

Re Schaefers Estate¹

In this case, an attorney for property was removed by the court. Dinah Teffer (“**Dinah**”) and Marion Yates (“**Marion**”) were the adult nieces of Johanna Schaefers (“**Johanna**”). Dinah resided in the Toronto area and Marion made her home in California.

Initially, Dinah and Marion applied to the court to remove Peter Verbeek (“**Verbeek**”), a lawyer practicing in Mississauga, as Johanna’s attorney for property and personal care. At the same time, Dinah and Marion applied to be appointed as Johanna’s joint guardians of property. As Marion lived in California, Dinah applied alone to be appointed Johanna’s guardian of the person.

Pursuant to section 3 of the SDA, counsel was appointed early-on to represent Johanna’s interests and two preliminary orders were obtained which effectively froze Johanna’s assets, and required Verbeek to provide a monthly accounting of his expenses, file Johanna’s taxes, and deliver reply material. As it turned out, Verbeek failed to comply fully with both court orders. Through his counsel, Verbeek had also advised more than once that he would pass his accounts, but never did.

Ultimately, it was Section 3 counsel who brought a motion to have Verbeek removed as attorney for property and for the appointment of Scotiatrust as an interim guardian of property. Section 3 counsel also sought an order that Verbeek pass his accounts as attorney for property.

¹ 93 O.R. (3d) 447 (S.C.J.)

Dinah and Marion supported Section 3 counsel's removal motion and withdrew their application to be appointed Johanna's joint attorney for property. They further adjourned their application to have Verbeek removed as Johanna's attorney for personal care until such time as Section 3 counsel's removal motion was concluded.

At the time of the hearing, Johanna was 87 years old. She was formally diagnosed with Alzheimer disease in September 2006 and later assessed as being incapable of managing her property and making decisions regarding her personal care.

Johanna had granted powers of attorney for property and personal care in 1998 and 2006 respectively. Verbeek, who had acted as Johanna's lawyer, was named as Johanna's attorney for property and personal care in both the 1998 and 2006 powers of attorney. Verbeek had been managing Johanna's property since June 2006 and had also been making decisions regarding her personal care. Tellingly, Verbeek had not arranged for Johanna's capacity to be assessed prior to the execution of 2006 powers of attorney. There was, however, no capacity issues raised regarding the 1998 power of attorney for property.

Facts

In removing Verbeek as Johanna's attorney for property, Fragomeni, J. held as follows:

- (1) Johanna was incapable of managing her property;
- (2) Johanna's 2006 power of attorney for property was invalid as she lacked the necessary capacity to grant a power of attorney for property. This was based on the medical evidence filed, as well as the fact that Johanna's capacity had not been assessed prior to the execution of the 2006 power of attorney.
- (3) While the court found the evidence surrounding Johanna's 1998 power of attorney for property "conflicting and confusing", it was

not prepared to find that the 1998 power of attorney for property was invalid.

Decision

In determining whether an attorney should be removed, the jurisprudence establishes that two issues must be considered:

- (1) First, there must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor;
- (2) The second issue relates to whether the court is of the opinion that the best interests of an incapable person are being served by the attorney.

After carefully reviewing the substantial affidavit material that had been filed with the court (no cross-examinations had been conducted), the court held that there was strong and compelling evidence of misconduct or neglect on the part of Verbeek. Furthermore, it was in the best interests of Johanna that Verbeek be removed. The court further ordered that Verbeek pass his accounts and appointed Scotiatrust as Johanna's interim guardian of property.

In reaching his decision, Fragomeni, J. held that Verbeek had failed to fully comply with the two court orders respecting his administration of Johanna's property. Verbeek had also failed to address meaningfully the reporting and accounting concerns which were raised by Johanna's Section 3 counsel over the course of several months and had failed to formally pass his accounts despite repeated promises that he would.

The court was also concerned with the discrepancies that became self-evident between a copy of the 1998 power of attorney for property, which Verbeek first produced in his

reply material and the original of that same 1998 power of attorney for property, which Verbeek claimed to have found in Johanna's safety deposit box five months later and ultimately produced. The court was also not terribly impressed with Verbeek's attempts to blame Johanna's accountant for not filing her tax returns on time.

In addition, the court took notice of the fact that in December 2007, the Law Society of Upper Canada had suspended Verbeek's license for three months on a complaint regarding a series of real estate transactions. Verbeek was found to have engaged in professional misconduct in certain purchase, sale and mortgage transactions, including failing to serve his lender client in a conscientious and diligent manner.

With respect to acting in the best interest of Johanna, the court found that Verbeek was more interested in looking after the interests of the beneficiaries of Johanna's estate. As stated by the court:

I agree with the submissions of Mr. de Vries that as attorney, Verbeek is expected to act in the best interests of Schaefers and not necessarily in accordance with the wishes of the [Dutch] relatives of Schaefers.²

In the end, the court was satisfied on the record before it that Johanna did not have the capacity to manage her property. The court was also satisfied that Johanna lacked the capacity to give a power of attorney for property in April 2006. The 2006 power of attorney for property was invalid and could not stand.

With respect to the 1998 power of attorney for property, the court found that the evidence was conflicting and confusing. However, without clear evidence that it was

² 93 O.R. (3d) 447 at paragraph 50.

invalid, the court declined to find that it was invalid and could not stand. Nevertheless, the court concluded as follows:

Having considered all of the evidence filed and the submissions made by counsel I find and conclude that Peter Verbeek ought to be removed as attorney. There is strong and compelling evidence of neglect on the part of Mr. Verbeek such that the wishes of Johanna Maria Schaefer as set out in the 1998 Power of Attorney for Property should be terminated. The evidentiary foundation has been established to conclude that Johanna Schaefer's best interests are not being met. Mr. Peter Verbeek's conduct clearly demonstrates an inability to understand and perform his duties diligently. Although Mr. Verbeek characterizes this estate as simple, he is unable to properly fulfill his duties, even in the face of two Court Orders requiring him to do certain things. I am not satisfied that his neglect of his obligations can be attributed to tardiness or sloppiness. That characterization of his conduct minimizes the seriousness of his non-compliance with Court Orders or his non-compliance with disclosure requests or his inaction in proceeding with a passing of accounts despite his expressed intentions he would do so.³

Fragomeni, J. went on to state that an attorney for property is a fiduciary and the duties and the responsibilities associated with that position were significant and should not be easily ignored.

In the end, Verbeek's authority to act as Johanna's attorney for property pursuant to both the 2006 and 1998 powers of attorney for property was terminated. Verbeek was required to formally pass his account, Scotiatrust was appointed Johanna's interim guardian of property. Fragomeni, J.'s decision regarding costs has not yet been released.

³ 93 O.R. (3d) 447 at paragraph 51.