

TAB 20

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Part 7: Putting It All Into Practice

**Representing the Older Client (Incapable or Not)
in Guardianship Disputes**

D'Arcy J. Hiltz
Hiltz Szigeti LLP

Special Lectures 2010
**A Medical-Legal Approach to Estate Planning, Decision-Making,
and Estate Dispute Resolution for the Older Client**



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Representing the Older Client (Capable or Not) in Guardianship Disputes

D'Arcy Hiltz Barrister and Solicitor, Hiltz Szigeti LLP

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Introduction

There are fundamentals and variables in representing older clients in guardianship disputes. Both play a significant role in determining how the client will ultimately be represented.

The issue of the client's capacity to make property or personal care decisions is secondary to the client's instructions and wishes. With instructions and wishes, options can be developed and an agenda shaped. Without instructions and wishes, effective representation may be achieved by testing evidence and ensuring due process.

This paper will examine the fundamentals and variables. Case scenarios will be looked at to determine how both influence the representation of the older client.

Fundamentals

At its simplest, representation of an older client (capable or not) in guardianship disputes entails:

1. representing a responding party; and
2. responding to allegations of incapacity and the necessity for a guardianship.

The onus rests with the Applicant to establish incapacity in relation to either property, personal

care or both. The elderly client does not have to prove capacity. Capacity is presumed. ¹

“Compelling evidence is required to override the presumption of capacity. It is mental capacity and not wisdom that is the subject of the legislation. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake. ²

MISTER JUSTICE QUINN

If the presumption of capacity is likely to be rebutted, there is a further hurdle to overcome if a guardian is to be appointed. Subsections 22(3) and 55(2) of the *Substitute Decisions Act* prohibit the Court from appointing a guardian if the need for decisions to be made will be met by an alternative course of action that:

1. does not require the court to find the client incapable; and
2. is less restrictive of the client’s decision making rights than the appointment of a guardian.

¹ section 2 of the *Substitute Decisions Act*

² Re Koch, [1997] O.J. N. 1487, 33 O.R. (3d) 485 (Ont. Gen.Div.)

An alternative course of action would be if the client is able to carry out decisions with the help of others or through the appointment of an attorney for property or personal care. An individual may retain capacity to grant an attorney for property or personal care, even though they may be incapable of managing property or making personal care decision.³

“It is to be remembered that mental capacity exists if the appellant is able to carry out the decisions with the help of others.”⁴

MISTER JUSTICE QUINN

In the event there is an existing attorney, the Court will grant deference to the attorney. To overcome this deference, the Applicant will need to establish either that the Power of Attorney is not valid or that the attorney is in breach of their obligations and duties to the grantor.⁵

Variables

Instructions and wishes vary depending on each client and the circumstances of each particular case. In each case, the context of the dispute will be different. All of this influences the development of options and the shaping of an agenda.⁶

³ Subsections 9(1) and 47(3) of the *Substitute Decisions Act*

⁴ Re Koch, *supra*

⁵ For a discussion of the obligations owed by an attorney see *Teffer v. Schaefer*, [2008] O.J. NO 3618 (Ont. S.C.J.)

⁶ For a useful guide to assessing capacity to instruct counsel, see Notes on Capacity to instruct Counsel, by Phyllis Gordon, part of the November, 2003 Continuing Legal Education Program entitled “A Disability Law Primer”

Case Scenarios

Scenario 1 - “Pick Your Capacity” aka “What Kind of Capacity Assessment?”

The Facts

- A is 80 years old residing with his 65 year old spouse. They have been married 10 years. It is a second marriage for both.
- Within the last year, A experienced memory loss, confusion and a deterioration in his ability to attend to activities of daily living. A’s spouse who is A’s attorney for property and personal care, has been making all financial decisions and has recently arranged homecare for A.
- Unfortunately, A and his spouse have been quarreling to the point where they no longer speak.
- A’s spouse arranges for A to be admitted to a nursing home. A is told this is temporary while his spouse visits relatives out of town. The placement is in fact permanent. It is felt “best” that A not be told this (it would cause him too much stress).
- A’s spouse goes on vacation to Hawaii.
- While A’s spouse is away, A’s son from the first marriage learns of the situation. With the assistance of his son, A leaves the nursing home and resides with his son. A signs new Powers of Attorney for Property and Personal Care in favour of his son. A also signs a petition for divorce.
- When A’s spouse returns, she learns that A has left the nursing home and that there are new Powers of Attorney. She is served with the petition for divorce. The lawyer representing A in the divorce is A’s son. A refuses any contact with his spouse.

