HULL & HULL'S
ESTATE, TRUST AND CAPACITY LAW
BREAKFAST SERIES

"DEPENDANT'S SUPPORT CLAIMS, AVOIDING PROBLEMS WITH POWERES OF ATTORNEY"

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"Dependant's Support Claims, Avoiding Problems with Powers of Attorney"

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PRE-ESTATE LITIGATION

"CHALLENGING AND DEFENDING ATTORNEYS AND GUARDIANS"

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1. INTRODUCTION

Litigation involving an attorney or guardian is sometimes considered a subtopic of estate litigation matters generally. However, with the introduction of the *Substitute Decisions Act*, S.O. 1992 as amended, the focus on the role of the attorney or guardian has changed fairly dramatically. While the obligations and responsibilities have not significantly changed, there has been a change in the nature of the litigation. Given the rise in the number of powers of attorney for property and for personal care that have been executed in Ontario, the volume of complaints, problems and litigation arising from those powers of attorney, has increased.

2. STATUTORY CONSIDERATIONS

(a) Definitions

The *Substitute Decisions Act* separates into two parts, the statutory provisions surrounding a continuing power of attorney for property under Part I and a power of attorney for personal care under Part II. Section 7(1) defines a power of attorney for property as:

> 7.(1) **Continuing power of attorney for property.** – A power of attorney for property is a continuing power of attorney if,
>
> (a) it states that it is a continuing power of attorney; or
> (b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property.
>
> (2) **Same.** – The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except to make a Will.
>
> (3) **P.G.T. may be attorney.** – The continuing power of attorney may name the Public Guardian and Trustee as attorney if his or her consent in writing is obtained before the power of attorney is executed.
>
> (4) **Two or more attorneys.** – If the continuing power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.
>
> (5) **Death, etc., of joint attorney.** – If two or more attorneys act jointly under the continuing power of attorney

and one of them dies, becomes incapable of managing property or resigns, the remaining attorney or attorneys are authorized to act, unless the power of attorney provides otherwise.

(6) **Conditions and restrictions.** – The continuing Power of Attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act.

(7) **Postponed effectiveness.** – The continuing Power of Attorney may provide that it comes into effect on a specified date or when a specified contingency happens.

The *Substitute Decisions Act* sets out an extremely broad scope of powers which may be included in a power of attorney for property and, as such, the solicitor should ensure that the client has a full and complete understanding of the nature and effect of the document itself.

With respect to powers of attorney for personal care, section 46 of the *Substitute Decisions Act* provides as follows:

46. - (1) **Power of Attorney for Personal Care** - A person may give a written Power of Attorney for personal care, authorizing the person or persons named as attorneys to make, on the grantor's behalf, decisions concerning the grantor's personal care.

(2) **P.G.T. may be attorney** - The power of attorney may name the Public Guardian and Trustee as attorney if his or her consent in writing is obtained before the power of attorney is executed.

(3) **Prohibition** - A person may not act as an attorney under a power of attorney for personal care, unless the person is the grantor's spouse, partner or relative, if the person,

(a) provides health care to the grantor for compensation; or

(b) provides residential, social, training, advocacy or support services to the grantor for compensation.

(4) **Two or More attorneys** - If the power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.

(5) **Death, etc., of joint attorney** - If two or more attorneys act jointly under the power of attorney and one of them dies, becomes incapable of personal care or resigns, the remaining attorney or attorneys are authorized to act, unless the power of attorney provides otherwise.

(6) **Conditions and restrictions** - The power of attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act.

(7) **Instructions** - The power of attorney may contain instructions with respect to the decisions the attorney is authorized to make.

(b) *Capacity – Power of Attorney for Property*

The capacity to give a continuing power of attorney can be a difficult legal question for one to determine when challenging or defending an existing power of attorney for property.

Section 8 of the *Substitute Decisions Act* sets out a statutory framework for the court to consider.

Section 8 provides as follows:

8. (1) **Capacity to give continuing Power of Attorney.** – A person is capable of giving a continuing power of attorney if he or she,

(a) knows what kind of property he or she has and its approximate value;
(b) is aware of obligations owed to his or her dependants;
(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
(d) knows that the attorney must account for his or her dealings with the person's property;
(e) knows that he or she may, if capable, revoke the continuing power of attorney;
(f) appreciates that unless the attorney manages the property prudently its value may decline; and
(g) appreciates the possibility that the attorney could misuse the authority given to him or her.

(2) **Capacity to Revoke** - A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

A further statutory guideline with respect to capacity is set out in s.9 of the *Substitute Decisions Act* which provides as follows:

9. (1) **Validity despite incapacity** - A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.

(2) The continuing power of attorney remains valid even if, after executing it, the grantor becomes incapable of giving a continuing power of attorney.

(3) **Determining Incapacity** - If the continuing power of attorney provides that it comes into effect when the grantor becomes incapable of managing property but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when,

(a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

(b) the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act*.

Based on sections 8 and 9 of the *Substitute Decisions Act*, the test for capacity is very different to that of the test of testamentary capacity to make a Will.

In Will Challenge litigation, the propounder of the Will must show that the Will of which probate is sought is the true Will of the testator, and that the testator was a person of testamentary capacity.[1] A long recognized leading authority which described the degree of mental capacity necessary is found in Banks v. Goodfellow[2].

In circumstances where a continuing power of attorney for property is being sought, the provisions of s.8 and 9 of the *Substitute Decisions Act* make it clear that the level of enquiry and strength of mind is simply not as high as that expected when making a Will.

Having said this, the solicitor who draws the document must not think that a cursory review of the issue of capacity is sufficient.

In Re: Koch[3], Quinn J. makes it clear that the court will expect anyone who is assessing capacity of someone for the purposes of making a power of attorney,

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[1] Robins v. National Trust Co., [1927] A.C. 515 at 519, [1927] 1 W.W.R. 692, [1927] 2 D.L.R. 97, [1927] All E.R. Rep. 73 (P.C.).
[2] (1870) L.R. 5 Q.B.549.
[3] (1997) 33 O.R. (3rd) 485, Supplementary Reasons Re: Costs (1997), 35 O.R. (3rd) 71 (Ont. Crt Gen.Div.) Quinn J. p 74-75.

to carefully explore the client's cognitive abilities. Furthermore the assessor must do more than just record information and form an opinion.

