TAB 5

Reporting to Attorneys and Guardians: A Precedent Reporting Letter

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Practice Gems: Drafting and Administering Powers of Attorney for Personal Care and Property 2010
Avoiding the Pitfalls

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CONTINUING PROFESSIONAL DEVELOPMENT

LSUC Practice Gems:
Drafting and Administering Powers of Attorney for Personal Care and Property
2010

Reporting to Attorneys and Guardians: A Precedent Reporting Letter

(Date)
(Address)

Dear Sir/Madam:

Re: In the Matter of the Powers of Attorney of Jack Smith

Thank you for retaining us to provide you with advice on the roles of both an Attorney for Property and for Personal Care, as well as the Guardianship procedure for both.

I write to confirm the matters discussed during our recent meeting. We apologize in advance for the length of this Reporting Letter. It is important, however, that you review it thoroughly and understand the extensive powers that may be granted to you, and that you are considering accepting. In that meeting, you explained that your friend, Mr. Jack Smith, had considered appointing you as his attorney for the person, pursuant to a Power of Attorney for Personal Care ("POAPC") that his solicitor had drafted, although he had not yet executed. Additionally, you advised similar arrangements were proposed for property pursuant to a Continuing Power of Attorney for Property ("CPOAP") that he had drafted, although not yet executed.

In the event Mr. Smith is found to be incapable of granting a POAPC, or CPOAP, or fails to do so, and he requires personal care assistance or property assistance, then you indicated that you may also wish to consider the possibility of one day applying to become Mr. Smith's guardian of the person and/of property. You accordingly asked me to detail or you some of the duties and responsibilities as well as the procedure.

I will endeavour to enumerate for you below, in greater detail, your role and duties as an attorney for the person/property as well as a guardian of the person/property. In many instances, the roles/functions of these types of substitute decision makers overlap, with exceptions.

There can be significant differences in the roles, and in how the attorneyship, or guardianship appointments take effect and when the appointments crystallize. As suggested, the power granted under a Power of Attorney whether for property, or personal care, is granted by the grantor of the power while capable of granting the said power.

By contrast a guardianship appointment is granted by the court as a result of an Application brought by an applicant wishing to be appointed as the Guardian of the person, or the property of a person thought to be, or otherwise declared to be incapable of management of the property or the person. The court will not appoint a guardian of the person, or property unless a person has been found incapable. Other matters that will be briefly discussed concerning the obligations of both Attorneys and Guardians are the duty to invest; to account; entitlement to compensation, and how to avoid attracting liability for breach of fiduciary duty.

Preliminary Matters

The Governing Legislation

Attorneys acting pursuant to a CPOAP or a POAPC and court-appointed guardians of the property or the person are governed primarily by the *Substitute Decisions Act*, S.O. 1992, c. 30 (the "*SDA*") and to a degree, the *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A (the "*HCCA*"). Among other things, the *SDA* governs the fiduciary obligations of attorneys and their administration of the financial and personal care affairs of the grantor, and of mentally incapable grantors as well as the appointment of guardians for mentally incapable adults. It sets out the powers, duties (both general and specific), the standard of care, liability and associated protection and compensation applicable to attorneys and guardians.

The *HCCA* pertains to treatments and proposed treatments provided by health-care practitioners, the requirements with respect to consent to treatment and decisions with regard to admission to care facilities. The *HCCA* also has a hierarchy of substitute decision makers at S. 20 (excerpts below) where there is no attorney, or guardian as follows and a plan of treatment requires consent:

> **"Plan of treatment**
> If a plan of treatment is to be proposed for a person, one health practitioner may, on behalf of all the health practitioners involved in the plan of treatment,
> (a) propose the plan of treatment;
> (b) determine the person's capacity with respect to the treatments referred to in the plan of treatment; and

(c) obtain a consent or refusal of consent in accordance with this Act,
(i) from the person, concerning the treatments with respect to which the person is found to be capable, and
(ii) from the person's substitute decision-maker, concerning the treatments with respect to which the person is found to be incapable.

Consent
List of persons who may give or refuse consent

20. (1) If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following paragraphs:

1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.
2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.
3. The incapable person's representative appointed by the Board under section 33, if the representative has authority to give or refuse consent to the treatment.
4. The incapable person's spouse or partner.
5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
6. A parent of the incapable person who has only a right of access.
7. A brother or sister of the incapable person.
8. Any other relative of the incapable person. 1996, c. 2, Sched. A, s. 20 (1).

Requirements

(2) A person described in subsection (1) may give or refuse consent only if he or she,

(a) is capable with respect to the treatment;

(b) is at least 16 years old, unless he or she is the incapable person's parent;

(c) is not prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on his or her behalf;

(d) is available; and

(e) is willing to assume the responsibility of giving or refusing consent. 1996, c. 2, Sched. A, s. 20 (2).

Ranking

(3) A person described in a paragraph of subsection (1) may give or refuse consent only if no person described in an earlier paragraph meets the requirements of subsection (2). 1996, c. 2, Sched. A, s. 20 (3).

Same

(4) Despite subsection (3), a person described in a paragraph of subsection (1) who is present or has otherwise been contacted may give or refuse consent if he or she believes that no other person described in an earlier paragraph or the same paragraph exists, or that although such a person exists, the person is not a person described in paragraph 1, 2 or 3 and would not object to him or her making the decision. 1996, c. 2, Sched. A, s. 20 (4).

No person in subs. (1) to make decision

(5) If no person described in subsection (1) meets the requirements of subsection (2), the Public Guardian and Trustee shall make the decision to give or refuse consent. 1996, c. 2, Sched. A, s. 20 (5).

Conflict between persons in same paragraph

(6) If two or more persons who are described in the same paragraph of subsection (1) and who meet the requirements of subsection (2) disagree about whether to give or refuse consent, and if their claims rank ahead of all others, the Public Guardian and Trustee shall make the decision in their stead. 1996, c. 2, Sched. A, s. 20 (6).

Meaning of "available"

(11) For the purpose of clause (2) (d), a person is available if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal. 1996, c. 2, Sched. A, s. 20 (11)."

The Continuing Power of Attorney for Property

Mr. Smith proposes to appoint you as his attorney pursuant to a "Continuing Power of Attorney for Property" already defined and short formed for ease of reference as "CPOAP". Based on my discussions with you, it sounds as if Mr. Smith's counsel is of the view that he is capable of granting this CPOAP.[1] Having now had an opportunity to review the proposed CPOAP, it is evident that it is intended to appoint you alone as attorney, and not jointly or jointly and severally with another. The proposed power survives incapacity. It is important to document the day you start acting whether as agent, in an agency relationship as Mr. Smith directs, or whether in the event Mr. Smith becomes incapable. Mr. Smith's proposed CPOAP does not include a method for determining whether and when incapacity will arise and contains a triggering mechanism. The *SDA* provides assistance in that the power of attorney comes into effect in one of two ways: (i) when you are notified in the prescribed form by an assessor that an assessor has performed an assessment of Mr. Smith's capacity and has found that Mr. Smith is incapable of managing his property, or (ii) when you are notified that a certificate of incapacity has been issued in respect of Mr. Smith under the *Mental Health Act*, R.S.O. 1990, c. M.7.

