of attorney.

An application for the appointment of a guardian of property or a guardian of the person is made pursuant to section 22 and section 55 of the *SDA*, respectively. Part III of the *SDA* contains the procedure for such applications. Pursuant to section 22(1) of the *SDA*, any person, except those listed in section 24(1)<sup>28</sup> and 57(1)<sup>29</sup>, may apply to be appointed as the guardian of property or person. The *SDA* includes conditions of appointment<sup>30</sup> as well as direction as to who ought to be appointed.<sup>31</sup>

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<sup>28</sup> Section 24(1) states: A person who provides health care or residential, social, training or support services to an incapable person for compensation shall not be appointed under section 22 as his or her guardian of property.

<sup>29</sup> Section 57(1) states: A person who provides health care or residential, social, training or support services to an incapable person for compensation shall not be appointed under section 55 as his or her guardian of the person.

<sup>30</sup> See sections 22(1) and 55(1) of the *SDA*. Also see sections 6 for the test for incapacity to manage property, and section 45 for the test for incapacity for personal care.

<sup>31</sup> See sections 24(5) and 57(3) of the *SDA*.

The courts will consider two issues when dealing with the termination of a continuing power of attorney:

- 1) There must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the wishes of the donor. With respect to this issue the evidence has to establish that the donor was capable of granting a proper Power of Attorney;
- 2) The Court will consider whether the best interests of an incapable person are being served by the attorney.<sup>32</sup>

The case of *Teffer v Schaefers* (“*Teffer*”), exemplifies a situation where an attorney for both property and personal care was successfully removed. In *Teffer*, the applicant was diagnosed with Alzheimer’s disease and the respondent, a lawyer, was named attorney for property and personal care for the applicant in 1998 and 2006 powers of attorney. It was found that the applicant did not have the capacity to give a power of attorney for property in 2006. While the evidence was not strong enough to conclude that the 1998 power of attorney was invalid, there was strong and compelling evidence of neglect, to such a degree that the wishes of the applicant in 1998 were ignored. The attorney had failed to fully comply with two court orders respecting the administration of the grantor’s property. The attorney also failed to address concerns regarding his accounting which had been raised by the grantor’s counsel over the course of several months, and had failed to pass his accounts despite several promises to do so.

In the case of *Bennett v. Gotlibowicz*,<sup>33</sup> the argument was made that the *SDA* does not provide explicit authority for the court to grant an interim guardian of property, other than to the Public Guardian and Trustee in limited urgent circumstances.<sup>34</sup> However, the court stated that it can make an appointment of a guardian pending the final determination of an application for

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<sup>32</sup> *Teffer v Schaefers*, 2008 CarswellOnt 5447 (Ont SCJ) at paras 24-25.

<sup>33</sup> 2009 CanLII 33031 (ON SCDC).

<sup>34</sup> These circumstances can be found in sections 27 of the *SDA*, in regards to a temporary guardian of property, and in section 62 of the *SDA*, in regards to a temporary guardian of the person.

guardianship.<sup>35</sup> In *Gotlibowicz*, the Divisional Court upheld the appointment of a trust company as interim guardian of an elderly woman's property, as it was found to be in her best interests.

### *Application for Directions from the Court*

If there is a breach of the attorney or guardian's duties an application for directions from the court can be made to obtain various other forms of relief.<sup>36</sup> For example, section 31 provides a POA may do anything that the incapable person could do except make a will. If the POA takes steps that are arguably testamentary or makes what might be considered inappropriate gifts under section 37, an application for directions is an appropriate vehicle to bring the matter before the court. Such an application is made pursuant to section 39 of the *SDA*, concerning guardians or attorneys for property, or section 68 of the *SDA*, concerning guardians or attorneys for the person.

For example, under section 32(4) of the *SDA* the POA/Guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person. When the POA sequesters the Grantor in an effort to prevent family from having access it is appropriate to move for directions and possibly combine this with a motion under sections 12(c) and 22 of the *SDA* terminating the power of attorney for breach of duty. Under these sections, a court can give such directions as it considers to be for the benefit of the incapable person and consistent with the *SDA*.<sup>37</sup>

An application or motion under these sections may be made by: the incapable person's guardian of property; an attorney under a continuing power of attorney; a dependant, a guardian of the person or attorney under a power of attorney for personal care; the Public Guardian and Trustee; or by any other person with leave of the court.<sup>38</sup>

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<sup>35</sup> See *Gotlibowicz*, at para 12, where it is stated that the authority to make an interim guardianship appointment is provided in section 25(2)(b),(c) and 26 of the *SDA*.

<sup>36</sup> An application for directions may include a request for the termination or revocation of a POA.

<sup>37</sup> See sections 39(4) and 68(4) of the *SDA*.

<sup>38</sup> *SDA*, sections 39 (3), 68 (3).

### *Application or Motion for Passing of Accounts*

As mentioned above, attorneys and guardians have the duty to keep accounts and records. An application or motion for an attorney or guardian to pass his or her accounts is a remedy to look to if there is a suspicion of misappropriation or defalcation by the attorney or guardian. This type of application is dealt with in section 42 of the *SDA*, which provides that a court may order that all or a specified part of the accounts of an attorney or guardian of property be passed.

An application for a passing of accounts can be made by the attorney,<sup>39</sup> the guardian,<sup>40</sup> the grantor or incapable person, the grantor's or incapable person's guardian of the person or attorney for personal care, a dependant of the grantor or incapable person, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor of the grantor or incapable person, or any other person, with leave of the court.<sup>41</sup> In *Ali v Fruci*,<sup>42</sup> it is stated that in order for a court to grant leave to commence an action to require a passing of accounts, the court must be convinced that the applicant party has a genuine interest in the incapable person's or grantor's welfare, and that it is reasonable to believe that a court hearing the matter may order the attorney to pass his or her accounts.<sup>43</sup>

Section 42 of the *SDA* set out who may apply to court to have a power of attorney pass his/her accounts. One of those people who may make an application is the Grantor. When the Grantor dies the executor of the estate steps into his shoes permitting him/her to seek an accounting from the power of attorney. So what happens when the power of attorney for property has also been appointed as the executor under the last will and testament? While the executor stands in the shoes of the grantor and could ask for an accounting of the power of attorney for property, the

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<sup>39</sup> *SDA*, s. 42(2).

<sup>40</sup> *SDA*, s. 42(3).

<sup>41</sup> *SDA*, s. 42(4).

<sup>42</sup> 2006 CarswellOnt 1706 (Ont SCJ).

<sup>43</sup> *Ibid*, at para 3.

executor cannot be expected to challenge his/her own accounts while he/she was the power of attorney. While you might think that in these circumstances, the beneficiary might qualify as “any other person” under section 42 of the SDA that might not be the case. In this instance, the beneficiary seeking leave to have the power of attorney for property pass his or her accounts should also consider seeking the removal of the executor because of the inherent conflict of interest.<sup>44</sup>

The case of *Zimmerman v McMichael Estate* (“*McMichael Estate*”)<sup>45</sup> demonstrates how a court will deal with an attorney’s inadequately prepared accounts. In *McMichael Estate*, following the death of Mrs. McMichael, her niece and her niece’s husband (the estate trustees) brought an application for the attorney, Mr. Zimmerman, to account for his dealings with the trust property. The estate trustees made many objections to Mr. Zimmerman’s accounts, to which Mr. Zimmerman failed to respond. The court found that the accounts presented and sworn to by Mr. Zimmerman were inadequate and incomplete. The judge drew an adverse inference that by failing to respond properly to the questions raised by the estate trustees, Mr. Zimmerman was guilty of taking the money for himself and was required to reimburse the estate for those disbursements and expenses.

