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Protecting Vulnerable Adults – A Community Responsibility

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Protecting Vulnerable Adults – a Community Responsibility

According to the well known African proverb, it takes a whole village to raise a child. In the case of adults made vulnerable by mental frailty, it can be said that it takes a whole village to protect them from harm. As lawyers resident in the village, we have a special duty to ensure that the legal protections developed over the years to assist in this important obligation are adequately engaged. This paper will explore various means by which the legal profession can better discharge that duty. It will also provide information to assist in addressing the various legal issues that may arise when dealing with persons affected by a mental disability.

Background

Mental disability can take various forms, and may affect an individual's decision-making capacities in a number of ways. For example, an individual may experience a gradual deterioration in mental acuity; decisional capacity may be affected by a specific event, condition or illness which may have short term or long term implications; or an individual may have a developmental health condition that has affected the person since birth. The issues for the lawyer providing service will vary depending on the unique circumstances of the client. While previously mental capacity was a more global term implying a general deficit in decision making ability, the modern view is that capacity must be evaluated based on the particular decisions that are sought to be made. A person may lack capacity for one

purpose, such as managing property, but retain it for another, such as granting a power of attorney.

My views are informed by my perspective and experiences acting as the Public Guardian and Trustee of Ontario. Under the *Substitute Decisions Act, 1992*, the primary responsibility of the Ontario Public Guardian and Trustee is to act as a guardian of last resort for individuals who have been found to be mentally incapable of making their own financial or personal care decisions and who have no appointed attorney or family member available, capable and willing to step in to make necessary decisions. The Ontario Public Guardian and Trustee is also required to investigate allegations that a mentally incapable person is at risk of suffering serious financial or personal harm of such magnitude as to warrant a temporary guardianship application to the Ontario Superior Court of Justice in order to protect the person. These responsibilities uniquely inform my perspective on how we, as a profession, are meeting the legal needs of vulnerable adults.

The Epidemiology

The Office of the Public Guardian and Trustee serves over 9400 property guardianship clients. Approximately one-half are age 60 years and above, and of that group, one-third are over the age of eighty. Most of these older clients suffer from Alzheimer's disease or some form of dementia. According to the Alzheimer Society of Canada, 1 in 13 Canadians over age 65 has Alzheimer's or a related

disease, and 1 in 3 Canadians over age 85 has Alzheimer's or a related disease. [1]

Almost half of the people for whom the Ontario Public Guardian and Trustee acts as guardian of property are persons who suffer from mental health problems or psychiatric conditions. Previous Canadian studies have estimated that nearly one in five Canadian adults will personally experience a mental illness during a one year period. [2]

Many of the clients served by our office reside in supervised settings such as nursing homes and homes for special care, but half of them reside in the community, living independently with varying degrees of support.

It is common knowledge that the demographics are shifting, and the population is aging. This will have a profound impact on society, and will most certainly affect the types of legal issues that will be coming through your doorways. Consider this data exerted from *A Portrait of Seniors in Canada* (defined as age 65 and over):

> "The aging of the population will accelerate over the next three decades, particularly as individuals from the Baby Boom years of 1946 to 1965 begin turning age 65. The number of seniors in Canada is projected to increase from 4.2 million to 9.8 million between 2005 and 2036, and senior's share of

[1] Alzheimer Society of Canada 1997-2008 – www.Alzheimer.ca Retrieved September 29, 2008
[2] Health Canada. *A Report on Mental Illnesses in Canada*. Ottawa, Canada 2002

the population is expected to almost double, increasing from 13.2% to 24.5%...."[3]

And as to the issue of vulnerability, particularly as it affects the senior segment of the population, consider the following:

"In 2003, just under 4,000 incidents of violence against persons aged 65 or older were reported to 122 police services in Canada (Table 2.3.1). Over one-quarter (29%) of these reported incidents were committed by a family member, so throughout this section information is presented on incidents committed by family members and by persons outside the family.