- A's spouse commences an Application for guardianship of property and personal care of A. The spouse alleges that A is not capable of: making property or personal care decisions; granting Powers of Attorney; making a Will; and making a decision to divorce. She also claims that A is being unduly influenced by his son.
- The spouse requests A be assessed regarding capacity to make property and personal care decisions; capacity to grant Powers of Attorney; testamentary capacity and capacity to divorce.
- You are retained to act on behalf of A.

The Instructions

- You meet with A, explain the Application and the relief sought by the spouse.
- A instructs you to oppose the Application.
- A does not wish to return to his spouse or the nursing home.
- A is happy living with his son and wishes to divorce.
- A does not wish to have his capacity assessed.

Analysis

The law recognizes capacity as task specific. Under the *Substitute Decisions Act*, the court only has jurisdiction in guardianship disputes to order an assessment of a person's capacity in relation to property and personal care. There is no authority to order an assessment regarding capacity to divorce or testamentary capacity.

Case law has held that that the threshold for capacity to divorce is much lower than capacity to manage property or capacity to make personal care decisions:

“Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one’s spouse.”⁷

MADAM JUSTICE BENOTTO

Given this analysis, the agenda will be to establish that A has the requisite capacity to divorce. If so, the guardianship proceeding will be moot. It would be contrary in law to have an adverse party in a proceeding (i.e. a respondent in a divorce) appointed as the guardian of property and personal care of the person whose interest they are adverse to. The issue of capacity to manage property and make personal care decisions or for that matter capacity to grant a Power of Attorney for Property or Personal Care is not relevant. A therefore picks “capacity to divorce” as his choice of capacity. Expert opinions will be obtained that A has capacity to divorce.

Projected Outcome

- Court will agree that capacity to divorce is the relevant capacity and that A has such capacity.
- Case will settle in favor of A.
- Application for guardianship will be withdrawn with costs awarded to A.
- Capacity to divorce will be established as the relevant capacity. Any determination as to A’s capacity to manage property and make personal care decisions is not necessary.

⁷ Re Calvert [1997] O.J. NO. 553, 32 O.R. (3d) 281

Scenario 2 - “To Assess or Not Assess – That is the Question”

Facts

- B, an elderly widow resides alone in her apartment. She has four children.
- After the death of her spouse, B granted a Power of Attorney for Property and Personal Care in favor of her youngest child.
- Shortly after granting the Powers of Attorney, B’s memory began to deteriorate and she experienced periods of confusion. At times B has delusions that her spouse is still alive.
- B is admitted to hospital in a delusional state secondary to a urinary tract infection. During hospitalization, a disagreement arises amongst B’s children as to the appropriate treatment for B, who in the opinion of her treating physician is not capable.
- The youngest child produces the Power of Attorney for Personal Care and instructs the treating physician to deal only with her. The other siblings are angered, upset and concerned that their sister may not be making the right decisions for B.
- To complicate matters, the attorney for property and personal care is unemployed and has been so for a number of years. Concerns arise as to whether the assets of B are being managed appropriately by the youngest sibling.
- The three siblings commence an Application for Guardianship of Property and Personal Care of B. Affidavit evidence is filed by the siblings attesting to the deficits in B’s memory, her confusion and delusional state as observed by them.
- The siblings request an assessment of B’s capacity, failing which they seek an order from the court that B be assessed.
- You are retained to act on behalf of B.

Instructions

- You meet with B and advise her of the contents of the Application, the allegations and the relief requested.
- B tells you that she is content with her youngest child making decisions for her regarding personal care and property and that the other children tend to be very controlling and demanding.
- You advise B of her children's request to have her capacity assessed and the consequence of such an assessment.
- You advise B that she has the right to refuse the assessment.
- B tells you that she does not wish to undergo an assessment and wishes you to oppose any order for assessment and the guardianship Application.

Analysis

The *Substitute Decisions Act* grants the Court discretion to order an assessment only if the Court is satisfied that there are reasonable grounds to believe the person incapable and that the person's capacity is in issue in a proceeding under the Act.⁸

Assessments have been described as invasive and demeaning.⁹

In order to establish reasonable grounds, there must be some direct connection between the behavior and the capacity leading to the conclusion that there is a lack of capacity as defined.¹⁰

⁸ Section 79 of the *Substitute Decisions Act*

⁹ Unreported Decision of Flynn v. Flynn, OSJ, NO 03-66/07, December 18, 2007, per Pattillo S.C.J.

