# The Probater

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# COMPELLING AN ATTORNEY FOR PROPERTY TO PASS ACCOUNTS

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An attorney or guardian for property is obligated to maintain accounts and records of their administration while the person is incapable. The form of those accounts is regulated under the *Substitute Decisions Act, 1992* (the "SDA"). Although there is a positive obligation to maintain accounts, that obligation does not, in itself, equate to an obligation to make that information available for audit by anyone who might be concerned enough to ask.

The SDA provides a mechanism in which the court may, on application, order an attorney or guardian of property to pass their accounts. Section 42(4) of the SDA sets out those who may bring an application to compel a passing of accounts:

1. the guardian of person or attorney for personal care;
2. a dependant of the grantor or incapable person;
3. The Public Guardian and Trustee;
4. The Children's Lawyer;
5. a judgment creditor of the grantor or incapable person; and
6. any other person with leave of the court.

An application to compel a passing of accounts under the SDA often arises when the grantor only selects one child to act as his/her attorney while the other children are not given any authority to participate. This was the case in a recent Ontario Court of Appeal decision on this very subject. In *Lewis v. Lewis*, 2020 ONCA 56, Emerson and Marie Lewis chose two of their children to be attorneys so the other four children brought an application for the attorneys to account.

## The Test to Compel an Attorney to Account

The Court of Appeal commented that jurisprudence suggests that leave will often be denied for applicants that fall under the "any other person" category of section 42(4) of the SDA. The test for leave was set out in *Ali v Fruci* (2006), 22 E.T.R. (3d) 187 (Ont. S.C.) as follows: the court must be convinced that (1) the person or persons seeking leave have a genuine interest in the grantor's welfare; and (2) a court hearing the application under section 42(1) may order the attorney or guardian to pass his or her accounts.

The panel in Lewis then went on to consider the analysis and factors that were set out two years earlier in another Court of Appeal decision on section 42 of the SDA. In *Dzelme v. Dzelme*, 2018 ONCA 1018, the party seeking leave to compel a passing of accounts was a son who wanted his brother to disclose information about their parents' assets and account for his administration as attorney for property.

The Court of Appeal in *Dzelme* stated that the exercise of discretion under section 42 of SDA involves considering, (1) the extent of the attorney's involvement in the grantor's financial affairs; and (2) whether the applicant has raised a significant concern in respect of the management of the grantor's affairs to warrant an accounting.

## Some of the Reasons Why Such Applications are Commonly Denied

In *Lewis* and *Dzelme*, the application was dismissed and the attorney(s) were not made to account for the following reasons:

- the father continued to receive bank statements for some time and thereafter the attorneys were helping their parents pay their bills and the parents were apprised of all actions taken on their behalf (*Lewis*);
- the father participated in the application with a lawyer of his own and gave evidence that he had no concerns with the attorneys (*Lewis*);
- the parents' investment portfolios actually increased (*Lewis*);
- the parents' were capable when they gave written instructions telling the attorney not to

disclose any financial information to the applicant (*Dzelme*);
- the mother participated in the application and supported the attorney (*Dzelme*); and
- another brother corroborated the attorney's evidence that he was following his parents' wishes (*Dzelme*).

Given the direct participation by one of the two parents in both cases, it is difficult to imagine that a court would be persuaded to ignore the grantors' position and interfere by ordering a passing of accounts. One would presume that there must be uncontroverted evidence of serious misfeasance or wrongdoing to overcome the grantors' position since it is their property after all.

## A Rare Instance Where an Application was Successful

In contrast, *McAllister Estate v. Hudgin*, [2008] O.J. No. 3282, is a rare case where an application under section 42 of the SDA was successful. The circumstances in McAllister were different in that the application was brought after the grantor's death. The Court in *McAllister* found that beneficiaries of a grantor's Estate would qualify as "any other person" under section 42(4) after death because of the beneficiary's financial interest in the grantor's property.

The Court in *McAllister* agreed with the applicant beneficiary that there were causes for concern because the attorney had complete control of the grantor's finances and the value of the Estate on the death was found to be significantly less than the grantor's assets at the start of the attorney's involvement even when the grantor's expenses were taken into account.

Accordingly, the attorney was ordered to disclose various bank statements in lieu of a formal application to pass accounts.

## Best Practices for Attorneys or Guardians of Property

The difficult burden that section 42 of the SDA seems to place on applicants seeking an accounting should not be viewed as protection or reason to deny family members access to reasonable participation in the care of an incapable individual, particularly that of a parent.

Section 32(5) imposes a positive obligation on an attorney or guardian to consult with supportive family members and friends from time to time. Without unnecessarily breaching an incapable person's privacy by disclosing every aspect of their finances, an attorney or guardian should consider giving general updates about how bills are paid, whether monies are invested, and how the incapable person is involved in the process to the extent possible. Maintaining an open dialogue amongst family members would help reduce concerns and suspicions. More importantly, it can help create supporting, corroborative evidence for a later date when conflict does arise. As we saw in *Dzelme*, written instructions from the grantors and evidence from a supportive sibling can be very helpful.

It is also important to remember that an attorney or guardian who receives compensation for their role is held to a higher standard of care. A person who receives compensation as a substitute decision maker is expected to exercise the degree of care, diligence and skill as a person who is in the business of managing the property of others.

Knowing that you might be made to pass your accounts, no matter how rare, should motivate attorneys to keep clear records and to document the financial decisions that were made. While the death of the incapable individual would end one's role as attorney or guardian, it is to your benefit to be ready and prepared to justify the assets on death to the Estate and its beneficiaries. As attorneys or guardians, you may also consider bringing an application to pass accounts at regular intervals, on your own initiative, so that problems can be proactively resolved in a timely manner as opposed to passively allowing allegations of wrongdoing to accrue for decades.

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