These reported violent incidents were perpetrated almost equally against senior women (46%) and senior men (54%). Just under two-thirds of them (63%) were committed by persons from outside of the family, most often a stranger (34%) or a casual acquaintance (19%), while over one-quarter (29%) were committed by a family member.[footnote omitted]…

Common assault was the most frequently reported violent incident against seniors in 2003, accounting for 40% of all violent offences…. Common assaults include behaviours that do not result in serious injury, such as pushing, punching and slapping, and threatening to apply force. Common assault accounted for 55% of the offences committed by a family member and 33% of the offences committed by someone from outside the family.

[3] Statistics Canada, *A Portrait of Seniors in Canada, 2006* by M. Turcotte and G. Schellenberg, (Ottawa: Social and Aboriginal Statistics Division, 2006), at p. 12. The Report is available on line at www.statcan.ca.

> Male adult children and spouses were most often accused in family-related violence of seniors. One third of the accused were adult male children (33%), followed by male spouses (current and ex-spouses – 30%) and extended male relatives (15%), such as brothers and uncles. The average age of spouses accused of victimizing their partners was 66 years of age, while the average age of adult children was 40 years of age."[4]

As for the vulnerable adults who come into contact with the Ontario Public Guardian and Trustee, the legal issues are less often related to criminal assault and family violence and most often related to financial abuse or mismanagement of the person's property by others. The majority of inquiries to the Investigations Unit of the Ontario Public Guardian and Trustee concern financial abuse or mismanagement alleged to have been committed by an attorney for property or a family member of an elderly individual who is believed to be vulnerable and incapable of taking steps to withdraw from or terminate that relationship.

THE LEGISLATIVE FRAMEWORK

1. The *Substitute Decisions Act*

An important tool introduced to help safeguard the interests of mentally incapable adults is the *Substitute Decisions Act, 1992*, (hereinafter, "the *Act*") which was proclaimed on April 3, 1995.[5] The *Act* emphasizes pre-planning through powers of

[4] *Ibid*, p. 72.
[5] S.O. 1992, c. 30, as am.

attorney and other non-court avenues for substitute decision making, and positions guardianship as a remedy of last resort. The *Act* governs guardians of property and personal care, as well as attorneys under continuing powers of attorney for property and personal care. The *Act* permits adults to make powers of attorney for personal care, in addition to powers of attorney for property, which survive the incapacity of the donor. Mental capacity under the *Act* is determined with respect to particular issues or functions.[6] The test of capacity to make a power of attorney is specified in the *Act.*[7] The tests of capacity to manage property and personal care are specified in sections 6 and 45, respectively. Declarations of incapacity for personal care are made for specific functions such as clothing, health care, hygiene, shelter or nutrition or all functions, rather than the previous automatic global declaration under the former *Mental Incompetency Act.*

Upon proclamation of the *Act*, significant resources were expended by the government of the day to ensure that the people of Ontario were informed about the provisions of the new statute and that they were encouraged to choose an attorney for property and personal care and execute documents which were provided free from the Office of the Public Guardian and Trustee. These power of attorney kits remain available to the public by contacting the Public Guardian and Trustee or by downloading them free of charge at:

www.attorneygeneral.jus.gov.on.ca/english/family/pgt (English) or

www.attorneygeneral.jus.gov.on.ca/french/family/pgt (French).

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[6] Harvey Savage, Carla McKague, *Mental Health Law In Canada* (Toronto: Butterworths, 1987) at 104.

[7] Section 8.

The *Substitute Decisions Act* contains additional protections for adults who are subject to the *Act,* such as provisions for rights advice to persons who are subject to a guardianship application under the *Act.*[8] The *Act* also includes the right to refuse to be assessed except where ordered by the court[9], and the right to independent counsel in an application under the *Act,* accompanied by the presumption of capacity to instruct counsel.[10]

As mentioned, the Public Guardian and Trustee is the substitute decision maker of last resort. My office will only act where family members are unwilling or unable to do so. This may suggest that our clients are largely without family, but in fact over 75% of them do have family. The problem is that these family members are not willing or not suitable to serve as guardian, for a variety of reasons. Often, we encounter family members who are engaged in disputes with our clients or with each other, and dealing with these dynamics can occupy a significant amount of our time. These disputes can make their way into your offices as well, and I will have more to say about that later on in this paper.

