TAB 10

# Misfeasance, Nonfeasance, and the Self-Interested Attorney

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*13th* ***Annual*** **Estates and Trusts Summit**
**Day Two - November 18, 2010**

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# Misfeasance, Nonfeasance, and the Self-Interested Attorney

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*Powers of attorneys have been used for centuries as part of conventional agency relationships. With the advent of contemporary legislation like the Substitute Decisions Act, 'continuing powers of attorney' can survive a donor's incapacity. These create a new species of relationship that creates fiduciary obligations that exceed even conventional trust duties. Attorneys acting on behalf of incapable donors should conduct themselves to highest standards of probity and fidelity in addition to performing their duties competently within the statutory scheme. Unexcused breach of the duty of care results in compensation. For breach of fiduciary duty, restitution should be the norm with the full range of personal and proprietary remedies being available to restore the donor's interest and strip the attorney of any gain. In the very worst cases, an attorney with an interest in the donor's estate should not be allowed to profit from his or her wrong indirectly through his or her inheritance of assets previously misappropriated. Equity retains the power to use proprietary remedies to disturb such testamentary entitlements to foster the integrity of attorneyship.*

## I. INTRODUCTION

In this paper I consider the proper scope of the liability of an attorney under a continuing attorney for property under the *Substitute Decisions Act*.[1] It has been suggested by an eminent jurist that the fiduciary nature of the obligations of an attorney acting on behalf of an incapable person[2] approaches that of a trustee.[3] With respect, I disagree. I would suggest that the obligations owed to an incapable person are *more extensive* than that of a trustee. Indeed, given changing social circumstances and evolving legal regimes, I suggest that attorneyship[4] on behalf of an incapable donor has surpassed conventional trusteeship as the defining example of a fiduciary who must act to the highest standards of competency, probity and fidelity. In respect of conventional trusts, most beneficiaries are (or will become) able to enforce the trust and vindicate their entitlements at some point. I suggest that it is safe to assume that only in the rarest of cases will an incapable donor ever regain sufficient mental capacity to allow him or her to participate directly in enforcing the attorney's obligations.

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[1] S.O. 1992, c.30.

[2] I use incapacity throughout in the meaning of the *Substitute Decisions Act*, S.O. 1992, c.30, s.6.

[3] *Banton v Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Sup. Ct.), para. 151; approved, *Richardson Estate v. Mew*, 2009 ONCA 403, para. 48.

[4] I use 'attorneyship' here to include Court-appointed guardianship for property as well; *Substitute Decisions Act*, S.O. 1992, c.30, s. 38(1).

Protecting the dignity of such vulnerable people[5] and safeguarding their interests against exploitation is a social policy of 'super-ordinate importance'.[6] Attorneyship is a vitally important legal institution in contemporary society and the law must foster its proper operation; donors of such powers must have complete faith that the law will hold their attorneys to account for misconduct. Quite simply, if the law does not do so, continuing powers of attorney will become hollow devices.

It has recently been suggested that one of the unintended consequences of the *Substitute Decisions Act* is to have created a forum for 'high conflict' families to fight with each other.[7] I would add that financial exploitation of older adults through manipulation of the substitute decision-making regime itself is another; indeed it might properly be called 'elder abuse'. In answer, I would suggest that the law should respond with bright lines and effective remedies to deter misconduct and avoid unnecessary litigation. At least as far back as Roman law,[8] it has been recognized that no mature legal system allows for a wrong to go unremedied. English equity, of course, developed in part specifically to cure the problems of defects in the remedial response to legal wrongs and the inability of courts of law to administer justice effectively – hence, 'equity will not suffer a wrong to be without a remedy'. Indeed, as the Court of Appeal recently affirmed, citing Blackstone no less, equity is 'the soul and spirit of all law ... equity is synonymous with justice.'[9]

I suggest that a court of equitable jurisdiction is armed with all the tools necessary to ensure a wrongdoer ought not to be allowed to profit from his or her wrong where he or she breaches fiduciary obligations owed to an incapable donor under an attorneyship. Where the attorney breaches his or her duty of care, compensation should be the norm. Where the attorney breaches his or her fiduciary duty, restitution should be the norm. The donor's interest should be fully restored and the attorney ought not be allowed to profit from his or her wrong. Further, in the very hardest of cases, where the attorney is self-interested in the incapable donor's estate, I would suggest that Courts may properly order a proprietary remedy to disturb testamentary entitlements in favour of innocent heirs. 'Equity is not beyond the age of child-bearing' to use a familiar phrase,[10]

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[5] *Park v Park*, 2010 ONSC 2627, para 47.

[6] *Re Phelan* (1999), 29 E.T.R. (2d) 82 (Ont. Sup. Ct.), para. 23 per Kiteley J adopting the dicta of Dickson J. in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175.

[7] Jan Goddard, 'The *Substitute Decisions Act*: A Law of Unintended Consequences' presented at the LSUC Special Lectures 2010, *A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client* (Toronto: Law Society of Upper Canada, 2010), 2.

[8] *Ubi jus ibi remedium* ('where there is a right, there is a remedy'). See *Great Western Railway Co. of Canada v. Brown* (1879), 3 S.C.R. 159; *Norton v. Fulton* (1907), 39 S.C.R. 202; *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3.

[9] *Gonder v Gonder Estate*, 2010 ONCA 17, para. 21.

[10] *Eves v Eves,* [1975] 3 All E.R. 768, 771 (C.A.). The phrase was attributed to Harman LJ by Lord Evershed MR. See Sir Raymond Evershed, 'Equity is Not to be Presumed to be Past the Age of Child-Bearing' (1951-53), 1 Syd. L.R. 1, 4.

and we ought not hesitate to respond robustly to such grossly offensive conduct as the financial exploitation of people made especially vulnerable due to mental incapacity.

## II. POWERS OF ATTORNEY WHERE THE DONOR REMAINS CAPABLE: AGENCY

A power of attorney is, historically, a device that has been regulated through a combination of legal and equitable doctrine. As an agent, and like any agent, the attorney must carry out the door's instructions and exercise such care and skill in the performance of his or her duties as is necessary for the proper conduct of the business undertaken.[11] If the provisions of the power don't allow for its exercise, the attorney quite simply has no business attempting to exercise it. If the terms of the power do allow its exercise, the attorney is liable to make compensation for any loss that arises in consequence of its misuse. It's a simple model. The *Substitute Decisions Act* extends this model in respect of incapable donors. In respect of capable donors, however, I would suggest that the law remains and should remain unaffected by the statute's provisions.

### 'Attorneys' and 'Powers of Attorney'

In English law, the genesis of *attorney* as a legal term is somewhat obscure. The origin of the word itself lay in the French *atorne*, the past participle of *atourner*, meaning 'to turn to'. With the Norman Conquest, such terms migrated across *la Manche*.[12] The concept of authorized representation sufficient to bind the principal (that is, 'agency') entered English law from a combination of Anglo-Saxon law, Germanic law, and elements of canon and continental law that made their way into England after the Conquest. All of these came together to recognize isolated forms of binding representation in some circumstances; for example, to allow the agent to borrow on behalf of the Crown and bind the lender and borrower to each other. By the 13th century, it was clear that there were two facets to legally recognized representation: first, rights of representation and audience before some courts (through the doctrine of *attornatus* whereby a litigant, the *attornans,* could appoint another person to represent him in the litigation[13] and be bound by his representative's actions to the satisfaction of his

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[11] *Wolsely Tool & Motor Car Co. v. Jackson, Potts & Co.* (1915), 33 O.L.R. 96 (H.C.); affirmed (1915), 33 O.L.R. 587 (C.A.); *Tabata v. McWilliams* (1981), 33 O.R. (2d) 32 (H.C.); affirmed (1982), 40 O.R. (2d) 158 (C.A.).

[12] Or seen from the other direction, the English Channel. As one might expect there is a rich history on evolution of English legal language; see George E. Woodbine, 'The Language of English Law' *(1943), 18 Speculum 395*; Roger Dahood, 'Hugh de Morville, William of Canterbury, and Anecdotal Evidence for English Language History' (1994), 69 Speculum 40.

[13] See John Comyns, and Stewart Kyd, *A digest of the laws of England*, 4th ed. (Dublin: Luke White, 1793), 618; G. E. Woodbine, *Ranulf de Glanville, Tractatus de Legibus et Consuetudinibus regni Angliae*, ed. (New Haven: Yale Univ. Press, 1932). The term continued in use, to

opponent)[14] and as a more conventional commercial agent.[15] Indeed this was the meaning of *atourne* as used in what is considered to be the very first authority on English law written after the Norman Conquest, which was appropriately enough written in French.[16]

These were early and crude forms of agency that operated in quite narrow circumstances. Over time, and with the evolution of a mercantile rather than agricultural economy in England, agency became a commercial necessity in such matters as brokerage, shipping, sale of goods, and employment. One can't imagine a sophisticated economy being able to function without agents able to bind their principals and hence the law developed fairly briskly in the industrial age for quite pragmatic reasons. The legal treatment of agents was two-fold consistent with the division of legal and equitable doctrine and the differing jurisdictions of courts of law and equity – the common law courts tended to be concerned with the sufficiency of the appointment to bind third parties and enforcing the agreement as between the principal and the agent as a matter of contract law, while equity became involved where its *in personam* jurisdiction was necessary in order to make the attorney account for his or her actions and where the agent breached his fiduciary obligations.

As a matter of common law, a 'power of attorney' (in older usage a 'letter of attorney') itself had no special meaning as a precise term of art to be accorded some sort of special or *sui generis* treatment.[17] Rather, it was a species of contract and was enforced in the normal way with co-existent fiduciary obligations. As has been pointed out by others,[18] a power of attorney gives rise

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decreasing extent, until it formally abolished in England and Wales through the reforms under the *Supreme Court of Judicature Act 1875*, 38 & 9 Vict., c. 77. 'Attorney at law' is of course still used in America.

[14] See Frederick Pollock and FW Maitland, *The History of English Law*, 2nd ed. (Cambridge University Press, 1952), Vol. I, 228-229; Wolfram Müller-Freienfels, 'Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty' (1964), 13 Am. J. of Comp. L. 193, 195; Heinrich Brunner, 'Early History of the Attorney in English Law' (1908), 5 Illinois LR 257, 261-266.

[15] One might also distinguish *attorney* from the feudal ceremony of *attornment* wherein the feudal tenant would agree to be bound to the new lord in succession. Attornment still features as a legal term. A 'subordination, non-disturbance, and attornment agreement' addresses the priority of the rights of tenants and lenders. It deals with how and when the rights of tenants will be subordinate to the rights of lenders or, sometimes at lender's option, senior to the rights of lenders; see *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 (C.A.). As to the the colloquial use of attornment in respect of jurisdiction, see *R. v. Young*, [2010] O.J. No. 1991 (O.C.J.); *R. v. Mitchell* [2001] O.J. No. 4125 (O.C.J.).

[16] Francis Morgan Nichols, *Britton; the French text carefully revised with an English translation, introduction and notes* (Oxford: Clarendon Press, 1865).

[17] Of course statutes might have dealt with formalities and sufficiency of a sealed instrument for certain transactions; e.g. *An Act to Amend the Law of Property in Ontario*, 29 V. c.28, ss.23-24; R.S.O. 1877, c.95, ss.14-15.

