

**The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act**

**Trusts and Estates Division of the Ontario Bar Association**

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**Section 3 of the *Substitute Decisions Act* states:**

**Counsel for person whose capacity is in issue**

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

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

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

**Responsibility for legal fees**

(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees.

The representation of a client whose capacity is in issue, is one of the most difficult and challenging areas for lawyers.

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## **The Difficulty**

The lawyer-client relationship presupposes that the client has the requisite mental ability to make decisions and instruct counsel. When this ability is lacking, the *Rules of Professional Conduct* and *Rules of Civil Procedure* require a lawfully authorized representative to be appointed (i.e. a litigation guardian) to make decisions for the client.<sup>2</sup>

The difficulty lies in the fact that in proceedings under the *Substitute Decisions Act*, a litigation guardian is not required for a person whose capacity is in issue.<sup>3</sup> The person whose capacity is in issue is deemed to have capacity to retain and instruct counsel.<sup>4</sup>

## **The Challenge**

How do you represent an individual deemed by law to have capacity to retain and instruct you when, in your opinion: (a) the individual is unable to provide instructions; or (b) the instructions provided are in your opinion not capable instructions; or (c) the instructions provided are contrary to the best interests of the individual?

What are the guidelines and best practice section 3 counsel must or should follow in representing a person whose capacity is in issue in proceedings under the *Substitute Decisions Act*?

What can we learn from the case law?

What are the parameters of a section 3 appointment?

This paper will address these issues.

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<sup>2</sup> Rule 2.02(6) of the *Rules of Professional Conduct* and Rule 7.01 of the *Rules of Civil Procedure*

<sup>3</sup> Rule 7.01(2) provides that a respondent in proceedings under the *Substitute Decisions Act* does not require a litigation guardian. However, the Court may order a litigation guardian.

<sup>4</sup> Section 3 of the *Substitute Decisions Act*. Also, section 81 of the *Health Care Consent Act* contains an identical provision allowing the Consent and Capacity Board to order the Public Guardian and Trustee to arrange legal counsel for a person whose capacity is in issue in proceedings under that Act, and deeming the person to have capacity to retain and instruct counsel.

***RULES OF PROFESSIONAL CONDUCT and RULES OF CIVIL PROCEDURE***

The role of section 3 counsel under the *Substitute Decisions Act* must be considered in the context of the *Rules of Professional Conduct* and *Rules of Civil Procedure*.

**Rules of Civil Procedure**

Rule 7 – Parties Under Disability provides as follows:

Party Under Disability

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.

Substitute Decisions Act Applications

(2) Despite subrule (1), an application under the Substitute Decisions Act, 1992 may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise.

Rule 1.3 of the *Rules of Civil Procedure* provides as follows

"**disability**", where used in respect of a person or party, means that the person or party is,

- (a) a minor,
- (b) mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person or party has a guardian or not,
- or
- (c) an absentee within the meaning of the Absentees Act; ("incapable")

**Rules of Professional Conduct**

Rule 2.02 (6) of the *Rules of Professional Conduct* provides as follows:

Client Under a Disability

2.02 (6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

The Commentary to Rule 2.02 (6) provides as follows:

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

Rule 2.09 of the *Rules of Professional Conduct* provides as follows:

Withdrawal from Representation

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

2.09 (2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Mandatory Withdrawal

(7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client,

(b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,

(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,

(d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,

(d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or

(e) the lawyer is not competent to handle the matter.

Rule 4 of the *Rules of Professional Conduct* provides as follows:

The Lawyer as Advocate

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

The Commentary to Rule 4.01(1) provides as follows:

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done... When acting as an advocate, a lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case...

In civil matters, it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

## PARAMETERS OF THE APPOINTMENT

### **Obtaining the Appointment**

The Order directing the Public Guardian and Trustee to arrange legal counsel is usually obtained on the first return date of the application. Any party to the proceeding may request the order or alternatively, the Court on its own initiative may make the Order if it is satisfied that the person whose capacity is in issue in the proceeding does not have legal representation.