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[8] *The Substitute Decisions Act, sections 70(1)(c) and 70(2)(c).*

[9] The Court may order an assessment of a person alleged to be incapable pursuant to section 79 of the *Act.*

[10] Subsection 3(1) provides: "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."

2. The Capacity Assessment Office

Determining whether someone has the legal capacity to make decisions is a complex task. There are different tests for different purposes, and the *Act* empowers private capacity assessors to assist in making these determinations.

The Capacity Assessment Office of the Ministry of the Attorney General was created upon proclamation of the *Substitute Decisions Act.*[11] The Capacity Assessment Office is responsible for the education, training and designation of capacity assessors authorized to conduct capacity assessments under the *Act.*[12] Efforts have been made to ensure there is a sufficient number of capacity assessors across Ontario, that there are members from all of the permitted regulated health professions,[13] that they have a variety of expertise with dementia-related illnesses, acquired brain injuries, forms of mental illness and other causes of mental disability, that they can conduct assessments in a variety of languages and that they receive regular training in issues relating to capacity assessment. Capacity assessors are not employees of government – they are self-employed or employees of other institutions such as nursing homes or hospitals. Their fees are not regulated by the government. The person requesting a capacity assessment is obliged to pay the assessor, but these fees may be recovered on a successful

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[11] Created pursuant to O. Reg. 293/96, now O. Reg. 460/05.

[12] The assessment of an individual for testamentary capacity is not an assessment under the *Substitute Decisions Act.* This is a legal test which should be applied by the lawyer taking instructions for the Will. Capacity assessors are not trained in the legal test of testamentary capacity.

[13] The regulation permits capacity assessors to be members of one of the following health professions: College of Physicians and Surgeons, College of Nurses, College of Occupational Therapists, Ontario College of Social Workers and Social Service Workers, College of Psychologists.

guardianship application to the Superior Court of Justice, upon approval of the Judge. Upon request, the Capacity Assessment Office will provide a list of capacity assessors in the geographic area where the incapable person resides, with expertise in the area of mental disability, where available. When contacting a capacity assessor, the obligation of the solicitor is to specify the type of capacity assessment requested (either for court appointment of a guardian or the statutory appointment of the Public Guardian and Trustee), and provide any other relevant information about the incapable person.[14]

3. The Office of the Public Guardian and Trustee

Historically confined to the role of financial management of the affairs of incompetent adults, today by a number of statutes, the Public Guardian and Trustee now plays a larger role in the lives of incapable adults in Ontario.

For example, under *the Substitute Decisions Act,* the Public Guardian and Trustee:

(a) acts as guardian of property of the assets, finances and liabilities of incapable adults, by statutory or court appointment;

(b) acts as guardian for personal care of incapable adults by court appointment;

(c) reviews court applications for guardianship by family members and trust companies and provides comments to the Superior Court of Justice;

[14] The Capacity Assessment Office of the Ministry of the Attorney General may be contacted by telephone at: 416-327-6766 (Toronto) or Toll-Free at: 1-866-521-1033.

(d) investigates allegations of risk of serious adverse effects to the person or property of adults who are believed to be incapable and, where no less intrusive remedy will meet the needs of the incapable person, applies to the Superior Court for temporary guardianship of the adult; and

(e) maintains a Register of Guardians of Property and Personal Care.[15]

Under the *Health Care Consent Act,* the Public Guardian and Trustee as last resort decision-maker gives consent or refuses consent to treatment for individuals who have been found to be incapable of making a treatment decision for themselves and have no relative, guardian or attorney to act as their substitute decision-maker.[16] This decision-making role also includes the ability to make substitute decisions for placements in a long-term care facility and personal assistance services. Section 21 of the Act sets out the statutory principles which must be followed when making decisions for incapable persons. These statutory provisions are designed to ensure that all Ontarians have the right to informed consent to treatment. Last year, the OPGT made over 5,000 medical treatment decisions for incapable adults.

[15] Pursuant to O.Reg. 99/96. Pursuant to the regulation, certain information such as the name of the guardian and his or her contact information, is available publicly by contacting the Public Guardian and Trustee and identifying the incapable person.