(c) ***Capacity – Power Of Attorney For Personal Care***

With respect to powers of attorney for person care, the statutory provisions set out in s. 47 of the *Substitute Decisions Act* make it clear that the capacity threshold is much lower for such a power of attorney.

Section 47 provides as follows:

> 47. (1) **Capacity to Give Power of Attorney for Personal Care** - A person is capable of giving a power of attorney for personal care if the person,
>
> (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
>
> (b) appreciates that the person may need to have the proposed attorney make decisions for the person.
>
> (2) **Validity** - A power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it even if the grantor is incapable of personal care.
>
> (3) **Capacity to Revoke** - A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one.
>
> (4) **Capacity to Give Instructions** - Instructions contained in a power of attorney for personal care with respect to a decision the attorney is authorized to make are valid if, at the time the power of attorney was executed, the grantor had the capacity to make the decision.

The language of section 47 of the *Substitute Decisions Act*, makes it clear that with respect to the issue of capacity for a power of attorney for personal care, the necessary threshold is below that of a power of attorney for property, which is, in turn, below the threshold expected of someone to make a Will.

As a precaution, if the circumstances are such that it is likely that the power of attorney for property and personal care will be challenged by a family member, some consideration should be given to having your client assessed by a medical practitioner. I have found the Baycrest Centre for geriatric care (3560 Bathurst Street, Toronto, Ontario, M6A 2E1, phone number 416-789-5131, fax number 416-

785-2378) and, in particular, Dr. Michel Silberfeld, particularly helpful in cases which may or may not proceed to litigation.

I attach, as Appendix "A", a list of questions that the solicitor may consider when determining testamentary capacity. This can be a useful guideline for the even lower level of capacity to sign a Power of Attorney.

3. FORMAL VALIDITY

(a) *Power of Attorney for Property*

The *Substitute Decisions Act* sets out the formalities of executing a valid power of attorney.

As with a Will, there are specific provisions which govern the formal validity of a power of attorney.

When defending or challenging a power of attorney, one should consider this issue and determine whether or not it will assist you with your case.

Section 10 of the *Substitute Decisions Act* sets out the requirement that a power of attorney for property shall be witnessed by two witnesses in the presence of each other.

Section 10 of the *Substitute Decisions Act* provides as follows:

> 10. (1) **Execution** - A continuing power of attorney shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.
>
> (2) **Persons Who Shall Not Be Witnesses** - The following persons shall not be witnesses:
>
> 1. The attorney or the attorney's spouse or partner.
> 2. The grantor's spouse or partner.
> 3. A child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child.
> 4. A person whose property is under guardianship or who has a guardian of the person.
> 5. A person who is less than eighteen years old.
>
> (4) **Non-Compliance** - A continuing power of attorney that does not comply with subsection (1) and (2) is not effective, but the court may, on any person's application, declare the continuing power of attorney to be effective if the court is satisfied that it is in the interests of the grantor or his or her dependants to do so.

It is important to note that section 7 (1) (7.1) of the *Substitute Decision Act* provides that the continuing power of attorney need not be in any particular form. However, it must be properly witnessed for it to be valid.

Section 10 (4) provides that notwithstanding the fact that a power of attorney does not comply with the formal execution requirements set out in s.10, the court may, on application, declare the continuing power of attorney to be effective.

(b) *Power of Attorney for Personal Care*

With respect to a power of attorney for personal care, the execution requirements are similar.

Section 48 of the *Substitute Decisions Act* provides as follows:

> 48. (1) **Execution** - A power of attorney for personal care shall be executed in the presence of two witnesses, each of whom shall sign the power of attorney as witness.
>
> (2) **Persons Who Shall Not Be Witnesses** - The persons referred to in subsection 10 (2) shall not be witnesses.
>
> (3) [Repealed, S.O. 1996,c. 2, s. 31(2)].
>
> (4) **Non- Compliance** - A power of attorney for personal care that does not comply with subsections (1) and (2) is not effective, but the court may, on any person's application, declare the power of attorney for personal care to be effective if the court is satisfied that it is in the grantor's interests to do so.

4. RE: Koch – ASSESSMENTS WHAT IS EXPECTED OF AN ASSESSOR

In Re: Koch[4], Justice Quinn of the Ontario Court (General Division), dealt with an appeal from the decision of the consent and capacity board. Justice Quinn considered the decision of the board and whether or not it had erred in its findings that the appellant, Linda Koch, had been incapable of managing her financial affairs and property and been incapable of consenting to her placement

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[4] ibid.

in a care facility, pursuant to section 20.2(6) of the *Substitute Decisions Act* and Section 80(1) of *The Health Care Consent Act*, 1996 S.O. 1996, s. 80(HCCA).

The appellant Linda Koch sought a reversal of the board's decision.

The court comprehensively dealt with the issue of what is required before the state will deprive a citizen of her liberty on the grounds of mental incapacity. The court reviewed at some length the evidence and set out a comprehensive chronology of events.[5]

In the decision Quinn J. undertook an extensive analysis of the evidence[6] and undertook an extensive analysis of the reasons for the board's decision.[7] In overturning the board's decision and setting aside the board's decision of incapacity Quinn J. emphasized the problem of the loss of liberty and freedom that the decision of incapacity brings with it.[8]

In the decision, Quinn J. went on to describe the assessment process undertaken in Re: Koch and made the analogy that the consequences of the *Substitute Decisions Act* and the *Health Care Consent Act* are best understood if one looked at the assessment process as a trial – a trial for which the family member has no preparation and at which he or she sits alone at the counsel table. In view of this concern, Quinn J., emphasized that any procedure by which a person's legal status can be altered must be checked by the appropriate safeguards of rigorous review.[9]

In Re: Koch a husband and wife had failed to negotiate a separation agreement and the husband made a complaint about his wife's capacity, which triggered the mechanisms of the *Health Care Consent Act* and the *Substitute Decisions Act*.