Notably, according to the *SDA*, a person will be found to be incapable of managing their property if they are unable to understand information that is relevant to making a decision in the management of their own property or if they are unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

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[1] As discussed, Mr. Smith would not have been capable of granting the CPOAP if, he: (a) Did not know what kind of property he had or its approximate value; (b) He was not aware of his obligations owed to his dependants; (c) He did not know that the attorney will be able to do on his behalf anything in respect of property that he could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney; (d) He did not know that you must account for his dealings with his property; (e) He did not know that he, if capable, could revoke the continuing power of attorney; (f) He did not appreciate that unless you manage his property prudently its value may decline; and (g) did not appreciate the possibility that you could misuse the authority given to you.

It is often a challenge to the attorney to identify the moment at which the attorney is to commence acting as a substitute decision maker (the "SDM"). The attorney must balance the role by discharging his/her fiduciary obligations according to the *SDA* and protecting and fostering the autonomy of the person for whom they are acting as SDM.

Attorneys should seek professional assistance on an ongoing basis where deemed necessary. If in doubt – ask!

Appointment of a Guardian of the Property

The *SDA* also permits the Court appointment of a guardian of property for a person who is incapable of managing their property if, as a result of this incapacity, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so. However, the court will not make such an appointment if it is satisfied that the need for decisions to be made will be met by an alternative course of action that either does not require the court to find the person to be incapable of managing property, or is less restrictive of the person's decision-making rights than the appointment of a guardian. For a guardianship appointment to issue, a finding of incapacity must be provided to the Court for the purposes of a declaration of incapacity. As well, unless the applicant is the incapable person's spouse, partner, relative, attorney for personal care or attorney under a continuing power of attorney, a person who provides health care or residential, social, training or support services to an incapable person *for compensation* cannot be appointed as a guardian of property. Based on our discussions, as Mr. Smith's friend, these factors would not be a bar to your appointment.

Absent an attorneyship or guardianship appointment, there is no authority to manage the property of an incapable person without a guardianship order.

Procedure

An application to appoint a guardian of property must be accompanied by the following documents:

(a) the proposed guardian's consent;

(b) if the proposed guardian is not the Public Guardian and Trustee (the "PGT"), a plan of management for the property, in the prescribed form; and

(c) a statement signed by the applicant, that

    (i) indicates that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or

(ii) if it was not possible to give the person alleged to be incapable the information referred to in subclause (i), describing why this was not possible.

If the applicant wishes an application to appoint a guardian of property to be dealt with by way of a "summary disposition" procedure, then the application must also be accompanied by two statements made in the prescribed form, one by an assessor and the other by an assessor or by a person who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months before the notice of application was issued (this is set out in section 72 of the *SDA*).

Each statement must indicate that its maker is of the opinion that the person is incapable of managing property, set out the facts on which the opinion is based, and indicate that its maker can expect no direct or indirect pecuniary benefit as the result of the appointment of a guardian of property. The statement may also indicate that its maker is of the opinion that it is necessary for decisions to be made on the person's behalf by a person who is authorized to do so and, in that case, shall set out the facts on which the opinion is based.

A statement made by an assessor may be used only if:

(a) the statement indicates that the assessor performed an assessment of the person's capacity and specifies the date on which the assessment was performed; and

(b) the assessment was performed during the six months before the notice of application was issued.

A notice of application for the appointment of a guardian of property must be served on the following persons, together with the applicable documents (noted above):

1. The person alleged to be incapable of managing property;
2. The attorney under his or her continuing power of attorney, if known;
3. His or her guardian of the person, if known;
4. His or her attorney for personal care, if known;
5. The Public Guardian and Trustee (the "PGT"); and
6. The proposed guardian of property.

The notice and accompanying documents must also be served on all of the following persons who are known, but these persons may be served by ordinary mail to their last known address:

1. The spouse or partner of the person who is alleged to be incapable of managing property, whose property is under guardianship, who is alleged to be incapable of personal care or who is under guardianship of the person, as the case may be;

2. The person's children who are at least 18 years old;

3. The person's parents; and

4. The person's brothers and sisters who are at least 18 years old.

Guardianship applications may be challenged by those who receive notice as required by the *SDA* which may lead to costly contested proceedings. One cannot assume that a Court will make an Order in an uncontested matter without a Court appearance.

The Power of Attorney for Personal Care

Mr. Smith proposes to appoint you as his attorney pursuant to a Power of Attorney for Personal Care ("POAPC"). Based on my discussions with you, it sounds as if Mr. Smith's counsel is of the view that Mr. Smith is capable of granting the POAPC. Mr. Smith has stated that he believes that you have a genuine concern for his welfare and he appreciates that he may need to have you make decisions for him at some point in the future.

As well, there are no bars to your appointment since you do not provide health care or residential, social, training or support services to Mr. Smith for compensation.

As an attorney for personal care, you can only make decisions about Mr. Smith's personal care, which encompass decisions concerning his health care, nutrition, shelter, clothing, hygiene, or safety, if he becomes mentally incapable of making these decisions himself or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. Having reviewed Mr. Smith's POAPC, it is evident that you are required to get confirmation of Mr. Smith's incapacity before you act. The *SDA* provides that where the POAPC does not specify a method to confirm incapacity, however, you may have that fact confirmed by notice to you in the prescribed form from an assessor stating that the assessor has performed an assessment of Mr. Smith's capacity and has found him incapable of personal care. More detail on this will follow below.

The test that the assessor will use to determine Mr. Smith's capacity to manage personal care is set out in the *SDA* and it provides that a person is incapable of personal care if he or she is not able to understand information that is relevant to making a decision concerning his own health care, nutrition, shelter, clothing, hygiene, or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

As stated where there is no POAPC, a guardian of the person appointed is not strictly necessary since the *HCCA* at section 20 provides a hierarchy of possible SDM's to make consent to treatment decisions. You may find that you require further advices as may become evident as to whether a guardianship appointment of the person is needed in the circumstances of Mr. Smith at any time in the future.

Appointment of a Guardian of the Person

The *SDA* permits the appointment of a guardian of the person by way of an application to the Court. An order appointing a guardian of the person must include a finding that the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or in respect of some of them, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so.

It is possible to apply to the Court for an appointing you for a limited period, often called a "limited appointment" if that is necessary, and the Court may impose such other conditions on the appointment as it considers appropriate. A limited appointment may be advisable where the period of incapacity is not expected to continue, or where it is limited to a particular (substitute) decision. In either case, the Order must specify whether the guardianship is intended to be full or partial.

Procedure

An application to appoint a guardian of the person must be accompanied by the following documents,

(a) the proposed guardian's consent;

(b) if the proposed guardian is not the PGT, a guardianship plan, in the prescribed form; and

(c) a statement signed by the applicant,

(i) indicating that the person alleged to be incapable has been informed of the nature of the application and the right to oppose the application, and describing the manner in which the person was informed, or

(j) if it was not possible to give the person alleged to be incapable the information referred to in subclause (i), describing why it was not possible.

An application to appoint a guardian of the person may also include one or more statements made by a person (in the prescribed form) who knows the person alleged to be incapable and has been in personal contact with him or her during the twelve months before the notice of application was issued.