### *Tracing, Constructive Trust, and Non-Dissipation of Assets*

Orders for a constructive trust, tracing, or the non-dissipation of assets are remedies which may be requested by way of application or motion. Tracing is a process to determine what has happened to property, including identifying proceeds and persons who received them. The court has described tracing as, “the process employed to identify and particularize the manner in which funds have been applied.”<sup>46</sup> Constructive trusts are created by operation of law to benefit a party who has been wrongfully deprived, and can be imposed in situations where monetary damages are inadequate. Lastly, an order for the non-dissipation of assets will freeze the assets of the

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<sup>44</sup> For cases dealing with attorneys and executors in dual roles, see: *McAllister Estate v Hudgin*, 2008 CarswellOnt 4991, and *De Zorzi Estate v Read*, 2008 CarswellOnt 1330.

<sup>45</sup> 2010 ONSC 2947.

<sup>46</sup> *Ruwenzori Enterprises Ltd. v Walji*, 2004 BCSC 741, at para 241.

incapable person, preventing the assets from being expended or disbursed until an agreement in writing or a further order of the court. In cases of misappropriation of assets, these are useful remedial tools for a claimant.

In the case of *Tiffin Estate v Tiffin* (“*Tiffin Estate*”),<sup>47</sup> the court made an order for, *inter alia*, tracing, constructive trust, and non-dissipation of assets. In *Tiffin Estate*, an action was commenced by the plaintiff, D, to recover from the defendants, his brother and sister-in-law, R and K, half the value of his parents’ estate. The claim was made on the basis of lack of testamentary capacity, undue influence by R and K, and breach of fiduciary duty. The court had no doubt that R and K had unduly influenced the deceased parents and breached their fiduciary duties as attorneys, as the estates of the deceased parents had been “plundered” by R and K at the earliest opportunity following the execution of their powers of attorney. The court found that the law imposed on the assets wrongfully taken a constructive trust to which the estates of the deceased parents were beneficiaries. Further, money subject to the constructive trust had been used to purchase two condominium units and a vehicle. As the plaintiff wished to recover the wrongfully taken property in its converted form (the condominium units and the vehicle), these assets were ordered to be transferred to the estate. The court also issued an order for the preservation of property since R and K were found to be holding all assets of the deceased parents’ estates in trust. *Tiffin Estate* demonstrates how these remedies can be used together in appropriate circumstances.

### *Interim Injunction*

An interim injunction is often an appropriate measure in when there is a risk of dissipation of assets prior to the hearing of the matter. The granting of an interlocutory injunction is a matter of discretion.<sup>48</sup> In *Negrych Estate v Negridge*,<sup>49</sup> the testatrix’s son had withdrawn large amounts of

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<sup>47</sup> 2004 SKQB 60.

<sup>48</sup> There are three main tests the court will consider when granting an injunction: 1) The applicant must have a *prima facie* case; 2) Whether the applicant will suffer irreparable harm if the injunction is refused; 3) Balance of convenience. See *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120 (SCC) at para 48.

<sup>49</sup> (1994), 3 ETR (2d) 189 (Ont Gen Div).

money from the testatrix's bank account prior to her death using a general power of attorney. The son had a fiduciary duty with respect to acting under the power of attorney, and had breached this duty. Following the death of the testatrix, the son did nothing to assist the executors of the estate with their duties in tracing the deceased's assets. The court stated at paragraph 9, "Given the fiduciary relationship of [the son] and the large amounts transferred by him under the power of attorney, and given the lack of evidence with respect to where the deceased's assets are, I am satisfied that the Plaintiffs are entitled to an interim interlocutory injunction to protect the assets of the estate of [the deceased]."

### *Damages*

General damages has been held to be a remedy available for misappropriation of funds. The Ontario Court of Appeal has held that the measure of damages for breach of fiduciary duty is restitutionary, meaning plaintiffs are only entitled to be placed in as good a position as they would have been in had the breach not occurred.<sup>50</sup>

An application for damages will often be included alongside one of the applications discussed above. In *Mulville, Re*,<sup>51</sup> the husband/attorney of the Mrs. Mulville brought an application to pass the accounts of the deceased's estate. The deceased's daughter and brother objected to the accounts, and asked for an award of compensatory damages and the termination of the husband's attorneyship. Although the husband's breaches of fiduciary duty were found to be in ignorance of his obligations, damages were awarded in the amount of \$25,000 to the incapable wife's estate.

Punitive damages may also be available in certain circumstances. For example, in *Dhillon v Dhillon*,<sup>52</sup> the defendants used forged powers of attorney to sell a property and punitive damages

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<sup>50</sup> *Authorson (Litigation Guardian of) v Canada (Attorney General)*, 2007 CarswellOnt 4221 (ONCA).

<sup>51</sup> 1999 CarswellOnt 276 (OCJ Gen Div).

<sup>52</sup> 2006 CarswellBC 3200 (BCCA).

were awarded to the victim. The punitive damages were upheld at the British Columbia Court of Appeal since neither of the defendants had acted innocently.

### *Effect of Attorney Misconduct on Compensation*

Regularly, an attorney will be entitled to compensation in accordance with section 40 of the *SDA*.<sup>53</sup> It has been held that a trustee or an attorney acting under a power of attorney may be disentitled to compensation, or the compensation may be reduced, where the conduct falls well below the standards expected of him or her. As mentioned, in *McMichael Estate*,<sup>54</sup> an attorney was required to repay compensation where accounts presented were inadequate and incomplete. In *Barberi v. Triassi Estate*<sup>55</sup> a joint attorney for personal care had recovered compensation from her mother's pension funds during the period that the daughter had taken care of her mother. The court exercised its discretion to disallow the daughter to take compensation for providing care for her mother, as the daughter had breached her fiduciary duties as attorney. The daughter had removed her mother from a nursing home contrary to an agreement with her brothers and contrary to the wording of the POAPC, and she had directed compensation to herself without consent from the other attorneys.<sup>56</sup>

### **Concluding Remarks and Precedents**

This paper is a brief summary of some types of POA abuses and a selection of remedies that can be looked to. Each case of attorneyship or guardianship abuse will turn on its facts and require a unique approach. In the attached appendices, you can find the following helpful precedents for some of the remedies discussed herein:

- Annotated Notice of Application for Guardianship (Appendix A);<sup>58</sup>

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<sup>53</sup> The regulation to the *SDA*, *General*, O Reg 26/95, governs the scale of attorney and guardian compensation.

<sup>54</sup> 2010 CarswellOnt 3481 (Ont SCJ).

<sup>55</sup> 2010 ONSC 3734.

<sup>56</sup> *Ibid*, at para 21.

<sup>58</sup> There is a precedent management plan on line provided by the LSUC which is available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491148> . We also refer the reader to a LSUC

- Notice of application – Guardian of property/Guardian of the person/Rescission of power of attorney/Compelling a passing of accounts/Ancillary relief (Appendix B);
- Affidavit of applicant in support of application – Guardian of property/Guardian of the person/Rescission of power of attorney/Compelling a passing of accounts/Ancillary relief (Appendix C);
- Judgment – Application for guardian of property/Guardian of the person/Compelling a passing of accounts (Appendix D);
- Motion, without notice, to obtain an order for a passing of accounts and a certificate of pending litigation (Appendix E);
- Affidavit in support of a motion without notice to obtain an order for a passing of accounts and a certificate of pending litigation (Appendix F);
- Order for a passing of accounts and a certificate of pending litigation (Appendix G);
- Notice of motion for directions pursuant to section 39 of the *Substitute Decisions Act, 1992* (Appendix H);
- Affidavit in support of a motion for directions, made pursuant to section 39 of the *Substitute Decisions Act, 1992* (Appendix I);
- Order for directions (Appendix J).

