



The 2015 Guide to
Advising the Elderly Client
Key Issues, Best Practices & Practical Approaches

November 4 - 5, 2015

Best Practices and Pitfalls in Guardianship Proceedings

Best Practices in Guardianship Proceedings



AGENDA



- Getting to Guardianship - Overview of Procedure:
 - Threshold Issues for Court-Appointed Guardianship
 - Other Factors to Consider at the Outset
 - Statutory Requirements of Application
 - OPGT Involvement (investigations, statutory guardianship)
 - Replacement / Termination of statutory guardianship, substituting court-appointed guardians
- Lessons from Litigation:
 - Evidentiary issues
 - Access / "visitation rights" / "custody"
 - Compensation
 - Costs
- ...in 45 minutes...



NOT ON THE AGENDA



- Role of Section 3 Counsel
- Guardianship of Property of Minors / CLRA
- POA documents
- Applications to Pass of Guardian's Accounts
- Litigation Guardians under Rules of Civ Pro
- Why won't the OPGT do what I want?



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OVERVIEW OF PROCEDURE

THRESHOLD ISSUES



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PROCEDURE



- *Substitute Decisions Act, 1992, SO 1992, c 30*
- Court-appointed guardians of property/person
- 3 THRESHOLD ISSUES:
 1. Lack of Capacity? s.22(1), 25(1), 55(1), 58(1)
 2. Necessary for a decision to be made on behalf of the allegedly incapable person? *Ibid.*
 3. Less restrictive alternative to guardianship? s. 22(3) / 55(2)



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PROCEDURE



- THRESHOLD ISSUES:
 - 1) Capacity to manage property
 - Presumption of capacity, s. 2(1)
 - Definition, s. 6
 - The ability to understand the information that is relevant in making a decision in the management of one's property; and
 - The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.



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PROCEDURE



- THRESHOLD ISSUES:

- 1) Capacity to manage personal care

- Presumption of capacity, s. 2(2)

- Definition s. 45

- The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
 - The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
 - "Right to knowingly be foolish" *Koch (Re)* (1997), 1997 CanLII 12138 (ON SC), 33 O.R. (3d) 485 (Gen. Div.), at p. 521



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PROCEDURE



- THRESHOLD ISSUES:

- 2) Decision required?

- Property: s. 22(1) / Person: 55(1)
 - *Deschamps v Deschamps*, [1997] OJ No 4894 at para 11, 75 ACWS (3d) 1130 (ONSC)



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- **THRESHOLD ISSUES:**

- 3) Less restrictive alternative?

- Per SDA s. 22(3) and 55(2)
 - Capable of granting powers of attorney?
 - HCCA?

OVERVIEW OF PROCEDURE

OTHER FACTORS TO CONSIDER

PROCEDURE



- OTHER FACTORS TO CONSIDER:

1. HCCA
2. Partial / time-limited appointments
3. Is the applicant a good candidate?
4. What the applicant should know in advance
5. Duties and responsibilities / compensation



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PROCEDURE



- OTHER FACTORS TO CONSIDER:

- 1) Consider the *HCCA*
 - s. 4(2) a person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services



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PROCEDURE



- OTHER FACTORS TO CONSIDER:

- 1) Consider the *HCCA*

- Section 20 of the *HCCA* provides a hierarchy of persons who may give or refuse consent on behalf of a person who is incapable with respect to treatment
- "treatment" is defined in subsection 2(1) as, inter alia, anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment
- *Cuthbertson v. Rasouli*, [2013] 3 SCR 341



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PROCEDURE



- OTHER FACTORS TO CONSIDER:

- 2) Is the applicant a good candidate?

- Attorney? Wishes of Incapable Person? Close Personal Relationship?
 - Criteria = s. 24(5) / 57(3); *Lazaroff v Lazaroff*, [2005] OJ No. 5197, 23 ETR (3d) 75
- If providing paid prescribed services....Spouse, partner relative or attorney?
 - SDA s. 24(1); ss. 57(1), 57(2), 57(2.1), 57(2.2)



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PROCEDURE



▪ OTHER FACTORS TO CONSIDER:

3) Help the applicant to avoid "pitfalls":

- Role of Fiduciary per 32(1) and 66(1)
- Participation of incapable person per 32(3) and 66(5)
- Foster regular contact / Consultation "supportive family and friends" and caregivers per 32(4), 32(5), 66(6), 66(7)
- Accounts per s. 32(6) and O Reg 100/96
- Standard of Care ss. 32(7-8); Priority to Incapable s.37
- Risk of liability for breach s. 33(1)
- Costs...more on this later....