Notably, if the applicant wishes an application to appoint a guardian of the person to be dealt with by way of summary disposition procedure, they will be required to include in the application two statements, each made in the prescribed form by an assessor (this is set out in section 74 of the *SDA*). Each statement shall indicate that its maker is of the opinion that the person is incapable in respect of their personal care functions, or in respect of some of them, and shall set out the facts on which the opinion is based. The statement may also indicate that its maker is of the opinion that the person needs decisions to be made on his or her behalf by a person who is authorized to do so and, in that case, shall set out the facts on which the opinion is based. Each statement shall contain an evaluation of the nature and extent of the person's incapacity, setting out the facts on which the evaluation is based.

Notice of an Application to appoint a guardian of the person must be served on the following persons, together with the documents referred to above, if applicable:

1. The person alleged to be incapable of personal care;
2. The attorney under his or her continuing power of attorney, if known;
3. His or her guardian of property, if known;
4. His or her attorney for personal care, if known;
5. The PGT; and
6. The proposed guardian of the person.

The notice and accompanying documents must also be served on all of the following persons who are known, but these persons may be served by ordinary mail to their last known address:

1. The spouse or partner of the person who is alleged to be incapable of managing property, whose property is under guardianship, who is alleged to be incapable of personal care or who is under guardianship of the person, as the case may be;
2. The person's children who are at least 18 years old;
3. The person's parents; and
4. The person's brothers and sisters who are at least 16 years old.

If, after using reasonable diligence, the applicant is unable to find any of these family members, service upon them will not be required.

Again, guardianship applications may be challenged by those who receive notice as required by the *SDA* which may lead to costly contested court proceeding. One cannot

assume that a court will make an Order in an uncontested matter without a Court appearance.

The Role of an Attorney/Guardian of Property and Personal Care

The Role/CPOAP/Guardian of Property

The powers granted to an attorney of property are quite extensive. An attorney acting under a CPOAP and/or a guardian acting as guardian of property has the power to do anything on behalf of the grantor that the grantor or the incapable person could do if capable, except make a will.

There is some case law which suggests that life insurance and RRSP designations are testamentary dispositions and, therefore, an attorney or guardian would be prohibited from designating or revoking beneficiary designations with respect to RRSPs, insurance policies, plans, etc. An Attorney/Guardian may complete transactions entered into by an incapable person. Despite the prohibition detailed herein, in some circumstances for example, in estate freeze situations or similar life planning initiatives may be facilitated by an Attorney/Guardian. Such planning does not include making a will, must be consistent with the Grantor's Will, or have beneficiary consent and there is not imposition to the Grantor or his dependents. In this event, Court approval is recommended. More will be said of this below, however, it is important to note at the outset that many of these powers are limited to the conditions and restrictions set out in the CPOAP, the *SDA* and, in the case of a guardianship, any conditions imposed by the court. The powers are also limited by common law.

The Role/POAPC/Guardian of Personal Care

Mr. Smith's POAPC authorizes you to make decisions on Mr. Smith's behalf regarding the following: health care, nutrition, shelter, clothing, hygiene or safety. In other words your decision is substituted for that of Mr. Smith as his SDM. Your decisions must be made prudently and with sensitivity to Mr. Smith's personal circumstances. Documentation of all decisions taken is essential, including who you consulted in making the decision, whether professionals, supportive family members, friends, or other. Personal care needs must also be coordinated effectively with property management.

POAPC's are governed by the *SDA* and to conditions and restrictions that are consistent with the *SDA*. Thus, despite the authority given to you in the POAPC, you are only allowed to make substitute decisions concerning those aspects of Mr. Smith's personal care that he cannot make for himself at a particular point in time. For example, if Mr. Smith becomes mentally incapable of making decisions about health care, but can still make decisions about other personal care matters, such as housing or safety, he would still have the right to make his own decisions with respect to these matters. You could of course assist him with these decisions, if he wished.

Having reviewed the POAPC, it is apparent that Mr. Smith proposes to give you instructions about specific decisions that he would like made in certain circumstances. For example, he has given you the right to make decisions about where he is to live, but has also stipulated that he would like to stay in his own home as long as possible. Another instruction is with respect to the type of health care Mr. Smith requests. As well, in that Mr. Smith's POAPC contains advance directives in which you may decline certain treatment, such as artificial life supports, in the event Mr. Smith suffers from a terminal illness, this particular POAPC is well often heard described as a type of "living will."

Notably, should a situation arise where you are required to make a decision in accordance with the POAPC to which the *Health Care Consent Act, 1996* applies, the provision encapsulating that instruction will only be valid if that *Health Care Consent Act* authorizes you to make that particular decision.

Should a scenario arise which necessitates a decision to be made by you with respect to the personal care of Mr. Smith to which the *Health Care Consent Act, 1996* does not apply *and* which you are prevented from making pursuant to the POAPC, you will be authorized to make the decision if: (i) you have reasonable grounds to believe that Mr. Smith is incapable of making that decision himself; and (ii) Mr. Smith's incapability to make that particular decision is confirmed. Since Mr. Smith's POAPC does not contain a method for obtaining such confirmation, that fact may be confirmed by notice to you in the prescribed form from an assessor stating that the assessor has performed an assessment of Mr. Smith's capacity and has found him incapable of personal care.

Where you need to make a decision and the decision conflicts with prior wishes you may find an application to the Consent and Capacity Board, to obtain the Board's approval or permission to depart from wishes concerning a particular decision that is to be made, is the prudent course to follow. Further legal advices should be sought in this event.

Consent to Treatment

In the event that Mr. Smith is incapable of consenting to treatment, consent may be given or refused by you in your capacity as an attorney or a guardian of the person. That said, these two stations are ranked in order of preference under the *Health Care Consent Act, 1996*, such that a guardian of the person is given first priority followed by the attorney for personal care.

In deciding whether to give or refuse consent to treatment on behalf of an incapable person, you will be required to do so in accordance with any known applicable wishes that Mr. Smith has expressed while he is capable, and, if you are not aware of any such applicable wishes, or if it is impossible to comply with a particular wish, then the you will be required to act in Mr. Smith's best interests. In determining the incapable person's best interests, you must take into consideration the following guidelines:

(a) Any known values and beliefs which the incapable person held when capable and would still act on if capable;

(b) Any other wishes expressed by the incapable person with respect to the treatment; and

(c) the following factors:

1. Whether the treatment is likely to:

    i. improve the incapable person's condition or well-being;

    ii. prevent the incapable person's condition or well-being from deteriorating; or

    iii. reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate.

2. Whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment;

3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risk of harm to him or her; and

4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

The *SDA* provides a procedure which allows the attorney/guardian to apply to the Consent and Capacity Board for permission to consent to treatment contrary to a wish expressed by the incapable person while capable.

The powers of a guardian, acting pursuant to a "full" guardianship are quite significant. The guardian may be permitted do any of the following depending on the authority granted by the Court:

(a) exercise custodial power over the person under guardianship, determine his or her living arrangements and provide for his or her shelter and safety;

(b) be the person's litigation guardian, except in respect of litigation that relates to the person's property or to the guardian's status or powers;

(c) settle claims and commence and settle proceedings on the person's behalf, except claims and proceedings that relate to the person's property or to the guardian's status or powers;

(d) have access to personal information, including health information and records, to which the person would be entitled to have access if capable, and consent to the

release of that information to another person, except for the purposes of litigation that relates to the person's property or to the guardian's status or powers;

(e) on behalf of the person, make any decision to which the *Health Care Consent Act*, 1996 applies;

(e.1) make decisions about the person's health care, nutrition and hygiene;

(f) make decisions about the person's employment, education, training, clothing and recreation and about any social services provided to the person; and

(g) exercise the other powers and perform the other duties that are specified in the order.