The agenda will be to establish the absence of evidence of any direct connection between the impairments and the alleged incapacity. The position will be that even if there is memory impairment, confusion and delusions, there is no evidence to tie this in with incapacity to manage property or make personal care decisions. The mere fact that B may have memory loss, confusion and delusions does not in itself mean B lacks capacity to manage property or make personal care decisions. Emphasis will be placed on due process, the right to refuse the assessment and the intrusive and demeaning nature of an assessment.

Furthermore, even if an assessment was ordered and B found incapable, there is still a Power of Attorney in force. The Court should therefore be urged to first consider whether there are any grounds to remove the attorney or to find the Power of Attorney invalid before determining if an assessment is warranted.

Projected Outcome

- The Court will likely agree that unless there is sufficient evidence to warrant the removal of the attorney or to find the Power of Attorney invalid, there would be no merit to ordering an assessment.
- The Court would likely conclude that although B's capacity is in issue in a proceeding under the *Substitute Decisions Act*, there is insufficient evidence to directly connect B's memory loss, delusions and confusion with an inability to
- manage property or make personal care decisions.

¹⁰ Supra

- The motion for an order for assessment will likely not be granted.
- Costs will likely be awarded to B.

Scenario 3 “The Conflicted Lawyer” aka “Commencing a Guardianship Application Against a Former Client”

The facts

- C is an 80 year old widower with 2 grown children with whom he has no contact.
- 20 years ago, C remarried. His spouse is 10 years younger.
- Throughout the marriage there has been conflict between C and his spouse. At one point C is physically assaulted by his spouse and they separate. C’s spouse is charged with assault and enters into a peace bond.
- Around this time C’s children re-emerge and a relationship is re-established.
- C goes to his lawyer and instructs the lawyer to commence divorce proceedings, to have his children named as his attorneys for property and personal care and as trustees and beneficiaries in his Will. The lawyer attends to this.
- A short time later, C and his spouse reconcile. C contacts his lawyer requesting the lawyer cancel the divorce proceedings, change his Powers of Attorney in favour of his spouse and prepare a new Will with his spouse as beneficiary. C’s lawyer refuses.
- The lawyer believe C’s spouse is coercing C (who is vulnerable) and unduly influencing him. The lawyer also believes C lacks capacity. The lawyer feels that C requires a guardian and wishes to initiate a guardianship for C.
- The lawyer (a general practitioner) comes to you for your expert opinion.

Analysis

The objective of the lawyer is to put a guardian in place for C in order to protect C's assets and make personal care decisions for C. You advise the lawyer of the following options:

Property:

1. Since the children are named as attorneys for property, they may take steps to "protect their father's property" by using the authority granted to them under the Power of Attorney.

- The lawyer advises that the children are reluctant to do this.

2. You advise the lawyer that an assessor may be contacted to assess C's capacity to manage property pursuant to section 16 of the *Substitute Decisions Act* for the purpose of determining whether the Public Guardian and Trustee should become statutory guardian of C's property.

- The lawyer is very happy with this. However, you advise the lawyer of the following problems in relation to this option:

(a) There is a prohibition on such an assessment if there is an existing Continuing Power of Attorney that grants the attorney authority over all of C's property (which is the case here); and

(b) C would have to agree to such an assessment (in all likelihood he would not).¹¹

¹¹ Subsection 16 (2) and 78 (1) of *Substitute Decisions Act*

3. You advise the lawyer that if C is admitted as a psychiatric patient to a psychiatric facility (i.e. a general hospital with a psychiatric ward) there is a statutory obligation under the *Mental Health Act* that C be assessed in relation to capacity to manage property.¹² C cannot refuse this assessment. If C is assessed not capable of managing property, the Public Guardian and Trustee will become C's statutory guardian of property (in the event the children do not wish to act under the Continuing Power of Attorney).

- The lawyer feels this would be the best option. However it is conditional on C being admitted as a psychiatric patient to a psychiatric facility.

4. The Public Guardian and Trustee may be contacted to investigate an allegation that C is incapable of managing property and that serious adverse effects are occurring or may occur as a result. Loss of a significant part of a person's property or a person's failure to provide necessities of life for himself or herself or for dependants, are serious adverse effects. In the event the Public Guardian and Trustee conducts an investigation and is satisfied that serious adverse effects are occurring or may occur, the Public Guardian and Trustee may make an Application to the Court for temporary guardianship of C's property.¹³

- The lawyer advises he has contacted the Public Guardian and Trustee and she will not be conducting an investigation.

¹² Subsection 54 (1) of the *Mental Health Act*

¹³ Subsections 27(1)(2)(3) and (3.1) of the *Substitute Decisions Act*

Personal Care:

1. Since the children are named as attorneys for personal care, in the event C is assessed not capable of making a personal care decision, they will be the highest ranking substitute decision maker.