Quinn J. set out a comprehensive list of steps that should be undertaken by an assessor in circumstances such as those found in Re: Koch[10] and reminded solicitors of the obligation to carefully interview your client to ensure that he or she meets the minimum statutory requirements set out in the *Substitute Decisions Act*.

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[5] supra. p.489-490.
[6] supra. p.507-514
[7] supra. p.514-517
[8] supra. p.517-518
[9] supra. p.518
[10] supra. p518-522

Quinn J. stated that:

1. The assessor/evaluator must maintain meticulous files;
2. The assessor/evaluator must be alive to an informant harboring improper motives;
3. The assessor/evaluator must ensure the person being examined is made aware of the significance and effect of a finding of incapacity (ie: the immediate loss of liberty and freedom to live where and how you choose) furthermore, that this "warning" is a requirement of section 78(2)(b) of the *Substitute Decisions Act*.

Section 78 of the *Substitute Decisions Act* provides as follows:

> 78. (1) **Right to Refuse Assessment** - An assessor shall not perform an assessment of the person's capacity if the person refuses to be assessed;
>
> (2) **Information to be provided.** - Before performing an assessment of capacity, the assessor shall explain to the person to be assessed;
>
> (a) the purpose of the assessment;
> (b) the significance and effect of the finding of capacity or incapacity; and
> (c) the person's right to refuse to be assessed.
>
> (3) **Application** – Subsections (1) and (2) do not apply to an assessment if,
>
> (a) the assessment was ordered by the Court under s. 79; or
>
> (b) a power of attorney for personal care contains a provision that authorizes the use of force to permit the assessment and the provision is effective under subsection 50(1).
>
> (4) **Use of prescribed form** – An assessor who performs an assessment of a person's capacity shall use the prescribed form in performing the assessment.
>
> (5) **Notice of findings** – An assessor who performs an assessment of a person's capacity shall give the person written notice of the assessor's findings.

4. The notes of the assessor must refer to the fact that the person being assessed was made aware of the significance

and effect of the finding of incapacity and that person was informed of the right to refuse to be interviewed;

5. That section 78 of the *Substitute Decisions Act* represents the minimum requirements for an assessment and that the person being assessed should be advised that she has the right to have her lawyer (or a friend or a relative) present for the interview;
6. The assessor must do more than merely record information provided by the person being assessed and then form an opinion;
7. The assessor must probe and determine the process by which the person being assessed arrived at an answer or statement;
8. Verification of the information received should be sought. For example, in Re: Koch, the allegations made by the husband, who was obviously in a conflict should, be verified for their accuracy;
9. The assessor must establish whether or not the person being assessed is able to understand the information that is relevant to making a decision in the management of her property;
10. The assessor should be sure that the person being assessed understands the information that is relevant to making a decision about admission to a care facility;
11. The assessor should make a distinction between failing to understand and appreciate risks and consequences, as opposed to being unable to understand and appreciate risks and consequences;
12. The assessor is not to inject their personal values, judgments and priorities into the process, as such the reasonableness of the persons words, deeds and choices, is not the test;
13. The test for incapacity is an objective test;
14. Some real effort must be undertake to determine which evidence to rely on from other witnesses when assessing capacity;
15. Compelling evidence is required to override the presumption of capacity found in section 2(2) of the *Substitute Decisions Act*.

Additional considerations that should be looked at during an assessment are whether or not your client presents well, is ambulatory, pleasant, co-operative and responsive to questions in a clear fashion.

Furthermore, you should consider whether or not there is any evidence of thought disorder, depression, delusions or hallucinations.

Some effort should be undertaken to ascertain the precise medications that your client is on and, in some circumstances, if properly

qualified, the assessor or solicitor could administer the modified mini mental status test for cognitive impairment.

If it is a potentially litigious situation and you have a client who is, possibly, on the "edge" with respect to capacity, you may want to undergo a competency assessment at the Baycrest Competency Clinic or any other properly qualified medical institution, this type of assessment can be of great assistance in the litigation.

5. PROCEDURAL CONSIDERATIONS

(a) *Who Has the Onus, Rules of Evidence and Standard of Proof?*

The question of onus in estate litigation matters is always one that brings with it some confusion.

In matters with respect to Powers of Attorney and the administration of the assets during one's lifetime, the question of onus is different to that of matters with respect to assets after death.

The fiduciary relationship of an attorney and an incapable person imposes obligations which present three general characteristics:

(1) the beneficiary has scope for the exercise of power;
(2) the beneficiary can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interest;
(3) the beneficiary is peculiarly vulnerable to or at the mercy of the beneficiary holding the discretionary power.[11]

As a fiduciary, the attorney has an obligation to act in an incapable person's best interest and not to permit his or her personal interest to conflict with that obligation. When a beneficiary, is an executor or a trustee, then that beneficiary is prohibited from buying, or otherwise acquiring property of the estate or trust without the consent of the court.

An attorney is clearly a trustee and is subject to the same prohibition.

Where an attorney acquires the beneficial interest of a fiduciary of an estate or trust, the beneficiary has a heavy burden to demonstrate that he took no advantage of his position, that the consent of the beneficiary was free and informed and that of a capable person.[12]

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[11] Frame v. Smith, [1987]2 S.C.R. 99, p.136 per Wilson, J.(Diss.).
[12] Waters, Law of Trusts in Canada (second edition), p.727-731.

6. ATTORNEY'S ACCOUNTS

There is clear statutory and common law authority for the proposition that a fiduciary or attorney has a duty to account[13].

Section 42 of the *Substitute Decisions Act* provides as follows:

(1) **Passing of Accounts.** – The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed.

(2) **Attorney's Accounts.** – An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts.

(3) **Guardian's Accounts** – A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property.

(4) **Others entitled to apply** – The following persons may also apply:

(1) The grantor's or incapable person's guardian of the 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.
(6) Any other person, with leave of the court.

(5) **P.G.T. a party** – If the public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious.