### **Content of the Order**

The Order directs the Public Guardian and Trustee to arrange legal counsel. The Order usually allows the fees of section 3 counsel to be paid out of the assets of the estate of the individual whose capacity is in issue.

The Public Guardian and Trustee, following receipt of the Order, contacts counsel to determine if they are available and agreeable to accept the appointment.

Once the appointment is accepted, notice is sent by the Public Guardian and Trustee to counsel for all parties in the proceeding notifying them of the identity of section 3 counsel and requesting that a copy of all pleadings be provided to section 3 counsel.

### **Payment**

The Public Guardian and Trustee is not responsible for payment of the legal fees of section 3 counsel. In the absence of a legal aid certificate, the person whose capacity is in issue is responsible for payment.

At the outset, section 3 counsel should confirm that their accounts when rendered will be paid out of the assets of the estate. Usually this is part of the initial Order. In the event a satisfactory payment arrangement cannot be arrived at, section 3 counsel may seek an Order for directions from the Court. In the event there is any disagreement regarding the accounts, payment may be made subject to the right to have the account assessed by an assessment officer pursuant to the *Solicitor's Act*.

### **Extent of Representation**

Section 3 counsel's role is restricted to representing the individual in proceedings under the *Substitute Decisions Act*. In some cases, a request may be made for preparation of powers of attorney or a will. Although there is no prohibition on section 3 counsel preparing or attending to execution of powers of attorney or a will, it may be advisable to refer such matters to outside counsel. By doing so, any potential conflict which may arise between the role of counsel and that of a potential witness in the proceedings will be avoided.

### **Restrictions**

Subject to counsel being limited to representing the client in proceedings under the *Substitute Decisions Act*, the role of section 3 counsel is the same as any other counsel representing a party in a proceeding – to advocate for the client in accordance with the instructions of the client, to the best of counsel's ability and in accordance with the provisions of the law.

### **Communications**

Section 3 counsel is free to communicate with counsel for one party in the absence of counsel for another party. Although section 3 counsel should strive to ensure all counsel feel they are being treated fairly, it must be remembered that the role of section 3 counsel is to advocate in accordance with the instructions provided by their client.

### **Mediation / Settlement**

Section 3 counsel should strive to mediate and settle issues in dispute, particularly in view of their unique position to do so.

### **WHAT CAN WE LEARN FROM THE CASE LAW?**

There is little case law that addresses the role of counsel appointed pursuant to section 3 of the *Substitute Decisions Act*. The one case that addresses the position of section 3 counsel is *Banton v. Banton*.<sup>5</sup>

In *Banton v. Banton*, Justice Cullity states:

*The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the Substitute Decisions Act, 1992 is potentially one of considerable difficulty.*

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<sup>5</sup> *Banton v. Banton*, (1998), 164 D.L.R. (4th) 176 at 218 (Ont. Gen. Div.).

Justice Cullity then proceeds to establish the following three propositions:

- Proposition 1      *Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Substitute Decisions Act, counsel is not in the position of a litigation guardian with authority to make decisions in the client's interests.*
- Proposition 2      *Counsel must take instructions from the client and must not act if satisfied that capacity to give instructions is lacking.*
- Proposition 3      *A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the court.*

### **Proposition 1**

Although this proposition is easily understood, it appears to present difficulty for counsel in its application. It is very tempting for counsel to represent a section 3 client based on what counsel feels is in the client's best interests, notwithstanding that: (a) counsel may have no instructions from the client; or (b) the instructions provided are, in the opinion of counsel, contrary to what counsel feels to be in the best interests of the client.

It is clear from proposition 1 that without instructions, counsel cannot act. It is even clearer, that counsel cannot act as a litigation guardian on their own instructions.