In addition, if the guardian has custodial power over the person and the court is satisfied that it may be necessary to apprehend him or her, the court may in its order authorize the guardian to do so. In that case, the guardian may, with the assistance of a police officer, enter the premises specified in the order, between 9 a.m. and 4 p.m. or during the hours specified in the order, and search for and remove the person, using such force as may be necessary.

Notably, there are specific limitations on the use of force, and more information can be provided on this issue, if requested.

Duties of an Attorney/Guardian of Property, Pursuant to the *SDA*

Duties – General

Whether you are an attorney appointed pursuant to a CPOAP or a court-appointed guardian of the property, you are a fiduciary. This means that you have a strict statutory duty to exercise your powers and discharge your duties diligently, with honesty, integrity in good faith, and for Mr. Smith's sole benefit and in his best interests. This duty is set out in section 32 of the *SDA*, which states:

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).

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."

The checklist for property attached hereto may give you further guidance.

As you can see, this is an extensive power and one which would place a significant onus on you to not only carefully manage Mr. Smith's financial affairs and property, but

also to consult, from time to time, with those of Mr. Smith's supportive family members and friends that he is in regular personal contact with as well as the persons from whom Mr. Smith receives personal care. It is also statutorily mandated that you encourage Mr. Smith to participate, to the best of his abilities, in your decisions about his property. The purpose of this is to ensure that you make decisions with a view to maintaining the comfort, well-being, and benefit of Mr. Smith.

Management Plans may need amending from time to time on notice to the Public Guardian and Trustee for approval, and may require Court approval.

The Last Will and Testament of Mr. Smith

The *SDA* imposes duties on you as an attorney/guardian with respect to Mr. Smith's Will and his assets. For instance, there is a duty upon you to make reasonable efforts to determine whether Mr. Smith has a Will and, if he does have a Will, what the provisions of the Will are. The *SDA* gives you the authority to compel production of the Will (and any property belonging to Mr. Smith) from any person in custody of it.

Locating and reviewing the Will as soon as possible before you deal with any of Mr. Smith's assets is important since the *SDA* prohibits you from disposing of any property that you know is subject to a specific testamentary gift, other than a specific gift of money, unless certain requirements are met and the expenditures are necessary for you to comply with your duties in caring for Mr. Smith.

If you were to dispose of property that is the subject of a specific testamentary gift, the beneficiary of that gift may be entitled to receive from the residue of Mr. Smith's estate the equivalent value of the property, or a *pro rata* share in the residue, if it is insufficient to satisfy the full obligation. You may face personal liability in the manner in which you deal with and preserve property.

Should you find it necessary to dispose of an asset that is the subject of a specific testamentary gift, we would strongly encourage you to proceed by way of application for directions in order to obtain the protection of a court order authorizing you to do so. This relief is available pursuant to section 39 of the *SDA*. You in turn should seek further legal advices in this event.

Case law in Ontario and indeed Canada, demonstrates that there is a higher duty placed on an attorney acting under a CPOAP following the grantor's incapacity. The Attorney is no longer an agent acting on the direction of the grantor, but more akin to a type of Trustee. Additionally, though not the case in this instance, the case law suggests there is a higher duty placed on an attorney who is a solicitor. As attorney therefore through common law has the added duties to do as follows:

1. stay within the scope of the authority delegated;

2. exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney may be held to the standard of a typically prudent person managing his or her own affairs; if being paid, the attorney may be held to the standard applicable to a professional property or money manager);

3. not make secret profits;

4. cease to exercise authority, if the power of attorney is revoked;

5. not act contrary to the interest of the grantor or in a conflict with those interests;

6. account for dealings with the financial affairs of the grantor, when lawfully called upon to do so; and

7. not exercise the power of attorney for personal benefit unless authorized to do so by the power of attorney, or unless the attorney acts with the full knowledge and consent of the grantor.

Mandatory Expenditures

The *SDA* enumerates those expenditures that must be made by you, as Mr. Smith's attorney/guardian out of his property. These are:

1. Expenditures that are reasonably necessary for Mr. Smith's support, education and care;

2. Expenditures that are reasonably necessary for the support, education and care of Mr. Smith's dependants; and

3. Expenditures that are necessary to satisfy Mr. Smith's other legal obligations.

There are several rules that apply to these mandatory expenditures. For instance, in making such expenditures, the value of Mr. Smith's property, his accustomed standard of living and his dependants and the nature of other legal obligations must be taken into account. With respect to expenditures specifically listed in paragraph 2, these may be made only if Mr. Smith's property is and will remain sufficient to provide for expenditures under the first paragraph, above. With respect to expenditures under paragraph 3, these may be made only if the property is and will remain sufficient to provide for expenditures under paragraphs 1 and 2.

You are also permitted to make gifts or loans to Mr. Smith's friends and relatives as well as charitable gifts, but there are certain rules that govern these types of optional expenditures, which we can discuss in further detail should the issue arise. Documentation is crucial of all gifts made together with reasons for their making.

Investments

If the CPOAP is silent on the matter of investments, we would strongly advise you to follow the investment provisions in the *Trustee Act*, R.S.O. 1990, c. T.23, and, in particular, what is referred to as the "prudent investor rule." A copy of the relevant provisions we are able to give to you should you require same. The *Trustee Act,* it should be noted however, does **not** apply to investments made by an attorney or guardian. Investment, tax and some estate planning advices may be necessary. You should consult with an accountant in determining disability credits, medical expenses, and other tax saving vehicles. The *SDA* mandates that you act prudently, diligently and fulfil your duties with integrity and honesty.

Case law in Ontario on investment obligations of an attorney gives the attorney some guidance on the scope of the duty. The following recent cases are an indication:

1. In *Sworik (Guardian of) v. Ware*[2] the court was critical of an attorney's consolidation of a grantor's assets. The Court was also critical of the inattention paid to the nature of the assets, interest rates being received on GICs and the history of prior investment success in choosing and holding assets.

2. In Re *Vickers Estate*[3] the Court noted that there was no duty on the attorney to fully preserve the capital of the estate of the grantor. The attorney owed its duty to the grantor and no one else. There was no duty to restrict her spending to the annual income generated by her assets. The grantor was entitled to have money spent for her benefit, and for her benefit alone, to ensure her comfort and well-being and not at a reduced standard so as to preserve an inheritance for her son. The attorney had to be prudent to ensure that sufficient capital remained available to meet her needs. (advices are recommended here); and

3. In *Fareed v. Wood*[4] the Court was critical of the lack of an investment plan from the attorney/solicitor. The Court noted that the fiduciary duty, as solicitor and attorney, required an investment plan for assets to be made. There is otherwise no analysis as to when such a plain is required. While the *SDA* does not require that attorneys prepare an investment plan, guardians of property are required to prepare a management plan.

Section 27(5), (6) and (7) of the *Trustee Act* which provide the criteria for a trustee to consider in planning the investment of trust property, diversification and obtaining investment advice may be instructive. That being said, Section 32(12) of the *SDA* provides that the *Trustee Act* does not apply to the exercise of a guardian of property

[2] [2005] 18 E.T.R. (3d) 132 (O.S.C.J.)

[3] [1999] O.J. No. 5555 (O.S.C.J.)