[18] *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79; *Daily Telegraph Newspaper Company v. McLaughlin* [1904] A.C. 776, 780 (P.C.) approving (1904), 1 C.L.R. 243 (Aust. H.C.); *Hill Estate v. Chevron Standard Ltd.* (1992), 83 Man. R. (2d) 58 (C.A.); M. Janice Sweatman, *Guide to Powers of Attorney* (Canada Law Book, 2002), 4-5; Kate Misurka, 'Powers of Attorney:

somewhat unconventionally to enforceable contractual obligations as a matter of principle. That is to say, if the power is set up in an isolated document rather than being included in a document that is itself enforceable in law (say a will or a contract for valuable consideration), then the absence of consideration would seem to render the contract ineffective in respect of certain transactions. Hence the use of seals on powers of attorney – the seal sufficed for valuable consideration as a matter of common law (but not in equity) and allowed the document to be held sufficient to execute a document itself which was required to be sealed.[19] With respect to the learned authors that have considered the point, to a certain extent the formalities point is rather tangential in most circumstances given that the true question is whether the donor and donee of the power intended to enter into enforceable legal relations. Thus, even if there was an oral agreement obviously not under seal, the power was considered good and the court adopted a liberal construction of its terms in order to allow for its use in the conventions of the trade or business in question.[20] Even if the power was faulty and the agent acted on it, the court presumes the obligation was good and enforces it accordingly.[21]

In an era before the advent of detailed regulation in such fundamental areas as employment or specific forms of trade, the common law and equity served to provide that necessary legal treatment of such powers in order to facilitate such arrangements. In accordance with the nature and method of the common law, cases created a body of principles that could be predictably applied to sets of facts as presented themselves. Thus, the power of attorney was a revocable instrument[22] (unless made irrevocable by the principal), and could be revoked by written instrument or oral statement[23] or an act of the donor inconsistent with its continuing operation.[24] It terminated on performance,[25] and termination could be implied into its terms[26] but only when necessary;[27] otherwise the agent could assume that the power continued until bankruptcy of the donor[28] or donee,[29]

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A Corporate and Commercial Application' (1996), 26 E.T.P.J. 1, 2; Carmen S. Theriault, 'Powers of Attorney - Some Fundamental Issues' (1999), 18 E.T.P.J. 227, 228.

[19] *Steiglitz v Egginton* (1815-1817), Holt 141; 171 E.R. 193 (Common Pleas); *Berkeley v Hardy* (1826), 5 B. & C. 355; 108 E.R. 132 (K.B.).

[20] *Entwisle v Dent* (1848), 1 Exch. 812; 154 E.R. 346 (Exheq.); *Pole v Leask* (1860), 28 Beav. 562; 54 E.R. 481 (Rolls Ct); *Davis v. Scottish Provincial Insurance Co.* (1865), 16 U.C.C.P. 176 (Upper Canada Common Pleas); *Brassard v. Langevin* (1887), 1 S.C.R. 145, 191.

[21] *School Trustees of Hamilton v Neil* (1881), 28 Gr. 408 (Ont. Ch.).

[22] *Bromley v Holland* (1802), 7 Ves. Jun. 3; 32 E.R. 2 (Ch); *Warlow v Harrison* (1859), 1 El. & El. 309; 120 E.R. 925 (Excheq.)

[23] *The Margaret Mitchell* (1858), Swab. 382; 166 E.R. 1174 (Adm.); *R v Wait* (1823), 1 Bing. 121; 130 E.R. 50 (Excheq.).

[24] *Smith v Jennings* (1605-1611), Lane 97; 145 E.R. 32 (Excheq.).

[25] *Gillow & Co v Aberdare* (1892), 9 T.L.R. 12 (C.A.).

[26] *Hamlyn & Co v Wood & Co.,* [1891] 2 Q.B. 485 (C.A.).

[27] *Jenkins v Gould* (1827), 3 Russ. 385; 38 E.R. 620 (Ch.).

[28] *Markwick v Hardingham* (1880), 15 Ch. D. 339 (C.A.); *Alley v. Hotson* (1815), 4 Camp. 325.

[29] *Bailey v Thurston & Co Ltd.,* [1903] 1 K.B. 137 (C.A.).

death of the donor or donee[30] (and might properly unless pass to the personal representative of the donee if set up in that way).[31] Where appropriate, aspects of the agent's obligations under the power of attorney were fiduciary in character[32] and, to avoid any abuse, a court of equity could interfere, for example, where the agent should have sought his principal's consent to enter into a transaction personally[33] and considered him a trustee for the principal as a result.[34] The policy was to make available extensive liability to redress deceit.[35] Then as now, disputes arose over the duty to account based upon whether the power of attorney set up fiduciary obligations or not.[36] That the power could not survive incapacity is immediately apparent; a person incapable to contract is incapable of acting as either a principal or agent,[37] with the law of contract determining the question of incapacity, whether labelled 'lunacy' or otherwise, whether formally determined or otherwise.

## Agents and the Fiduciary Principle

It is important to remind oneself that powers of attorneys as forms of agency continue to be important and may be made by commercial actors for wholly commercial dealings.[38] Such powers may involve the provisions of the *Powers of Attorney Act*[39] to effect certain transactions. When made by natural people rather than corporations, such powers of attorney are *capable* of continuing beyond the donor's later incapacity at which time the *Substitute Decisions Act* is engaged and its provisions govern the exercise of such powers of attorney.[40] The point is important in respect of the application of the fiduciary principle to simple agency relationships set up by powers of attorney.

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[30] *Adams v Buckland* (1705), 2 Vern. 514; 23 E.R. 929 (Ch.); *Jacques v Worthington* (1859), 7 Gr. 192 (Upper Canada Ch.).
[31] *Foster v Bates* (1843), 12 M. & W. 226; 152 E.R. 1180 (Exch. of Pleas.).
[32] Whether 'trust and confidence' was reposed in the agent; for example, *Padwick v Stanley* (1852), 9 Hare 627; 68 E.R. 664 (Ch).
[33] *Rothschild v Brookman* (1831), 5 Bligh. N.S.P.C. 165; 5 E.R. 273 (Ch); *Harrison v Harrison* (1868), 14 Gr. 586 (Upper Canada Ch.).
[34] *Lees v Nuttall* (1834), 2 My. & K. 819; 39 E.R. 1157 (Ch.); *Ross v Scott* (1875), 22 Gr. 29 (Ont. Ch.).
[35] *Commercial Bank of Windsor v. Morrison*, (1902), 32 S.C.R. 98.
[36] *Barry v Stevens* (1862) 31 Beav. 258; 54 E.R. 1137 (Rolls Ct.).
[37] *Daily Telegraph Newspaper Company v. McLaughlin* [1904] A.C. 776 (P.C.). The question normally arose not in respect of the validity of the power in question but rather whether an attorney or donor might be liable to a third party or upon a transaction with a third party; *Blades v Free* (1829), 9 B. & C. 167; 109 E.R. 63 (K.B.); *Drew v Nunn* (1879), 4 Q.B.D. 661; *Yonge v Toynbee,* [1910] 1 K.B. 215. Cf. *Kerr v Town of Petrolia* (1921), 51 O.L.R. 74 (Ont. H.C.); *Canada Permanent Trust Co v Parks* (1957),, 8 D.L.R. (2d) 155 (NBSC – App Div).
[38] See Kate Misurka, 'Powers of Attorney: A Corporate and Commercial Application' (2006), 26 E.T.P.J. 1
[39] R.S.O. 1990, c.P.20.
[40] *Substitute Decisions Act*, S.O. 1992, c.30, s.7(6).

Equity, of course, does not normally supervise 'powers' independently but rather supervises a person who owes certain types of personal obligations to another. In that context, equity might interfere with the exercise of the power in question. Equity's intervention in such cases, however, has more to do with the fact that the person holding the power is a fiduciary independent of the power rather than the power having an independent fiduciary character.[41] Thus, for example, where a trustee owes a non-compellable discretionary power to appoint property, equity will not normally intervene unless there is a 'fraud on a power,'[42] that is exercising the power *mala fides*. Here it is not merely the act of exercising the appointment beyond the terms of the power but doing so intentionally[43] and thus frustrating the intention of the donor in giving the power.[44]

The exercise of equitable jurisdiction is much different in respect of a 'power of attorney' setting up a simple agency than a 'power' of appointment exercised by a trustee. It is a much narrower jurisdiction and is used to assist the donor in obtaining information from the attorney to ascertain whether an action should be brought for misuse of the power, answerable in damages in contract. One must remember that common law courts in England prior to 1875 were separate from the equitable courts; the common law court had no *in personam* jurisdiction over the agent with the power to force him to account through injunction. Hence, equity judges could, in essence, compel the agent to account for his actions. This was particularly important at a time when the governing rules respecting discovery were less mature than today. The process is the same today notwithstanding that courts of law and equity are fused and talk of equity has fallen to the wayside in general.

Where a complication arises is in respect a confusion of terms. An agent is not necessarily a fiduciary in the sense that his or her principal placed trust in him or her and granted discretionary powers.[45] Equity, however, for a long time has regarded an agent has having an obligation to 'account' to his principal with the fiduciary principle used as a vehicle to compel that the agent respond to reasonable inquiries. This is not the same as an obligation 'to pass accounts' as a fiduciary or to 'account for profits' as a remedy to a wrong. The differentiation is that in one case equity acts to compel an agent to respond to ensure that no equitable fraud has taken place, and, in the other, equity recognizes a wrong has been committed and requires a full statement of transactions preliminary to deciding upon remedial consequences. In both cases, equity compels the agent to explain at least some of his behaviour.

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[41] Lionel Smith, 'Understanding the Power' in Wiiliam Swadling (Ed), *Understanding the Quistclose Trust* (Oxford: Hart Publishing, 2004).
[42] *Edell v. Sitzer* (2001), 55 O.R. (3d) 198 (H.C.J.), para 164; *Fox v Fox Estate* (1995), 28 O.R. (3d) 496 (C.A.); *Vatcher v Paull*, [1915] A.C. 372.
[43] *Re Brook's Settlement,* [1939] 1 Ch 993.
[44] See generally *Schipper v Guaranty Trust Co of Canada* (1989), 69 O.R. (2d) 386 (C.A).
[45] *Knoch Estate v. Jon Picken Ltd.* (1991), 4 O.R. (3d) 385 (C.A.).

## Maintaining a Traditional Approach to Agency

I would suggest that agency for an capable principal and attorneyship for an incapable donor are very different and ought to be regarded and developed differently. Assume that an older adult gives a continuing power of attorney for property and remains capable until his or her death. Must the attorney as agent necessarily keep an account of all transactions as if he or she were acting for an incapable donor? I would suggest the answer is clearly no. Are there circumstances in which the Court can compel the agent to present detailed accounts? Yes. In each case, however, it is conventional agency and not the statutory model of substitute decision-making that is the source of the Court's jurisdiction to compel the attorney to respond.

