

## TAB 8

# Removing an Attorney for Property – Why, When and How

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## The Six-Minute Estates Lawyer 2009



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# **THE SIX-MINUTE ESTATE LAWYER 2009**

## **REMOVING AN ATTORNEY FOR PROPERTY**

### **WHEN, WHY and HOW**

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# Removing an Attorney for Property

## Why, When and How<sup>1</sup>

### Introduction

While fully capable, a person has the right to grant powers of attorney to a family member or close personal friend. Once a person becomes incapable of managing his/her property, or making personal care decisions, the appointed attorney(s) can act in his/her place. Attorneys for property or personal care are governed by the *Substitute Decisions Act*<sup>2</sup> (“**SDA**”).

Attorneys for property and personal care have wide ranging powers and are required to act in the best interests of the incapable.<sup>3</sup> Attorneys are considered to be in a position of trust and are therefore regarded by the court as fiduciaries and generally held to a higher standard.

Removing an attorney for property is notoriously difficult. In general, the courts are loath to interfere with a person’s choice for attorney(s), which was made when the person was fully capable. Moreover, the SDA is designed not only to protect the incapable, but also to, in large measure, jealously guard a person’s right to choose who he/she wants to look after him/her and his/her property.

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<sup>2</sup> *Substitute Decisions Act*, S.O. 1992, c. 30, as amended.

<sup>3</sup> SDA sections 31 and 66.

However, in certain situations, a family member, or a close friend, may feel compelled to challenge the validity of powers of attorney and may apply to the court to be appointed as guardian.<sup>4</sup> An attorney for property and/or personal care can be removed by the court for dereliction of duty, including breach of fiduciary duty. A party can also apply to the court for an order mandating the attorney to take certain actions such as fostering family relationships or consulting with supportive family members.<sup>5</sup>

In this paper, I will consider the legal requirements and the test to be met to remove an attorney for property. A recent case reported in the Ontario Reports<sup>6</sup> is well worth considering in this regard, as it presents an interesting fact pattern and capably canvasses the applicable law.<sup>7</sup> I will also consider whether it may be more appropriate to apply to the court for directions rather than seeking the far more draconian and difficult relief of removing an attorney for property.

What I will not consider in this paper is the more benign situation where an applicant applies to the court to be appointed guardian of property as no power of attorney has been granted (in other words, a straightforward court application to be appointed guardian of property). Considering the “why, when and how” in removing a personal care attorney will also have to wait for another day and another forum.

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<sup>4</sup> SDA sections 22 and 55.

<sup>5</sup> SDA sections 39 and 68.

<sup>6</sup> *Re Schaefer's Estate* (2008), 93 O.R. (3d) 447 (S.C.J.).

<sup>7</sup> In the interest of full disclosure, I was counsel for the applicants.

## **Why Remove an Attorney for Property**

The plethora of emotional and moral reasons for removing an attorney for property ultimately carries little real weight with the court. While context and colour are important ingredients in painting a convincing picture as to why an attorney for property should be removed, emotional and/or moral reasons alone will not carry the day. A family's sense of self-entitlement – "family should look after family" – also comes up short if accompanied by nothing more.

The legal foundation for embarking upon a removal application is quite clear:

- (1) Strong and compelling evidence of misconduct or neglect on the part of the attorney must be advanced and proven (idle speculation and conjecture will not suffice); and
- (2) The best interests of an incapable person are not being served by the attorney.

## **When to Remove an Attorney for Property**

There is no hard and fast rule and/or prohibition as to when a party can move or apply to the court to have an attorney for property removed. However, it can be quite safely posited that a party should only apply to the court when strong and compelling evidence presents itself. Too often, a party is too hasty in commencing a removal application. A party must ensure that he/she has marshaled the necessary evidence to convince a rightfully cautious judge to remove an attorney for property. Moreover, a note of caution to the faint of heart or the skinflint: litigation, especially challenging an attorney for property (or personal care), is emotionally taxing and can be remarkably expensive; expect a fight.