[4] [2005] O.T.C. 526 (O.S.C.J.)

duties or the performance of a guardian's duties. Accordingly, a guardian of property need not adhere to the requirements or strictures of the latter *Act* in that regard.

Further advice on this issue can be provided upon request.

The Specific Duty to Account of Attorneys/Guardians of the Property

Once you begin acting pursuant to the CPOAP/as a guardian of the property, you will become responsible for all of Mr. Smith's property. Getting started is often difficult. It is, therefore, very important to determine all of his assets as soon as possible and to prepare a list or inventory of same on the date you assume your responsibilities. Photographs of the assets are an option. Another priority is to immediately contact any/all of financial institutions and insurance companies used by Mr. Smith and ensure that his credit cards and other obligations/loans/debts are properly seen to.

The reason that it is necessary to keep detailed accounts, records and inventories of Mr. Smith's monies/assets is that one of the most important duties you will have as an attorney/guardian is to your duty to account. There are very specific requirements for keeping accounts, which are found in the applicable regulations to the *SDA*, which we have attached to this letter. An attorney or guardian is liable for damages resulting from a breach of duty. The Court may relieve an attorney/guardian of a breach if satisfied the attorney/guardian acted honestly, reasonably and diligently.

Given that one of the most common criticisms directed at attorneys/guardians is that they have failed in their duty to maintain proper accounts and records and to produce them on request, it is strongly recommended that you keep any/all vouchers, receipts, bills, invoices, bank statements, cancelled cheques, and pass books and collect them during the course of your dealings with Mr. Smith's finances/assets. It is also advisable that you keep a ledger which tracks all of the receipts, disbursements, and investments that you make on Mr. Smith's behalf.

Maintaining accurate and detailed accounts and records is very important in the event that you are called upon to provide an accounting of your dealings with Mr. Smith's money. An accounting can take two forms, an informal accounting, or a formal "passing of accounts." A passing of accounts is a formal procedure which is made by way of application to the Court and requires you to pass your accounts in a special court format governed by the Court rules. This is an onerous and expensive procedure which will require that you justify, to the satisfaction of the Court, all of your dealings with Mr. Smith's money/assets.

It is usually the case that where an attorney/guardian maintains accurate and up-to-date accounts and records of their dealings with the grantor's finances, this usually placates would-be applicants and dissuads them from bringing an application to cause the attorney/guardian to pass his/her accounts.

As well, we cannot emphasize enough the importance of keeping Mr. Smith's assets/monies separate from your own. As a fiduciary, you are legally prohibited from using or borrowing Mr. Smith's property for your own use or benefit, unless this is authorized by the CPOAP or pursuant to the *SDA*. Likewise, property and accounts should not be placed in the joint names of you and Mr. Smith.

Duties of an Attorney/Guardian of the Person, Pursuant to the *SDA*

As an attorney appointed pursuant to a POAPC or a court-appointed guardian of the person, you are a fiduciary. This means that you have a strict statutory duty to exercise your powers and discharge your duties diligently and in good faith. This is set out in subsection 66(1) of the *SDA*. A checklist is enclosed covering these powers and duties for your assistance. You are also statutorily required to explain to Mr. Smith what your powers and duties are. The decisions made are crucial to Mr. Smith's dignity, liberty and serenity. Additionally, keep in mind the power granted unlike for property, is not "continuing". The power is only effective in respect of specific decisions the grantor is incapable of or has been found incapable of.

As noted above, if the *Health Care Consent Act, 1996* applies to any decision that you are called upon to make, and you have a duty to make that decision in compliance with that Act. For instance, decisions respecting admission to a care facility, about chronic acute medical conditions, restraint, treatment and terminal illness. In situations where you are required to make decisions to which the *Health Care Consent Act, 1996* does not apply, you are required to make those decisions in accordance with the following guiding principles:

1. If you are aware of a wish or instruction applicable to the circumstances that Mr. Smith expressed while capable, you must make the decision in accordance with that wish or instruction;

2. You must use reasonable diligence in ascertaining whether there are such wishes or instructions;

3. If Mr. Smith expressed a later wish or instruction while he was capable, this wish or instruction will prevail over an earlier wish or instruction;

4. If you do not know of a wish or instruction applicable to the circumstances that Mr. Smith expressed while capable, or if it is impossible to make the decision in accordance with the wish or instruction, you must make the decision in Mr. Smith's best interests.

In determining what Mr. Smith's best interests are, heed must be had to the *SDA* which requires that you take into consideration the following:

(a) the values and beliefs that you know Mr. Smith held when capable and you believe he would still act on if capable;

(b) Mr. Smith's current wishes, if they can be ascertained; and

(c) the following factors:

1. Whether your decision is likely to,

   i. improve the quality of Mr. Smith's life,

   ii. prevent the quality of Mr. Smith's life from deteriorating, or

   iii. reduce the extent to which, or the rate at which, the quality of Mr. Smith's life is likely to deteriorate.

2. Whether the benefit Mr. Smith's is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision.

Importantly, in accordance with the governing regulations, you are required to keep records of decisions made by you on Mr. Smith's behalf. And, you are required to encourage Mr. Smith to participate, to the best of his abilities, in the decisions you make on his her behalf and foster his independence.

You are required by law to not only foster regular personal contact between Mr. Smith and his supportive family members and friends, but to consult from time to time with those of his supportive family members and friends who he is in regular contact with, as well as the persons from whom he receives personal care.

You are also required to always choose the least restrictive and intrusive course of action that is available and is appropriate in the particular case. To that end, you are prohibited from using confinement or monitoring devices or from restraining Mr. Smith physically or by means of drugs, and you cannot give consent on Mr. Smith's behalf to the use of confinement, monitoring devices or means of restraint, unless, the practice is essential to prevent serious bodily harm to him or to others, or it allows Mr. Smith greater freedom or enjoyment.

Duty to Account – Records to be kept by an Attorney/Guardian of the Person

An attorney/guardian should always keep a notarized copy of the Power of Attorney document or the Court Order appointing him/her.

The records that an attorney/guardian must keep include:

- A list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date
- A copy of medical reports or other documents, if any, relating to each decision

- The names of any persons consulted, including the incapable person, in respect of each decision and the date
- A description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed
- A description of the incapable person's current wishes, if these can be ascertained, and if they are relevant to the decision
- For each decision taken, the guardian's opinion on each of the guiding principles listed above

Duties of Attorneys/Guardians of Property and Personal Care, Pursuant to the Common Law

In addition as stated herein, the specific duties that may have been set out by the grantor in the POA and in the *SDA*, are supplemented by the common law which also imposes the following duties additional duties upon attorneys/guardians:

- The attorney/guardian must stay within the scope of the authority delegated;
- The attorney/guardian must not make secret profits;
- The attorney attorney/guardian must cease to exercise authority, if the POA is revoked;
- The attorney/guardian must not act contrary to the interest of the grantor or in a conflict with those interests;
- The attorney/guardian must not exercise the POA for personal benefit unless authorized to do so by the POA, or unless the attorney acts with the full knowledge and consent of the grantor;
- The attorney/guardian cannot assign or delegate his or her authority to another person, unless the instrument provides otherwise. Certain responsibilities cannot be delegated.