An attorney for a capable donor is merely 'a conduit whose role is to facilitate contractual relations between the principal and third parties, always acting within the terms of the appointment.'[46] In a simple case, and assuming that the attorney actually acted under the power, the question is only whether the donor of the power approved the actions properly in the power itself or later ratified them by words or conduct[47] rather than looking to whether the attorney acted 'faithfully' or otherwise discharged more extensive fiduciary obligations. The donor always retains the ability to discharge the attorney through a new instrument or revocation of the existing instrument.[48] Thus, in *Fair v. Campbell Estate*,[49] Langdon J held:

> If the grantor is sui juris, he makes the decisions. He is not obliged to involve the attorney in all or any of them. He is not obliged to ask the attorney to help him to implement all or any of his decisions. Where the grantor is sui juris, imposition of a duty to account can cast an impossible burden on the attorney. He could be required to account for decisions over which he had no influence and for transactions that he did not implement in whole or in part…

This is a very traditional approach.[50]

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[46] *Sworik v. Ware* (2005), 18 E.T.R. (3d) 132 (Ont. Sup. Ct.), para. 93. Similarly, *Banton v Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Sup. Ct.), para. 151 ('An attorney for a donor who has mental capacity to deal with property is merely an agent'); approved, *Richardson Estate v. Mew*, 2009 ONCA 403, para. 48; *Miksche Estate v. Miksche* (2009), 97 O.R. (3d) 641 (Ont. Sup. Ct.), para. 64.

[47] For example, *Koperniak v. Wojtowicz*, 2010 ONSC 2424; *Re Coupland Estate* (2005), 25 E.T.R. (3d) 1 (Ont. Sup. Ct.); appeal dismissed, (2006), 25 E.T.R. (3d) 5 (Ont. C.A.).

[48] For example, *Cusinato v. Cusinato*, 2009 CarswellOnt 8899 (Ont. Sup. Ct.); appeal dismissed on other grounds, 2010 ONCA 259.

[49] (2002), 3 E.T.R. (3d) 67, para. 28-31 (Ont. Sup. Ct.). See *Harris v. Rudolph (Attorney for)* (2004), 10 E.T.R. (3d) 129 (Ont. Sup. Ct.), para. 40.

[50] e.g. *Barry v Stevens* (1862), 31 Beav. 258; 54 E.R. 1137 (Rolls Ct.).

I suggest that this is not a jurisdiction arising under the *Substitute Decisions Act*; the statute governs the exercise of powers flowing from a continuing power of attorney or guardianship where the donor is incapable. Rather, it is an ancillary jurisdiction of equity in aid of contract. In a number of cases in recent years, however, courts have been confronted with the question of whether s.42 of the *Substitute Decisions Act* gives the Court jurisdiction to order a passing of accounts where donor was capable when the power was exercised; that provisions reads:

> 42. (1) The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.
> Attorney's accounts
>
> (2) An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.

The thinking seems to have been that an accounting in respect of the exercise of power that might be drafted to survive incapacity (and thus bring itself within the statute) is available through this section notwithstanding that the donor was in fact capable at the time that the power was exercised.[51] With respect, I would suggest that there really is no need to complicate matters by bringing the statute into things. The Court retains a jurisdiction to assist the donor or his representative regardless of the statute based on the avoidance of equitable fraud and that gives the court jurisdiction to make such an order without parasitic reliance on the statute. The important thing is to identify a set of circumstances (say where misappropriation was admitted,[52] or there was circumstantial evidence of unconscionable or wrongful conduct)[53] to allow the Court to exercise its equitable jurisdiction in a principled way and thereafter craft an appropriate order that responds to the circumstances of the dispute. Like in other areas, the Court can control the disclosure of information to balance competing interests and obligations. [54]

Thus consider the situation that has arisen in both *McAllister Estate v. Hudgin*[55] and *De Zorzi Estate v. Read*.[56] In both cases, attorney acted on a power of attorney during the life of an incapable donor to assist in the conduct of personal

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[51] *Stickells Estate v. Fuller* (1998), 24 E.T.R. (2d) 25 (Ont. Gen. Div.), para. 12-14; ; *De Zorzi Estate v. Read* (2008), 38 E.T.R. (3d) 318 (Ont. Sup. Ct.), para. 8.
[52] *Harris v. Rudolph (Attorney for)* (2004), 10 E.T.R. (3d) 129 (Ont. Sup. Ct.), para. 44.
[53] *Cornacchia v. Cornacchia* [2007] O.J. No. 157; 2007 CarswellOnt 223 (Ont. Sup. Ct.); *Bishop v. Bishop* [2006] O.J. No. 3540; 2006 CanLII 30585 (Ont. Sup. Ct.), varied on other grounds, 2007 ONCA 170; *Fareed v Wood* [2005] O.J. No. 2610; 2005 CanLII 22134 (Ont. Sup. Ct.); *Mari v. DiPasquale,* [2000] O.J. No. 201; 2000 CarswellOnt 159 (Ont. Sup. Ct.).
[54] *Schmidt v Rosewood Trust,* [2003] A.C. 709 (P.C.), preferring the Court's equitable jurisdiction to competing theories to order a trustee to disclose information to a beneficiary.
[55] (2008), 42 E.T.R. (3d) 313 (Ont. Sup. Ct.).
[56] (2008), 38 E.T.R. (3d) 318 (Ont. Sup. Ct.).

business and opposed accounting for actions to the estate trustee. In *McAllister Estate v. Hudgin*, beneficiaries of the estate pointed to suspicious circumstances wherein the estate trustee as attorney may have misappropriated the donor's assets. An accounting in the conventional sense was not ordered; rather, production of records sufficed.[57] In *De Zorzi Estate v. Read*, the Court went further and ordered a full passing of accounts, but the operative time frame for the accounting was only three months.[58] I would suggest that these cases are less about any real obligation to maintain accounts as might be said to be part of a duty of care and much more about the need for information to ascertain whether a claim ought to be brought against the attorney.[59]

It is unnecessary in such cases to rely on the *Substitute Decisions Act* in preference to general equity in such cases and what would appear to be a good reason not to do so; the attorney wasn't a 'substitute decision maker' and was instead merely an agent – and agency and attorneyship are very different indeed.

**One Further Point: Agency, Incapacity and Frailty**

A capable donor is an autonomous agent. I have argued that a conventional power of attorney ought not be regarded as a continuing power of attorney where the donor is capable as the fundamental condition upon which the *Substitute Decisions Act* arises (incapacity) is missing. Two circumstances may arise that require clarification.

First, what of the attorney who continue to use, detrimentally, the non-continuing power of attorney after the donor's incapacity? I would suggest that it is not necessary to attempt to bring the attorney who acts on the now terminated agency (because of the principal's incapacity) into the *Substitute Decisions Act* for supervision. Nor is it necessary to have no regard for context and merely rely on the rules of contract and statuteto determine rights and the scope of liability.[60] An attorney who continues to act where the donor is incapable is not a 'substitute decision-maker' as contemplated by the statute because he or she is neither appointed under a continuing power of attorney nor appointed by the Court as a

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[57] (2008), 42 E.T.R. (3d) 313 (Ont. Sup. Ct.), para.16.
[58] (2008), 38 E.T.R. (3d) 318 (Ont. Sup. Ct.), para. 13-15.
[59] See also *Roger Estate v. Leung* (2001), 38 E.T.R. (2d) 226 (Ont. Sup. Ct.) the attorney could be cross-examined to the same effect. In some circumstances, particularly where an action is brought alleging an independent wrong, the Court may use the Rules of Civil Procedure to like effect; see *Kaunaite Estate v. Kazlauskas* [2009] O.J. No. 4696; 2009 CarswellOnt 6867 (On. Sup. Ct.) respecting Rule 51.06(1)(b). As to the Public Guardian and Trustee seeking guardianship and an accounting thereafter, see *Campbell v. Evert*, 2009 CarswellOnt 1533; 2009 CanLII 12321 (Ont. Sup. Ct.); *Ontario (Public Guardian & Trustee) v. Hawkins*, 2009 CarswellOnt 1535 (Ont. Sup. Ct.); *Teffer v. Schaefers* (2008), 93 O.R. (3d) 447 (Ont. Sup. Ct.).
[60] The *Powers of Attorney Act*, R.S.O. 1990, c.C43, s.3(1) preserves the ability to bind the principal to the attorney and third parties through the power provided that person 'acted in good faith and without knowledge of the termination, revocation or invalidity.'

guardian. Such a person is, however, a trustee – a *trustee de son tort*.[61] In such cases it is not that the attorney repudiates the relationship of agency and thus is regarded as a trustee,[62] but that he or she uses the now-terminated power of attorney and exercises dominion and control over the property[63] and takes upon himself or herself 'the custody and administration of property on behalf of others and though sometimes referred to as constructive trustees… [such people are] in fact, actual trustees.'[64] Thus, the attorney can be treated as a conventional trustee but without having to extend the statute in a manner that I suggest is both wrong and unnecessary.

Second, what of the frail and infirm donor who remains capable and has given a general power of attorney with immediate effect – should the law have regard for that person merely as a commercial actor or would it be appropriate to bring supervision of the attorney within the *Substitute Decisions Act*? I would suggest, again, that the statute is not engaged as the donor remains capable. However, the fact that the donor has capacity does not mean that equity cannot extend its jurisdiction to prevent the donor's exploitation. One the one hand, it is important not to regard an agent as more in all cases; to repeat Langdon J's dicta, '[i]f the grantor is sui juris, he makes the decisions' and the agent carries them out.' One the other hand, the presence of the ability for discretion in the exercise of a general power of attorney, influence over interests, and the inherent vulnerability of the frail donor[65] are all consistent with a wider fiduciary duty than merely accounting for actions. As Fletcher Moulton L.J. said:[66]

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of

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[61] *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; *Mara* v *Brown,* [1896] 1 Ch 199; *Air Canada v. M & L Travel Limited*, [1993] 3 S.C.R. 787; *Royal Bank of Canada v. Fogler, Rubinoff* (1991), 5 O.R. (3d) 734 (C.A.); Paul Perrell, 'Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty' (1999), 21 Adv. Q. 94.

[62] Ruth Sullivan, 'Strangers to the Trust', [1986] Est. & Tr. Q. 217, 246 cited with approval in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, para. 57.

[63] Donovan W.M. Waters, Mark Gillen, and Lionel Smith, *Waters' Law of Trusts in Canada*, 3rd Ed. (Carswell, 2005), 490-491.

[64] *Taylor v Davies,* [1920] A.C. 636, 651.

[65] *Hodgkinson v Simms*, [1994] 3 S.C.R .377.

[66] *Re Coomber*, [1911] 1 Ch. 723, 728-29; cited with approval, *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, para. 185.

> fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

Thus, in such circumstances, it is not that the statute is necessary for equity to take jurisdiction over the attorney, it is equity's own doctrines that recognize a differential fiduciary obligation that arises functionally and contextually in response to the vulnerability of the donor in the circumstances of the case. In other words, 'attorney for a frail but otherwise capable donor' does not categorically import wide-ranging fiduciary obligations.

## II. POWERS OF ATTORNEY WHERE THE DONOR IS INCAPABLE: ATTORNEYSHIP

In Ontario, as elsewhere, the inadequacy of the traditional power of attorney regime for use by individuals (especially older adults) to manage ongoing personal care and property management has given way to sophisticated substitute decision-making regimes that can survive mental incapacity.