- You advise the lawyer that the authority conveyed by the Power of Attorney for Personal Care is conditional upon incapacity and conveys no “custodial power” over C.

2. The Public Guardian and Trustee may be contacted to investigate an allegation that C is incapable of personal care and that serious adverse effects are occurring or may occur as a result. Serious illness or injury or deprivation of liberty or personal security, are serious adverse effects. In the event the Public Guardian and Trustee conducts an investigation and determines that there are reasonable grounds to believe C incapable of personal care and that the prompt appointment of a temporary guardian of C is required to prevent serious adverse effects, the Public Guardian and Trustee must apply to the Court for an order for temporary guardianship of C.

- The lawyer advises that he has contacted the Public Guardian and Trustee and she will not be conducting an investigation.

Projected Outcome

- The likelihood of the Public Guardian and Trustee becoming statutory guardian of property or guardian of personal care for C is slim to nil.
- Other than the advice provided there are no other options available for the lawyer to achieve his objective in relation to C.

- In the event the lawyer initiates an Application on behalf of the children to be appointed guardian of either the property or personal care of C, the lawyer will be placing himself in a conflict of interest, notwithstanding what he believes may be in the best interest of C.
- You advise the lawyer that since he previously acted for C he must not act for the children in an Application against his former client.
- You advise the lawyer that in the event the children wish to proceed with an Application for guardianship, they should seek other legal counsel.

Scenario 4 “The Evasive Attorney”

The facts

- D is an elderly wealthy widow living alone in her home. She has no children.
- After the death of her spouse, D appointed her long time lawyer as her attorney for property and personal care. D also named her lawyer as trustee in her Will.
- Shortly thereafter, D began to experience memory loss, confusion and an overall inability to care for herself. D’s attorney began to use her authority to manage D’s finances.
- After falling at home, D was admitted to hospital. At hospital D was assessed not capable of making treatment decisions and admission to a nursing home was recommended. D was also assessed not capable of managing property.
- D’s lawyer advised the hospital of the Power of Attorney, however D stated her signature was forged. The hospital notified the Public Guardian and Trustee of the finding of incapacity to manage property and given D’s statement about her signature, the hospital located a nephew of D’s in Alberta.

- Upon learning of D's situation, her nephew was agreeable to becoming involved in D's care and assisting D with managing property.
- The nephew requested the lawyer/attorney allow him to take over making decisions for D, however the lawyer/attorney refused.
- The nephew believed the lawyer/attorney was only interested in generating fees for acting as attorney, however the lawyer/attorney advised she was acting "for free".
- The nephew commenced an Application for guardianship of property and personal care of D.
- You are retained to act on behalf of D.

Instructions/Wishes

- During your meeting with D you explain the proceedings and the findings of incapacity. You try to determine who D would want to assist her regarding management of her property and personal care. Initially D insists she wants only her nephew of whom she speaks in glowing terms. D also tells you that her nephew has moved in with her. D speaks very disparagingly of her lawyer/attorney insisting she forged signatures on documents.
- You have concerns as to whether D's instructions/wishes are being influenced by her nephew. In order to deal with this, you make arrangements that the nephew not reside with D for a one week period and that he have no telephone contact with D during this period.
- After the one week period of no contact with the nephew, you meet again with D.
- At this point, D is no longer making disparaging remarks about the lawyer/attorney and in fact appears to speak fondly of her. D is not quite sure why her nephew is

suddenly back in her life. When asked if D has a preference, D says she does not. As long as her money is safe, accounted for and being managed appropriately, D states she is satisfied. D also wishes to remain in her home.

- The position of D is made known to the other parties.

Analysis

D is not objecting to assistance in the management of her property or personal care. There is no issue as to capacity to manage property or make personal care decisions. D is not capable. D wishes to be maintained at home as long as it is possible and wishes to ensure that her funds are safeguarded, accounted for and managed appropriately. Provided this is done, D's wishes will be complied with. The sole issue is whether the lawyer/attorney has been managing D's funds appropriately. There is no evidence that D's signature was forged. Accordingly, an accounting should be requested on behalf of D.

Projected Outcome

- If a satisfactory accounting is provided, D's position will be to allow the status quo to remain.
- In the event the accounting is deficient, depending on the deficiency, D's position will likely be that her attorney be removed and a guardian of property be appointed.
- D's wishes/ instructions will be complied with in terms of her property and personal care.

Conclusion

Representing the older client (capable or not) in guardianship disputes is shaped and influenced not by the client's capacity to make property or personal care decisions, but the client's instructions and wishes. In the absence of instructions/wishes, representation is best accomplished by testing the evidence and ensuring due process.