Are there limits on a Power of Attorney for Property under the *Family Law Act and Rules (Ontario)*?

Part III: Representing an Incapable Spouse in Matrimonial Litigation

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This is the third article in a three-part series discussing the powers and limits of an attorney, acting under a power of attorney for property, in the context of Family Law.

The *Family Law Rules* provide that the court may authorize a person to represent a "special party", which includes a mentally incapable person, so long as that person is willing and appropriate for the task.[1] Despite this Rule, Courts in Family Law cases have tended to look to Rule 7 of the *Rules of Civil Procedure* which sets out a more detailed framework for the representation of mentally incapable persons in litigation.[2] An attorney must satisfy the criteria under Rule 7.03(10) before acting as such. One requirement that often becomes an issue is whether or not the attorney has an interest in the proceeding adverse to the party under disability.[3]

Consider the situation where an attorney is the adult child of the donor and is also a designated beneficiary under the attorney's will. While the attorney's status as a beneficiary does not alone constitute a conflict of interest, it is easy to see why the attorney's financial stake in the donor's estate could interfere with his or her ability to act only in the best interests of the donor. For example, in the case of *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417 (S.C.C.) the Court was not convinced that the litigation guardians would not place their interests ahead of the interests of their mother. Mr. Justice Major, referring to the criteria under Rule 7, stated:

> The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest vis-à-vis the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of

[1] *Family Law Rules,* O Reg 114/99, R. 2(1) and R. 4(2)
[2] *Zabawskyj v. Zabawskyj,* [2008] W.D.F.L. 3061 (Ont. S.C.J.) at para. 12
[3] *Rules of Civil Procedure,* RRO 1990, Reg 194, R. 70.3(10)(ii) and (iii)

> indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. [...]
>
> It is acceptable in most cases, and perhaps desirable in some cases, to have a trusted family member or a person with close ties to the dependent adult act as litigation guardian. [...] However, there are exceptions. One such exception is the situation currently presented by this appeal, in which there is a particularly acrimonious and long-standing dispute among the children concerning their dead parent's estate. In such cases, the indifference required to be a litigation guardian is clearly absent.[4]

Conversely, the Court in *Zabawskyj v. Zabawskyj,* [2008] W.D.F.L. 3061 (Ont. S.C.J.) held that the son of the disabled father, despite also being a beneficiary under his will, was appropriate to act on the father's behalf in the matrimonial litigation proceeding. Both the father and the mother were found to lack capacity following the mother's application for an interest in the father's property. The daughter successfully appointed the Public Guardian and Trustee to represent the mother. However, she contested her brother's application to represent their father on the grounds that the son, as the sole beneficiary under his father's will, was in a position of conflict.

The Court rejected the daughter's argument and granted the son's application to represent his father in his capacity as attorney. In reaching the conclusion, the Court considered Rule 7. Specifically, the son had the skills to represent his father's interests and was a proper person to be appointed as his representative under Rule 7.03(10)(i)(ii). Furthermore, the son had no interest in the proceeding adverse to that of his father, the party under disability, as required by Rule 7.03(1)(i)(iii). The Court adopted the holding in the Supreme Court of Canada's decision in *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417 (S.C.C.), which held that "the criteria to appoint and remove a litigation guardian turn on the best interests of the dependant."[5] The Court in *Zabawskyj* stated:

> There exists a possibility, therefore, that before the end of this trial Bohdan Zabawskyj may be called upon to consider, on behalf of his father, a settlement proposal. With his credibility possibly in dispute on the issues of the enforceability of the separation agreement and the date of separation, a risk might exist that any decision Bohdan Zabawskyj might make about a settlement proposal could be influenced by a personal interest

[4] *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417 (S.C.C.) at paras. 20-21
[5] *Gronnerud (Litigation Guardian of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417 (S.C.C.) at para. 34

about his own reputation. However, at this point of time such a risk is remote and merely speculative. I have no cogent evidence before me that Bohdan Zabawskyj would not be able to conduct a cold, hard assessment of the merits of his father's defence based on the admissible evidence, applicable legal principles and the advice of counsel.[6]

[6] *Zabawskyj v. Zabawskyj,* [2008] W.D.F.L. 3061 (Ont. S.C.J.) at para. 33