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▪ OTHER FACTORS TO CONSIDER:

3a) Help the applicant to avoid "pitfalls":

- Applicant ≠ the allegedly incapable adult – lawyer for applicant cannot also represent AIA
- Beware of joint retainers for applicants in high conflict families
- Each applicant for joint guardianship should swear his or her own affidavit and show each meets criteria



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PROCEDURE



- **OTHER FACTORS:**

4) The allegedly incapable adult ("AIA") is entitled to oppose the application / assessment

- 24(5) / 57(3) – AIA's wishes are factor for court to consider
- Court-ordered assessment ss. 79(1) if test met
- Principles to be applied: *Abrams v. Abrams*, [2008] O.J. No. 5207 (S.C.J.)
- Requires compelling evidence to override presumption of capacity or court will dismiss application (see *Jhauj v Kooner*, 2015 ONSC 4598 (CanLII))



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OVERVIEW OF PROCEDURE

STATUTORY REQUIREMENTS



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Applications under s. 69



PROPERTY

- 70(1): Components
 - Evidence re capacity
 - Consent of guardian
 - Management Plan
 - Applicant's Statement
- 25(2)(b): Bond
 - *Gryszczuk v Gryszczuk*, [2002] OJ No 5944 at para. 7.
- 69(1), 69(6): Service

PERSON

- 70(2): Components
 - Evidence re capacity
 - Consent of guardian
 - Plan of Guardianship
 - Applicant's Statement
- 69(3), 69(6): Service



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Applications under s. 69



"PITFALLS" TO AVOID:

- Dispensing with Service?
 - Only re family members, and only if they waive their right to be served: *Boyd v Thomson*, [2006] OJ No 4796 at para. 32, 28 ETR (3d) 312
 - See *Blair v. Reijers*, 2013 ONSC 6021 – failure to serve all parties = a factor in costs
 - PGT takes position language in SDA makes service under s.69 mandatory



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Applications under s. 69



- **UNOPPOSED / SUMMARY PROCEDURE**

- 72 (property)
- 74 (person)
- 77 (1) (no hearing)
- 77(2) for additional materials required in application record



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Applications under s. 69



- **"PITFALLS" TO AVOID:**

- You may file unopposed, but it's possible that allegedly incapable adult or other party could attend
- If you're not sure, speak to local court staff about scheduling
- Do not keep court date if it's not needed - check your practice directions, check with local bench and bar association, keep the court informed if status changes
- Serve the PGT at least 10-15 days before hearing to get response



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OVERVIEW OF PROCEDURE

PGT INVOLVEMENT



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PGT



- 1) Respondent in guardianship proceedings under section 69
- 2) Appoints section 3 counsel if ordered to do so
- 3) Investigates in prescribed circumstances
- 4) Statutory Guardianship of Property in prescribed circumstances



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1) Respondent in Applications / Motions

- Application to Terminate Stat. Guardian of Property
 - 69(0.1)
- Application to Appoint Guardian of Property/Person
 - 69(1) / 69(3)
- Motion to Terminate Guardianship of Property / Person
 - 69(2) / 69 (4)
- 69(8) – Parties are persons served above
- Letter from counsel for OPGT as “written submissions” if OPGT is served within 15 days

2) Appoints Section 3 Counsel

- If Ordered to do so under section 3
- “Pitfalls” to avoid:
 - make sure this relief is included in your Notice of Application
 - appreciate that no substantive relief should be obtained against the A.I.A. without section 3 appointment
 - Substantive relief includes a court ordered capacity assessment

3) Duty to Investigate

- section 27 (property), section 62 (person)
- Evidence of lack of capacity, AND
- serious adverse effects
 - Loss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependants
 - Serious illness or injury, or deprivation of liberty or personal security
- Guardianship Investigations Unit, 416-327-6348 or toll-free at 1-800-366-0335 or TTY: 416-314-2687.