(6) **Filing of accounts.** – The accounts shall be filed in the court office and the procedure in the passing of accounts is the same and has the same effect as in the passing of executors' and administrators; accounts.

(7) **Powers of court.** – In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

(a) direct the Public Guardian and Trustee to bring an application for guardianship of property;

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[13] See Re Taerk, [1957] O.R. 482 (C.A.), also see Re Warsh unreported decision of Sheard J., August 26, 1994, O.J. No. 3234/93.

(b) suspend the power of attorney pending the determination of the application;
(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;
(d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity; or
(e) order that the power of attorney be terminated.

(8) **Same.** - In an application for the passing of the accounts of a guardian of property the court may, on motion or on its own initiative,

(a) adjust the guardian's compensation in accordance with the value of the services performed;
(b) suspend the guardianship pending the determination of the application;
(c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application; or
(d) order that the guardianship be terminated.

This provision is further expanded by section 49(3) of the *Estates Act*[14] which provides as follows:

> The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as the judge considers proper and just to the estate or trust fund, by any order made under this subsection is subject to appeal.

As to the common law authority, the Ontario Court of Appeal Re: Taerk[15] stated:

> It is plain to me that after the amendment to the *Surrogate Courts Act*, as now found in s.772(3), *supra*, a judge on passing the accounts of an executor, administrator or such a trustee, has jurisdiction to enter into and make full inquiry and accounting of and concerning two classes of property, namely: (the numbering is mine) (1) The property which the deceased was possessed of at the time of his death. (2) The property which the deceased was entitled to at the time of his death. For the purpose of making such inquiry and

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[14] R.S.O. 1990, c.E.21.
[15] [1975] O.R. 482 (C.A.).

> accounting, a Judge is expressly empowered to "decide all disputed matters arising in such accounting subject to appeal". The scope of the inquiry and accounting which may be lawfully made by a Judge of the Surrogate Court is not limited to the property in possession of the deceased at the time of this death. It extends to and includes property which the deceased was entitled to at that time, and the Judge may decide all disputed matters arising in such accounting in respect of the title to such property. Thus, in my opinion, it was within the scope of s. 72(3) and the jurisdiction of a Judge of the Surrogate Court acting thereunder to enter into and make full inquiry concerning the rights of the deceased at the time of his death to the money, bonds and coupons owned by him in his lifetime and which during his lifetime had passed into the possession of the defendants, or the defendant Alexander J. Turk, as the case might be. If, upon such an inquiry, a Judge decided that the deceased was entitled to such money, bonds or coupons or any part of them, he had power under the subsection to compel the executors to make an accounting thereof.

7. COSTS

The question of costs in contested matters surrounding a power of attorney is sometimes difficult to predict.

Often, the courts approach these kinds of situations in a similar way that estate matters are looked upon. For example, costs of the litigation may in fact be born by the assets of the incapable person in some situations. However, this trend is changing and some real consideration should be given to whether or not the cost of the litigation will be paid by the parties themselves.[16]

It is interesting to note that the Ontario Court of Appeal, in Re Taerk[17], held that based on the conduct of the executors of the estate and the son's of the deceased, they, personally, pay to the plaintiff her costs of the appeal and that the defendant should not be reimbursed out of the estate for any such costs.

In any event, one thing is certain, if matters of this nature are contentious the costs can be considerable, given the nature of the disputes.

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[16] see Schnurr, B.A., "Estate Litigation – Who Pays the Costs", [1991] 11 E.T.J. 52, Hull, Ian "Costs in Estate Litigation", 18 E.T.R. (2d) 218.

[17] see note 16 above.

THE PUBLIC GUARDIAN AND TRUSTEE

DUTIES AND POWERS OF A GUARDIAN OF PROPERTY

The purpose of this information bulletin is to help a person who has been appointed as the guardian of property of an incapable person. It explains what this important role involves, what things the guardian is allowed to do and what steps must be taken by the guardian to meet his or her obligations to the incapable person.

This information bulletin may also be useful to other people who are not guardians. For example, if you are considering applying to be the guardian of a relative or friend who is incapable, you should be fully aware of what the role involves. If you are a person working with a guardian of property, you may want to know what the guardian is allowed to do and what you can expect in your dealings with the guardian.

The powers and duties of a guardian of property are set by law. The Substitute Decisions Act, 1992 and the regulations under that law set out these powers and duties. This bulletin is a summary, based on the law. It is not as comprehensive as the law itself. This bulletin is not legal advice. If, after reading this information bulletin, you have more questions or uncertain about how to interpret the information, you should consult with a lawyer.

The Purpose of a Guardian of Property

People who are mentally incapable of handling their own finances are unable to look after their own welfare by looking after the basic financial transactions that adults normally carry out for themselves. They are unable to do their own banking, look after day-to-day bills, buy personal items, buy food, shelter and services, collect payments to which they are entitled or deal with assets they own such as a house or investments. This makes them extremely vulnerable. It also affects other people such as dependants, service providers and those who own property together with the incapable person. The role of a guardian of property is to step into the shoes of the incapable person for the purpose of financial decisions and transactions on that person's behalf. This serves to protect the welfare of the incapable person. It also indirectly benefits others whose own financial interests are connected to those of the incapable person.

This obligation is a very serious one. Almost every aspect of the incapable person's life is affected - directly or indirectly - by the guardian's actions. By performing the role diligently and sensitively, the guardian will give the incapable person the most comfortable, enjoyable and safe life that the incapable person can afford. On the other hand, extreme harm can result to the incapable person and to others if the guardian does not act diligently and honestly. Therefore, the highest standards of honesty, integrity and trust are demanded from the guardian.

Passing control of an incapable person's income and assets to a guardian of property does not mean that the guardian assumes ownership of the income and assets. Ownership remains in the name of the incapable person. Similarly, the guardian does not become personally liable for any of the incapable person's financial obligations. He or she is simply responsible for managing, in the best way possible, what the incapable person has.

