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Trusts and Estates Section
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In this Issue:

The Continuing Power Of Attorney For Property:[1] To Exercise Or Not To Exercise

*Irit Gertzbein**

Every estates practitioner should be prepared for the day a client to whom a CPOAP under the *Substitute Decisions Act*, 1992 (the "SDA")[2] had been granted ("Attorney"), likely by a parent, calls to ask:

What can I do, what should I do, with the CPOAP granted to me, if I believe my mother/father is "losing it" but he or she disagrees with me and wants to maintain independence? May I override her/his decisions? How can I avoid liability if I act against the wishes of my mother/father in order to protect her/him from exploitation and imprudent decisions?[3]

This article identifies some of the legal issues which may arise in cases similar to the hypothetical scenario described above, and outlines for the estates practitioner the recommendations he or she may make to the Attorney in such circumstances, based on the applicable law.

(IN)CAPACITY

It is settled law that the presence of mental illness or cognitive impairment is not, in and of itself, sufficient grounds to override decisions or actions of the grantor.[4] However, if it can be demonstrated that the illness or impairment interferes with the grantor's ability to manage his or her property (distinct from the ability to grant or revoke a power of attorney for property), or if there is evidence by way of an assessor's report that the grantor is not able to understand information that is relevant to making a decision or to appreciate the reasonably foreseeable consequences of a decision or lack of a decision in the management of his or her property ("Incapacity"),[5] the Attorney has a duty to make decisions and take actions in the stead of the grantor, in the best interest of the grantor.

TO EXERCISE OR NOT TO EXERCISE

Essentially, in any circumstance, the Attorney must make best efforts to strike the right balance between the two (often competing) principles

[1] B.A. Garner, *A Dictionary of Modern American Usage*, (New York: Oxford University Press, 1998) [hereainfter "Garner") at page 542; P. Tasko, ed., The *Canadian Press Stylebook*, 12th ed. (Toronto: The Canadian Press, 2002) at 304.
[2] *Garner* at 542.
[3] These rules are also described in W. Morris, ed., *The American Heritage Dictionary of the English Language* (New York: American Heritage Publishing Co. Inc, 1969) at page 1175.
[4] http://en.wikipedia.org/wiki/Semicolon.
[5] www.gprc.ab.ca/library/Homepage/Help%20With/LSC/LSC%20pdfs/Semicolon%20and%20Colon%20Usage.pdf
[6] *Ibid*.

Capacity Law Questionnaire Update

*Jan Goddard**

Fifty-six members of our section responded to the capacity law questionnaire distributed in the late spring. As promised, there was a draw among all respondents for a $100 bookstore certificate, donated by Jan Goddard and Associates, and the lucky winner was Wendy Templeton of Toronto. Thanks to everyone who took the time to complete the questionnaire.

The Capacity Law Working Group is still reviewing the questionnaire results, and a summary and analysis of these will be published in a future issue of *Deadbeat*.

The Capacity Law Working Group is an *ad hoc* committee of our section executive, with the following terms of reference:

- To consult with and provide a forum for section members regarding their experience with and views on the capacity laws of Ontario, specifically the *Substitute Decisions Act, 1992* (*SDA*) and the *Healthcare Consent Act, 1996* (*HCCA*)

- To identify and report on legal and other issues arising from the application of the *SDA* and *HCCA*

- Where appropriate, to advocate for improvements in the *SDA* and *HCCA* or in their application

The Group's chair is Jan Goddard, who can be reached at (416) 928-6685.

**Jan Goddard, Jan Goddard and Associates*

Some Further Thoughts on Costs in Estate Litigation

*John O'Sullivan**

In the October 2009 edition of *Deadbeat*, Elizabeth Seo provided a helpful survey of recent costs decisions in estates litigation. A decision released by Justice Pitt in late October 2009 throws additional light on the issue of costs.

The decision in *Estate of Elizabeth Gyetvan*[1] is consistent with the message in *McDougald Estate v. Gooderham*[2] and *Salter v. Salter*[3] that costs will not be routinely ordered out of the Estate and that parties "cannot treat the assets of the estate as a kind of ATM bank machine...".

In *Gyetvan*, Justice Pitt awarded full indemnity costs against the unsuccessful respondent, to be paid from his interest in the proceeds of sales of real estate devised to him under the will.

Elizabeth Gyetvan had left three parcels of real estate to her two sons who were the co-executors and sole beneficiaries of her estate. The properties had still not been transferred to the sons more than four years after Elizabeth's death because of bitterness between them.