[16] Section 20(1) of the *Health Care Consent Act, 1996,* S.O. 1996. c. 2, Sched. A, as am. The list, in priority, is: a guardian, an attorney, a representative appointed by the Consent and Capacity Board, a spouse or partner, a child or parent, a brother or sister or any other relative, or if none of the foregoing are able and willing, the Public Guardian and Trustee.

Under the *Rules of Civil Procedure,* the Public Guardian and Trustee:

(a) acts as litigation guardian as last resort under Rule 7 for incapable adults for whom the Public Guardian and Trustee acts as guardian of property or personal care;

(b) acts as litigation guardian under Rule 7 for incapable adults who have no other person able or willing to act as litigation guardian in the proceeding;[17]

(c) Provides written Reports to the Superior Court of Justice under Rule 7.08(5) on motions for approval of a settlement involving an adult party under disability, where the materials are referred to the Public Guardian and Trustee by a Justice of the Superior Court;

(d) Reviews notices under Rule 74.04(6) of the appointment of an estate trustee, where there is an incapable beneficiary of an estate who has no guardian or attorney or anyone not in a conflict of interest to protect the interests of the incapable person in the estate or on a passing of accounts under Rule 74.18(3.1);

(e) responds to motions to discontinue proceedings by or against incapable adult parties under rule 23.01(2) and Rule 7.07(1);

(f) responds to motions to dismiss for delay where an incapable adult is a plaintiff, under Rule 24.02;

(g) responds to status hearings where there is an adult party under disability, under Rule 48.14(9);

[17] The Public Guardian and Trustee has a similar role under Rule 4 of the Family Court Rules, to act as a representative of a special party. The Rules of the Small Claims Court also provide for special representation of a party under disability.

(h) responds to motions under Rule 15.04 to remove a solicitor of record where the party for whom the solicitor is acting is under a disability;

(i) responds to service upon incapable persons or absentees under Rule 16.02(i) and (k) of the Rules of Civil Procedure; and

(j) may act under a representation order under Rule 10 for incapable adults or as a friend of the Court under rule 13.02 in litigious proceedings, at the invitation of a Justice of the Superior Court.

4. Other Protections for Parties under Disability in Litigation

In addition to the rules noted above, the Ontario *Rules of Civil Procedure* contain a number of provisions for the protection of incapable adults, such as:

(a) Rule 19.01(4): a party under disability may only be noted in default with leave of a judge under Rule 7.07;

(b) an adult party under disability must be represented by a solicitor: Rule 15.01(1);

(c) motions for payment out of court to a party under disability must be made on notice to the Children's Lawyer or the Public Guardian and Trustee; and

(d) Motions for approval of settlements, whether or not a claim has been commenced, must be approved by a Justice of the Superior Court in accordance with Rule 7.08(1).

In 2004, amendments were made to the *Solicitors' Act* regarding contingency fee agreements.[18] O.Reg. 195/04 contains a specific provision affecting parties under disability:

> "A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,
>
> (a) apply to a judge for approval of the agreement before the agreement is finalized; or
>
> (b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure."[19]

The *Family Law Act*, section 55, requires court approval *in advance* of a domestic contract to which an incapable person is a party.

These are only a few examples of the procedural and statutory protections that exist in provincial statutes and the Rules of various Courts in Ontario, whose purpose is to ensure the protection and fair treatment of vulnerable adults.

ISSUES ARISING IN PRIVATE PRACTICE

Having provided some background on the legislative framework and a number of examples of statutory and other protections that exist for the protection of vulnerable adults, I will turn back to the more practical considerations that you may face when such persons and their family members arrive in your office for advice. One of the best examples can be found in the decision of Mr. Justice Cullity, in the

[18] S.O. 2002, c. 24, Sched. A., section 3.
[19] O. Reg. 195/04, section 5(1).

case of *Banton* v. *Banton*.[20] It is a cautionary tale about the pitfalls that may arise for lawyers serving elderly vulnerable adults.