Authority of a Guardian

As a guardian of property, you are allowed to do on the incapable person's behalf anything in relation to his or her property that the person could do if capable, except to make a will. For example, you are allowed to do the following on the incapable person's behalf:

- open and close bank accounts
- redirect pensions and other income
- apply for benefits or supplementary income to which the person is entitled
- choose pension options
- deal with investments
- collect debts
- pay bills
- buy goods and services
- start or defend law suits, if there are financial implications
- lend, sell, store or dispose of personal belongings
- maintain or sell a house or vehicle

You are entitled to receive, from any person or business, information about the property that belongs to the incapable person and copies of any documents signed by, or given to, the incapable person.

A person who holds, or controls the property is required by law to deliver the property to you when you require that person to do so. This situation will arise if you need control of the property for a decision that you make in the best interests of the incapable person. For example, you may need to obtain the contents of the incapable person's safety deposit box to look for valuable papers like savings bonds or guaranteed investment certificates. You are entitled to obtain the person's will, if they have one. You should always do so.

Legal Responsibilities of a Guardian

- You must keep the incapable person's financial accounts and transactions completely separate from your own. You must never borrow or use the incapable person's money for yourself or your family and friends unless authorized in the management plan or by the court (see below). You are only allowed a specific amount to compensate you for your work as a guardian (see the section on Compensation below).

- You must consider the personal comfort or well-being of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The most important goal in performing your role is to maximize the quality of life of the incapable person.

- You must manage the property in a way that accommodates the decisions made about the incapable person's personal care. For example, if the person wants to live in a certain place and can afford it, it would be your duty to arrange to pay for this choice of residence. If the person wants to take a vacation and can afford it, it would be your duty to make arrangements to pay for it. However, there is one exception to this obligation. You may make a financial decision that overrides a personal care decision **only if** to do otherwise would result in negative consequences with respect to property that **heavily outweigh** the personal care benefits of the decision. For example, the person may want to remain living in his or her own house, but may require 24 hour care and not have enough money to pay for it without selling the house and moving to another residence. In that case, the need to sell the house in order to have enough money to pay for the person's care may heavily outweigh the person's wish to remain living in the house.

- It is your responsibility to try to inform the incapable person of all your powers and duties, to the extent that the person is able to understand.

- As the guardian of property you must encourage the incapable person to participate, to the best of his or her abilities, in your decisions about the property.

- You must discuss the financial decisions and transactions you make, from time to time, with family members and friends who are in regular contact with the incapable person and with people providing personal care (for example, nurses, doctors, support workers) to the incapable person. You must also foster personal contact between family members, caregivers, and the incapable person.

- You must act in accordance with the management plan established for the property. The management plan is the document outlining the details of the property that you submitted to the Public Guardian and Trustee or the court with your application for guardianship. This plan may be amended from time to time, with the Public Guardian and Trustee's approval.

- You must make reasonable efforts to determine whether the incapable person has a will, and if so what the will says. If the incapable person's will includes a gift of property, you must retain that property so that it may be passed on in accordance with the incapable person's will. You may need to depart from this rule if selling the property is absolutely necessary for you to fulfil your duties to the incapable person while he or she is alive.

Required Expenditures by a Guardian

As the guardian, you are required to make certain expenditures from the incapable person's property, provided there is enough money, in the following order:

1. Expenditures that are necessary, within reason, for the support and care of the incapable person.

2. If enough money remains, expenditures for the maintenance and education of the incapable person's dependants.

3. If enough money remains, expenditures that are necessary to meet the incapable person's legal obligations.

Discretionary Expenditures

In addition to the required expenditures listed above, you **may** make the following expenditures:

- Gifts or loans to the incapable person's friends and relatives if the incapable person previously (before becoming incapable) indicated that he or she would make these gifts or loans.

- Charitable gifts, if the incapable person previously made similar gifts or authorized these gifts in a power of attorney before becoming incapable. These gifts shall not exceed the lesser of

  - 20% of the incapable person's income in the year the gift is made; or
  - the maximum amount or value of gifts provided for in a power of attorney previously signed by the incapable person before becoming incapable

BUT

- If the incapable person indicates to you that he or she does not want to make gifts or loans, you must follow the person's wishes. You must not make a gift or loan to friends or family or make a charitable donation that is contrary to the expressed wishes of the incapable person.

Directions from Court

If any difficult questions about the management of the property arise, you may apply to the court for directions on how to resolve the issue. The court you apply to will be the Superior Court of Justice (formerly known as the Ontario Court, General Division). The court will give you directions as to what it considers to be beneficial to the incapable person. You will probably require the services of a lawyer to bring your application to court.

Compensation

As a guardian of property, you may be paid for your work. The annual compensation that you are allowed to take is set out in a fee scale in Ontario Regulation 159/00 that is outlined below. This scale determines the amount of compensation you may take and the method you shall use to calculate that amount. You may take more compensation than the amount prescribed by the fee scale if you receive written consent from the Public Guardian and Trustee AND the incapable person's guardian of the person or attorney under a power of attorney for personal care, if he or she has one. You should speak with a lawyer or an accountant to receive advice on how to calculate these fees.

Fee Scale:

As a guardian of property, effective April 1, 2000 for all **new** transactions, you are entitled to compensation of:

- 3% on capital and income received by you;
- 3% on capital and income disbursements; and
- 3/5ths of 1% of the annual average value of the assets (this is called the care and management fee).

Note that for transactions prior to April 1, 2000 fees were 2.5% on capital and income received by you and on capital and income disbursements, and 2/5 of 1% of the annual average value of the assets

Capital received by you includes the incapable person's property that you locate, secure and manage for the incapable person such as real estate, bank accounts and guaranteed investment certificates.

Income received by you on behalf of the incapable person may include pensions, government benefits, dividends, interest and rent.

A capital disbursement on behalf of an incapable person may include buying an asset on his or her behalf, such as buying a house or investing in Canada Savings Bonds.

An income disbursement on behalf of an incapable person is a payment made on behalf of the person, for items such as rent, utilities, food, clothing or housekeeping services.