The Americans led the way.[67] In 1950, President Truman ordered the Federal Security Agency to hold a national conference on aging. In 1954, the State of Virginia legislated that powers of attorney could survive incapacity.[68] In 1961, the 'White House Conference on Aging' recommended that social agencies, legal aid and bar associations, and the medical profession study ways to facilitate the provision of protective services to older people. That same year, the American Bar Foundation released its report on *The Mentally Disabled and the Law*.[69] In 1963, the American *National Council on Aging, Guardianship and Protective Services for Older Adults* produced a report dealing with questions of mental capacity and financial management.[70] The American Law Institute included durable power of attorney provisions in its 1969 *Uniform Probate Code*.[71] The English Law Commission began to look at the matter in the mid-1960s releasing

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[67] See generally Karen E. Boxx, 'The Durable Power of Attorney's Place in the Family of Fiduciary Relationships' (2001-2002), 36 Ga. L. Rev. 1.
[68] 1954, c.486; now Va. Code Ann. § 11-9.1.
[69] Frank T. Lindman and Donald C. McIntyre, *The Mentally Disabled and the Law* (Chicago: Univ of Chicago Press, 1961). See Ralph Slovenko and William C. Super, 'The Mentally Disabled, the Law, and the Report of the American Bar Foundation' (1961), 47 Virginia L. Rev. 1366.
[70] V. Lehmann and G. Mathiasen, *Guardianship and Protective Services for Older People* (New York: National Council on Aging Press, 1963).
[71] § 5-501-505, 8 U.L.A. 418, 418-424. See David M. English, 'The UPC and the New Durable Powers' (1992), 27 Real. Prop. & T.J. 333.

a working paper on the subject in 1967 and a final report in 1970.[72] The Law Reform Commission of Ontario released its own *Report on Powers of Attorney* in 1972,[73] recommending that the law take greater account of mental incapacity in powers of attorney. The process of legislative reform began thereafter in Ontario and eventually produced the *Substitute Decisions Act* in 1992.[74] Eighteen years on, 'substitute decision-making' comes to mind before commercial agency when one speaks of powers of attorney.

The *Substitute Decisions Act* provides:

> 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.
>
> (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.
>
> (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.
>
> ...
>
> 33. (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.

Without any doubt, conceptually or by operation of the statute, an attorney acting under a continuing power of attorney for an incapable donor is a fiduciary. The entire statutory scheme respecting substitute decision-making is predicated on the principle that a person is presumed capable of making his or her own decisions as to their property[75] and personal care.[76] Where a person is incapable, a substitute decision-maker has authority if previously appointed by

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[72] Law Commission for Great Britain, *Powers of Attorney* (Working Paper No.11) (London: Law Commission, 1967). The final report was presented in 1970; Law Commission for Great Britain, *Powers of Attorney* (London: H.M. Stationery Off., 1970). The British legislation started its own development the following year with amendments to the governing power of attorney statute.

[73] Ontario Law Reform Commission, *Report on Powers of Attorney* (Toronto: Dept. of Justice, 1972).

[74] See Jan Goddard, 'The *Substitute Decisions Act*: A Law of Unintended Consequences' (LSUC Special Lectures 2010), 2-5; M. Janice Sweatman, *Guide to Powers of Attorney* (Canada Law Book, 2002), 24-46.

[75] *Substitute Decisions Act*, S.O. 1992, c.30, s.2(1).

[76] *Health Care Consent Act*, 1996. S.O. 1996, c.2, s.4(2).

the incapable person in a suitable power of attorney or is appointed by the Court or where the Public Guardian and Trustee has statutory authority to make decisions.[77]

Without wishing to describe the statute unduly, I would suggest that it is apparent that Part I, ss.31-42, represents a complete statutory scheme for the management of the incapable person's property. I would suggest the fact that the statute ousts the *Trustee Act*[78] is not a reflection of any legislative intention that the obligations of an attorney are any less than a trustee, but rather that the rules developed in respect of conventional trusts are inapplicable to this particular context notwithstanding that the basic model of law is shared. Hence, the *Substitute Decisions Act* has its own provisions respecting the exercise of the attorney's powers to discharge his or her obligations – a conventional trustee need not consult with the beneficiary and/or his family and friends in making decisions,[79] nor have regard for the beneficiary's will,[80] nor have the ability to give gifts or make loans to the beneficiary's family or friends[81] in respect of property that the beneficiary would have an interest in (it would be a breach of trust to do so). The attorney has more than have obligations of investment and distribution to the donor of the power; the attorney is a substitute for the principal decision-maker and must make decisions with the same degree of self-interest (or generosity) that the donor might reasonably display. Moreover, these are powers and duties that 'shall be exercised and performed diligently, with honesty and integrity and in good faith, and for the incapable person's benefit' – the obligations of the attorney *exceed* that of the trustee of a conventionally settled trust.

Notwithstanding that the content of the obligations of the attorney are different, I would suggest that the trusts comparison is apposite in respect how the law supervises the attorney or guardian – how he or she may be retires,[82] pass accounts,[83] and be entitled to take compensation.[84] The rules under the statute differ from a conventional trust in application to context and not in concept. Thus, I would suggest that the best way to conceive of the model established is as a sort of elevated trust but, again, where the obligations of the attorney exceed that of a trustee. Thus, whether the obligation arises from the autonomous act of the donor or the appointment of a guardian by the Court,[85] the attorney has a set of

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[77] Obviously there are practical distinctions between the two offices of attorney and guardian. For example, the posting of security. The *Substitute Decisions Act*, S.O. 1992, c.30, ss. 24(3)(4); 25(1) provides for the posting of a bond by guardians but not attorneys; see *Sundell v. Donyluk*, 2010 ONSC 5019 where the bond was not required.

[78] *Substitute Decisions Act*, S.O. 1992, c.30, s.32(12).

[79] *Substitute Decisions Act*, S.O. 1992, c.30, s.32(5).

[80] *Substitute Decisions Act*, S.O. 1992, c.30, s.35.1. See *Champion v. Guibord*, 2007 ONCA 161.

[81] *Substitute Decisions Act*, S.O. 1992, c.30, s.37.

[82] *Substitute Decisions Act*, S.O. 1992, c.30, ss.11, 69.

[83] *Substitute Decisions Act*, S.O. 1992, c.30, s.42.

[84] *Substitute Decisions Act*, S.O. 1992, c.30, s.40.

[85] I have omitted statutory guardianship purposefully given that this form of guardianship is merely an shortened administrative process that does not necessitate dissimilar treatment in respect of

obligations that have to be exercised exclusively in favour of a beneficiary with a life interest in the property (the donor) and with an obligation to preserve such assets as are available for those enjoying a remainder interest (those interested in the donor's estate, be they creditors or heirs). In place of a conventional settlement is the statute as adjusted by the donor himself or herself within the continuing power of attorney document or by the Court's direction.

Seen in this way, the model of attorneyship set up under the statute incorporates a conventional structure of rights and obligations, compels personal performance, and usefully draws a distinction between the attorney's duty of care in competent administration (exercising the 'care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs') and as a fiduciary (who must act 'with honesty and integrity and in good faith'). Thereafter, substantive liability is more easily predictable notwithstanding that the remedial response to a breach may still pose difficulties.

**The Duty of Care**

It is trite law that duties of care might arise by statute, agreement, or special relationship between parties. It is equally trite law that breach of a duty of care is actionable negligence where loss occurs. Obviously, then, a duty of care is a legal concept that works to ensure competent performance of obligations. Without wishing to restate basic propositions needlessly, it is worthwhile to remind oneself of the differentiation between duties of care and fiduciary obligations.

A duty of care is axiomatically different than a fiduciary duty and it is critical to maintain that substantive distinction both in respect of the appropriate scope of substantive liability and the remedial consequences of a finding of liability. Liability for breach of a duty of care may be excused; breach of a fiduciary duty may not. Liability for breach of a duty of care leads to compensatory remedies; liability for breach of a fiduciary duty may lead to restitutionary remedies. Under conventional trusts doctrine,[86] we take care to recognize that the trustee is not the insurer of the beneficiary's interest. He or she must administer the trust competently and the standard of care is the traditional standard of 'ordinary prudence'.[87] That this is axiomatically different from a fiduciary duty is apparent from the fact that the trustee will be forgiven technical breaches of his or her duty of care where the trustee acts in accordance with the traditional requirements of

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the duty or standard of care owed to the incapable person; *Substitute Decisions Act*, S.O. 1992, c.30, s. 32(9).

[86] *Bristol & West Building Society v. Mothew*, [1996] 4 All E.R. 698 (C.A.); *Armitage v. Nurse*, [1997] 2 All E.R. 705 (C.A.). Cf. *3464920 Canada Inc. v. Strother*, 2007 SCC 24, para. 157-158.

[87] *Fales v Canada Permanent Trust Company* [1977] 2 S.C.R. 302; *Learoyd v Whiteley* (1887), 12 A.C. 727.

honesty and reasonableness.[88] Unlike breach of a fiduciary duty, then, liability is not strict. One sees that same concept exactly in the *Substitute Decisions Act* and it operates exactly the same – the duty of care has a corresponding standard of conduct, and liability is tied to the ability of the attorney to seek the direction of the Court[89] and, where he or she does not do so, plead the statutory attorney's defence.[90] The object of the exercise is to promote sound management of the incapable person's property and hence there is a standard of care that is tied to competence and not perfection. If it were otherwise, attorneyship and trusteeship both would be hollow institutions as no rational person would ever accept appointment.

I would suggest that a number of points can be taken in respect of the duty of care and the necessity that the attorney is capable of performing to the statutory standard.

Obviously the law wishes to respect the autonomous choice of a donor to select his or her attorney. However, and on par with the selection of a guardian in the first instance where no continuing power of attorney was made by the incapable person, there is concern with the integrity of the office of attorney itself – only a suitable person should be allowed to remain in office and a guardianship application may be brought to terminate the continuing power of attorney.[91] It is vital that the person appointed attorney or guardian is capable of discharging the duty of care.[92] This is most clear in those contested guardianship cases (which seem much too frequent) in which courts prefer one potential guardian over another, or a neutral guardian over warring kin, on the basis that mere willingness to promise to do the job is insufficient for appointment – one must be truly seized of the extensive nature of both the duty or care and fiduciary duties that are inherent in guardianship of another's property and be willing to act in accordance with those obligations. Kinship or friendship is not enough to warrant being trusted to discharge the obligations competently whether the obligation arose from the power of attorney, statutory guardianship, or by Court appointed guardianship. In such cases, a neutral actor like the Public Guardian and Trustee[93] or a corporate guardian[94] might be best. However appointed, and despite any dislike for anyone that he or she must work with,[95] attorneys and

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[88] *Trustee Act*, R.S.O. 1990, c.T.23, s.35; *Re Stuart* [1897] 2 Ch 583; *Re Grindey,* [1898] 2 Ch. 593, 601; *National Trustee Co of Australia v General Finance Co of Australasia,* [1905] A.C. 373, 381.

[89] *Substitute Decisions Act*, S.O. 1992, c.30, s.39(1).

[90] *Substitute Decisions Act*, S.O. 1992, c.30, s.33(2).

[91] *Substitute Decisions Act*, S.O. 1992, c.30, s.12(1)(c).

[92] See generally *Abrams v Abrams*, 2010 ONSC 1254.

[93] *Waffle (Public Guardian and Trustee of) v. Duggan*, 1999 CanLII 1388 (Ont. C.A.); *Bennett v. Gotlibowicz*, 2009 CanLII 15890 (Ont. Sup. Ct.). *Thus in Lazaroff v. Lazaroff*, 2005 CanLII 44834, para. 31 (Ont. Sup. Ct.), Corbett J commented that the Public Guardian and Trustee is not 'a guardian *comme les autres'.*

[94] *Chu v Chang*, 2010 ONSC 1816.