***Banton v. Banton*: A Cautionary Tale**

The circumstances of the case as described at length by Mr. Justice Cullity, were as follows. The elderly George Banton was born in 1906 and married three times during his lifetime. He and his first wife had five children and from them, eighteen grandchildren. His relationship with his children had always been close. George Banton's first wife died in 1970 and in 1971, he married her sister Lily. In the 1980s Lily's Alzheimer's disease became more progressed and George himself deteriorated physically. In the early 1990s George Banton underwent multiple surgeries as he was afflicted with prostate cancer. He was also severely hearing impaired and had mobility problems and problems with incontinence. In the early 1990s Lily was moved into a retirement home and within a couple of years, George sold his home and moved into a different retirement home. Lily died in June 1994.

Years before, George Banton had made a will leaving his estate to his children and he gave his two sons continuing power of attorney over all of his property. George changed his will (as one might conventionally expect) after he married Lily to make some provision for her. Within a month of Lily's death in 1994, George had formed a friendship and "close attachment" with Muna, a 31 year old waitress working in

[20] [1998] O.J. No. 3528 (Ontario Court of Justice (General Division). If you note up this case, you will find that there are numerous separate Orders relating to aspects of the case, including a ruling by the Ontario Court of Appeal in *Banton* v. *CIBC Trust Corp*. [2001] O.J. No. 1023, concerning appeals of several of the Orders of Mr. Justice Cullity. However, I present these facts to you and invite you to read Justice Cullity's learned Judgment which followed a full trial and was not appealed.

the restaurant at George's retirement home. As his children became increasingly concerned about that relationship, various appointments were made for George with a geriatric specialist to review the issue of his financial competence. A medical opinion was obtained that George Banton was incapable of managing his property. At the same time, his sons (and attorneys) were concerned to protect his property and sought legal advice about how best to do so as they had been told by George's bank that he had, in the company of Muna, recently withdrawn a significant amount of cash and attempted to cash other cheques. Based upon the advice they received, the sons created a Trust Agreement to look after George during his lifetime and upon his death provided dispositive provisions consistent with his existing will.

Unknown to any of his children, George and Muna secretly married late in 1994 and when that was subsequently discovered, there were ensuing fireworks between them and George's children. Several days after their marriage, George and Muna went to a lawyer and he was told that they were (recently) married and that George wanted to make a new will and give Muna power of attorney. The lawyer's instructions were that the new will would leave George's entire estate to Muna with a gift over to a charity should she predecease him. The will and power of attorney were signed within a couple of days of the lawyer's first meeting with George and Muna.

George Banton continued to live at the retirement home until he moved in with Muna in April of 1995. On May 4, 1995, the will was re-executed by Mr. Banton. During this time, the level of conflict grew, competing capacity assessments were conducted and the Office of the Public Guardian and Trustee became involved and launched a court application for guardianship of property that was contested by George Banton.

By late October 1995, George Banton was severely ill and hospitalized. Before his death in mid-February of 1996, he had moved into a different nursing home and there was some restoration of his relationship with his children. At the time of George Banton's death, the guardianship litigation was unresolved. Not surprisingly, other issues took precedence after George Banton died and ultimately, an order for directions was made as to the scope of the issues that were tried before Justice Cullity.

The issues Justice Cullity were required to adjudicate upon included George Banton's testamentary capacity after he married Muna, whether she exerted undue influence over him in respect of those testamentary dispositions, whether his sons, while acting as his attorneys, created a valid Trust in their efforts to protect George Banton and whether George Banton had the mental capacity to marry Muna. Not surprisingly, there were very contentious questions of fact on which the evidence conflicted. Credibility was very much an issue in those respects.

While the reported decision provides a thorough review and restatement of the applicable legal principles, I think the following observation aptly captures the complexity of the legal framework that faced different lawyers involved in the affairs of George Banton and his family:

> "With the possible exception of the law relating to capacity to marry, the applicable legal principles are reasonably well settled. As in other cases involving elderly testators, the difficulty lies in finding the facts and applying the principles to them. The difficulty is accentuated in this case by the existence of different legal tests for determining capacity to marry, testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, and capacity for personal care. Each of these is relevant in varying degrees to the issues in this case. It is clear that capacity or incapacity for one such purpose does not necessarily determine the question for other purposes. Although in each case the question may depend, at least, in part, upon the individual's cognitive powers, the nature of the understanding required is not the same. The tests are, therefore, different and this is now made explicit in the provisions of the Substitute Decisions Act dealing with capacity to manage property, capacity to give a power of attorney with respect to property, capacity for personal care and capacity to give a power of attorney for personal care."[21]

[21] *Ibid*, para. 6, p. 7.