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program with CLE materials that took place on February 2, 2012 and was entitled. “The Annotated Guardianship Application”. These materials are most useful to those preparing this type of application, guardianship plan and management plan.

*Substitute Decisions Act, 1992, S.O. 1992, c. 30*

**Duties of guardian**

**32. (1)** A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. 1992, c. 30, s. 32 (1).

**Personal comfort and well-being**

**(1.1)** If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit. 1996, c. 2, s. 20 (1).

**Personal care**

**(1.2)** A guardian shall manage a person's property in a manner consistent with decisions concerning the person's personal care that are made by the person who has authority to make those decisions. 1996, c. 2, s. 20 (1).

**Exception**

**(1.3)** Subsection (1.2) does not apply in respect of a decision concerning the person's personal care if the decision's adverse consequences in respect of the person's property significantly outweigh the decision's benefits in respect of the person's personal care. 1996, c. 2, s. 20 (1).

**Explanation**

**(2)** The guardian shall explain to the incapable person what the guardian's powers and duties are. 1992, c. 30, s. 32 (2).

**Participation**

**(3)** A guardian shall encourage the incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property. 1992, c. 30, s. 32 (3).

**Family and friends**

**(4)** The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person. 1992, c. 30, s. 32 (4).

**Consultation**

- (5)** The guardian shall consult from time to time with,
- (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and
  - (b) the persons from whom the incapable person receives personal care.
- 1992, c. 30, s. 32 (5).

**Accounts**

**(6)** A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property. 1996, c. 2, s. 20 (2).<sup>59</sup>

<sup>59</sup> *Accounts and Records of Attorneys and Guardians, O. Reg. 100/96*

*Substitute Decisions Act, 1992, S.O. 1992, c. 30*

**Standard of care**

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. 1992, c. 30, s. 32 (7).

**Same**

(8) A guardian who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise. 1992, c. 30, s. 32 (8).

**P.G.T.**

(9) Subsection (8) applies to the Public Guardian and Trustee. 1992, c. 30, s. 32 (9).

**Management plan, policies of P.G.T.**

(10) A guardian shall act in accordance with the management plan established for the property, if the guardian is not the Public Guardian and Trustee, or with the policies of the Public Guardian and Trustee, if he or she is the guardian. 1992, c. 30, s. 32 (10).

**Amendment of plan**

(11) If there is a management plan, it may be amended from time to time with the Public Guardian and Trustee's approval. 1992, c. 30, s. 32 (11).

**Application of *Trustee Act***

(12) The *Trustee Act* does not apply to the exercise of a guardian's powers or the performance of a guardian's duties. 1992, c. 30, s. 32 (12).

**Attorney under continuing power of attorney**

**38. (1)** Section 32, except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property. 1992, c. 30, s. 38; 1996, c. 2, s. 25 (1).

**Authority under subs. 37 (5)**

(2) An attorney under a continuing power of attorney shall make an application to the court to obtain the authority referred to in subsection 37 (5). 1996, c. 2, s. 25 (2).

## **APPENDIX A**

Court File No.

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

[NAME(S)]

Applicant

- and -

[NAME OF INCAPABLE PERSON, NAME OF ATTORNEY FOR  
PROPERTY AND/OR PERSONAL CARE, NAME OF TRUST  
COMPANY] and THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

Application under s. 22 [PROPERTY] and 55 [PERSONAL CARE] of the  
*Substitute Decisions Act, 1992*, S.O. 1992, c. 30.

NOTICE OF APPLICATION

Annotation:

*The named respondents are specified by section 69 of the Substitute Decisions Act, 1992, as amended ("SDA"). These include an attorney for personal care, even if the application is with respect to the incapable person's property, and vice versa. The application may also be with respect to additional sections of the Substitute Decisions Act such as section 39 (directions) and section 42 (passing of accounts).*

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on                      day, the                      day  
of                      , 2012 at                      a.m., at

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an

Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

Issued by:

\_\_\_\_\_  
Local Registrar

Address of court office:

TO: [INCAPABLE PERSON OR HIS/HER LAWYER]

TO: [ATTORNEY FOR PROPERTY AND/OR PERSONAL CARE  
OR THEIR LAWYERS]

TO: [ALL FAMILY MEMBERS]

**Annotation:**

*Sub-section 69 (6) requires that the notice of application and accompanying document be served on all of the following persons who are known, by ordinary mail:*

*The spouse or partner of the alleged incapable person or person under guardianship, the incapable person's children who are eighteen years of*

*age (respecting property) or sixteen years of age (respecting personal care), the incapable person's parents, and the incapable person's brothers and sisters who have attained the age of eighteen (property) or sixteen (personal care). Service is not required on a person whose existence or address cannot be ascertained by the use of reasonable diligence. The persons referred to in subsection 68 (6) may be added as a party at any stage whether served initially or not. See section 69 in its entirety for the full detail.*

TO: [TRUST COMPANY]

TO: The Public Guardian and Trustee  
595 Bay Street, Suite 800  
Toronto, Ontario M5G 2M6  
Attn: Intake

**Annotation:**

*Service on the Public Guardian and Trustee is also required by s.69(4) of the SDA*

**APPLICATION**

1. The applicant[s] make[s] application for:
  - (a) An order terminating the conditional statutory guardianship of property of **[name of incapable person]** granted by the Public Guardian and Trustee of the Province of Ontario to \_\_\_\_\_, pursuant to a certificate dated \_\_\_\_\_; [or] An order terminating the power of attorney for property granted by \_\_\_\_\_ to \_\_\_\_\_ on [date]; [or] An order terminating the statutory guardianship of property of **[name of incapable person]** issued by the Public Guardian and Trustee pursuant to a certificate of incapacity dated \_\_\_\_\_.

**Annotation:**

*Prior to the appointment of a guardian of property, any previously existing authority must be terminated. A statutory guardianship or continuing power of attorney for property can be terminated by a court order: see SDA Section 12 (1) (c) and Section 20 paragraph 1.*

(b) A declaration that the respondent [NAME OF INCAPABLE PERSON] is incapable of managing property and that, as a result, it is necessary for decisions to be made on [his/her] behalf by a person who is designated to do so;

**Annotation:**

*This declaration is a statutory requirement: SDA subsection 25 (1)*

(c) An order appointing [NAME(S) OF PROPOSED GUARDIAN(S)] as the guardian[s] of property of the respondent [NAME OF INCAPABLE PERSON];

(d) An order that the management plan of [NAME] is approved and that the guardian of property shall act in accordance with the management plan;

**Annotation:**

*A management plan in the prescribed form is a required element of an application for guardianship of property: see SDA subsection 32 (10) and subsection 70(1)(b).*

(e) An order for directions with respect to the timing of a passing of accounts by [NAME] as guardian of the property of [NAME OF INCAPABLE PERSON] proposed by the applicants to be \_\_\_\_\_ years from the date of an order granted herein, and thereafter to be passed pursuant to further court order;