Maintaining and Passing Accounts

As the guardian of property, one of your main legal duties is to keep accounts of all transactions involving the property. You may be required to pass (submit) your accounts to the court for inspection in several circumstances. The Public Guardian and Trustee may apply to the court for an order requiring you to pass your accounts. As well, the incapable person, the incapable person's guardian or attorney for personal care, any of the incapable person's dependants, the Children's Lawyer, a creditor of the incapable person or anybody else, with the court's permission, may apply to the court for an order requiring you to pass your accounts. You may apply to the court for a passing of accounts as well, for several reasons, including questions regarding the amount of compensation that you are permitted to take. In an application for the passing of your accounts, the court may grant or adjust your compensation and temporarily suspend or even permanently terminate your guardianship, depending on the outcome.

It is therefore extremely important that you maintain your records and accounts in a manner outlined below. (See Ontario Regulation 100/96).

Records and Accounts - What is Required

In addition to the accounts, you MUST keep your certificate of statutory guardianship or the court order that appointed you as the guardian, a copy of the management plan and a copy of any court orders that relate to management of the incapable person's property. It is your responsibility to keep the original copy of your certificate in a safe place and it is recommended that you NEVER give this certificate to anybody else to hold.

The records that you keep *must* include:

- A list of *all* of the incapable person's assets as of the date of the first time you make any transaction on the incapable person's behalf. Assets include real estate, money, securities, investments, motor vehicles and other personal property;

- An up-to-date list of all assets acquired and disposed of (bought, sold, loaned or given as a gift) on behalf of the incapable person. You must include the date and reason for acquiring or disposing of the property and the name of the person from or to whom the asset was acquired or disposed;

- An up-to-date list of all money that you pay out or receive on behalf of the incapable person, including all details associated with the transaction, i.e. the date, reason, information about the account you withdrew from or deposited into, and the person with whom you carried out the transaction;

- An up-to-date list of all investments made on behalf of the incapable person, including amount, date, interest rate and type of investment;

- An up-to-date list of all of the incapable person's liabilities (debts) as of the date of your first transaction as guardian;

- An up-to-date list of all liabilities that you have paid off or taken on, if any, on behalf of the incapable person, including the date, the nature of the liability (to whom or for what does the person owe or no longer owe money) and the reason for its being discharged or incurred; and

- An up-to-date list of all compensation that you take, including the amount, date and method of calculation AND a list of the assets and the value of each asset used to calculate your management fee, if any.

It is also a good idea to keep copies of invoices and bills you have paid on the person's behalf, and cancelled cheques. You must retain the accounts and records until you no longer have guardianship over the property and one of the following occurs:

- another person is given the authority to manage the incapable person's property and you deliver the accounts and records to that person;
- the incapable person dies and you deliver the accounts and records to the person with legal responsibility for the estate;
- you are discharged from your duties by the court and the time for appealing the decision has expired or you are being discharged on appeal; or
- a court order directs you to destroy or dispose of the accounts and records;
- you are provided with a document called a release, relieving you of any further personal legal responsibility for your actions as a guardian, signed by the person, if they are now capable, or a legal representative of the person's estate, or a new guardian.

Maintaining Confidentiality

You are not allowed to disclose any information contained in the accounts and records unless required to do so in order to make transactions on the incapable person's behalf or otherwise fulfil your duties as a guardian, or if ordered to do so by a court.

You must produce copies of your records to:

- the incapable person;
- the incapable person's attorney for personal care or guardian of the person;
- the Public Guardian and Trustee.

- This information bulletin has been provided to help a person who has been appointed as a guardian of property of an incapable person. While it provides useful information about the role and responsibilities of a guardian of property, it is only a summary and it is not legal advice. If you have specific questions about your own situation, you should speak 1to a lawyer or an accountant to receive advice to guide you.

SUGGESTED COMPENSATION CLAUSES FOR PERSONAL CARE POWER OF ATTORNEY

(a) In consideration of my attorney(s) acting on my behalf under this power of attorney, I direct my legal representatives to pay compensation to him, her or them out of my property. My attorney(s) may apply to my personal representatives annually for compensation based on itemized time dockets submitted to them for the work done including travelling time and out of pocket expenses. My attorney(s) reasonable estimates as to the fair market value of the docketed time for various services rendered may be relied on by my personal representatives for the purpose of compensating my attorney(s).

(b) In consideration of my attorney(s) acting on my behalf under this power of attorney, I direct my legal representatives to pay compensation to him, her or them out of my property. My attorney(s) may apply to my personal representatives annually for compensation based on itemized time dockets submitted to them for the work done including travelling time and out of pocket expenses. The basis for compensating my attorney(s) shall be the hourly rate for services earned by them in their profession, trade or occupation during the last completed taxation or $_____ per hour, whichever is greater.

SUGGESTED SPECIFIC INSTRUCTION IN PROPERTY POWER OF ATTORNEY TO COMPENSATE PERSONAL CARE ATTORNEY

I direct my attorney to expeditiously compensate any persons who are actively engaged in acting under any Attorney for Personal Care which I have made in accordance with directions in that behalf contained the said Personal Care Power of Attorney.

SUGGESTED INCENTIVE CLAUSE FOR WILL TO COMPENSATE PERSONAL CARE ATTORNEY

(a) To pay to any person who has acted as my Attorney for Personal Care during my lifetime, _____% of the residue of my estate for each year which he, she or they have acted on my behalf.

(b) To pay to any person who has acted as my Attorney for Personal Care during my lifetime, the sum of $ _____ for their care, pains, trouble and time in having executed this office.

