

Wills, Trusts & Estates

Who will live and who will die: Part two

By Charles Wagner



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(September 24, 2020, 8:26 AM EDT) -- In my first article in this two-part series on *Bennett v. Gotlibowicz*, [2008] O.J. No. 1351, I discussed the issue of our (opposing counsel and myself) respective clients' arguments as to the validity of two different powers of attorney for personal care of a person I will refer to as "Mr. G." After a medical emergency, my client claimed her power of attorney was the valid one and that she wanted all steps necessary to be taken to save her father's life. Mr. G's wife claimed she had the valid power of attorney and wanted nature to take its course.

The judge hearing the matter, Justice T.P. Herman, made a decision that reads in part as follows:

"The paramount consideration must be the best interest of Mr. Gotlibowicz. It is his best interest that the power of attorney be clarified, on an interim basis, so that he can return to Leisureworld and so that decisions can be made if necessary. I cannot resolve the conflicting evidence with respect to Mr. Gotlibowicz's capacity to appoint the applicants as his attorney on the basis of the evidence before me. A

further assessment will be done. A question has been raised with respect to Mrs. Gotlibowicz's capacity. I make no finding as to her capacity. However, the instruction that she gave last week not to take Mr. Gotlibowicz to the hospital would not appear to have been in his best interest and was contrary to what he wanted. It is therefore in my opinion that it is in Mr. Gotlibowicz's best interest that the power of attorney for personal care dated November 26, 2007 be confirmed as valid on an interim, without prejudice basis, until further order of the court or agreement between the parties."

If you search the *Substitute Decisions Act* (the SDA) you will not find any mention of a court having the jurisdiction to declare the validity of powers of attorney on an interim basis. Arguably, absent specific wording in the Act the court does not have the jurisdiction to make a finding of interim validity. This is the same type of argument some used to argue that absent the circumstances set out in s. 28 of the *Estates Act* (that being a will challenge), the court does not have jurisdiction to appoint an estate trustee during litigation (ETDL). The argument was dismissed in a host of cases including *Rubin Estate v. Rubin Estate* 2017 ONSC 3498.

In a case comment on *Rubin Estate*, we paraphrased a portion of Justice Fred Myers' decision as his comments are very relevant to our discussion: The court's inherent jurisdiction exists in parallel with the court's statutory powers. The court has broad and inherent powers to supervise the management of estates and to control its own processes. In part the court uses these powers to fill gaps where the legislature has not provided an answer such as when it is appropriate to appoint an officer of the court to preserve an estate at risk. The legislation is not a complete code.

Arguably, the SDA is also not a complete code and the court has broad and inherent powers to supervise the management of an attorney's choices for the personal care of the person under their charge; indeed, this responds directly to the court's pre-existing *parens patriae* jurisdiction with respect to vulnerable people.

There is no reason the court cannot use its inherent powers to fill in gaps where the SDA has not provided an answer. I submit that is exactly what happened in the case of *Bennett v. Gotlibowicz* where it was unclear on the evidence before the court which power of attorney was the valid one. While she did not say so, I am presuming Justice Herman relied on s. 68(4) of the SDA which

provides that in a motion for directions "The court may by order give such directions as it considers to be for the benefit of the person and consistent with this Act."

It is important to remember that judges are most often endeavouring to provide real solutions for the difficulties presented by the litigants before them. They have a discretion to use their best judgment to fill in gaps in the law. In my view, that's what happened in this case and the courts should not shy away from doing so.

I want to take this opportunity to wish all of my colleagues and friends a healthy happy new year.

This is the second of a two-part series. Read the first article: [Who will live and who will die: Part one.](#)

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