[95] Thus in one case the Court directed the warring kin who accepted co-appointment under a power of attorney that they must 'bear their feelings of the other, work together inasmuch as their

guardian must accept that their obligations are owed to the donor and that they will not be easily removed or discharged from office[96] and will be held accountable both substantively and in costs[97] for acts which don't meet the statutory duty of care.

Second, the model clearly speaks to positive obligations are not merely discretionary non-compellable powers set up in a commercial power of attorney. These obligations go much farther than any conventional trusteeship predicated upon the principal obligations of investment and appointment within the terms of the settlement.

Third, the nature of the duty of care as one distinct from fiduciary duties remains in place. Thus, for example, consider the position of a co-attorney who performs to the relevant standard of care but where a breach arises and loss is occasioned due to the negligent conduct of a co-attorney: liability is the same under the *Substitute Decisions Act*[98] as under the applicable standard of care for trustees.[99] In neither case, is the innocent held accountable for the wrong of another as a matter of a duty of care. Moreover, breach of the duty results in compensation.[100] While I will take up remedies below, I would suggest it as nothing short of astounding to infer that the statute limits remedies for breach of fiduciary duty to compensation; hence, compensation under s.33(1) is the norm for unexcused breach of a duty of care alone. All equitable remedies remain in place as against an attorney who breaches his or her fiduciary duties owed to an incapable donor.

**The Fiduciary Duty of the Attorney**

It is trite law that agents have some fiduciary obligations to their capable principals; I have remarked in passing that in the context of a power of attorney these obligations are of a prophylactic nature, seeking to respond to the need to ensure that the agent has not acted outside the scope of the power or committed some equitable wrong. I would suggest that the *Substitute Decisions Act* makes much more extensive use of the fiduciary principle in respect of incapable donors of continuing powers of attorney and have suggested that these fiduciary obligations are *at least* as extensive as that of a trustee.

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personalities will permit them so that the stated and unequivocal intention of… [the donor] be honoured through the administration in her incompetency as she had made those appointments;' *Martin v. Beriault*, 2006 CanLII 346 (Ont. Sup. Ct.), para. 10 per Crane J.

[96] *Mullan v. Parr*, 2009 CanLII 18684 (Ont. Sup. Ct.); *Teffer v. Schaefers* (2008), 93 O.R. (3d) 447 (Ont. Sup. Ct.); *Bennett v. Gotlibowicz*, 2009 CanLII 15890 (ON S.C.).

[97] *Fiacco v. Lombardi*, 2009 CanLII 46170 (Ont. Sup. Ct.); *Chu v. Chang*, 2010 ONSC 1816; *Bosch v. Bosch*, 2010 ONSC 1352.

[98] *Shibley v. Shibley*, [2004] O.J. No. 1577; 2004 CanLII 35096 (Ont. Sup. Ct.).

[99] *Fales v Canada Permanent Trust Company,* [1977] 2 S.C.R. 302.

[100] *Substitute Decisions Act*, S.O. 1992, c.30, s.33(1).

Without wishing to comment on foundational matters unduly, I would suggest that it is necessary to consider the fiduciary principle in some greater detail – but not as the question usually arises; that is, whether there is a fiduciary obligation owed in the circumstances of a given case.[101] Rather, I wish to do so in respect of what sort of wrong is committed in breaching fiduciary obligations, which is a species of equitable fraud.

Equity was, and remains, different from common law. It is traditionally regarded as having developed as a protection against oppression and injustice; relieving against harsh laws, harsh application of law, and harsh results where the law was inadequate. The protection of the vulnerable was the hallmark of the equitable jurisdiction. By at least 1615,[102] the general jurisdiction in equity was recognised as being one exercised to correct men's consciences for 'frauds, breaches of trust, wrongs and oppressions of whatever nature.' One text writer described this conception of the jurisdiction:[103]

> The object of the Court of Chancery was, in the first instance, the purification of the defendant's conscience. It was a cathartic jurisdiction. If a person is allowed to remain in possession of property which it is against his conscience for him to retain, his conscience will be oppressed; and the court, out of tenderness for his conscience, will deprive him, notwithstanding his resistance, of what is so heavy a burden upon it. This principle is at the very bottom of the doctrines of the court.

To give effect to its mandate, the concept of 'equitable fraud' developed and both pre-dates the common law jurisdiction and is a wider concept. The concept of equitable fraud or constructive fraud allowed a court of equity to relieve even against an act that was neither intended as dishonest nor committed recklessly. As Lord Haldane LC said:[104]

> … it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a court of Equity imposes upon him. His fault is that he has violated however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent…

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[101] *Hodgkinson v Simms,* [1994] 3 S.C.R. 377.
[102] *Earl of Oxford's Case* (1615), 1 Rep. Ch. 1; 21 E.R. 485 (Ch.). The case also established that law prevails where there is a conflict – 'equity follows law'.
[103] Walter Ashburner, *Principles of Equity* (London: Butterworths & Co., 1902), 51; W.M.C. Gummow, 'The Injunction in Aid of Legal Rights' (1993), 56 Law & Contemp. Problems 83, 98-99.
[104] *Nocton v Lord Ashburton* [1914] A.C. 932, 954.

This concept of equitable fraud is rooted in a pragmatic view of equity as being able to respond to an infinite variety of offensive acts[105] and has accordingly been left as a fluid rather than rigidly defined concept as a matter of judicial policy. At the same time, equitable fraud is a doctrine bound up with some degree of fault. The difficulty is in assessing the degree of fault that is sufficient to say that an obligation should be constructed and a remedy provided in the circumstances of the case. This is compounded by the nature of equitable fraud as being wider than law, and, at least traditionally, speaking to moral standards of conduct.[106] Notwithstanding, the doctrine remains firmly part of Canadian law.[107]

The jurisdiction to avoid equitable fraud is given effect to, in part, by the fiduciary principle. The term fiduciary comes from the nominative case (*fiducia*) of the Latin verb *fido* (trust).[108] Once again a historical reference helps to understand the importance of the concept: *Fides* was the Roman goddess of faith and trust who oversaw the moral integrity of Rome, and Roman law and its progeny placed great importance on duties that arose from good faith. So too did English equity which was influenced by Roman law through canon law received in England after the Norman Conquest. So too does contemporary Canadian equity regard fiduciary duties as significant; discretion, influence over interests, and inherent vulnerability are the touchstones of such duties.[109] Of course not all arrangements that create fiduciary obligations make all obligations within that relationship fiduciary in character;[110] some care must be taken in setting out the content of the fiduciary duty in question.

Given that s.32(1) of the *Substitute Decisions Act* deems the attorney of an incapable person to be a fiduciary, there is no doubt that he or she is one. Given the nature of the duties set out by the statute and the vulnerability of the incapable donor, I would suggest that the continuing attorney for property is a fiduciary of the highest order, even exceeding that of a conventionally situated trustee. Moreover, I would suggest that the fiduciary principle acts both to combat misfeasance and to mandate performance. Conceptually this is to say that equity might alternately enjoin the attorney to avoid actual and apparent conflicts or interest and give up the fruits of any breach of that standard[111] (as in

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[105] 'Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it'; *Reddaway v Banham,* [1896] A.C. 199, 221 per Lord Macnaghten.

[106] See L.A. Sheridan, *Fraud in Equity* (London: Pitman & Sons, 1957), 188-189, 193-197.

[107] See *Liverpool and London and Globe Insurance Co. v. Wyld,* [1877] 1 S.C.R. 604; *Taylor v. Wallbridge,* [1879] 2 S.C.R. 616; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canson Enterprises Ltd. v. Boughton & Co,.* [1991] 3 S.C.R. 534 ; *K.M. v. H.M.,* [1992] 3 S.C.R. 6; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19.

[108] Canadian courts can be well skilled in etymology; see *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361, 362 (S.C.).

[109] *Hodgkinson v Simms,* [1994] 3 SCR 377; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

[110] *Galambos v Perez*, 2009 SCC 48.

[111] For recent examples, see *Watson Estate v. Beatrice Watson-Acheson Foundation*, 2010 ONSC 5043, para. 18; *Zimmerman v. McMichael Estate,* 2010 ONSC 2947, para. 88-90.

the case of a trustee or any other fiduciary)[112] or specifically perform on the obligation (and neither delegate nor remain inactive). As Brown J described the nature of the obligation recently, it is to act 'motivated *solely* by a concern, *objectively-based*, for the best interests of the incapable person.'[113]

Fiduciary obligations are important obligations. Traditionally we have identified both categories of relationships that give rise to such duties as well as recognising functional criteria that assist in labelling certain obligations as fiduciary in character. This speaks to the social significance of certain types of relationship and the importance that we attach to performance, and, equally, the seriousness with which the law regards breach of such duties. I would suggest that the breach the fiduciary obligations of an attorney owed to an incapable person is so grossly repugnant to social values that the law must respond robustly to deter such conduct.

It is important to be able to draw a distinction, then, between acts which are simple negligence (that is, breach of the duty of care which are not excused) and breaches of fiduciary obligations (which are wrongs because they are axiomatically different than mere negligence). In the case of the *Substitute Decisions Act*, the liability for former arises on breach of the standard of the care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. Liability under the latter arises where the attorney fails to act honestly, with integrity, and in good faith for the incapable person's benefit. As with a trust, a single act can breach one or the other standard or both. However, the nature of the wrong, the policy interest in responding to the wrong, and the remedial response are very different. Consider pre-taking of compensation as against misappropriation of funds subject of a fiduciary obligation. The former is a breach of the duty of care answerable in damages; the latter is much more serious, giving rise to proprietary remedies where appropriate, and, potentially, criminal liability.[114]

## III. THE REMEDIAL RESPONSE AND THE PROBLEM OF THE SELF-INTERESTED ATTORNEY

It is not my intention to survey all the possible bases for liability or remedies that might arise in respect of the attorney's breach of the duty of care and/or fiduciary duties. In respect of the duty of care, the matter is rather straight-forward and leads to compensation for loss. In respect of the fiduciary duties owed by an agent *as trustee de son tort*, an agent with more extensive fiduciary obligations, and both an attorney and guardian under the *Substitute Decisions Act*, the matter is more complicated and leads to restoration of the donor's interests and restitution of the fiduciary's gain. In this respect the full panoply of remedies from

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[112] *Bray v Ford*, [1896] A.C. 44, 51
[113] *Chu v Chang*, 2010 ONSC 1816, para. 13 (emphasis in the original text).
[114] Criminal Code, R.S.C. 1985, c.C-46, s.331 (theft by power of attorney).

personal money awards for equitable compensation or as an accounting of profits to proprietary remedies over assets into which the donor's interests can be traced become available. However, there remains a problem; that of the attorney with an interest in the donor's estate where the donor is either incapable or too frail to alter the status quo. Where appropriate, I suggest that a Court can use equitable remedies to disturb proprietary entitlements arising through testamentary instruments or by statute.

## 1. Agency: The Remedial Goal is Compensation for Loss

As I have argued above, common law governs powers of attorneys in their traditional use as setting up agencies. It is trite law that the attorney is liable in damages for any loss occasioned for acting outside the terms of the power unless ratified by the principal. The agent is liable for loss caused by his or her acts; the action is wholly governed by contract and the normal operation of the *Courts of Justice Act*[115] in relation to interest payable on any money award.

It is equally trite law that the agent has a fiduciary obligation to respond to reasonable inquiries; those inquires may yield information upon which the agent might be made liable on some other basis in law or equity or both. For example, the agent may become a *trustee de son tort* for intermeddling with the property of the principal or the principal may be able to seek legal or equitable remedies as against a third property possessed of the principal's property. Again, this is wholly conventional.