4) Statutory Guardianship (property only)

- Section 15(1) – assessment by physician under the *Mental Health Act* on admission of AIA to psychiatric facility /unit
- Section 16 of SDA -assessment by designated capacity assessor (AIA must consent to the assessment) that results in finding of incapacity if requestor has no knowledge of:
 - Any pre-existing continuing powers of attorney of property / personal care
 - Any application before the court to appoint guardian of property



REMOVAL OF GUARDIANS

WHALEY
ESTATE LITIGATION

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Removal



- 1) Replacing the PGT as statutory guardian of property
- 2) Terminating the statutory guardianship all together
- 3) Substituting a court-appointed guardian

WHALEY
ESTATE LITIGATION

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1) Replacing the PGT as statutory guardian:

- s 17(1)
- Form 1: General, O Reg 26/95 and Management Plan
- incapable person's current wishes, if they can be ascertained, and the closeness of the applicant's relationship to the person
- Security
- If PGT declines to appoint, reasons in writing (s 18(1))
- If dispute, PGT shall apply to court to decide (18(2));
Public Guardian and Trustee v. Duggan, 1998 CanLII 14929 (ON SC)

1 a) Termination of PGT's statutory guardianship

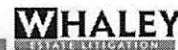
- s.16.1 SDA : Send to the PGT
 - (i) the original power of attorney that was executed prior to the appointment of the PGT, or a copy of it that is authenticated in a manner satisfactory to the Public Guardian and Trustee (Notarized)
 - (ii) a written undertaking signed by the attorney to act in accordance with the power of attorney, and
 - (iii) proof satisfactory to the Public Guardian and Trustee of the identity of the person named as the attorney in the power of attorney (Notarized copy of photographic ID.)

Terminating Guardianship



2) TERMINATING GUARDIANSHIP

- Motion to terminate guardianship of property / person: 69(2) / 69(4)
- Contents of motion record re property:
 - 73 (summary)
- Contents of motion record re person:
 - 71(2) or 75 (summary)
- Service requirements: 69(2) / 69(4)
- If unopposed, can proceed in writing: 77(2)(b)
- If opposed: hearing / trial per 77(3)



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Substitute...



3) Motion to substitute guardian of property / person under s 26 (property) / 61 (personal care)

- The overarching and fundamental factor in appointing a guardian or having one replaced or removed is what is in the best interest of the incapable person: *Bennett v. Gotlibowicz*, [2009] O.J. No. 1438 (Ont. S.C.J.) at para. 19; *Chu v. Chang*, [2009] O.J. No. 4989 (Ont. S.C.J.) at para. 26.

Consiglio v. Consiglio, 2012 ONSC 4629, 2012 CarswellOnt 9887, 219 A.C.W.S. (3d) 986



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Substitute...



- ss 26 (4) (property) / 61 (4) (personal care)
 - ss 69 (1) (property) / 69 (3) (personal care), and ss 69 (5) to (9)
 - (who to serve)
 - ss 70 (1) (property) / 70 (2) (personal care)
 - (required documents)
- section 77 (summary disposition)



LESSONS FROM LITIGATION



LESSONS



- 1) Evidentiary issues
- 2) Access / Visitation Rights
- 3) Compensation
- 4) Costs



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LESSONS



- EVIDENCE RE LACK OF CAPACITY:
 - balance of probabilities: *Re Phelan*, 1999 Carswell Ont 2039; 29 E.T.R. (2d) 82, [1999] O.J. No. 2465
 - third party independent evidence – corroboration of affiant's anecdotal evidence
 - report or letter or affidavit from a physician or psychologist
 - capacity assessment requested for the purposes of an application pursuant to s.22, 55 or s.72 of the SDA



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LESSONS



- “PITFALLS” RE CAPACITY EVIDENCE:
 - lack of capacity to “X” ≠ lack of capacity to “Y”
 - assessments that include statements such as, “I find X lacks capacity to manage her property”
 - affidavits that include phrasing such as, “Dr. Y has found/declared X to be incapable of managing property” without attaching a report or record as an exhibit
 - assessments / reports / records that are outdated
 - assessments / reports that do not refer to the tests set out in the SDA at ss. 6 and 45