**Annotation:**

*Although the SDA does not speak specifically to the periodic passing of accounts, members of the bench have consistently indicated that it is important that a guardian of property return periodically to the court to demonstrate that he or she is acting appropriately. In fact, section 4(e) of the SDA grants the court authority to order the accounts of a guardian to be passed. It is usually suggested that the first passing of accounts commence within six months of the second anniversary of the date of the guardianship order, although it is sometimes proposed that the first passing of account occur after the first year, to identify any difficulties that the guardian of property is experiencing early in the guardianship. As there is a cost to a passing of accounts, once it is established that the guardian of property is cognizant of his or her duties and keeping appropriate accounts, it may be to the incapable person's financial advantage to stretch the accounting periods out to three years' duration, or even longer, depending on the complexity of the incapable person's financial affairs.*

(f) An order that the respondent **[NAME OF ATTORNEY FOR PROPERTY OR STATUTORY GUARDIAN OF PROPERTY]** shall forthwith deliver to **[NAME(S) OF PROPOSED GUARDIAN(S)]** for management of all assets belonging to **[NAME OF INCAPABLE PERSON]** currently in **[his/her]** possession and control;

(g) An order that **[NAME(S) OF PROPOSED GUARDIAN(S)]** shall receive from **[NAME OF ATTORNEY FOR PROPERTY OR STATUTORY GUARDIAN]** a list of the assets of **[NAME OF INCAPABLE PERSON]** held by **[him/her]**, and **[NAME(S) OF PROPOSED GUARDIAN(S)]** shall commence its management of the

property of **[NAME OF INCAPABLE PERSON]** on the basis that this list is a true and accurate listing of all of **[NAME OF INCAPABLE PERSON]**'s assets, without in any way restricting **[NAME(S) OF PROPOSED GUARDIAN(S)]**'s ability to subsequently require **[NAME OF ATTORNEY FOR PROPERTY OR STATUTORY GUARDIAN]** to pass **[his/her]** accounts for the period during which **[he/she]** has acted as guardian of the property **[or attorney]** of the property of **[NAME OF INCAPABLE PERSON]**;

**Annotation:**

*Although the applicant or the subsequent guardian of property (if different) may want a formal passing of accounts from the previous attorney for property or guardian of property, obtaining a formal passing of accounts can hold up management of the incapable person's property or affect the new guardian of property's ability to account for property received. The purpose of the proposed order above is to relieve the new guardian of property of any obligation to start with a list of assets produced as the result of a formal passing, when it may be impossible to commence the guardianship on this basis.*

- (h) An order dispensing with the requirement for the guardian of property to obtain a security bond; [or] An order for directions regarding the obtaining of a guardianship bond;

**Annotation:**

*Subsection 25 (2) provides that an order appointing a guardian of property may require that the guardian post security in the manner and amount that the court considers appropriate. Obtaining a bond as security can be challenging for a variety of reasons. If the assets are significant, the applicant for guardianship will have to address the issue of security. Alternatives can include a restriction on dealing with real estate, a limit on the term of the bond, other limits on the guardian's powers or the appointment of two joint guardians who must act together.*

- (i) An order that money being held with the Accountant of the Ontario Superior Court of Justice shall be paid out to [NAME OF PAYEE] forthwith, that the period of appeal for the court's order is abridged, and dispensing with the requirement in Rule 72.03 (2) (c) (ii);

**Annotation:**

*If money is being held by the Accountant on behalf of the incapable person, an order appointing a guardian of property will not be sufficient*

*authority to require the accountant to pay out the money. The Accountant requires a specific court order and, if a payout is desired before the passage of the appeal, the order must provide for the appeal period to be abridged. Rule 72.03 (2) (c) requires the filing of an affidavit regarding the abridgement of the appeal period.*

(j) An order terminating the power of attorney for personal care dated [DATE] that was granted to the respondent [NAME OF ATTORNEY] by the respondent [NAME OF INCAPABLE PERSON];

**Annotation:**

*A power of attorney for personal care can be terminated by the appointment of guardian of the person pursuant to subsection 53 (1) (b).*

(k) A declaration that the respondent [NAME OF INCAPABLE PERSON] is incapable of personal care and specifically in respect of [his/her] own health care, nutrition, shelter, clothing, hygiene and safety, and that, as a result, it is necessary for decisions to be made on [his/her] behalf by a person who is authorized to do so;

**Annotation:**

*A declaration of incapacity is required as part of an order appointing a guardian of the person. There are six functions of personal care with respect to which an individual can be incapable: health care, nutrition, shelter, clothing, hygiene and safety. Subsection 58 (1) requires a finding that the person is incapable in respect of all of these functions or some of them, as the case may be.*

(l) An order appointing the applicant[s], [NAME(S) OF PROPOSED GUARDIAN(S)], as the guardian[s] of personal care of the respondent [NAME OF INCAPABLE PERSON];

(m) An order that the guardianship plan of [NAME(S) OF PROPOSED GUARDIAN(S)] is approved and that the guardian[s] of personal care shall act in accordance with the guardianship plan;

**Annotation:**

*The guardianship plan is a required document in an application for guardianship of the person (SDA subsection 70 (2) (b)). Subsection 66 (15) requires a guardian of the person to act in accordance with the guardianship plan.*

(n) An order that [NAME(S) OF PROPOSED GUARDIAN(S)], as the full guardian of the person of [NAME OF INCAPABLE PERSON], may exercise custodial powers over [NAME OF INCAPABLE PERSON], determine [his/her] living arrangements and provide for [his/her] shelter and safety;

(o) An order that [NAME(S) OF PROPOSED GUARDIAN(S)], as guardians of the person of [NAME OF INCAPABLE PERSON], may act as [his/her] litigation guardians, except in respect of litigation that relates to [his/her/their] status or powers as the guardian[s] of [his/her] person [and property];

(p) An order that **[NAME(S) OF PROPOSED GUARDIAN(S)]**, as guardian[s] of the person of **[NAME OF INCAPABLE PERSON]**, may commence and settle claims and proceedings on **[his/her]** behalf, except claims and proceedings that relate to **[his/her/their]** status or powers as guardian[s] of **[his/her]** person **[and property]**;

(q) An order that **[NAME(S) OF PROPOSED GUARDIAN(S)]**, as guardians of the person of **[NAME OF INCAPABLE PERSON]**, shall have access to personal information, including health information and records, to which **[NAME OF INCAPABLE PERSON]** could have access if capable, and that further, **[NAME(S) OF PROPOSED GUARDIAN(S)]**, may consent to the release of that information to another person, except for the purposes of litigation that relates to **[his/her/their]** status or powers as guardians of **[NAME OF INCAPABLE PERSON]**'s person **[and property]**;

(r) An order that **[NAME(S) OF PROPOSED GUARDIAN(S)]**, as guardian[s] of the person of **[NAME OF INCAPABLE PERSON]**, may make any decision on **[NAME OF INCAPABLE PERSON]**'s behalf to which the *Health Care Consent Act, 1996* applies;

(s) An order that [NAME(S) OF PROPOSED GUARDIAN(S)], as guardians of the person of [NAME OF INCAPABLE PERSON], may make decisions about [NAME OF INCAPABLE PERSON]'s health care, nutrition, hygiene, employment, education, training, clothing, recreation, and about any social services provided to [him/her];

**Annotation:**

*Orders requested in (n) to (s) above are all possible powers that can be given to a guardian of the person when an order is made for full guardianship of the person (when the guardianship covers all six personal care functions: health care, nutrition, shelter, clothing, hygiene and safety). The possible powers are outlined in subsection 59 (2). If a person is not incapable with respect to all functions, it is possible to obtain an order for the partial guardianship of the person, in which case the court may order which specific possible powers set out in subsections 59 (2), (3), (4) and (5) are included in the powers given to the guardian under the order for partial guardianship. (See SDA subsection 60 (3)).*