Appendix B

OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

Integrated Client Services Department
595 Bay Street
Toronto, Ontario
M5G 2M6

Hours of operation are 8:30 a.m. to 4:30 p.m., Monday to Friday

Intake Unit and Screening Unit
Telephone: 416-327-6683
Fax: 416-314-2642
Toll-free: 1-800-366-0335

Guardian Investigations Unit
Telephone: 416-327-6348
Fax: 416-3314-2642
Toll-free: 1-800-366-0335

Client Services

Toronto Regional Office
Telephone: 416-314-2800
Fax: 416-314-2619
Toll-free: 1-800-366-0335

London Regional Office
401 Clarence St., 3rd floor
London, Ontario N6A 3M6
Telephone: 519-660-3140
Fax: 519-660-3148
Toll-free: 1-800-891-0504

Hamilton Regional Office
119 King St. West – 9th floor
Hamilton, Ontario L8P 4T9
Fax: 905-546-8301
Telephone: 905-546-8300
Toll-free: 1-800-891-0502

Ottawa Regional Office
244 Rideau St., 3rd floor
Ottawa, Ontario K1N 5Y3
Telephone: 613-241-1202
Fax: 613-241-1567
Toll-free: 1-800-891-0506

Sudbury Regional Office
199 Larch Street, Suite 602
Sudbury, Ontario P3E 5P9
Telephone: 705-564-3193
Fax: 705-564-3193
Toll-free: 1-800-891-0503
*Satellite office in Thunder Bay

Support of Dependants under Part V of the *Succession Law Reform Act*

1. RESTRICTION ON TESTAMENTARY POWER

Since the early 1900s, legislators in the common law jurisdictions began to give to the court a discretionary power to order proper maintenance and support out of the assets of an estate in circumstances where the testatrix had failed to make an adequate provision for support of dependants. In Ontario, the *Dependants' Relief Act*, R.S.O. 1970, c.126 and the successor provisions in the *Succession Law Reform Act*, R.S.O. 1990, c.S.26, set out the statutory provisions whereby a testator's power to do what they wish with their assets was restricted.

Some of those persons that may make dependants' relief claims are:

- the deceased's wife or husband;
- a brother or sister of the deceased;
- a former wife or husband of the deceased;
- a child or grandchild of the deceased;
- a person treated by the deceased as a child of the family in relation to any marriage of the deceased.

The limits set out by the legislators on testamentary power are not firmly entrenched; however, there is still a struggle between the choice of providing a reasonable level of support for dependants and the enforcement of a moral duty of the deceased to divide his or her estate amongst his or her dependants.

2. THE POWER OF THE COURT

Section 58 (1) of the Succession Law Reform Act confers on the Court the power to make an order for support as follows:

> 58. (1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made

out of the estate of the deceased for the proper support of the dependants or any of them.

a) Testate or Intestate

b) Proper Support - see also 5 below

c) The Court means The Superior Court of Justice

d) On Application

e) Adequate Provision - see also 4 below

f) Out of the Estate

i) Estate assets in the usual sense
ii) Claw Back

g) Section 72 (1) includes or claws back certain assets and provides as follows:

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her; and

(g) any amount payable under a designation of beneficiary under Part III.

This enabling provision has been written using very broad language to allow the court a great deal of discretion. For example, the term "proper support" gives the court a considerable amount of flexibility.

3. WHO IS A DEPENDANT

One of the first considerations that must be carefully reviewed is the question of "Who is a Dependant"? Dependant is defined as the spouse, the common law spouse, a parent, a child or brother or sister of the deceased to whom, in each case, the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

Section 57 of the Act defines a Dependant as:

a) the spouse or same-sex partner of the deceased,

b) a parent of the deceased,

c) a child of the deceased, or

d) a brother or sister of the deceased, to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death;

Each of the terms "child", "parent" and "spouse" is further defined by Section 57 as follows:

Definitions:

"child" means a child as defined in subsection 1(1) and includes a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"parent" includes a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody;

"spouse" means a spouse as defined in subsection 1(1) and in addition includes either of a man or woman who,

(a) were married to each other by a marriage that was terminated or declared a nullity, or

(b) are not married to each other and have cohabited,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

The definitions provided allow for some scope with respect to a class of dependants. There are questions as to the meaning of the requirement that the deceased was "providing support" and the meaning of the phrase "immediately before his or her death". Furthermore there is a new definition of same-sex partner.

4. WHAT IS ADEQUATE PROVISION FOR SUPPORT

Section 62(1) of the Act provides as follows:

(1) In determining the amount and duration, if any, of support, the Court shall consider all the circumstances of the application, including,

a) the dependant's current assets and means;

b) the assets and means that the dependant is likely to have in the future;

c) the dependant's capacity to contribute to his or her own support;

d) the dependant's age and physical and mental health;

e) the dependant's needs, in determining which the Court shall regard to the dependant's accustomed standard of living;

f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

g) the proximity and duration of the dependant's relationship with the deceased;

h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;

i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;

j) a contribution by the dependant to the realization of the deceased's career potential;

k) whether the dependant has a legal obligation to provide support for another person;

l) the circumstances of the deceased at the time of death;

m) any agreement between the deceased and the dependant;

n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under Court order;

o) the claims that any other person may have as a dependant;

p) if the dependant is a child,

(i) the child's aptitude for and reasonable prospects of obtaining an education, and

(ii) the child's need for a stable environment;

q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;

r) if the dependant is a spouse,

(i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an

obvious and gross repudiation of the relationship,

(ii) the length of time the spouse cohabited,

(iii) the effect on the spouse's earning capacity or the responsibilities assumed during cohabitation,

(iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,

(vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,

(viii) the desirability of the spouse remaining at home to care for a child; and

s) any other legal right of the dependant to support, other than out of public money.

(2) In addition to the evidence presented by the parties, the Court may direct other evidence to be given as the Court considers necessary or proper.

(3) The Court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant, as the case may be, including any statement in writing signed by the deceased.

(4) In estimating the weight to be given to a statement referred to in subsection (3), the Court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement.

5. WHAT IS THE NATURE OF SUPPORT

a) Dependency

b) It need not be Monetary

c) Material Support of Spouses

d) Beware of Jurisprudence of Other Provinces

6. CONTRACTING OUT OF SUPPORT OBLIGATION

Section 63(4) of the Act provides as follows:

> Agreement or waiver - An order under this section may be made despite any agreement or waiver to the contrary.

But see Section 62 1)(m) above.

7. LIMITATION PERIOD

Section 61 of the Act provides as follows:

(1) Limitation period - Subject to subsection (2), no application for an order under section 58 may be made after six months from the grant of letters probate of the will or of letters of administration.