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LESSONS



- “PITFALLS” RE CAPACITY EVIDENCE:
 - Re court-ordered assessments under s. 79(1), “proceeding under the SDA”:
 - proceedings to appoint a guardian of property (see ss. 17, 22 and 27(3.1)), or of the person (see ss. 55 and 62(3.1)), to review a finding of incapacity (see s. 20.2), or to terminate or vary guardianship (see ss. 20.3, 26, 27(9.1), 28, 61, 62(11) and 63)).
 - “There is no “stand-alone” relief available to the applicant for a capacity assessment to be granted in the absence of an application brought under the SDA for any of the permitted relief.”
Neill v. Pellolio, 2001 CanLII 6452 (ON CA)

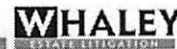


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LESSONS



- “PITFALLS” RE CAPACITY EVIDENCE:
 - Compelling anecdotal evidence to convince a court to order that the alleged incapable person submit to a capacity assessment pursuant to s.79 of the SDA: *Jhauj v Kooner*, 2015 ONSC 4598 (CanLII)
 - Purpose of obtaining the evidence must relate to the best interests of the AIA, i.e. not just to do an “early” will challenge



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LESSONS



- ACCESS / “VISITATION RIGHTS”
 - Guardian of personal care is obliged to foster regular personal contact between the incapable person and supportive family members and friends (ss. 66(6) and 67). Similarly, the guardian is obliged to consult from time to time with supportive family members and friends of the incapable person who are in regular personal contact with the incapable person (ss. 66(7)(a) and 67)



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LESSONS



- ACCESS / "VISITATION RIGHTS"
 - Absent a finding of incapacity, no jurisdiction to order visitation rights: *Neill v. Pellolio*, 2001 CanLII 6452 (ON CA)
 - The wishes of the incapable person are very important if evidence of them can be ascertained
 - "Custodial authority" in personal care \neq custody in family law



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LESSONS



- COMPENSATION:
 - Compensation for Guardian of Property:
 - SDA 40(1) re guardian of property
 - 3% of disbursements of capital and revenue
 - annual care and management fee of .6% of the fair market value of assets
 - BUT...



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LESSONS



- COMPENSATION:
- Subject to judicial discretion:
 - SDA 42(8)
 - *Toronto General Trusts Corp v Central Ontario Railway Co* (1905), 6 OWR 350 (H.C.) [five factors]
 - *Jeffrey Estate (Re)* (1990), 39 ETR 173, 22 ACWS (3d) 1198 [holistic approach]
 - *Shibley (Re)*, [2004] OJ No 5246 at para. 33, 136 A.C.W.S. (3d) 183 [holistic approach]
 - *Aber Estate, Re* [yes]
 - *Osmulski Estate v. Osmulski*, 2014 ONSC 6370 [no]



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LESSONS



- COMPENSATION:
- Compensation for Guardian of the Person? Maybe:
 - *Cheney v Byrne*, [2004] O.J. No. 2773 (ONSC)
 - *Brown (Re)*, [1990] OJ No 5851 (ONSC)
 - *Sandhu (Litigation Guardian of) v Wellington Place Apartments*, [2006] OJ No 2448 (ONSC)
- Also subject to judicial discretion



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LESSONS



▪ COSTS

- Modern Approach: *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ON CA)
- “Not an ATM”: *Salter v. Salter Estate* (sub. nom. *Bilek v. Salter Estate*), 2009 CanLII 28403 (ON SC)
- Application of Rule 58 of the Rules of Civil Procedure



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LESSONS



▪ COSTS

- Application of modern approach in capacity litigation: *Fiacco v. Lombardi*, 2009 CanLII 46170 (ON SC)
- Protecting incapable person from costs:
 - *Ziskos v. Miksche*, 2007 CanLII 46711
 - *Kulyski v. Kulyski Estate*, 2014 ONSC 3615
 - But see *Lisowick v. Alvestad*, 2015 ONSC 257



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LESSONS



▪ COSTS

- Applicant ordered to pay Respondent's substantial indemnity costs: *Scalia v. Scalia*, 2015 ONCA 492; 2015 CarswellOnt 9780 (ONCA)
- Applicant to pay a portion of PGT's costs: *The Public Guardians and Trustee v. Dodson*, 2015 ONSC 1927; costs decision at 2015 CarswellOnt 6265; 2015 ONSC 2810



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LESSONS



COSTS: UNPREDICTABLE!



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QUESTIONS?