Notably, in situations where a capable grantor appoints and directs an Attorney to deal with their property, the Attorney is considered to be an agent of that person, carrying out the instructions of the grantor (in this case the grantor is considered the principal). Though the fiduciary standard or expectation is arguably lower in such a relationship, an Attorney in this position is still a fiduciary with a duty only to the grantor and should, therefore, keep detailed written documentation of instructions and act diligently and in good faith.

Standard of Care and Avoidance of Liability for Breach of Duty

Attorney/Guardian of Property

Depending on whether the attorney or guardian accepts compensation for their role, the *SDA* provides that they will be held to a different standard of care. Thus, an attorney or guardian who does not receive compensation for managing the property of the grantor is held to a slightly lower standard. He or she is required to 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. However, an attorney or guardian who receives compensation for managing the property of the grantor is required to exercise the degree of care diligence and skill that a person in the business of managing the property of others is required to exercise. Whether or not a different standard actually applies is to be determined and therefore, we strongly advise you manage property prudently, seek advices of professionals where necessary and keep detailed, accurate records of every transaction.

An attorney/guardian will be liable in damages for breach of their duty, unless he or she can prove to a court that they acted honestly, reasonably, and diligently.

Attorney/Guardian of the Person

As noted above, an attorney/guardian of the person is required to exercise their powers and perform their duties diligently and in good faith. The *SDA* protects attorneys and guardians who meet this duty by providing that no proceeding for damages can be commenced against an attorney/guardian for anything done or omitted in good faith in connection with the attorney's/guardian's powers and duties under the Act.

Litigation and the Costs Consequences

There is a deeply entrenched view that guardianship or power of attorney litigation will be funded by the incapable person. However, as a result of an increase in cases involving family disputes surrounding the proper administration of property or care of incapable persons, we think it important to alert you to the fact that our Courts have sent a clear message to the public that proceedings brought under the *SDA* are not designed to enable disputing family members to litigate their hostility in Court.

In the recent Ontario Superior Court of Justice case of *Salter v. Salter Estate* [5], the following statement by the Honourable Justice Brown is relevant and should be considered a warning to all litigants:

[5] 2009 CarswellOnt 3175 (Ont. S.C.J.).

> From a year of acting as administrative judge for the Toronto Region Estates List I have concluded that the message and implications of the *McDougald Estate* case are not yet fully appreciated. A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. *Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes.*[Emphasis added].

Additionally, as stated by the Court in *Abrams v. Abrams*, 2010 ONSC 1254 (CanLII) a guardian has one focus: the assessment of the capacity and best interests of the person whose condition is in issue and the courts will not tolerate family factions trying to twist the *SDA* proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues."

Accordingly, there are potentially significant cost consequences involved in bringing unnecessary or inappropriate *SDA* proceedings and we would strongly caution you to obtain legal advice before you decide to proceed in a litigious manner.

Compensation

Attorneys/Guardians of the Property

As an attorney/guardian of Mr. Smith's property, you are entitled to take compensation from Mr. Smith's property in accordance with the prescribed fee scale and the CPOAP itself. Generally speaking, you are entitled to a 3% fee for capital and income receipts and a 3% fee for capital and income disbursements, plus $3/5^{th}$ of 1% as a care and management fee. However, some of the recent case law suggests that the Courts will maintain their jurisdiction to determine whether the calculation is reasonable in the circumstances. Thus, if, for instance, a Court finds that the attorney/guardian's record keeping is deficient and he/she is unable to account for considerable sums of money, the amount of compensation may be reduced. If it is proven that an attorney/guardian has acted in breach of his or her fiduciary duty and/or was negligent, or has prematurely taken compensation where not authorized to do so, a Court may order that the attorney/guardian re-pay the compensation taken with interest and even reduce or suspend compensation. And, as noted above, should you decide to pay yourself

compensation, you may be held to a higher standard of care by the court with respect to how you carry out your duties as Mr. Smith's attorney.

We can provide you with a copy of section 40 of the *SDA* in due course should you require, which addresses some of the issues relating to compensation, such as when it may be taken, as well as the regulation that sets out, in greater detail, how to calculate compensation. Should you require any assistance in making this calculation, please advise us.

Attorney/Guardian of the Person

To date, no regulations have been passed which prescribe the circumstances in which an attorney/guardian of the person may be compensated for their services. Nor is there a regulation prescribing the amount or method of calculating compensation.

That said, there is some case law to suggest that compensation may be awarded provided it can be proven to the court that the services provided were either necessary or desirable and reasonable. The amount claimed must also be reasonable. In the case of *Brown (Re)* (1999), 31 E.T.R. (2d) 164 (Ont. S.C.J.), the Court held that the reasonableness of a claim for compensation is a matter to be determined by the court in each case, bearing in mind the need for the services, the nature of the services provided, the qualifications of the person providing the services, and the period over which the services were furnished. The Court was careful to note that this was not an exhaustive list of factors, but was merely illustrative of factors that would have to be considered by a court in making a determination as to compensation for an attorney/guardian of the person.

Brown (Re) was followed in the case of *Cheney v. Byrne (Litigation Guardian of)* (2004), 9 E.T.R. (3d) 236. In this case, two solicitors who had been acquainted with the incapable person and her husband became attorneys for the wife's personal care after her husband's death. The solicitors sought compensation at their hourly rates. The Court did not heed to the PGT's objection that the applicants did not deliver "hands on" personal care in the same manner as specialized facilities that provide day-to-care. Rather, it was impressed with the attention and involvement of the applicants in overseeing the care of the incapable woman and awarded compensation. That said, the Court reduced the hourly rate by reason of the fact that all of the other services that they had rendered in other capacities (as guardians of the property), and because other individuals had provided the "difficult personal care services."

Miscellaneous other information

Maintaining Confidentiality

An attorney for property is not supposed to disclose any information contained in the accounts and records of the incapable person, unless required to do so, in order to make transactions on the incapable person's behalf, or as court ordered to do so.

However the attorney for property must produce copies of his/her records upon request to the grantor of the CPOAP, or the incapable person's attorney for personal care or guardian of the person and the PGT. Similarly, a guardian of the person or personal care attorney is not permitted to disclose any information contained in his/her records concerning personal care or health issues unless required to do so in order to make decisions on the incapable person's behalf.

Determining the scope of the power

You must determine whether or not Mr. Smith has any dependants, whether you are a guardian of the property or an attorney for Mr. Smith's property. There may be some obligation on Mr. Smith to continue to support a dependant. You should seek further legal advices if this is the case.

Section 3 Counsel

The *SDA* at Section 3, provides as follows:

Counsel for person whose capacity is in issue

3. (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,

(a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.

If court proceedings become contested for any reason, it may be that the court or the PGT is of the view that the incapable person should have counsel of his/her own.

In these circumstances you may wish to seek further advices from a professional on the role of Section 3 Counsel.

Passings of accounts

You may be asked or called upon on some point in the future, to pass your accounts as an attorney or as a guardian of property.

Accordingly, as stated within this reporting letter, you would be duty bound to keep detailed and accurate records.

In the event that you are called upon to pass your accounts at some date in the future, we would be pleased to assist you and provide you with further advices on how the application is brought. It is crucial to remember that the attorney/guardian arguably owes a duty of care (though the caselaw is unclear; note Vickers Estate above at p. 17)

to the residual beneficiaries, hence the importance of taking custody of the incapable person's Will.