Thus, in the simple case where an older adult gives a power of attorney to a family member to assist him or her in administering their affairs, the agent has no special obligations to keep accounts in the manner of an attorney under a continuing power of attorney or a Court appointed guardian in respect of an incapable person, or, a trustee. I have argued that cases like *McAllister Estate v. Hudgin*[116] and *De Zorzi Estate v. Read*[117] are best explained in terms of the slender fiduciary duty to provide information to the principal and where necessary the Court may take charge of that process. There is a balance between protecting the rights of principals and not exposing agents to onerous record-keeping obligations that were not contemplated as part of the arrangement. In the context of older adults this also balances the interest in regarding such people, absent compelling circumstances to the contrary, as fully autonomous agents.

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[115] R.S.O. 1990, c.C43.
[116] (2008), 42 E.T.R. (3d) 313 (Ont. Sup. Ct.).
[117] (2008), 38 E.T.R. (3d) 318 (Ont. Sup. Ct.).

## 2. The Duty of Care under the Substitute Decisions Act: The Remedial Goal is Compensation

Like an trustee, an attorney or guardian of an incapable person is liable to make compensation for losses[118] to the donor for mismanagement of his or her property that is unexcused by the Court and which flows from the breach. The measure of damages for compensation is 'actual loss which the acts or omissions have caused.'[119] Thus, there are two requirements, that the breach of the duty *caused* the loss and that the attorney is personally *liable* for the breach (that is, the loss was not caused by another attorney's unexcused breach) and must make compensation.[120]

The interest here is to promote sound management. Thus, the issues that arise under this form of liability arise in exactly the same way under the management of a conventional trust. However, whereas a trustee looks to the trust settlement itself and the terms of the *Trustee Act* as retained or ousted, the attorney looks to the provisions of the *Substitute Decisions Act* as adjusted by the terms of the continuing power of attorney. Similarly, a guardian looks to the provisions of the *Substitute Decisions Act* as adjusted by the terms of the Court's order appointing the guardian and the management plan approved by the Court. The action here arises under the *Substitute Decisions Act* and money awards are subject to the normal operation of the *Courts of Justice Act* in relation to interest payable in respect of the damages awarded.

Cases under this head of liability, whether through attorneyship or trusteeship, are normally those that arise on any conventional passing of accounts – for example, whether the attorney correctly identified transactions against which he or she may take compensation.[121] Again, the law is stable on this point.

## 3. Breach of Fiduciary Duty: The Remedial Goal is Restitution

I have suggested that there is structural parallel between the duty of care and fiduciary duties of conventionally situated trustee and a conventionally situated attorney to an incapable donor. I have suggested further, that the attorney's fiduciary obligations exceed that of a trustee given the special vulnerabilities of the incapable donor. Somewhere in this general area, I would suggest that one should properly add the attorney under a not-necessarily continuing but general power of attorney to a capable donor who is so frail and vulnerable that the law

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[118] Thus where the property reverts through resulting trust there is no loss. See *Re Nesbitt Estate*, 2005 CanLII 63817 (Ont. Sup. Ct.); *Down Estate v. Racz-Down*, 2009 CanLII 72075 (Ont. Sup. Ct.).
[119] *Fales v Canada Permanent Trust Company*, [1977] 2 S.C.R. 302, 320 per Dickson J.
[120] *Shibley v. Shibley*, 2004 CanLII 35096 (Ont. Sup. Ct.).
[121] *Bagnall v. Bruckler*, 2009 CanLII 44706 (Ont. Sup. Ct.).

takes special account of him or her and protects against misconduct by the attorney. There is of course a difference – the attorney to the incapable donor have specific obligations to act positively and could be compelled to act by the Court (although one would expect that a guardianship would always be the preferable course). For the purposes of remedial response to breach of each of these attorney's fiduciary obligations, the position largely remains the same. Grossly offensive conduct such as acting faithlessly to a very vulnerable person should be met with a strong response as a matter of principle.

Given the parallel with the structure of trusteeship, I would suggest that it is not necessary for me to review here the many ways that equity can act against the equitable wrongdoer – from personal money awards for compensation[122] to proprietary relief of many kinds to tracing the property into the hands of a third party or perhaps even identifying a third party accessory to the wrong who might also be held liable. There are many variations on the same theme. The Court uses the remedial devices at its disposal flexibly such that the party wronged is entitled to be put in as good a position as it would have been in had the breach not occurred,[123] and, to strip any gains arising from the wrong from the wrong-doer.

I would suggest perhaps one augmentation. A beneficiary is entitled to claim property from the trustee and to hold the trustee to restore the beneficiary to the position that he or she should have enjoyed but for the trustee's breach of fiduciary duties. This is an expansive form of liability that seeks to take account of the type of wrongful conduct (breach of fiduciary duty rather the breach of the duty of care) and make available remedies to deter such conduct. Offensive conduct is not to be lightly excused by a Court even if the settlor had made generous allowance for misbehaviour.[124] I would suggest that Courts should turn their minds to the appropriateness of awarding compound rather than simple interest on legal or actual rates as best restores the donor to the position that he or she could have occupied. The normal rule, of course, does not favour compound interest.[125] In matters such as these, where an attorney has breached a fiduciary obligation and equity could otherwise use proprietary and personal remedies to like effect, it is possible.[126] Thus, in *Bank of America Canada v. Mutual Trust Co.*,[127] Major J. held:

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[122] On equitable compensation, see *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, para. 84, approving the dicta of McLachlan J in dissent in *Canson Enterprises Ltd v Boughton & Co.,* [1991] S.C.R. 534, para. 93.

[123] *Hodgkinson v Simms*, [1994] 3 SCR 377.

[124] For example, the great reluctance to give effect to exculpatory clauses in respect of gross negligence. See *Armitage v Nurse* [1997] 3 W.L.R. 1046. Cf. *Caponi v. Canada Life Assurance Co.*, 2009 CanLII 592 (Ont. Sup. Ct.)

[125] *Courts of Justice Act*, R.S.O. 1990, c.C43, s.128(1), (4)(a).

[126] *Courts of Justice Act*, R.S.O. 1990, c.C43, s.128(1), (4)(g).

[127] 2002 SCC 43. See *Claiborne Industries v. The National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.); *Brock v. Cole* (1983), 40 O.R. (2d) 97 (C.A.).

> 41 Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 CJA, including an award of compound interest... It is of some interest that in Air Canada v. Ontario (Liquor Control Board), [1997] 2 S.C.R. 581 (S.C.C.), at para. 85... Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity.
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> 42 In this case, the Court of Appeal recognized that the court has the jurisdiction to award compound interest under the court's general equitable jurisdiction and that an award of compound interest grounded in equity is, in the language of ss. 128(4)(g) and 129(5), "payable by a right other than under this section"...

I would suggest that compound interest on money awards for breach of a continuing attorney's fiduciary duty be the norm in order to foster a principled view of attorneyship and deter misfeasance and misappropriation. Certainly it is open to the Court to presume compound interest on money awards in respect of misappropriation of conventional trust property[128] and order compound interest even where we trace misappropriated property into the hands of a third party in 'knowing receipt'.[129] The breach of a continuing attorney's fiduciary duty is equally serious as breach of a trustee's fiduciary obligations and the two scenarios ought to be treated similarly for the purposes of this rule.

The recent case of *Zimmerman v. McMichael Estate*[130] provides a useful illustration. Here the defendant was a fiduciary to a deceased woman. He was both an attorney under a power of attorney and a trustee in respect of her alter ego trust (remainder to charitable beneficiaries). The donor was 81 years old, frail, and in ill health when the power was granted. Her capacity was not an issue before the Court and I assume that she was capable until her death notwithstanding that she was in quite ill health. Shortly after making the power of attorney, the donor moved from her private residence to into institutional arrangements in hospitals or seniors' residences until her death four years later. After her death, the estate trustees of her estate sought the attorney/trustee to pass his accounts under the power of attorney and under the trust for the time that he held both offices (he was replaced as trustee after the donor's death). There was protracted litigation in respect of the preparation of the accounts and in respect of objections made by the estate trustees. The accounts in respect as presented by the attorney as trustee were 'inadequate, incomplete and in many respects false.'[131] The attorney and trustee failed to account for cash

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[128] *Waxman v Waxman*, 2008 ONCA 426, para. 5.
[129] *Peppiatt v. Nicol* (2001), 148 O.A.C. 105 (CA.).
[130] 2010 ONSC 2947.
[131] 2010 ONSC 2947, para. 37.

withdrawals, loans he made to himself, and transactions entered into on behalf of the donor and trust. The lack of record-keeping and responding to reasonable inquiries 'frustrated the court's ability to fairly assess his conduct as attorney and trustee.'[132] Moreover, he actively obstructed attempts to get an accounting by the estate trustees and beneficiary. His conduct was 'egregious.'[133] Justice Strathy held:

> [49] Considering that Mrs. McMichael was resident in hospitals and nursing homes during almost the entire period covered by the Trusts, there was an onus on Mr. Zimmerman to explain how these expenses could possibly have been for her benefit or related to his duties in the administration of the Trusts. It is simply impossible to objectively determine whether any of these expenses were legitimate expenses on behalf of Mrs. McMichael or the Trust. Only Mr. Zimmerman is in a position to explain and justify the expenses. It is not sufficient for him to make general statements, such as assurances that he acted with the "utmost rectitude" at all times. He had an obligation to demonstrate that each challenged disbursement was properly made. He made no attempt to do so.

A litany of complaints were brought against the defendant as attorney and trustee. Suffice it to say that Mr. Zimmerman breach his duties thoroughly and fundamentally.

One issue was the pre-taking of compensation by the defendant as trustee. Normally, of course, a trustee is not entitled to pre-take compensation; an attorney for an incapable person is so entitled under the statute. This is more a functional than a principled distinction; whereas a trustee is entitled to fair and reasonable compensation on the traditional tariff as adjusted by the Court,[134] an attorney is entitled to the prescribed rate set out in the Regulation.[135] In neither case, can the trustee or attorney merely help himself to the managed funds. Thus, whether one calls it mistaken pre-taking or merely a mistake in management, there is a world of difference between negligence and misappropriation. In this case a defence was advanced, and rejected, that the attorney's misconduct could more properly be seen as a breach of the duty of care (improperly but honestly pre-taking compensation) rather than a breach of fiduciary duty (through misappropriating property of the donor). His Honour held:

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[132] 2010 ONSC 2947, para. 39.
[133] 2010 ONSC 2947, para. 48.
[134] *Trustee Act*, R.S.O. 1990, c.T.23, s.61. See *Laing Estate v Laing Estate* (1998), 41 O.R. (3d) 571 (C.A.).
[135] O. Reg. 26/95.

[74] In this case, the trust deed impliedly permitted pre-taking. It stated:

> Any of the Trustees may take and be paid out of the Trust Fund or the income there from or both in such proportions as the Trustees see fit such compensation as is reasonable having regard to the size of the Trust Fund and the time and effort expended by him or her in connection with the administration of the trusts herein contained…

[75] The authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable, and this required that a reasonable calculation be made and that a record of the taking and the calculation be preserved. In the absence of such a record, the court and the beneficiaries have no way of distinguishing between a taking of compensation, a loan or a defalcation.