(t) An order seeking directions for the conduct of mediation in this proceeding;

**Annotation:**

*Mandatory mediation applies to Substitute Decisions Act applications in the City of Toronto, the City of Ottawa and the County of Essex. Rule 75.1.05 requires the applicant to make a motion seeking directions for the conduct of the mediation. If the guardianship application is opposed, it is most efficient to address mediation at the time directions are being given with respect to other procedural matters concerning the litigants, such as the exchange of documents, examinations of parties and future trial of the issues.*

(u) An order authorizing **[NAME(S) OF PROPOSED GUARDIAN(S)]**, as guardians of the person of **[NAME OF INCAPABLE PERSON]**, to change existing arrangements in respect of custody of or access to a child, or give consent on **[NAME OF INCAPABLE PERSON]**'s behalf to the adoption of a child;

(v) THIS COURT ORDERS that **[NAME OF PROPOSED GUARDIAN (S)]**, as guardians of the person of **[NAME OF INCAPABLE PERSON]**, is authorized, with the assistance of a police officer, to enter the premises located at **[ADDRESS OF PREMISES]**, between **[SPECIFY TIMES OF THE DAY]**, and search for and remove **[NAME OF INCAPABLE PERSON]**, using such force as may be necessary;

**Annotation:**

*The powers set out in (u) and (v) are extraordinary powers: not usually sought or granted by the court. The power to apprehend a person, found at subsection 59(3), can only be used with respect to specific identified premises. It is not a general power to apprehend a person at any time, in*

*any place, on an ongoing basis. The power to change custody or access arrangements for a child or consent to adoption of a child is made possible pursuant to subsection 59 (4) and is not a power that would be granted by the court unless there were a specific reason why it should be.*

(w) An order dispensing with the need for service of this application on the following individuals given the fact that they have signed affidavits in support of this application and consenting to the relief requested: **[NAMES OF FAMILY MEMBERS WHO HAVE CONSENTED AND NEED NOT BE SERVED FOR ANY OTHER REASON];**

**Annotation:**

*Section 69 of the SDA provides for who should be served with guardianship application. This includes, pursuant to subsection 69 (6), service on the spouse or partner of the person alleged to be incapable, service on the alleged incapable person's children of at least eighteen years of age (respecting property) or at least sixteen years of age (respecting personal care), the alleged incapable person's parents and the alleged incapable person's brothers and sisters who have reached the age of eighteen (property) and sixteen (personal care). However, service on such persons is not required if their existence or address cannot be ascertained by use of reasonable diligence. In *Boyd v. Thomson*, [2006] O.J. No. 4796 (S.C.J.), the Court held that in certain circumstances, at the court's discretion, service on family members can be dispensed with if they have consented to not being served. This case arose where there were privacy concerns about disclosure of the incapable person's finances.*

(x) An order dispensing with the requirement for a factum in this proceeding;

**Annotation:**

*An application normally requires a factum. It may be reasonable to ask the court to dispense with the requirement of the factum. However, in*

*many cases, it would still be advisable to prepare a factum. SDA applications can be legally and factually complicated.*

(y) An order that the applicant's costs of this proceeding shall be paid from the property of [NAME OF INCAPABLE PERSON] on a full indemnity basis; and

**Annotation:**

*The costs of the guardianship application will always be in the discretion of the presiding judge. In many cases, it will be reasonable to seek costs from the incapable person on a full indemnity basis. However, it is important that the applicant understand that he or she is personally responsible for the costs at first instance, and may incur liability for the costs of others as well.*

(z) Such further and other relief as counsel may request and this Honourable Court may deem just.

2. The grounds for the application are:

(a) The respondent [NAME OF INCAPABLE PERSON] is incapable of managing property [and is incapable of making decisions regarding his/her personal care];

(b) The respondent [NAME OF INCAPABLE PERSON] is in need of a guardian of property in order to ensure that it is managed on [his/her] behalf during [his/her] incapacity;

(c) The respondent **[NAME OF INCAPABLE PERSON]** is in need of a guardian of person so that decisions can be made for **[his/her]** benefit with **[his/her]** prior capable wishes and best interests being given due weight and consideration;

(d) **[DESCRIBE OTHER SPECIFIC GROUNDS such as relationship of proposed guardian to incapable person, other reasons why current attorney for property or statutory guardian is not appropriate; and indicate other family members who are in support of this application]**

(e) The *Substitute Decisions Act, 1992*, S.O. 1992, c.30, as amended and in particular sections:

6 – incapacity to manage property

12 (1) – termination of continuing power of attorney

20 – termination of statutory guardianship

22 – application for appointment of guardian of property

24 (5) – criteria for appointment of guardian of property

(a) whether proposed guardian is also attorney for property

(b) incapable person's current wishes

- (c) closeness of applicant's relationship to incapable person
- 24 (6) – appointment of 2 or more guardians of property
- 25 (1) – finding of incapacity to manage property
- 25 (2) – contents of order:
  - (a) may order security,
  - (b) may limit the period of appointment,
  - (c) may order other conditions
- 45 – incapacity for personal care
- 53 (1) – termination of power of attorney for personal care
- 55 – application for appointment of guardian of the person
- 57 (3) – criteria for appointment of guardian of the person
  - (a) whether proposed guardian is attorney for property
  - (b) incapable person's current wishes
  - (c) closeness of the applicant's personal relationship to  
incapable person
- 57 (4) – appointment of 2 or more guardians of the person
- 58 – finding of incapacity to make personal care decisions
- 59 – appointment of full guardianship of the person
- 60 – appointment of partial guardianship of the person
- 79 – order for assessment

80 – restraining order

81 – order for enforcement of assessment order

**Annotation:**

*If a person's capacity is in issue in a proceeding, and the court is satisfied there are reasonable grounds to believe the person is incapable, the court may order the person to be assessed. Section 79 provides for an order for assessment. Section 80 provides for a restraining order to be made preventing another person from interfering with the assessment. Where an assessment order is not complied with, section 81 provides for the apprehension and taking into custody of the alleged incapable person for the purpose of conduct of the assessment.*

(f) The *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rules:

1.04 – interpretation of the Rules (in particular, Rule 1.04(1.1)

(proportionality))

3.02 – jurisdiction of court to extend or abridge any time prescribed by the *Rules*

14.05 – proceedings brought by notice of application

38 – jurisdiction and procedure of applications

57 – costs of proceedings

75 – contentious proceedings in estate matters

75.1 – mandatory mediation – estates, trusts and substitute decisions

(g) The *Courts of Justice Act*, R.S.O. 1990, c. C.43, section

105 – order for physical examination

127 – 131 – pre- and post-judgment interest and costs

(h) Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. The following documentary evidence will be used at the hearing of the application:

- (a) The affidavit of \_\_\_\_\_, sworn \_\_\_\_\_
- (b) The affidavit of \_\_\_\_\_, sworn \_\_\_\_\_; and
- (c) Such further and other material as counsel may advise and this Honourable Court may permit.

**[NAME]**  
**[ADDRESS]**  
**[TEL. NO.]**  
**[FAX NO.]**  
**[SOLICITORS FOR THE APPLICANT(S)]**

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These materials were originally prepared in connection with The Law Society of Upper Canada's CPD program titled "The Annotated Guardianship Application", presented on February 20, 2007, as well as The Law Society of Upper Canada's CPD program titled "The Annotated Guardianship Application 2012", presented on April 24, 2012.