There is much case law on passings of accounts, the taking of compensation, and the duty to account. The abundance of case law demonstrates the importance of keeping full detailed records both for your protection from a liability perspective, and such that you are able to account and discharge your duties and obligations under the governing legislation.

Directions and Assistance from the Court

Attorneys and Guardians are permitted by the provisions of the *SDA* to apply to the Court for directions where questions cannot be resolved by the SDM. In the event you require this assistance, we would be please to assist you.

Conclusion

This letter has been provided to you for guidance purposes respecting the roles and responsibilities involved in acting as the attorney for the property/person of Mr. Smith. It also provides some ancillary guidance with respect to court-appointed guardianships of the property/person. You are entitled to and urged to seek professional advice where deemed necessary on an ongoing and continuing basis.

Though this letter is lengthy, it does not attempt to cover all of the possible questions that you may have or the issues and challenges that may arise throughout the duration of your attorneyship—as many problems are not only fact-specific, but change as time goes on. As such, when you require any further advice or assistance, please do not hesitate to contact us. You may indeed have questions on the matters addressed in this letter. We look forward to assisting you further if necessary in your assistance to Mr. Smith and his affairs.

Regards,

Yours truly,

Caution: This Sample Reporting Letter is not intended to be relied upon or substitute your own research, diligence and good judgment. It is provided as a sample only. It is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation September 10, 2010

Encls: (2)

1. Checklist of the duties of an attorney under CPOAP;
2. Checklist of the duties of an attorney under POAPC

A CHECKLIST"

DUTIES OF AN ATTORNEY UNDER A POWER OF ATTORNEY FOR PROPERTY PURSUANT TO THE SUBSTITUTE DECISIONS ACT, 1992 (the "SDA")

An Attorney MUST...

- ❑ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act*, 1992 (the "SDA") and the *Health Care Consent Act*, 1996 (the "HCCA")

- ❑ Be 18 years of age

- ❑ Rely on the presumption of capacity, unless reasonable grounds exist to conclude a person is incapable of managing property, incapable of understanding information relevant to the management of such property, or is unable to appreciate the reasonably foreseeable consequences of a decision, or lack of decision

- ❑ Be aware of the extent of the power of attorney given to the attorney and the circumstances of such power or authority:
    - o Is the power a "Continuing" Power of Attorney?
    - o Is the power limited to a particular period of incapacity?
    - o Is the power to come into effect on a specified date, or event, and correspondingly is such a date or event to be determined in accordance with the Power of Attorney document or the requirements pursuant to the SDA - query the need to obtain a capacity assessment?
    - o Is the power to be exercised solely or jointly with another?

- ❑ Act in accordance with the Power of Attorney document which may authorize the attorney to take any action that the grantor of the attorney could have taken, if capable, except make a Will

- ❑ Determine whether the grantor of the Continuing Power of Attorney has the requisite capacity to grant such a power:

- Is he grantor aware of the scope of property possessed?
- Is the grantor aware of the approximate value of property possessed?
- Is the grantor aware of obligations owed to dependants?
- Is the grantor aware of the conditions and restraints attached to granting a Power of Attorney?
- Is the grantor aware that an attorney has a duty to account for all actions taken?
- Is the grantor aware of the power to revoke the Continuing Power of Attorney if capable to do so?
- Is the grantor appreciative of the risks of entrusting property to the attorney?

❑ Be aware that the power or authority can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

❑ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

❑ Be aware of the statutory obligations of resignation
- Deliver the resignation to the grantor, the joint or alternate attorneys, spouse/relatives, if applicable
- Notify persons previously being dealt with on the grantor's behalf

❑ Be aware that a Power of Attorney terminates upon the death of the grantor

❑ Be aware of and exercise legal fiduciary duties diligently, honestly, with integrity, in good faith, and in the best interests of the grantor, while also taking into account the grantor's well-being and personal care

❑ Explain to the grantor its powers and duties and encourage the grantor's participation in decisions

❑ Facilitate contact between the grantor and relatives or friends

❑ Consult with relatives, friends and other attorneys on behalf of the grantor

❑ Keep accounts of all transactions

- ❑ Be aware of the standard of care, diligence and skill expected in dealing with the grantor's affairs
  - o Ordinary prudence v. Professional prudence
- ❑ Be aware of the legal liability assumed for a breach of an attorney's duties
- ❑ Determine whether the grantor has a Will and the provisions of such Will in order to preserve any property specifically bequeathed in the Will
- ❑ Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care
- ❑ Be aware of the rights and duties to make application to the court for directions if deemed necessary in managing the grantor's property, or for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions
- ❑ Be aware of the responsibility to formally pass accounts, if required by the grantor, grantor's dependants, the Public Guardian and Trustee, the Children's Lawyer, a judgment creditor, the attorney for personal care, or pursuant to court order
- ❑ Make a comprehensive list of all the grantor's assets from the date of exercising the Power of Attorney
- ❑ Keep a continuous list of all assets acquired or disposed of, complete with dates, amounts, reasons and other relevant details, such as names of individuals conducting transactions, deposit information, interest rates, investment information, liabilities and relevant other calculations
- ❑ Keep a copy of the Continuing Power of Attorney and all other relevant court orders relating to the attorney's power or authority
- ❑ Not disclose information contained in the grantor's accounts and records, except to the grantor, the grantor's attorney for personal care, pursuant to a court order, or as is consistent with the duties and authority granted, or as requested of the attorney and by the grantor's spouse, or the Public Guardian and Trustee
- ❑ Keep accounts and records until the authority granted under the Power of Attorney ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney passes the accounts

There are limits and restrictions for authority of Estate Planning, and gifting by the Attorney. The requirements of S. 32 of the SDA as set out below apply to Attorneys in the same way as to Guardians. These duties must be considered in the exercise of authority:

- **Duties**

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;

- **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;

- **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;

- **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;

- **Explanation**

(2) The guardian shall explain to the incapable person what the guardian's powers and duties are;

- **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;

- **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;

- **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.

- **Accounts**

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property;

- **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;

- **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;

- **P.G.T.**

(9) Subsection (8) applies to the Public Guardian and Trustee;

- **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;

- **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;

- **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;

- **Liability of guardian**

33. (1) A guardian of property is liable for damages resulting from a breach of the guardian's duty;

- **Same**

(2) If the court is satisfied that a guardian of property who has committed a breach of duty has nevertheless acted honestly, reasonably and diligently, it may relieve the guardian from all or part of the liability;

- **Exception, corporate directors**

(3) Subsection (2) does not apply to a guardian acting as a director of a corporation in which the incapable person is a shareholder unless the guardian has acted honestly, reasonably and diligently with a view to the best interests of the corporation;

- **Breach of duty**

(4) For the purposes of this section, a breach of duty includes a breach of a duty or other obligation by a guardian acting as a director of a corporation, whether arising in equity, at common law or by statute.

The following further restrictions and limitations should be considered in light of a decade of case law on the subject of Attorney duties, obligations and the authority of the Attorney to conduct Estate Planning on behalf of the Grantor of a Power of Attorney:

- An Attorney may not change a beneficial designation of life insurance or a "Plan" Why? An instrument is considered testamentary in nature if it is intended that it only come into effect after a person's death. Therefore a policy of life insurance pursuant to the *Insurance Act* (Ontario. R. S. O. 1990, C.I.8 as amended) and a "Plan" pursuant to the *Succession Law Reform Act,* (R.S.O. 1990, Chapter S.26), are considered testamentary Acts. Note, however, there is an exception to this rule in that an Attorney may possibly continue an appointment under a Plan or insurance designation if switching from one Plan to another but Court approval is recommended for certainty *(Desharnais v. Toronto Dominion Bank 2001 BCSC 1695 (CanLII). [2001] B.C.J. [No. 2547]).*

- An Attorney may want to protect an incapable person's assets from a potential spousal claim but in doing so, must not defeat a claim under the *Family Law Act* (*Banton* v. *Banton*, *1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.).*

- An Attorney may complete transactions already entered into by an incapable person.