The end result of this particular proceeding was that Mr. Banton was found to lack testamentary capacity when he signed the wills leaving his property to Muna, the marriage was found to be valid and the earlier will thereby revoked, and Mr. Banton was deemed to have died intestate. Many other proceedings followed, as you might imagine.

The circumstances of the *Banton* case are not uncommon. Similar types of disputes are reported to our Investigations Unit on a regular basis. Informed by this case and by our own experience, I will consider some specific areas where lawyers should be particularly on guard when representing adults who may be vulnerable by reason of a mental disability or a cognitive impairment.

Powers of Attorney

The types of complaints that are received by the Office of the Public Guardian and Trustee, suggest to me that lawyers could probably improve some of their practices at the front-end of incapacity planning for clients. Once powers of attorney are in use for the benefit of a person who has lost their own decision-making capacity, we must also consider whether it is possible and advisable to build in some safeguards to minimize the risk that instruments of empowerment (like powers of attorney) do not become instruments of mismanagement in the hands of attorneys who either fail to understand their obligations to the grantor or fail to appreciate what their fiduciary duties require in law.

I suggest that as a profession, many lawyers could improve service to their clients in this area through a return to the basics. Lawyers who are approached by prospective clients with a shopping list that includes a "simple will" and "a simple power of attorney" must step back and consider their obligations to educate the clients about what wills and powers of attorney may provide for and how they will work. Arguably, the *Substitute Decisions Act* provides clarity about the legal test for capacity to grant a continuing power of attorney for property and a power of attorney for personal care.[22] However, the onus is upon the lawyer to consider and apply that test in every situation and to use his/her probative interviewing skills to discern the client's circumstances with sufficient clarity to enable the lawyer to confidently take instructions and fulfill the retainer. While the Act also confirms the existence of presumptions of capacity to make one's own decisions[23], lawyers must be attuned, at the early stages of the interview, to the language, demeanor and responses of the client during the interview process. If the lawyer has concerns about whether the client has the requisite instructional capacity, the lawyer must cautiously and tactfully probe further. Moreover, the lawyer may be forced to consider whether his or her own opinion about the client's capacity is enough. An expert opinion may be warranted and the lawyer must approach obtaining that opinion with care and of course, with the consent of the client.

[22] Sections 8 and 47 respectively.
[23] Sections 2 and 3(1)(b).

Surprisingly, lawyers all too often fail to address the issues of confidentiality and conflict of interest when an elderly person is accompanied to the lawyer's office by a child, relative or caregiver. Even if the elderly person wishes to have that companion sit in the meeting, the lawyer must be cautious to address those potential problems and reserve the right to meet with the client privately. If there are language or other communication barriers that are the reason for having another person present, it may be necessary for the lawyer to make alternative arrangements to facilitate communication at a later date with the client which will not otherwise risk a compromise of that client's confidential instructions and the advice he or she receives.

Particularly since the *Act* came into force, there have been numerous continuing legal education programs by the Ontario Bar Association and the Law Society of Upper Canada that have endeavored to educate and keep lawyers abreast of developing trends involving powers of attorney.[24] Interestingly, the case law about lawyers' liability in power of attorney cases making legal headlines recently, runs the gamut of situations, some of which have involved vulnerable adults, while others involved commercial lending transactions.[25]

I suggest that lawyers may want to explore with their clients ways in which they can assist to keep attorneys on the right fiduciary path in the future. For example,

[24] See for example the Ontario Bar Association's Continuing Legal Education Program entitled Powers of Attorney – A Practitioner's Toolkit, October 6, 2005.
[25] See for example LawPRO Volume 7, Issue 2, Summer 2008, "Powers of Attorney And Solicitors' Liability: The Case Law", pp. 9 – 11.

the lawyer may wish to seek instructions from the client to send a reporting letter of sorts to the appointed attorney(s), either at the time the power of attorney is granted or at a specified future date (if the power of attorney is not immediately effective), identifying the attorney's fiduciary responsibilities to the grantor and the grantor's expectations about how those responsibilities can be fulfilled. Some lawyers whose practices focus on serving vulnerable adults provide a set of sample accounts and basic instructions to attorneys about how to maintain the financial records required by law.