## **APPENDIX B**

## APPENDIX 24.2

**NOTICE OF APPLICATION —  
GUARDIAN OF PROPERTY/GUARDIAN OF THE  
PERSON/  
RECISSION OF POWER OF ATTORNEY/  
COMPELLING A PASSING OF ACCOUNTS/  
ANCILLARY RELIEF**

*(This precedent is applicable to a situation where there are allegations as to the capacity of a grantor to give a power of attorney and the misuse of the power of attorney by the attorney. It is coupled with the request that the appropriate declaration be made respecting the person's incapacity such that the applicant becomes guardian of property and of the person, together with interim relief with regard to property at risk in the hands of the attorney. It is adaptable to less complex fact situations, i.e., to the simpler application to have the applicant appointed as guardian of property and/or guardian of the person.)*

Court File No.

## SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMIE SMITH

Applicant

- and -

JACK DOE, HAROLD DOE, SHIRLEY DOE  
and THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

**APPLICATION UNDER Sections 22 and 55 of the  
SUBSTITUTE DECISIONS ACT, 1992, S.O. 1992, c. 30**

**NOTICE OF APPLICATION****TO THE RESPONDENTS**

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant.  
The claim made by the Applicant appears on the following pages.

This Application will come on for hearing on *(day)*, *(date)*, at *(time)*, at  
*(address of court house)*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this Court Office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it with proof of service, in the Court Office where the Application is to be heard as soon as possible, but not later than two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE WITHOUT FURTHER NOTICE TO YOU.

If you wish to oppose this Application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date:

Issued  
by

\_\_\_\_\_  
Local Registrar  
Address of Court Office

TO: *(Name and address of  
Respondents)*

AND THE OFFICE OF THE  
TO: PUBLIC GUARDIAN AND  
TRUSTEE  
595 Bay Street  
Suite 800  
Toronto, Ontario  
M5G 2M6

**1. THE APPLICANT MAKE APPLICATION FOR:**

- (a) an Order declaring that Jack Doe is incapable of managing property and, as a result, it is necessary for decisions to be made on his behalf by a person or persons who are authorized to do so;
- (b) an Order declaring that Jack Doe is incapable in respect of his personal care and, as a result, it is necessary for decisions to be made on his behalf by a person or persons who are authorized to do so;
- (c) an Order appointing the Applicant as permanent guardian of the property, without security, and as permanent guardian of the person for Jack Doe;

- (d) in the alternative to the relief sought in (a), (b) and (c) above, an Order appointing the Public Guardian and Trustee as a temporary guardian of property pursuant to Section 27 (6) of the *Substitute Decisions Act, 1992*;
- (e) an Order that Jack Doe undergo an immediate assessment;
- (f) a mandatory injunction restraining the Respondents, Harold Doe and Shirley Doe, and their agents and servants, from transferring, encumbering and otherwise dealing with the assets of Jack Doe, including, but not limited to those moneys, funds, and G.I.C.s on deposit at *(name of bank branch)* located at *(branch location)*;
- (g) a mandatory injunction restraining the *(name of bank branch)* located at *(branch location)* from dealing with the moneys, funds and G.I.C.'s on deposit in the name of Jack Doe and a mandatory injunction restraining the said *(bank branch)* from dealing with the moneys, funds, and G.I.C.'s traceable to Jack Doe;
- (h) an Order suspending the powers of the Respondents, Harold Doe and Shirley Doe, pursuant to Section 27 (8) of the *Substitute Decisions Act, 1992*;
- (i) rescission of a Power of Attorney given by Jack Doe to the Respondents, Harold Doe and Shirley Doe;
- (j) an order that the Respondents, Harold Doe and Shirley Doe, be compelled to commence an Application to Pass their accounts in respect of their dealings pursuant to a power of attorney granted by Jack Doe within 30 days of the date of this Order;
- (k) an Order compelling the Public Guardian and Trustee to disclose forthwith to the Applicant and his solicitors the accounting, documentation and other information provided by the Respondents, Harold Doe and Shirley Doe;
- (l) an Order compelling the *(name of bank branch)* to disclose to the Applicant and his solicitor a history with respect to all accounts maintained in the name of or for Jack Doe;
- (m) An Order abridging the time for service or validating service of the Application herein, if necessary;
- (n) costs of the Applicant on a solicitor-and-client basis payable by the Respondents, Harold Doe and Shirley Doe, or in the alternative out of the capital of the property of Jack Doe with the right to recover such costs from the Respondents; and
- (o) such further and other Order as to This Honourable Court seems just.

**2. THE GROUNDS FOR THE APPLICATION ARE:**

- (a) Sections 6, 22, 27, 45, 55, 62 and 79 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30;
- (b) Sections 101, 105 and 122 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and

(c) Rules 14, 16.08, 33 and 40 of the *Rules of Civil Procedure*.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Application:

- (a) Affidavit of Jamie Smith, sworn (*date*);
- (b) Consent and Statement of Jamie Smith dated (*date*);
- (c) Management Plan dated (*date*);
- (d) Guardianship Plan dated (*date*); and
- (e) Such further and other material as counsel may advise and this Honourable Court will allow.

(*Date of issue*)

(*Name, address, telephone  
and fax number of Solicitors  
for Applicant*)  
Solicitors for the Applicant

## **APPENDIX C**

## APPENDIX 24.3

**AFFIDAVIT OF APPLICANT IN SUPPORT OF  
APPLICATION —  
GUARDIAN OF PROPERTY/GUARDIAN OF THE  
PERSON/  
RECISSION OF POWER OF ATTORNEY/  
COMPELLING A PASSING OF ACCOUNTS/  
ANCILLARY RELIEF**

Court File No.

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMIE SMITH

Applicant

- and -

JACK DOE, HAROLD DOE, SHIRLEY DOE  
and THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

**APPLICATION UNDER Sections 22 and 55 of the  
SUBSTITUTE DECISIONS ACT, 1992, S.O. 1992, c. 30**

**AFFIDAVIT**

I, JAMIE SMITH, of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY:

1. I am the Applicant herein and a nephew of the Respondent, Jack Doe, and as such have knowledge of the matters hereinafter deposed to.
2. The other two individual Respondents (hereinafter referred to as "the Does") are, respectively, another nephew and his wife. The Does, are appointed as attorneys pursuant to a General Power of Attorney dated (*date*) (a true copy of which is attached hereto as Exhibit "A" to this my Affidavit).
3. Jack Doe was born on (*date*). My uncle never married or fathered any children. He had two siblings, namely, James Doe and Geraldine Smith, both of whom predeceased my uncle.
4. At the time the aforesaid Power of Attorney was purportedly executed, our uncle was attended to by his family physician, Dr. S. Henderson. Attached

hereto and marked as Exhibit "B" to this my Affidavit is a true copy of his report dated (*date of report*) from Dr. Henderson advising that Jack Doe "has a history of progressive gradual memory loss with prior paranoia" and "suffers from an early dementia (likely Alzheimer's)".