- An Attorney may take steps for the protection of the lawful dependants of the Grantor (*Drescher* v. *Drescher Estate (2007), E.T.R (3d) (287) N.S.S.C.).*

- An Attorney may make gifts that the Attorney has reason to believe the Grantor, if capable, would make.

- An Attorney may settle an "*Alter Ego Trust*" similarly certain "Estate Freeze" planning may also be undertaken by an Attorney. Generally speaking, such planning is permitted if it is consistent with the Grantor's last Will and Testament, or otherwise if the ultimate beneficiary(s) consent and it is in keeping with the terms of the SDA including that there will be no loss suffered by the Grantor. In such circumstances, the Attorney should strongly consider the prospect of obtaining Court approval of any such Estate Freeze or *Alter Ego Trust* planning, particularly if controversies or litigation is expected. Tax considerations must be factored into any planning.

- ❑ Attorney's should always consider in the context of any decision taken obtaining the consent of the Grantor. Consent of the Grantor should be obtained where legal action is taken on behalf of the Grantor.

- ❑ An Attorney has the authority to sell, transfer, vote the shares on behalf of the Grantor of a Power of Attorney document; however where the Grantor is also a Director of a corporation, the Attorney does not have the same authority as the Grantor. In other words, the Attorney has no authority to act as Director on behalf of the Grantor. Only where the Grantor is a sole shareholder, or, has consent of all the other shareholders, can the Attorney, in the capacity as shareholder under the Power of Attorney, elect to become a Director and act in that capacity on behalf of the Grantor.

- ❑ An Attorney should seek the advice of a tax accountant, or lawyer, when conducting any transaction which involves any sort of estate planning on behalf of the Grantor of a Power of Attorney, particularly in a corporate or succession planning context.

"A CHECKLIST"

DUTIES OF THE ATTORNEY UNDER A POWER OF ATTORNEY FOR PERSONAL CARE PURSUANT TO THE SUBSTITUTE DECISIONS ACT, 1992 (the "SDA")

An Attorney MUST...

- ❑ Be advised of the legislation applicable to the attorney acting under a Power of Attorney, including the *Substitute Decisions Act, 1992* (the" SDA") and the *Health Care Consent Act, 1996*

- ❑ Be aware that an individual of 16 years of age is capable of giving or refusing consent of one's own personal care

- ❑ Be aware that an individual may grant a written Power of Attorney authorizing personal care decisions be made on the grantor's behalf

- ❑ Be aware that if the attorney is the Public Guardian and Trustee, their consent is required in writing prior to the execution of the Power of Attorney document for such appointment to be valid

- ❑ Not act as an attorney under a Power of Attorney if for compensation, the attorney is providing health care, residential, social, training or support services to the grantor, unless the attorney is a spouse, partner or relative of the grantor

- ❑ Act in accordance with the Power of Attorney document and be aware of the extent of the power or authority granted and the circumstances of such authority
    - o Is the power to be exercised solely or jointly?
    - o Is the power or instruction given in the Power of Attorney document consistent with relevant statutory requirements?

- ❑ Determine whether the grantor of the Power of Attorney has the requisite capacity to grant such a power
    - o Does the grantor have the ability to understand and appreciate the role of the attorney and in particular the risks associated with the appointment?

- Does the grantor have capacity to give instructions for decisions to be made as to personal care?
- Is the grantor aware of the Power to revoke the Power of Attorney if capable?
- The grantor's capacity to give a power is **not** related to the incapability of the grantor's own personal care

- ❑ Recognize the validity of the Power of Attorney document and the statutory requirements regarding execution and witnessing

- ❑ Be aware that the Power of Attorney can be revoked and such revocation must be in writing and executed in the same manner as the Power of Attorney document itself

- ❑ Be aware of the rights and duties to make application to the court for directions if deemed necessary in exercising the attorney's role effectively and for lending effectiveness to the Power of Attorney document, which might otherwise be ineffective according to statutory provisions

- ❑ Be aware of applicable statutory requirements, which dictate the effectiveness of the authority given in the Power of Attorney document

  - The HCCA applies to certain decisions made by attorneys, and provides authority to the attorney to make certain decisions
  - The HCCA prescribes certain decisions which require the grantor of the Power of Attorney to be confirmed incapable of personal care prior to any decision being taken by the attorney
  - Review the required method of ascertaining capacity - is the method prescribed in the Power of Attorney document itself, or is it to be in the prescribed form pursuant to an assessor in accordance with the SDA?
  - What verbal or written instructions have been given by the grantor of the Power of Attorney in respect of either capacity, the assessment or the assessor?

- ❑ Be aware that special provisions exist in the SDA and the HCCA addressing conflicting requirements under the Power of Attorney document itself and the statutory requirements in relation to capacity assessments, assessors and the use of force, restraint and detention where required in reasonable circumstances in respect of the grantor's care and treatment

- ❑ Be aware that no liability will be assumed by the attorney arising from the use of force if used as prescribed under the SDA and the HCCA

- ❑ Arrange for a capacity assessment at the request of the grantor, except where there as been an assessment performed in the six months immediately previous

- ❑ Be aware the statutory requirements concerning resignation
  - Deliver the resignation to the grantor, the joint or alternate attorneys, or spouse/relatives, if applicable
  - Notify persons previously being dealt with on the grantor's behalf

- ❑ Be aware that a Power of Attorney for personal care terminates on the death of the grantor

- ❑ Be aware of, and exercise, legal fiduciary duties diligently, honestly, with integrity, in good faith and in the best interests of the grantor while taking into account the grantor's well-being and personal care

- ❑ Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions

- ❑ Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor

- ❑ Keep records of all decisions made on the grantor's behalf

- ❑ Facilitate contact between the grantor, relatives and friends

- ❑ Consult with relatives, friends and other attorneys on behalf of the grantor

- ❑ Facilitate the grantor' independence

- ❑ Make decisions which are the least restrictive and intrusive to the grantor

- ❑ Not use or permit the use of confinement, monitoring devices, physical restrain by the use of drugs or otherwise except in so far as preventing serious harm to the grantor or another

- ❑ Not use or permit the use of electric shock treatment unless consent is obtained in accordance with the HCCA

- ❑ Maintain comprehensive records
    - o A list of all decisions made regarding health care, safety and shelter
    - o Keep all medical reports or documents
    - o Record names, dates, reasons, consultations and details, including notes of the wishes of the grantor

- ❑ Give a copy of the records to the grantor, or other attorney, or the Public Guardian and Trustee as required

- ❑ Keep a copy of the Power of Attorney for personal care and all other court documents relating to the attorney's power or authority

- ❑ Keep accounts or records until the authority granted under the Power of Attorney for Personal Care ceases, or the grantor dies, or the attorney obtains a release, is discharged by court order, or the attorney is directed by the court to destroy or dispose of records