(2) Exception - The Court, if it considers it proper, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

8. THE COURT'S ORDER

Section 63(1), (2) and (3) of the Act provides as follows:

(1) Conditions and Restrictions - In any order making provision for support of a dependant, the Court may impose such conditions and restrictions as the Court considers appropriate.

(2) Contents of Order - Provision may be made out of income or capital or both and an order may provide for one or more of the following, as the Court considers appropriate,

a) an amount payable annually or otherwise whether for an indefinite or limited period or until the happening of the specified event;

b) a lump sum to be paid or held in trust;

c) any specified property to be transferred or assigned to or in trust for the benefit of the dependant, whether absolutely, for life or for a term of years;

d) the possession or use of any specified property by the dependant for life or such period as the Court considers appropriate;

e) a lump sum payment to supplement or replace periodic payments;

f) the securing of payment under an order by a charge on property or otherwise;

g) the payment of a lump sum or of increased periodic payments to enable a dependant spouse or child to meet debts

reasonably incurred for his or her own support prior to an application under this Part;

h) that all or any of the money payable under the order be paid to an appropriate person or agency for the benefit of the dependant;

i) the payment to an agency referred to in subsection 58(3) of any amount in reimbursement for an allowance or benefit granted in respect of the support of the dependant, including an amount in reimbursement for an allowance paid or benefit provided before the date of the order.

(3) Where a transfer or assignment of property is ordered, the Court may,

a) give all necessary directions for the execution of the transfer or assignment by the executor or administrator or such other person as the Court may direct; or

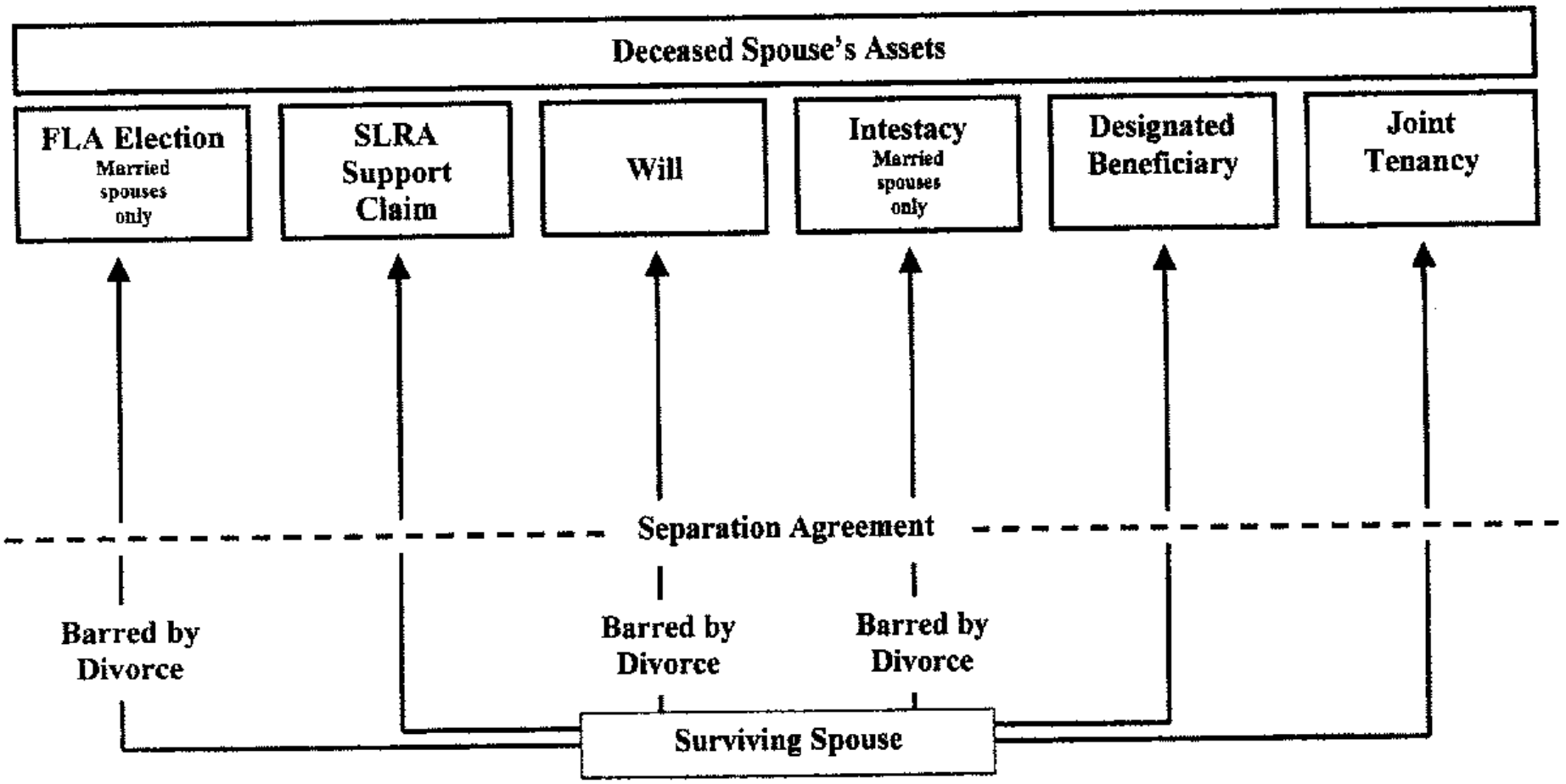
b) grant a vesting order.

9. INTERIM AND SUSPENSORY ORDERS

Sections 59 and 64 of the Act make provisions for these orders.

10. GENERAL COMMENTS

FIGURE 1



Scenario One:

- Married/unmarried spouse
- No children
- Intestacy or Last Will leaving estate to spouse
- Subsequent separation agreement
- No divorce

Scenario Two:

- Married/unmarried spouse
- No children
- Intestacy or Last Will leaving estate to spouse
- Subsequent separation agreement
- Divorce
- Remarriage
- New Will