5. In (*date*), the Does made plans in order to arrange for my uncle to be moved to a nursing home close to their home. To my knowledge, no family members were aware of the move or the existence of the Power of Attorney.
6. From my own observations, my uncle's mental capabilities have been diminishing over the past two years. (*provide personal observations*).
7. I also have personal knowledge regarding my uncle's financial circumstances as I assisted him until the Respondents took charge of his affairs. When I became aware of the Power of Attorney to the Does, I asked that they provide particulars. I was advised that this was "none of my business". (*provide other particulars as to the dealings of the attorneys*).
8. I wrote to the Public Guardian and Trustee, who has made a number of inquiries. However, the Public Guardian and Trustee has advised that it does not have the authority to communicate the results of their inquiries, absent a court order.
9. I was able to determine that my uncle's accounts were transferred to (*name of bank branch*), which branch is the same as the Respondents. Attached hereto and marked as Exhibit "C" to this my Affidavit is the true copy of correspondence from my solicitor dated (*date*), sent in an effort to freeze all funds. In response, the branch advises that it accepts the Power of Attorney as being validly executed and is acting in accordance with the Respondents' directions.
10. I remain very concerned about all of these developments and the complete failure of disclosure. It is my opinion that my uncle was not mentally capable of making any financial decisions or signing another Power of Attorney and I suspect that the Respondents have taken advantage of my uncle for their own personal gain.
12. In support of my Application to be appointed as Guardian of Property and as Guardian of the Person of Jack Doe, the Management Plan and Guardianship Plan are attached hereto and marked as Exhibits "D" and "E" to this my Affidavit. I hereby undertake, if appointed, to act and perform my duties in accordance with the Management and Guardianship Plans.
13. I make this Affidavit in support of relief more particularly set out in the Notice of Application herein.

SWORN before me in the (*name of* )  
*town or* )  
*city*) in the (*Judicial District or* )  
*Municipality*) )  
 this day of (*date*)

\_\_\_\_\_  
 JAMIE SMITH

A COMMISSIONER FOR TAKING OATHS ETC.

## **APPENDIX D**

## APPENDIX 24.5

**JUDGMENT —  
APPLICATION FOR GUARDIAN OF PROPERTY/  
GUARDIAN OF THE PERSON/  
COMPELLING A PASSING OF ACCOUNTS**

Court File No.

SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE     )     (*Day and date order made*)

B E T W E E N:

JAMIE SMITH

Applicant

- and -

JACK DOE, HAROLD DOE, SHIRLEY DOE  
and THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

**APPLICATION UNDER Sections 22 and 55 of the  
SUBSTITUTE DECISIONS ACT, 1992, R.S.O. 1992, c. 30**

**JUDGMENT**

THIS APPLICATION, made by the Applicant was heard this day at  
(*place*).

ON READING the Notice of Application and the Affidavit of Jamie Smith and on hearing the submissions of counsel for the Applicant and the Respondents, Harold Doe and Shirley Doe, and the Respondent, The Public Guardian and Trustee

1. THIS COURT DECLARES that Jack Doe is incapable of managing property with respect to Section 25 of the *Substitute Decisions Act, 1992*, and, as a result, it is necessary for decisions to be made on his behalf by a person who is authorized to do so.
2. THIS COURT DECLARES that Jack Doe is incapable of personal care in respect of the functions referred to in Section 45 of the *Substitute Decisions Act, 1992*, and, as a result, needs decisions to be made on his behalf by a person who is authorized to do so.

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3. THIS COURT ORDERS that the Applicant is hereby appointed as the guardian of property and guardian of the person for Jack Doe.
  4. THIS COURT ORDERS that Applicant shall discharge his responsibilities as guardian of property and guardian of the person in accordance with the Management Plan and Guardianship Plan filed herein.
  5. THIS COURT ORDERS that Applicant shall post a bond representing the value of the Estate of Jack Doe in the amount of (value of estate).
  6. THIS COURT ORDERS that the Respondents, Harold Doe and Shirley Doe, are required to commence an application to pass their accounts in the format required by Rule 74.17 of the *Rules of Civil Procedure* in respect of their dealings with the property of Jack Doe pursuant to a power of attorney executed (*date of execution*) within 30 days of the date of this Order.
  7. THIS COURT ORDERS that the Applicant pass his accounts as guardian of the property for the period ending one year from the date of this Judgment within three months of the end of the one-year period.
-

## **APPENDIX E**

## APPENDIX 24.6

**MOTION, WITHOUT NOTICE, TO OBTAIN AN  
ORDER FOR A PASSING OF ACCOUNTS AND A  
CERTIFICATE OF PENDING LITIGATION**

*(It is often advisable to take advantage of the fact that an order for the passing of accounts may be available by way of a motion on a without-notice basis, which is often prompted by the situation where, for example, an executor has not been able to obtain a sufficient accounting from the attorney who had been managing the testator's financial affairs prior to his death. This is particularly advisable in the case where estate assets may be at risk and interlocutory relief is sought for the purpose of securing assets as quickly as possible. To bring a motion without notice, originating process must first be issued. Depending on the circumstances, this can be either a Statement of Claim or a Notice of Application.)*

Court File No.

## SUPERIOR COURT OF JUSTICE

## B E T W E E N:

JAMIE DOE Estate Trustee  
of the Estate of JACK DOE

Plaintiff/Applicant

- and -

HAROLD DOE

Defendant/Respondent

**NOTICE OF MOTION**

THE Applicant makes a motion, on a without-notice basis, to the Court on (day), (date), at (time), at (address of courthouse).

**1. THE MOTION IS FOR AN ORDER:**

- (a) an Order requiring Harold Doe to commence an Application to Pass Accounts, in relation to his dealings with Jack Doe as Attorney pursuant to a Power of Attorney granted by Jack Doe, in accordance with Rules 74.17 and 74.18 of the *Rules of Civil Procedure*, within 30 days after this Order is served upon Harold Doe; and

- (b) a Certificate of Pending Litigation in respect of property municipally known as (*municipal address of property*) and having the legal description set out in Schedule A hereto (the "property"); and
  - (c) such further and other Order as to this Honourable Court seems just.
2. **THE GROUNDS FOR THE MOTION ARE:**
- (a) the Plaintiff/Applicant has been unsuccessful in obtaining accounting from the Defendant/Respondent in respect of his dealings pursuant to a Power of Attorney granted by the deceased, Jack Doe;
  - (b) the Defendant/Respondent transferred title to the property of the deceased to himself and the deceased as joint tenants pursuant to the Power of Attorney shortly before the death of the deceased;
  - (c) Section 42 of the *Substitute Decisions Act, 1992*;
  - (d) Section 103 of the *Courts of Justice Act*;
  - (e) Rule 42 of the *Rules of Civil Procedure*;
  - (d) Rules 74.17 and 74.18 of the *Rules of Civil Procedure*; and
  - (e) Such further and other grounds as this Honourable Court may permit.
3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Application:
- (a) Affidavit of Jamie Doe, sworn (*date*); and
  - (b) Such further material as counsel may advise and this Honourable Court will allow.

Date:

(*Name, address,  
telephone and fax number of  
Solicitors for Applicant*)

Solicitors for the Plaintiff/Applicant

## **APPENDIX F**

## APPENDIX 24.7

**AFFIDAVIT IN SUPPORT OF A MOTION WITHOUT  
NOTICE  
TO OBTAIN AN ORDER FOR A PASSING OF  
ACCOUNTS AND A  
CERTIFICATE OF PENDING LITIGATION**

Court File No.

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMIE DOE Estate Trustee  
of the Estate of JACK DOE

Plaintiff/Applicant

- and -

HAROLD DOE

Defendant/Respondent

**AFFIDAVIT**

I, JAMIE DOE, of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY:

1. I am the Plaintiff/Applicant herein, a son of the deceased, Jack Doe, and the executor and trustee herein and as such have knowledge of the matters hereinafter deposed to.
2. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of the Last Will and Testament of the deceased.
3. The Defendant/Respondent, Harold Doe, is my brother and my sole sibling. The deceased died on *(date of death)*, our mother having predeceased our father.
4. Approximately two years prior to the death of our father, he suffered a debilitating stroke. The Respondent moved our father into his home ("the property") and provided necessary care for him. The property was rented out and provided an income that assisted with the care of the deceased. With my knowledge, our father granted a continuing Power of Attorney to the Defendant/Respondent dated *(date)*, a copy of which is attached hereto and marked as Exhibit "B".