One brother applied for a declaration that the properties had vested by virtue of s. 9 of the *Estates Administration Act*, for an order requiring the Land Registry office to register the brothers' ownership, and for an order for the sale of all three properties under the *Partition Act*.

The conduct of the respondent brother during the litigation lent credence to the applicant's affidavit evidence of the respondent's failure or refusal to cooperate since the death of their mother.

Justice Archibald on the first attendance ordered the vesting declaration and registration of the real estate in the names of the brothers, on consent. He adjourned the balance of the application, urging the respondent to retain counsel, and recorded in his endorsement that the respondent was going to retain counsel. The respondent brother did not approve the draft order, or retain counsel. On the second attendance, the court ordered a settlement conference. This was held a month later, but no settlement resulted.

The respondent brother did not attend court on the ensuing motion to fix a peremptory return date for the application. When the application came on for hearing before Justice Pitt, his Honour noted in his endorsement that the respondent had filed no evidence and "had seen fit not to retain counsel". He also noted that applicant brother had done "everything within his power" to have the real estate sold and the proceeds divided. He granted the application and gave the applicant brother carriage of the sales, stipulating that the signature of the respondent brother was not required in respect of the listing of the properties or the acceptance of offers. He also ordered the proceeds of the three sales to be paid to the applicant brother's solicitors in trust.

As to costs, Justice Pitt ordered "costs of and incidental to the application on a full indemnity basis" in an amount to be approved by the Court on notice to the respondent, to be charged against the interest of the respondent brother in the sale proceeds. In addition, His Honour removed the respondent brother as an estate trustee. It was clear that the respondent brother's conduct (outlined above) factored heavily in the making of the costs award.

The message in the *McDougald Estate* and *Salter* cases echoes throughout Justice Pitt's decision in Gyetvan.

**John O'Sullivan, Weir & Foulds LLP*

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[1] Unreported decision of Justice Pitt of the Ontario Superior Court.
[2] *McGougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, 999 O.A.C. 203, 255 D.L.r. (4th) 139 (Ont.S.C.J.)

[3] *Salter v. Salter Estate* [2009] W.D.F.L. 3762, 2009 CarswellOnt 3175; see also *Salter v. Salter Estate* 2009 CarswellOnt 1272, 49 E.T.R. (3d) 139 (Ont.S.C.J.)

In the Matter of the Estate of William Woodrow Charles, Deceased: Communicating with the Toronto Estates List Office by Email

*Susannah B. Roth**

Estates and trust solicitors dealing with the Toronto Estates Office should take note of the recent endorsement of Justice D.M. Brown in *In the Matter of the Estate of William Woodrow Charles, deceased* (Court File No. 01-3632/08, endorsement dated October 23, 2009). In the context of an application for confirmation by resealing of appointment of estate trustee with a will, the Toronto Estates Registrar, pursuant to Rule 74.14(2) of the *Rules of Civil Procedure* (Ontario), sought direction from Justice Brown as to whether the Toronto Region Estates Office could communicate by email with the applicants for certificates of appointment to inform them of corrections required and to receive corrections from applicants. In his endorsement, Mr. Justice Brown stated that he saw no reason why the Registrar could not communicate by email (see para. 9) noting that to do so would enhance the public's access to justice (see para. 13), and that allowing only paper-based communications via mail runs contrary to Rule 1.04(1), which provides that the *Rules of Civil Procedure* "shall be liberally constructed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" (at para. 14). Justice Brown went on to direct the Registrar to contact applicants and to give them the choice of receiving email communications from the Toronto Region Estates Office, in addition to the traditional paper-based mail communications option.

Justice Brown's decision in this case is a welcome one. On a practical note, any person wishing to deal with the Toronto Estates Office by email should make a specific written request in their initial correspondence with the Court.

**Susannah B. Roth, O'Donohue & O'Donohue, Barristers & Solicitors*

Pyramids, The Wizard of Oz, *Garron* and *Antle*

*Ed Esposto**

Have you ever watched a young child try to construct something out of wooden blocks? Generally, the child collects blocks of different shapes and sizes and they are not so much assembled into a coherent plan as simply piled one atop the other. And if you, an adult, try to assist in implementing a better-engineered plan, you will likely be rebuffed. Children (like managing partners) largely don't welcome corrections. If you help a child play with blocks, you act more as a servant than design partner.