## How to Remove an Attorney for Property

In terms of the procedure, regard should be had to Part III of the SDA, which sets out the required procedure in guardianship applications, including who is entitled to notice.<sup>8</sup> From a practical or strategic point of view, I can offer the following suggestions:

- (1) Bide your time and carefully marshal the evidence. Remember, you need strong and compelling case;
- (2) Consider asking The Office of the Public Guardian & Trustee (“**PGT**”) to investigate;<sup>9</sup>
- (3) Compile a detailed list of the attorney’s misdeeds and inactions;
- (4) Talk to neighbours and caregivers to gather critical information and to be “kept in the loop”;
- (5) Continue to visit and be in contact with the incapable;
- (6) Talk to the incapable to try to ascertain his/her wishes (without necessarily being disruptive);
- (7) Remain involved;
- (8) Ask to be consulted by the attorney or for regular progress reports;
- (9) Ask family members and friends to visit the incapable; and
- (10) Be prepared to “fight like hell.”

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<sup>8</sup> SDA section 23.

<sup>9</sup> SDA sections 27, 62, 82 and 83.

### ***Re Schaefers Estate***

This case is instructive. Dinah Teffer (“**Dinah**”) and Marion Yates (“**Marion**”) were the adult nieces of Johanna Schaefers (“**Johanna**”). Dinah resided in the Toronto area and Marion made her home in California.

Initially, Dinah and Marion applied to the court to remove Peter Verbeek (“**Verbeek**”), a lawyer practicing in Mississauga, as Johanna’s attorney for property and personal care. At the same time, Dinah and Marion applied to be appointed as Johanna’s joint guardians of property. As Marion lived in California, Dinah applied alone to be appointed Johanna’s guardian of the person.

Pursuant to section 3 of the SDA, counsel was appointed early-on to represent Johanna’s interests and two preliminary orders were obtained which effectively froze Johanna’s assets, and required Verbeek to provide a monthly accounting of his expenses, file Johanna’s taxes, and deliver reply material. As it turned out, Verbeek failed to comply fully with both court orders. Through his counsel, Verbeek had also advised more than once that he would pass his accounts, but never did.

Ultimately, it was Section 3 counsel who brought a motion to have Verbeek removed as attorney for property and for the appointment of Scotiatrust as an interim guardian of property. Section 3 counsel also sought an order that Verbeek pass his accounts as attorney for property.

Dinah and Marion supported Section 3 counsel’s removal motion and withdrew their application to be appointed Johanna’s joint attorney for property. They further

adjourned their application to have Verbeek removed as Johanna's attorney for personal care until such time as Section 3 counsel's removal motion was concluded.

At the time of the hearing, Johanna was 87 years old. She was formally diagnosed with Alzheimer disease in September 2006 and later assessed as being incapable of managing her property and making decisions regarding her personal care.

Johanna had granted powers of attorney for property and personal care in 1998 and 2006 respectively. Verbeek, who had acted as Johanna's lawyer, was named as Johanna's attorney for property and personal care in both the 1998 and 2006 powers of attorney. Verbeek had been managing Johanna's property since June 2006 and had also been making decisions regarding her personal care. Tellingly, Verbeek had not arranged for Johanna's capacity to be assessed prior to the execution of 2006 powers of attorney. There was, however, no capacity issues raised regarding the 1998 power of attorney for property.

## **Facts**

In removing Verbeek as Johanna's attorney for property, Fragomeni, J. held as follows:

- (1) Johanna was incapable of managing her property;
- (2) Johanna's 2006 power of attorney for property was invalid as she lacked the necessary capacity to grant a power of attorney for property. This was based on the medical evidence filed, as well as the fact that Johanna's capacity had not been assessed prior to the execution of the 2006 power of attorney.
- (3) While the court found the evidence surrounding Johanna's 1998 power of attorney for property "conflicting and confusing", it was not prepared to find that the 1998 power of attorney for property was invalid.



## **Decision**

In determining whether an attorney should be removed, the jurisprudence establishes that two issues must be considered:

- (1) First, there must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor;
- (2) The second issue relates to whether the court is of the opinion that the best interests of an incapable person are being served by the attorney.

After carefully reviewing the substantial affidavit material that had been filed with the court (no cross-examinations had been conducted), the court held that there was strong and compelling evidence of misconduct or neglect on the part of Verbeek. Furthermore, it was in the best interests of Johanna that Verbeek be removed. The court further ordered that Verbeek pass his accounts and appointed Scotiatrust as Johanna's interim guardian of property.