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June 2006

5. I have not been able to obtain any sort of accounting from the Defendant/Respondent with respect to his dealings pursuant to the Power of Attorney. Further, a search of title reveals that the property was transferred to our father and the Defendant as joint tenants two months prior to the death of our father. Attached hereto and marked as Exhibit "C" to this my Affidavit is a true copy of the Transfer/Deed of Land evidencing the transfer of title.
6. I make this Affidavit in support of relief more particularly set out in the Notice of Motion herein and, in particular, for a Certificate of Pending Litigation and an accounting in relation to the Defendant's/Respondent's dealings with the Power of Attorney granted by our father to the Defendant/Respondent.

SWORN before me in the (*name of* )  
town or )  
city) in the (*Judicial District or* )  
Municipality) JAMIE DOE  
this day of (*date*) )

A COMMISSIONER FOR TAKING OATHS ETC.

## **APPENDIX G**

## APPENDIX 24.8

**ORDER FOR A PASSING OF ACCOUNTS AND A  
CERTIFICATE OF PENDING LITIGATION**

Court File No.

SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE     )     (*Day and date order made*)

B E T W E E N:

JAMIE DOE

Plaintiff/Applicant

- and -

HAROLD DOE

Defendant/Respondent

**ORDER**

THE MOTION, made by Plaintiff/Applicant, on a without-notice basis, was heard this day at (*place*).

ON READING the Notice of Motion and the Affidavit of Jamie Doe and on hearing the submissions of counsel for the Plaintiff/Applicant,

1. THIS COURT ORDERS that the Defendant/Respondent be compelled to commence an Application to Pass his accounts in respect of his dealings pursuant to a Power of Attorney granted by the deceased within 30 days following service of the Order herein upon him.
  2. THIS COURT ORDERS that a Certificate of Pending Litigation in respect of property municipally known as (*municipal address of property*) and having the legal description set out in Schedule A hereto (the "property") is hereby granted
  3. THIS COURT ORDERS that the Notice of Motion, supporting Affidavit and Order herein be forthwith served upon the Defendant/Respondent.
-

## **APPENDIX H**

## APPENDIX 24.9

**NOTICE OF MOTION FOR DIRECTIONS PURSUANT  
TO  
SECTION 39 OF THE *SUBSTITUTE DECISIONS ACT*,  
1992**

Court File No.

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMIE DOE

Applicant

- and -

JACK DOE and  
THE PUBLIC GUARDIAN AND TRUSTEE

Respondent

**NOTICE OF MOTION FOR DIRECTIONS**

THE APPLICANT will make a motion to the Court on (day), (date), at (time), at (address of courthouse).

**PROPOSED METHOD OF HEARING:** The Motion is to be heard orally.

**1. THE MOTION IS FOR:**

- (a) an Order authorizing the Applicant, as guardian of the Respondent, Jack Doe, to sell cottage property legally described as (*legal description of property*) and directions from the Court as to how to expend or otherwise deal with the sale proceeds therefrom; and
- (b) such further and other Order as to This Honourable Court seems just.

**2. THE GROUNDS FOR THE MOTION ARE:**

- (a) the Applicant is at liberty to apply s. 39 to the Court for directions pursuant to the *Substitute Decisions Act, 1992*, with respect to the sale of cottage property, and the disposition of sale proceeds therefrom, as the cottage property is the subject of a specific testamentary gift;
- (b) such further and other grounds as this Honourable Court may permit.

**3. THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Application:

www.canadalawbook.ca

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- (a) Affidavit of Jamie Doe, sworn (*date*); and
- (b) such further material as counsel may advise and this Honourable Court will allow.

Date:

*(Name, address,  
telephone and fax number  
of Solicitors for Applicant)*

Solicitors for the Applicant

## **APPENDIX I**

## APPENDIX 24.10

**AFFIDAVIT IN SUPPORT OF A MOTION FOR  
DIRECTIONS,  
MADE PURSUANT TO SECTION 39 OF THE  
SUBSTITUTE DECISIONS ACT, 1992**

Court File No.

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMIE DOE

Applicant

- and -

JACK DOE and  
THE PUBLIC GUARDIAN AND TRUSTEE

Respondent

**AFFIDAVIT**

I, JAMIE DOE, of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY:

1. I am a son of Jack Doe and the guardian of property and person for Jack Doe and as such have knowledge of the matters hereinafter deposed to.
2. I was appointed as guardian pursuant to the Order of Justice (*name of judge*) on (*date of Order*). Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of the aforesaid Order.
3. In accordance with the Management and Guardianship Plans filed at the time of the original application herein, Jack Doe has been maintained and supported in his home since the onset of his incapacity. While he has done quite well in these surroundings, Jack Doe's financial resources have dwindled to the extent that I am obliged to either look to the sale of his remaining capital asset, a cottage property, in order to maintain the same level of care or place him in an institution, where his quality of life will be considerably less.

*(Provide such background information which, with respect to this precedent, would include a description of the nature of the incapacity in relation to the costs to maintain the incapacitated person in his current*

*surroundings as opposed to alternative accommodation, financial resources, relevant medical documentation, legal description and value regarding the cottage property, etc.)*

4. The cottage property is, however, the subject of a specific testamentary gift as it is bequeathed by Jack Doe pursuant to his Last Will and Testament to his nephew, Harold Smith, who has been served with the Motion herein. Attached hereto have marked as Exhibit "B" to this my Affidavit is a true copy of the aforesaid Will
5. I have been advised by my solicitors and do verily believe that certain protection for beneficiaries named in an incapable person's Will have been incorporated into the *Substitute Decisions Act, 1992*. In Schedule A attached hereto, I have set out how I propose to expend the proceeds of sale for the continued care of Jack Doe, such that the remaining proceeds, if any, would be paid to Harold Smith upon the death of Jack Doe.
6. I make this Affidavit in support of relief more particularly set out in the Notice of Motion herein and, in particular, for the direction of this Court with respect to the sale and disposition of the sale proceeds of the cottage property.

SWORN before me in the (name of )  
town or )  
city) in the (Judicial District or )  
Municipality) ) JAMIE DOE  
this day of (date) )

A COMMISSIONER FOR TAKING OATHS ETC.

## **APPENDIX J**

## APPENDIX 24.11

## ORDER FOR DIRECTIONS

Court File No.

SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE     )     *(Day and date order made)*

B E T W E E N:

JAMIE DOE

Applicant

- and -

JACK DOE and

THE PUBLIC GUARDIAN AND TRUSTEE

Respondent

THIS MOTION, made by *(identify moving party)* for Directions was heard this day at *(place)*.

ON READING the Notice of Motion and the Affidavit of Jamie Smith and on hearing the submissions of counsel for the Applicant and the Respondents,

1. THIS COURT ORDERS that property having the legal description set out in Schedule A attached hereto be sold with the proceeds *(set out scheme of distribution)*.
  2. THIS COURT ORDERS that each of the parties shall be entitled to move for further directions as may be advisable or necessary.
  3. THIS COURT ORDERS the costs of all parties to this Application shall be paid on a solicitor-and-client basis.
-