Providing Legal Representation to Adults Who May Be Vulnerable

As I adverted to above, in a legal proceeding under Ontario's substitute decision making laws, when an adult's decision-making capacity has been called into question, an order may be made to have legal representation provided to the person.[26] Where the person qualifies to be legally aided, resort to that financial assistance may be sought. These enhanced rights protections are in addition to the right that any individual may exercise to go out and retain a lawyer to represent him or her in a legal proceeding. The express statutory provisions are there in recognition of the significance of the loss of the ability to make one's own choices – a right that we virtually take for granted as adults in Canadian society. While the statutes provide that the person shall be deemed to have capacity to retain and instruct counsel, as a matter of practice, many lawyers may find themselves in

[26] See section 3 of the *Substitute Decisions Act, 1992* and section 81 of the *Health Care Consent Act, 1996*.

alien territory and uncertain about the limits of their role and the permissible scope of their advocacy.

Legal Aid Ontario ("LAO") has developed standards of practice for members of their Consent and Capacity Panel, a group of lawyers specially trained to deal with issues relating to the law of consent and mental capacity and who are prepared to provide legal services in these types of proceedings in accordance with the rules of LAO. These standards are largely to provide some guidance and assistance to lawyers grappling with these issues and to ensure minimum levels of basic advocacy skills in such proceedings.[27]

In *Banton*, Justice Cullity made the following observation in reference to the lawyer who represented George Banton in the contested guardianship proceeding and also testified at the trial:

> "The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the Substitute Decisions Act is potentially one of considerable difficulty. Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Act, I do not believe that counsel is in the position of a litigation guardian with authority to make decisions in the client's interests. Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking. A very high degree of

[27] See www.legalaid.on.ca/en/info/CCB_Standards.asp for the English standards.

> 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."[28]

The Lawyer's Ethical Obligations to a Vulnerable Client

In addition to the ethical duties owed by lawyers to all clients, the Law Society of Upper Canada's *Rules of Professional Conduct* speaks directly to the lawyer's solicitor-client relationship with a client under disability:

> "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 reasonable possible, maintain a normal lawyer and client relationship."[29]

The commentary to the Rule acknowledges the reality that a client's ability to make decisions may change throughout the course of a retainer and that a client who once had the ability to make decisions, may no longer have that ability. The rule clarifies the lawyer's ethical obligation to ensure that the client's interests are not abandoned and suggests the appointment of a litigation guardian or assistance from the Public Guardian and Trustee, in the case of an adult party under disability. More specifically, subrule 2.02(7) prohibits a lawyer from receiving a medical-legal report about the client on the condition that the report not be shown to the client. The breach of this rule may have serious consequences in the case of a client whose capacity is in doubt, where the client may react adversely to the contents of such a report. The commentary to the subrule suggests that the client be encouraged to review the report in the offices of the medical professional who

[28] See *Banton*, Supra note 20, p. 25, para. 90.
[29] Subrule 2.02(6).

prepared it, as the medical professional will be in a position to appropriately counsel the client.

Conflicts of Interest

Our review of motions for approval of settlements for adults under disability indicates that some lawyers do not show sufficient regard to the potential conflicts of interest between an incapable person who is recovering significant sums as a result of catastrophic injuries in a motor vehicle accident, and the incapable person's *Family Law Act* claimants in the same legal proceeding. These potential conflicts include: the allocation of settlement funds among all the plaintiffs, particularly in cases where there are minimal policy limits on the available insurance thereby putting the incapable person's financial interests in conflict with the *Family Law Act* claimants (one or more of whom may be the incapable person's caregivers), the amount of the contribution of the *Family Law Act* claimants to the legal costs of the proceeding and the appointment of an attorney or guardian to manage the settlement funds of the incapable person if he or she is incapable of managing property, where the litigation guardian may want to manage the funds in the absence of any legal authority to do so.