In reaching his decision, Fragomeni, J. held that Verbeek had failed to fully comply with the two court orders respecting his administration of Johanna's property. Verbeek had also failed to address meaningfully the reporting and accounting concerns which were raised by Johanna's Section 3 counsel over the course of several months and had failed to formally pass his accounts despite repeated promises that he would.

The court was also concerned with the discrepancies that became self-evident between a copy of the 1998 power of attorney for property, which Verbeek first produced in his reply material and the original of that same 1998 power of attorney for property, which Verbeek claimed to have found in Johanna's safety deposit box five months later and

ultimately produced. The court was also not terribly impressed with Verbeek's attempts to blame Johanna's accountant for not filing her tax returns on time.

In addition, the court took notice of the fact that in December 2007, the Law Society of Upper Canada had suspended Verbeek's license for three months on a complaint regarding a series of real estate transactions. Verbeek was found to have engaged in professional misconduct in certain purchase, sale and mortgage transactions, including failing to serve his lender client in a conscientious and diligent manner.

With respect to acting in the best interest of Johanna, the court found that Verbeek was more interested in looking after the interests of the beneficiaries of Johanna's estate. As stated by the court:

I agree with the submissions of Mr. de Vries that as attorney, Verbeek is expected to act in the best interests of Schaefers and not necessarily in accordance with the wishes of the [Dutch] relatives of Schaefers.<sup>10</sup>

In the end, the court was satisfied on the record before it that Johanna did not have the capacity to manage her property. The court was also satisfied that Johanna lacked the capacity to give a power of attorney for property in April 2006. The 2006 power of attorney for property was invalid and could not stand.

With respect to the 1998 power of attorney for property, the court found that the evidence was conflicting and confusing. However, without clear evidence that it was invalid, the court declined to find that it was invalid and could not stand. Nevertheless, the court concluded as follows:

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<sup>10</sup> 93 O.R. (3d) 447 at paragraph 50.

Having considered all of the evidence filed and the submissions made by counsel I find and conclude that Peter Verbeek ought to be removed as attorney. There is strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Johanna Maria Schaefer as set out in the 1998 Power of Attorney for Property should be terminated. The evidentiary foundation has been established to conclude that Johanna Schaefer's best interests are not being met. Mr. Peter Verbeek's conduct clearly demonstrates an inability to understand and perform his duties diligently. Although Mr. Verbeek characterizes this estate as simple, he is unable to properly fulfill his duties, even in the face of two Court Orders requiring him to do certain things. I am not satisfied that his neglect of his obligations can be attributed to tardiness or sloppiness. That characterization of his conduct minimizes the seriousness of his non-compliance with Court Orders or his non-compliance with disclosure requests or his inaction in proceeding with a passing of accounts despite his expressed intentions he would do so.<sup>11</sup>

Fragomeni, J. went on to state that an attorney for property is a fiduciary and the duties and the responsibilities associated with that position were significant and should not be easily ignored.

In the end, Verbeek's authority to act as Johanna's attorney for property pursuant to both the 2006 and 1998 powers of attorney for property was terminated. Verbeek was required to formally pass his account, Scotiatrust was appointed Johanna's interim guardian of property. Fragomeni, J.'s decision regarding costs has not yet been released.

## **Directions**

As I indicated in the Introduction, a party can apply to the court for directions regarding the conduct of the attorney. Directions were not sought in *Re Schaefer's Estate*. However, directions are worth considering before embarking on a removal application.

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<sup>11</sup> 93 O.R. (3d) 447 at paragraph 51.

Regrettably, family members often find themselves in a situation where a loved one is being legally cared for by a family member or friend they no longer like or trust. A common complaint from family members or friends is that they are, or feel, excluded from participating in or influencing decisions regarding the incapable person.

However, under the SDA, any person, with leave, can seek directions from the court on any question arising under a power of attorney. Pursuant to sections 39 and 68 of the SDA, the court may give such directions as it considers to be for the benefit of the incapable person and consistent with the SDA.

Section 32 of the SDA sets out the duties of an attorney for property. In general, the attorney is required to exercise his/her duties and powers with diligence, with honesty and integrity and in good faith for the incapable person's benefit. If the attorney fails in those duties, but the evidence does not warrant the attorney being removed, recourse can be had to section 39 of the SDA and court issued directions.