

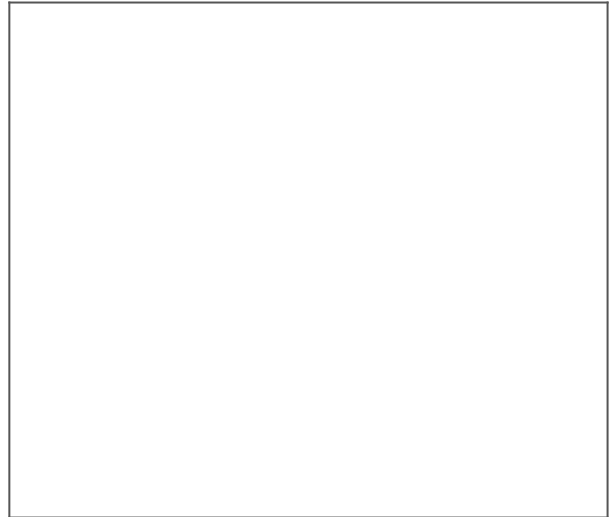
Courts grapple with the duties of committees and guardians of property

published 09/21/2005

With the changing demographics in Canada, questions as to the duties and responsibilities of individuals such as committees and guardians of property, appointed by the Court to administer the assets of mentally incompetent people, are arising with greater frequency.

Often a family member is appointed by the Court and wants to spend or use the assets of an incapable person in a manner where the benefit to that incapable person is either negligible or non-existent, but which benefits the committee or the committee's family in some way. This can take the form of gifts of cash or assets or the expenditure of funds to improve an asset ostensibly for the incapable person but which such person has little or no use for anymore. Invariably, the committee derives either a direct or indirect benefit out of the use of the assets and seeks to justify the expense or gift on the basis that 'it's what Mom would have done if she had capacity' or 'Dad doesn't need the money anymore'.

Depending on the requirements of the applicable provincial legislation and existing evidence of past practice, there may be some leeway in terms of the continuation of gifts on behalf of the incapable person to the immediate family (i.e., \$50 to the grandchildren on their birthdays); however, actions taken by the committee or guardian which are clearly in conflict with their fiduciary duties to the incapable person and which serve no benefit to anyone but the committee or his or her family are clearly done at the risk



and, ultimately, at the expense of the committee.

The Manitoba Court of Appeal has recently confirmed the ability of a judge to order a committee to repay to the estate of a now deceased, formerly incapable, person certain moneys improperly spent, without the necessity of the beneficiaries of the estate having to bring an action against the committee to prove their loss.

In the decision of Todosichuk v. Daviduik, [2004] M.J. No. 453 (Man. C.A.), the Manitoba Court of Appeal reviewed the findings in the Queen's Bench decision reported at [2003] M.J. No. 125. The respondent, Catherine Daviduik, was 87 years old and living alone when she suffered a stroke in December, 1997. She was discharged from hospital in February of 1998 and briefly returned to her home. At that same time, the appellant, Elizabeth Todosichuk, who was the respondent's niece, was appointed by the Court as committee for the respondent. In March, 1999, the respondent moved into a personal care facility, where she remained until her death in November of that year. To date, probate has not been taken out for the estate.

Starting in July, 1999 and continuing until February, 2000, the appellant undertook substantial renovations to the respondent's home, with a cost of in excess of \$35,000; the home being valued at approximately \$50,000 before the renovations and \$66,000 after the renovations. While the appellant was not the direct beneficiary of these expenditures, her son is to receive the house pursuant to the terms of the respondent's **Will**. Accordingly, the residuary beneficiaries of the respondent's

estate challenged these expenditures at the passing of the appellant's accounts.

The trial judge made strong findings against the appellant, including that the renovations were 'grossly in violation of the [appellant's] obligations' (at paragraph 17), and that the renovations were in 'dereliction of the responsibility of a committee, who should have the interest of the incapable party in mind' (at paragraph 24), resulting in the judge ordering the expenditures to be charged back to the appellant.

In responding to the argument of the appellant's counsel that there was an error on the part of the trial judge as to the reasonableness of the renovation repairs, Chief Justice Scott found 'simply stated, there is absolutely no merit to this assertion' (paragraph 12).

The appellant's counsel also challenged the ability of the trial judge to order the appellant to pay the estate back for the expenses, arguing the residuary beneficiaries should have to sue the appellant, as the estate could be unjustly enriched by the expenditures.

The Manitoba Court of Appeal reviewed the fiduciary obligations of a committee to an incapable person and concluded that 'the breach of such a special relationship gives rise to the widest array of equitable remedies' (at paragraph 21) and that the 'court is concerned not only in compensating a wronged plaintiff, but also in upholding the obligations of good faith and loyalty' (at paragraph 22).

The Manitoba Court of Appeal also found that a 'beneficiary need not suffer an actual loss in order to be entitled to a remedy' (at

paragraph 23) and 'given the shameful conduct on the part of the appellant fiduciary' (at paragraph 26) it ordered the appellant to pay the funds to the court pending the final outcome of the administration of the estate, while repeatedly emphasizing the obligations of a committee and the lengths the court will go to in upholding this fiduciary relationship.

Clearly, actions taken by a committee or guardian which fall outside the parameters of the fiduciary relationship can meet with the court's wrath and prove very costly to that appointed representative.

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