The lawyer for the party under disability is also in a potential conflict with that party in respect to the quantum of the legal fees to be paid by them, particularly in the case of a contingency fee agreement.

These potential conflicts demonstrate the need for the independent review and approval by the Superior Court of Justice of settlements affecting parties under disability. Full and frank disclosure is required by the lawyer to demonstrate to the Court that the interests of the party under disability have been protected, in priority to any other interest of the lawyer in the proceeding.

Class Actions

Proceedings under the *Class Proceedings Act*, *1992*[30] pose a particular challenge for adults under disability and for the Public Guardian and Trustee. Class actions have become an everyday part of life. However, the notice provisions, website addresses and newspaper publication may not come to the attention of an adult under disability who may be a class member in the action. The Public Guardian and Trustee is not required to be served with notice of every class proceeding and, indeed, would be unable to respond to all such notices, even if served. Currently, the Public Guardian and Trustee is occasionally served with motions to certify a class proceeding or motions for approval of a settlement, or motions for this combined relief. Notice and service of proceedings under the *Class Proceedings Act* is, to date, gratuitous by plaintiff's counsel, unless otherwise specifically directed by the Superior Court of Justice. Even where notice is given, the Public Guardian and Trustee may have difficulty identifying potential incapable class members, whether they are incapable clients for whom the Public Guardian and Trustee acts as guardian of property, or other incapable adults who may or may

[30] S.O. 1992, c. 6.

not have a guardian of property. In rare cases, a list of potential class members may be available,[31] or the Public Guardian and Trustee may have the ability to conduct searches to determine if any clients are potential class members.[32] However, these cases are the exception, and the challenge remains for the Public Guardian and Trustee to receive notice, to identify appropriate cases in which incapable adults may have an interest, and to determine whether or not specific representation is required in the proceeding to protect the interests of incapable adults. Lawyers can be helpful by considering whether or not to provide notice to the Public Guardian and Trustee where the interests of an adult under disability may be affected by a class proceeding. In some cases, this may be apparent from the cause of action itself, as in *Ledyit v. Bristol Myers Squibb*, where the subject drug was prescribed to adults for mental illness[33].

Removal from the Record

Frequently, the Public Guardian and Trustee is served with motions under Rule 15.04 where counsel wish to be removed as solicitor of record because the client has become incapable of instructing in the legal proceeding. When this occurs, the lawyer should ensure that, prior or concurrently with the motion under Rule 15.04, a litigation guardian with counsel has been appointed and is able and willing to

[31] For example, in *Bellaire v. Daya*, [2007] O..J. No. 4819 at para. 73, Madam Justice Hoy ordered production of a patient list to the Public Guardian and Trustee under strict confidentiality provisions.
[32] In *Ledyit v. Bristol Myers Squibb*, [2008] O.J. No. 119, the Public Guardian and Trustee was able to determine whether or not some of its clients were consumers of the drug, Serzone and its generic equivalent, Nefazadone, for purposes of responding to the class proceeding. Prior to doing so, the Public Guardian and Trustee was appointed as friend of the Court on the request of Mr. Justice Cullity.
[33] *Ibid*

continue the proceeding on behalf of the incapable person. This step is consistent with the lawyer's ethical obligation under Rule 2.02(6) of the *Rules of Professional Conduct* and ensures that the client's interests are not abandoned or subject to a motion to dismiss by opposing counsel.

Conclusion

As a community, we share a responsibility to help protect those of our members who through disability or disadvantage are vulnerable to exploitation or abuse. In the case of persons who lack the mental capacity to care for themselves in one or more aspects of their lives, and who have no family to watch out for them, that responsibility is complex. As lawyers, we must do our part to ensure that the protections provided for in the law through the several mechanisms mentioned in this paper are appropriately employed. We must be alert to the opportunities for abuse that exist when serving this vulnerable population, and vigilant in safeguarding its interests. Only through our individual efforts as legal professionals and our collective efforts as a community will the legislative tools that have been put into place to address these needs be fully effective.