…

[83] Mr. Zimmerman failed to keep any record of his pre-takings of compensation, although he was required to do so by the *S.D.A.* in relation to the Power of Attorney. There is no record whatsoever of his calculations of the compensation to which he was entitled. There is no evidence at all that he ever communicated with the beneficiaries of the Trust, or with any of the professional advisors, to explain that he was pre-taking compensation or the basis on which it was being calculated. Although he suggested at one point in his evidence that he was taking compensation quarterly, the evidence does not bear this out.

[84] I accept that somewhere in the back of his mind Mr. Zimmerman knew that he was entitled to compensation as a trustee and he may even have made some sort of rough and ready calculation of his entitlement. If that is what he was doing, the onus was on him to ensure that his takings were reasonable and appropriate in all the circumstances. The onus was also on him to ensure
that his takings were open and documented. He did none of these things.

It was clear then that the defendant as trustee and attorney acted improperly by any standard. What is puzzling about *Zimmerman v. McMichael Estate* and others like it[136] is the remedy:

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[136] Similarly, *Volchuk Estate v. Kotsis*, 2007 CanLII 28527 (Ont. Sup. Ct.); *Jacobs Estate v. Hershorn* (2006), 23 E.T.R. (3d) 308 (Ont. Sup. Ct.); *Fareed v Wood*, [2005] CanLII 22134 (Ont. Sup. Ct.); *Re York Estate*, 1998 CarswellOnt 3184 (Ont. Gen. Div.).

[110] I come to these conclusions on the undisputed evidence and on the basis of Mr. Zimmerman's own admissions. In light of these conclusions, Mr. Zimmerman is entitled to no compensation for his services as attorney and trustee.

[111] Mr. Zimmerman will be required to repay the amounts that he has pre-taken by way of compensation, in the total amount of C$356,462.50 and US$85,400.00, together with pre-judgment interest from the date of each taking.

[112] For the reasons given, Mr. Zimmerman shall repay the sum of $34,064.55 paid to Reynolds Accounting Services for the preparation of accounts.

[113] Mr. Zimmerman must also reimburse the Trust for $2,000.00, being the value of the missing Lismer sketch.

It seems clear in this case that no matter how the fiduciary duty was constructed (that is as attorney or as trustee), the defendant breached not merely the duty of care but also his fiduciary duties. He took money for his own benefit, in sums that could not be considered reasonable, kept few records, frustrated all attempts at getting him to account, and was ultimately denied compensation at all. Given that the proceedings may not have yet terminated at trial, perhaps I have misconstrued the state of the litigation. However, assuming for the sake of argument that my apprehension of the facts is accurate, one would think a remedy that reflected the seriousness of the breach was consistent with an award of compound interest actual or the legal rates, whichever is higher.

**4. The Problem of the Self-Interested Attorney**

In the last fifty years or so in Canada, England, Australia and elsewhere, the nature of the constructive trust has been closely examined. Such a trust was said to have operated, in traditional terms, either 'institutionally' or 'remedially'. 'Institutionally' meant, for example, that some exceptional trusts could be fully constituted by the Court on the basis that the settlor did everything he or she could have done to prefect the trust, but there was still a failure to vest in circumstances that the failure was not attributable to the settlor. Hence the Court could 'perfect the imperfect gift' through a constructive trust, institutionally and without reliance on judicial discretion.[137] The remedial constructive trust is much more contentious - remedy for what? The utility and significance of the development of the law of unjust enrichment becomes immediately apparent; an explanation for why a mistaken payment, for example, might yield a restitutionary

[137] *Re Rose,* [1952] Ch. 499.

rather than a compensatory remedy,[138] or, why 'quantum meruit' arises in autonomous unjust enrichment based on the reasonable expectations of the parties.[139]

Those that take an expansive view of unjust enrichment take a correspondingly narrow view of equity and its traditional soft standard of conscience;[140] not for them are spirited defences of equity and conscience as creative devices.[141] It masks discretionary decision-making and sloppy thinking ('palm-tree justice') and ought to yield to the quasi-scientific approach of unjust enrichment. In essence, at least some commentators such as the late Prof. Birks, argued for a more civilian approach to equity and a categorization of 'juristic reasons' or 'unjust factors' that might justify an enrichment staying with or returning to one party or another. Certainly a remedy for a legal wrong like 'fraud' (deceit) was one such factor that might justify proprietary relief; 'equitable fraud' less certainly so. Canadian courts accepted a middle ground - yes to unjust enrichment and an autonomous action in unjust enrichment, and, yes also to traditional equity. I would suggest that the pragmatic Canadian approach preserves equity as an important and flexible jurisdiction while still allowing for greater precision in how the Court may act where there is no traditional wrong or doctrine to explain why an enrichment and corresponding deprivation is suspicious and might yield to an order restoring the *status quo ante*.

Thus far in this paper, I have discussed the obligations of an attorney under a continuing power of attorney for an incapable donor and have remarked upon both the duty of care that such an attorney must discharge, and, the extensive fiduciary obligations owed by the attorney to the donor. Liability in these circumstances does not arise in autonomous unjust enrichment; liability arises under the *Substitute Decisions Act* or in equity as appropriate to the circumstances. There is a wrong that drives liability. At one extreme of attorney liability (breach of the duty of care), liability may be excused; there is a statutory defence. At the other extreme, egregious breach of fiduciary duty, liability is never excused and the remedial response is robust. The question that remains to be confronted is this: how expansive can be the remedial response – may it disturb proprietary entitlements of a very particular kind, that is that arise as a matter of inheritance? I suggest that the answer is yes and that the Court has a

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[138] *Chase Manhattan Bank v. Israel-British Bank,* [1981] Ch. 105.

[139] I have considered the question is some detail elsewhere; 'Unjust Enrichment Claims Against the Estate Based on the Provision of Services to the Deceased' (2009), 29 E.T.P.J. 59

[140] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996), 26 W.A.L.R. 1; Peter Birks 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999), 23 M.U.L.R. 1.

[141] See the recent speech of Lord Neuberger MR, 'Has Equity Had Its Day?' (Hong Kong University Common Law Lecture 2010); available online the Judiciary of England and Wales web-site, http://www.judiciary.gov.uk/. See also Sir Anthony Mason, 'Themes and Prospects' in P.D. Finn (Ed.) *Essays in Equity* (Sydney: Law Book Co.,1985); 'Equity's Role in the Twentieth Century' (1997), 8 King's College L.J. 1; Lord Justice Millett 'Equity - The Road Ahead' (1995–96), 6 King's College L.J. 1.

jurisdiction to use a constructive trust to, in essence, order that the attorney is incapable of inheriting from the wronged donor either to the extent of the wrong or perhaps at all. I don't suggest that this be an automatic response at all; merely, that we recognize that if attorneyship is to be fostered as a legal institution we must ensure that egregious wrongs not go unremedied and wrongdoers not be allowed to profit, even indirectly, from their wrongs.

Consider the following not uncommon scenario: an older adult gives a continuing power of attorney for management of her property to an adult child. The donor's will leaves her estate to her children equally. The attorney accepts the appointment and acts using the power while the donor remains capable and under her direction; the attorney is the agent of the donor. The donor is later diagnosed with dementia and is incapable of managing her property. The *Substitute Decisions Act* is now fully engaged and the obligations owed by the attorney to the donor are extensive; the attorney is a fiduciary of the highest order. Left unsupervised by the donor, the attorney acts badly. Perhaps he misappropriates property or merely omits to do anything at all. The donor is denied the use of her funds; perhaps the effect of this opportunity is not keenly felt in the circumstances of the donor but perhaps it is all too keenly felt (those who know of the variability in the quality of available of long term care will instantly appreciate the differences that might arise). In any case, in this way the attorney is able, alternately, to take an advance on his expected inheritance or to preserve the assets of the donor to enhance the attorney's expected future share of the estate or both.

Aside from the possibility of stanching the bleeding through the appointment of a guardian while the door remains alive, one would think, based on the foregoing discussion, that the proper course would be an action against the attorney for breach of the duty of care and breach of fiduciary duty. However the matter is brought before the Court, and in whatever form, what should be the proper remedial response? Obviously a money award, but at first blush it would seem that whatever remedy is ordered it may well prove ineffective. If the order is made *inter vivos*, and assuming that the donor dies with assets and that the estate is solvent, the attorney is in effect merely forced to pay money into a sort of escrow to be claimed in some remaining part later as a gift due to him or her under the Will. If the money is paid to the estate of the donor after his or her death, the attorney seems to transfer the money from one pocket to another. Such a result seems inadequate.

To my mind, the resolution of the *lacuna* set out above relies upon the law fostering the integrity of attorneyship through appropriate standards of conduct and effective remedies to answer improper conduct, both negligent and fraudulent in character. If necessary, and with some trepidation, I suggest that in an appropriate case, the Court retains an equitable discretion to respond to an egregious case of wrongdoing by a fiduciary by disturbing the entitlements due to him or her in the donor's will or that would run in his or her favour through the

intestacy rules. What then should be the result? The attorney should have to provide compensation with compound interest to the estate unless the donor or her estate might be better off by claiming a proprietary remedy against property into which the misappropriated money can be followed or traced. This has the effect of both restoring the donor's interest and forcing the attorney to disgorge any gain. Thereafter, I would suggest that the trustee should be held incapable of inheriting any share of the estate up to the amount awarded against the attorney; that is, the attorney is a constructive trustee in favour of innocent heirs to that amount. If appropriate, as in the case of nonfeasance producing a difficulty in quantifying the harm, the Court ought to presume complete incapacity to inherit with the attorney having the onus of rebutting that presumption and establishing a quantum of that the Court might in good conscience allow the attorney to retain. I will endeavour to explain why I suggest that this solution is appropriate in law and on policy terms.

In a case about the extent of liability for the equitable wrong of breach of confidence, Lord Griffiths said '[t]he statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case.'[142] Lord Griffiths' point was that equity cannot be allowed to be used in an unpredictable and undisciplined way. While it may properly be a creative jurisdiction, 'equity acts consistently and in accordance with principle.'[143] I suggest that it would be in accordance with the principle that 'equity will not suffer a wrong to be without a remedy' to allow a constructive trust to be ordered to remove the profit from any wrong accruing to the wrongdoer.

Thus I would suggested that the jurisdiction to disturb proprietary entitlements through proprietary remedies in equity can be understood as follows: first, we look to the nature of the wrong to discover whether the harm is sufficiently significant to allow for such a powerful remedy to be ordered. Second, we consider whether the remedy is appropriate in the circumstances of the case; that is, would there be unintended and deleterious effects on third parties that might otherwise have equally good, or superior, claims against the property to be made subject of the order. Thus, as McLachlan J said in *Soulos v. Korkontzilas*, a constructive trust might arise in response to an equitable wrong in the form of a breach of fiduciary duty as a matter of orthodoxy:[144]

> 33. ... [t]he constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

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[142] *Attorney General v Guardian Newspapers Ltd (No 2),* [1990] 1 A.C. 109, 268.
[143] *Muchinski v Dodds*, [1985] HCA 78, para. 7, per Deane J.
[144] *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217, para. 33-35.

> 34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
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> 35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

I would suggest that the institution of attorneyship is socially significant, arises on high standards of trust and probity, and requires as a matter of good conscience that attorneys be prevented from profiting from wrongs directly or indirectly. It is the very best example in fact.