### **Proposition 2**

Proposition 2 presents considerable more difficulty than proposition 1. In fact, proposition 2 appears inconsistent and contradictory to the provisions of deemed capacity found in section 3 of the *Substitute Decisions Act*.

Proposition 2 states that counsel must not act if satisfied that capacity to give instructions is lacking – Section 3 of the *Substitute Decision Act* states that the individual is deemed to have capacity to give instructions. Can this inconsistency/contradiction be resolved? Perhaps.

A possible resolution involves interpreting section 3 as a statutory right of the person whose capacity is in issue, to be represented by legal counsel, without allowing for objection that the person lacks capacity to retain and instruct counsel. In essence, the deeming provision of section 3 acts as a shield to any attack on the person's capacity to instruct counsel, thus ensuring the right to counsel. This statutory right however does not: (a) remove the professional obligation of section 3 counsel to ensure that the individual has the requisite capacity to instruct; or (b) obligate counsel to represent the individual in the absence of instructions<sup>6</sup>. If an individual suffers from severe cognitive impairment or is in a coma, the ability to provide instructions is absent. In the absence of instructions, it is clear that counsel cannot act. The deeming provisions of section 3 cannot be interpreted as having the effect of creating instructions when no instructions exist.

Given this interpretation, the critical issue is whether the individual has the requisite capacity to instruct counsel. This determination rests in the sole and exclusive domain of section 3 counsel. In essence, section 3 counsel acts as judge and jury with no right of appeal. It is therefore fundamental that section 3 counsel approach the task of determining capacity in a manner consistent with the gravity of the consequences, keeping in mind not only the needs of the

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<sup>6</sup> This position is not entirely consistent with the guidelines published by the Public Guardian and Trustee on the role of section 3 counsel. When the client will not or cannot give instructions, the guidelines indicate that the lawyer must not become a substitute-decision maker for the client in the litigation; that is, the lawyer cannot consent to the proposed action or treatment even if it appears to be in the best interests of the client. The lawyer must ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.

individual but counsel's obligations to the Court. Capacity is not based on whether a decision is wise or foolish, nor is it based on actual understanding or appreciation. Capacity is based on ability.<sup>7</sup>

### **Proposition 3**

Proposition 3 speaks of the high degree of professionalism required of counsel in those cases where the client's wishes may be in conflict with his or her best interest and counsel's duty to the Court. Proposition 1 however, confirmed that counsel is not to act as litigation guardian based on what counsel feels to be in the best interests of the client. Are these two propositions contradictory?

It is clear that in those cases where a client has capacity to instruct, what counsel feels to be in the best interests of the client, should not play a role in the representation of the individual. However, what counsel must not do is allow their representation to be in conflict with their obligations to the Court. It may even be argued that the obligations of section 3 counsel to the Court are greater than that of other counsel. As discussed, the deeming provisions of section 3 act as a shield from attacks that counsel is not acting in accordance with instructions from their client. The mere fact that section 3 counsel is acting, is seen as evidence that counsel is satisfied that the instructions provided by the client may be acted upon. As such, the Court relies on counsel's representations that the position advanced by them on behalf of their client is based on such instructions.

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<sup>7</sup> For a useful guide to assessing capacity to instruct counsel, see *Notes on Capacity to Instruct Counsel*, by Phyllis Gordon, part of the November 2003 Continuing Legal Education Program titled *A Disability Law Primer*

In the Banton case, Justice Cullity concluded on the facts of that case, that counsel for the person whose capacity was in issue (who was not section 3 counsel) was not taking instructions from the client, and that the instructions that were provided and acted upon, were contrary to the best interests of the client. The Court felt that this fact together with other circumstances in the case were of a sufficient nature that counsel should have been alerted to the presence of undue influence and that this should have been addressed. In these circumstances, it was felt that by not taking steps to address these issues and correct information which counsel knew was not accurate during the proceedings, counsel's representation could be seen as a breach of duty to the Court.