What, then, of the testamentary context? On the one hand we need not be concerned with how third parties like creditors might be concerned if we recognize that it is only the attorney's inheritable share that is at issue; that is, the question arises only if the estate is solvent. Thus, if the attorney restores the estate to the position it should have been in on the death of the donor and third party creditors have a superior claim to the assets of the estate, the question of disturbing the attorney's inheritance never arises. Again, the solution works well as third parties may now look to the restored assets to satisfy their claims and the wrongdoer no longer profits from his wrong.

We are still left with the converse situation, the estate is solvent and the attorney is in a position to recoup in whole or in part the money restored. If he pays to the estate and there is an equal division between his siblings and himself, he is allowed to retain his share of the proceeds paid. While this does not allow him to profit from the wrong, it certainly provides a discount to the award and provides no deterrence to other wrongdoers. Obviously we are not dealing with criminal law punishment but it is important to foster the integrity of attorneyship.

The law does not interfere with proprietary entitlements flowing from a testamentary instrument easily, any more than it disturbs proprietary entitlements in other contexts. In the testamentary context there is, however, a jurisdiction based on the conduct of their heir both at common law and even under the Quebec Civil Code.[145]

There is a long-standing, but somewhat uncertain,[146] jurisdiction not to allow those who cause the death of another unlawfully to inherit from their estate, receive insurance proceeds on the life of the victim, or take property under the doctrine of survivorship in respect of joint tenancies. In *Brissette Estate v. Westbury Life Insurance Co.*,[147] the insurer sought to avoid payment under a policy of life insurance where a husband murdered his wife, was the designated beneficiary to the proceeds of a policy of life insurance, renounced his claim in favour of her estate, and then sought to have the proceeds paid into the estate.

The issue in *Brissette Estate* was whether the policy of insurance should be enforced, and, if so, whether a constructive trust might arise against the murderer. For the majority of the Court, Justice Sopinka denied the claim on both bases. The contract of insurance contemplated that the husband would inherit, but that he could not do so on the traditional rule that one who murders the insured cannot claim insurance proceeds on the victim's life. The dissenters, Gonthier and Cory JJ., would not allow the murder to inherit but held that the contract should be enforced narrowly in favour of innocent heirs; in other words, that the insurer would seem to gain inappropriately. Sopinka J held: [148]

> 7 In order to determine whether, as a matter of public policy, the Court should resort to the device of a constructive trust, it is appropriate to consider whether the application of public policy which denies payment to the felonious beneficiary would work an injustice if recovery is denied to the appellants. After all, it is this policy that prevents the

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[145] Civil Code of Québec, L.R.Q., c. C-1991, Art. 621(1): 'The following persons may be declared unworthy of inheriting... a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner.' See *Piché v. Fournier*, 2010 QCCA 188. Such conduct includes non-criminal conduct including fraud and abuse of the deceased – 'it covers a broader scope than that of the commission of a crime'; *Commentaires du ministre de la Justice*, T-1, p.366. The offensive conduct must either be intentional or voluntary. Thus, a defence of not criminally responsible to a murder charge that is accepted may allow the murdered to inherit.

[146] See *Demeter v. Dominion Life Assurance Co.* (1982), 35 O.R. (2d) 560 (C.A.); *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; *Houghton v Houghton* [1915] 2 Ch. 173; *Re Gore* [1972] 1 O.R. 550 (H.C.J.); *R v National Insurance Commissioner* (1981), 1 All E.R. 769 (Q.B.); *Dunbar v Plant,* [1998] Ch. 412. See The Law Commission, *The Forfeiture Rule and the Law of Succession* (Law Com No. 295) (The Law Commission for England and Wales, 2005); Tasmania Law Reform Institute, *The Forfeiture Rule (Issues paper No. 5)* (Tasmania Law Reform Institute, 2003); Timothy Youdan, 'Acquisition of Property by Killing' (1973), 89 L.Q.R. 235; Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008), 8 Law and Justice Journal 342.

[147] [1992] 3 S.C.R. 87. See also *Re Dredger* (1976), 12 O.R. (2d) 271 (H.C.J.)

[148] *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87.

contract from taking effect in accordance with its terms. If denial of recovery by the estate is not inconsistent with this policy, then there is no misuse of public policy which would warrant a conclusion that its application is unjust.

...

9 The rationale of the policy which denies recovery to the felonious beneficiary is that a person should not profit from his or her own criminal act...

...

13 But, even if I had concluded that the denial of recovery to the estate was inconsistent with public policy, in my opinion it would be contrary to established principles of equity to employ a constructive trust in this case. A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her own wrongful conduct. For example, in Schobelt v. Barber, [1967] 1 O.R. 349 (H.C.), the court imposed a constructive trust on property which passed to a joint tenant who had murdered his co-tenant. By virtue of the instrument creating the joint tenancy the surviving tenant acceded to the whole property. In order to prevent the wrongdoer from being unjustly enriched, the whole property was impressed with a constructive trust with the estate of the deceased joint tenant as beneficiary of one-half of the property.

14 The requirement of unjust enrichment is fundamental to the use of a constructive trust...

...

16 In this case, no claim of unjust enrichment has been made out... It cannot be said that but for Gerald's act, Mary's estate would have recovered the money. The wrongdoer does not benefit from his own wrong, nor is the insurer in breach of its duty to Mary. It is simply complying with the express terms of the contract. Moreover, there is no property in the hands of the wrongdoer upon which a trust can be fastened. By virtue of public policy the provision for payment in the insurance policy is unenforceable and no money is payable to the wrongdoer. The effect of a constructive trust would be to first require payment to the wrongdoer and then impress the money with a trust in favour of the estate...

Thus a constructive trust will arise in testamentary circumstances in relation to unjust enrichment, which on the majority's view did not arise.

*Brissette Estate v. Westbury Life Insurance Co* arose before the authoritative recognition of autonomous unjust enrichment as an action in *Garland v*

*Consumers Gas Co.*[149] Now, we would approach the matter as follows. If the contract, will or other instrument is effective to convey the interest, then autonomous unjust enrichment does not arise; that is, there is a traditional juristic reason for the gain of the inheritance. Of course, within its own terms, the law may hold the instrument (like the contract of insurance)[150] to be ineffective where, say, the beneficiary murders the insured. Given that we don't conceive of unjust enrichment as a vehicle to promote discretionary decision-making at large any more than equity (*unjust* enrichment relates to absence of juristic reason not 'justice'), then one returns to the wrong itself and its remedy. This allows for principled and controlled evolution of doctrine within the area of law giving rise to the wrong substantively rather than removing the matter to unjust enrichment for resolution.

Thus we return to equity. Having argued that a constructive trust is available as a remedy to force restoration, make restitution, and prevent the wrongdoer profiting from his wrong, it is only necessary to determine how such a question might be analyzed. I would suggest that the method I have suggested helps to treat the case of the attorney who does nothing at all in the face of the donor's need; that is the attorney who is liable for complete nonfeasance. If the donor was alive, of course, we could (in theory) order that the attorney personally perform the obligations. One would think that such a faithless and neglectful attorney would be an unsuitable person and should be replaced by a guardian; indeed, we might say that the attorney should give way to the guardian and ought to suffer in costs in any proceedings that arise unnecessarily in respect of the appointment of a guardian in succession.[151] Thus, I would suggest, the easiest approach is to reverse the onus and put the attorney to the task of showing that the Court in good conscience might allow him or her to take of the inheritance that would otherwise accrue to him or her. This seems a pleasing result on principle and, I suggest, would work quite pragmatically as well.

## IV. CONCLUSION

Powers of attorney set up an agency in traditional practice. Under the regime created by the *Substitute Decisions Act*, attorneyship under a 'continuing power of attorney' in respect of an incapable donor means much more. For this important institution to evolve properly, the law must develop and foster a principled approach both to attorney liability and the remedial response to such liability. One must distinguish between the duty of care and the extensive

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[149] 2004 SCC 25.

[150] Cf. *Richardson Estate v. Mew*, 2009 ONCA 403

[151] It seems quite apparent that the trend is not to encourage litigation on powers of attorney or in respect of guardianships for either property or personal care and to use the costs rules to deter litigation. See *Bosch v. Bosch*, 2010 ONSC 1352; *Chu v Chang*, 2010 ONSC 1816; *Bennett v. Gotlibowicz*, 2009 CanLII 48503 (Ont. Sup. Ct.); *Bailey v. Bailey*, 2009 CanLII 72071 (Ont. Sup. Ct.); *Fiacco v. Lombardi*, 2009 CanLII 46170 (Ont. Sup. Ct.); *Teffer v. Schaefers*, 2009 CanLII 21208 (Ont. Sup. Ct.).

fiduciary obligations owed to the donor. Upon breach, compensation follows the former and restoration and restitution the latter. Where appropriate, and in extreme cases, I suggest that Courts of equitable jurisdiction may use the full range of equitable proprietary remedies to ensure that an attorney who breaches his or her fiduciary duties does not profit from the wrong directly or indirectly even to the extent of disturbing inheritable interests in the donor's estate by the attorney. I don't suggest that this be an automatic response; rather, I suggest that if we recognize that attorneyship is to be fostered as a vital legal institution, we must ensure that egregious wrongs do not go unremedied and wrongdoers not be allowed to profit, even indirectly, from their wrongs.

# Misfeasance, Nonfeasance, and the Self-Interested Attorney

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**Problem:** The attorney under a 'continuing POA' misappropriates from an incapable donor and is ordered to repay – but stands to inherit; seemingly a wrong without an effective remedy.

**Solution?** *Is there jurisdiction to disturb the attorney's proprietary entitlements that arise under the Will / on intestacy?*

- **Problem:** a sizeable body of law has developed around the Substitute Decisions Act; but there is inconsistency in application.
- **Required:** missing in many of the cases is a structured method of analysis.
- **Method:** Distinguish between conventional administrative obligations & fiduciary duties, and, appropriate remedies for each.


## Donor is Capable: Agency

- Simple and conventional agency model.
- Attorney bound by terms of agency.
- Fiduciary obligation to provide information (to allow action to be brought for misuse of the power).
- Liability is for loss. Remedy is compensation.

## Donor is Incapable: SDA

- *Substitute Decisions Act* sets a comprehensive code, adjustable by donor within the POA.
- Compelling social interest in fostering principled model of attorneyship.
- **Need for bright lines and effective remedies to maintain integrity of attorneyship** and to allow doctrine to develop properly.


## Attorneyship: Structure of the Model

- *Looks like a conventional trust*:
  - Settlor = donor
  - Trustee = attorney
  - Beneficiaries = donor (for life) + donor's estate (remainder)
  - Instrument = SDA & POA (attorneyship)

## Attorneyship: Content

- *Operates like a conventional trust*:

attorney has a duty of care (liability can be excused via attorney's defence) and fiduciary duties (liability is strict).


## Attorneyship: Remedies

- Breach of the Duty of Care: Compensation.
- Breach of Fiduciary Duty:
  - Restoration
    - Compound interest where appropriate; *Courts of Justice Act*, s.128(1), (4)(g).
    - Pr esumed? *Waxman v Waxman*, 2008 ONCA 426
  - Restitution: 'a wrongdoer should not be allowed to profit from his wrong' = full range of proprietary relief.

## Resolving the Problem of the Self-Interested Attorney

**Problem:** Attorney inherits, in whole or in part, the assets misappropriated and repayable or repaid.

**Solution:** Equitable jurisdiction to order, where appropriate, proprietary remedy in favour of innocent heirs – a form of forfeiture.

Misappropriation of an incapable person's property is a form of elder abuse.