### **GUIDELINES AND BEST PRACTISES**

1. Maintain as far as reasonably possible a normal lawyer and client relationship.
2. Meet and take instructions from the client in person, in the absence of anyone who may have the potential of influencing the client.
3. Assure the client that your presence is a result of the Court believing it appropriate that they have legal representation.
4. Advise the client of the nature of the Court proceedings, the allegations and the relief requested. Remember, this may be a particularly stressful and anxious situation for the client and appropriate steps to address this should be taken.

5. Advise the client of the rights afforded to them under the law. For example, if the relief being sought in the proceedings is for an Order to assess their capacity, explain the consequences of such an assessment and the right to refuse the assessment.

6. In appropriate circumstances, assist the client in preparing and submitting an application to Legal Aid. In the event the client does not qualify for legal aid, provide the client with an estimate of your fees. A written retainer should be prepared and provided to the client for signing if appropriate and/or provided to the individual who has lawful authority to manage the property of the client during the course of the proceedings. Always ensure transparency in relation to your fees.

7. In the event the client does not want you to act, attempt to determine why. The individual may have been provided with incorrect or misleading information and in this regard you should ensure that the individual knows that you are there to represent their interest only; that what they say to you will be maintained in confidence unless they permit you to disclose the information; and that you will act to the best of your ability on their instructions, provided those instructions do not interfere with your duty to the Court. If the individual prefers that another lawyer represent them, ask for the identity of the other lawyer to determine whether or not that lawyer would in fact be in a position to represent the individual. In the event the individual simply wishes to represent themselves or indicates that they do not want you to represent them, then it is clear that you should not act. You must advise the Court and the Public Guardian and Trustee accordingly.

8. In the event the client is unable to instruct, do not act. Advise the Public Guardian and the Court. In certain circumstances, you may be able to obtain instructions based on wishes expressed by the client from sources such as powers of attorney, wills or individuals who have no vested interest in the outcome of the proceedings. Again, the Court should be made aware of your inability to obtain instructions directly from the client and you may wish to seek direction from the Court as to whether you should continue to represent the client as section 3 counsel or whether an appointment as amicus curiae is warranted or for that matter, whether a litigation guardian should be ordered keeping in mind the Court does retain power to appoint a litigation guardian notwithstanding the deeming provisions set out in section 3.<sup>8</sup>

9. In the event instructions are provided and you are not satisfied that the instructions are capable instructions, again you must not act. Follow the same procedure as set out above. Ensure however that you do not equate capacity of the individual with what you feel to be in the best interests of the individual. Remember, even capable individuals make unwise or foolish decisions.

10. Be vigilant of circumstances which may give rise to undue influence and take steps which are appropriate.

10. At the earliest opportunity, contact all counsel with a view to narrowing the issues in the proceeding and to determine which issues are capable of resolution and which are not.

11. Keep your client informed.

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<sup>8</sup> See footnote 3 supra

12. Discuss avenues of resolution and settlement with your client and to the extent possible encourage settlement. The position of section 3 counsel lends itself to this.

13. Ensure that your costs are reasonable considering the issues at stake. Be sensitive and cognizant of the fact that the deeming of an individual to have capacity to retain and instruct you is not the equivalent of *carte blanche* for your fees. As has become obvious with recent decisions, costs of all counsel will be closely scrutinized by the Court and must be seen as reasonable and fair given the work done and the issues at stake.

### **CONCLUSION**

The assessment of capacity is best described in terms of process rather than outcome. In other words, it is not the wisdom of the decision but the process of decision making.

In many ways the role of section 3 counsel may be viewed in a similar manner.

Ultimately, whether counsel has satisfied the requirements of their role pursuant to section 3 of the *Substitute Decisions Act*, may be determined less by outcome and more by the process in which they fulfilled their responsibility not only to the individual whose capacity is in issue, but also the Court.