PATIENTS PROPERTY ACT

I. KIDNAPPING – INTERJURISDICTIONAL ISSUES

We live in a very mobile society. We own property in other countries. We travel to other countries for both short holidays or extended ones (Snowbirds). We have family in other countries. What happens if we become incapacitated while in one of these other jurisdictions? Do our planning tools we have created in B.C. work in that other jurisdiction? What law governs us if we spend half our time in B.C. and half of our time in Arizona, Hawaii or Italy? Where is our habitual domicile? Unfortunately, the answers to these questions are not always easy to determine and the Courts have struggled with some very difficult situations.

A. The Heli Munroe Case

The *Heli Munroe* case from Nova Scotia has highlighted the difficulties surrounding jurisdiction over incapable adults.

Dr. Helena Munroe was trained as an occupational therapist and taught at the university level specializing in Alzheimer's and dementia. She is a British (born in Scotland) and Canadian citizen and married a Canadian, Sandy Munroe in 1964. In 2000 she and her husband retired in Nova Scotia and in 2001 Heli granted an enduring Power of Attorney to her husband and named her colleague, Carol Sifton as her alternate. Unfortunately, in 2003 she was diagnosed with Alzheimer's and by 2005 was found to be incapable of managing herself and her affairs. Heli was being cared for by her husband Sandy. While she had been close to her family in the UK, she did not want them to be involved in her care.

In November of 2005, Heli's brother, Marek Pospiezalski, came to Canada for the first time to visit his sister. Marek told Sandy that he was taking Heli for lunch but in fact put her on a plane to the UK via Boston. The RCMP refused to file kidnapping charges on the basis that Heli went with her brother "willingly". The Criminal Code (R.S., 1985, c. C-46) s.279 provides:

279. (1) Every person commits an offence who kidnaps a person with intent
- (a) to cause the person to be confined or imprisoned against the person's will;
- (b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
- (c) to hold the person for ransom or to service against the person's will.

Clearly the capacity to consent is a critical component and one that needs to be addressed by necessary amendments to the Criminal Code.

On December 22, 2006, Sandy applied to the N.S. Court and had the POA confirmed and the authority to consent to medical treatment and further appointed Sandy and Carol Sifton or alternatively guardian of the estate and person of Heli pursuant to the N.S. *Hospitals Act*.

Heli was not located until May of 2007. The Canadian High Commission located Heli in a psychiatric hospital. Her physician in the UK was not told about her husband until he received a copy of the POA from the Canadian High Commission. Upon him learning of this, her doctor there placed Heli under the Protection of Vulnerable Adults Panel which is a panel struck under their Protection of Vulnerable Adults legislation (POVA). The UK doctor and Nova Scotia doctor were in agreement that Heli be moved back to Nova Scotia and the POVA agreed. Prior to her being sent back, however, the decision was made to keep Heli in the UK by the UK authorities on the basis that she was too frail to travel.

B. The Orshansky Case

Earlier, in the U.S., a similar situation arose except that the person doing the "kidnapping" was the incapable adult's chosen attorney under an enduring Power of Attorney. Mollie Orshansky lived in Washington, D.C. but her family she was close to lived in New York. The family had been managing her affairs through a revocable trust Mollie had settled and Mollie had appointed her sister as trustee. Mollie had purchased an apartment in New York to move into when she couldn't manage on her own anymore. The apartment was in the same building as one of her sister's. Mollie was found self neglecting and the hospital she was involuntarily admitted to petitioned the D.C. court for a Court appointed conservator. Mollie's niece came to Washington with the documentation showing that her aunt had planned for incapacity and had appointed the niece as her decision maker. The Washington health authorities and the Court appointed conservator were not helpful. The niece removed her aunt to the State of New York and applied in New York to be her conservator. The D.C. Court ordered that Mollie be returned to Washington, D.C. and forwarded the Orders to New York. The New York proceeding was stayed pending an appeal by the niece. The appeal *In Re Mollie Orshansky*, 804 A.2d 1077; 2002 D.C. App. LEXIS 488 (copy of decision in Appendix "A") found that the judge had abused her discretion and ought to have taken Mollie's preplanning into account and where possible, ought to have adhered to her intentions.

C. B.C. Cases

In B.C., a similar case to the Munroe one arose but only crossed provincial boundries. *Re Grav*, 2007 BCSC 123 dealt with a situation in which the son of Fritz Grav took his father from a care facility in Ontario and brought him to Victoria. Fritz had granted his son and daughter an enduring Power of Attorney in Ontario and a Power of Attorney for health and personal care to his daughter who lived in Ontario. Upon him being moved to B.C., new planning documents were signed by Fritz appointing the son. Thus there were competing POAs from different provinces. The son applied for a committee Order and the daughter opposed and further sought an order for her father's return to Ontario. The Court could not conclude which of the planning documents executed more recently were valid and whether he had the capacity to revoke prior documents or not. The Court found it necessary, therefore to make a declaration under the *Patients Property Act* that Fritz was incapable of managing himself and his affairs. When the Court came to decide who the committee should be, the Court reviewed the facts upon which Fritz came to B.C. Fritz had lived in Ontario for 49 years. Fritz and his wife lived on their own until they both moved into a care facility due to his wife's declining health. Friz' wife died on February 19, 2005 and the son removed him from the home in Ontario on February 25, 2005. There was evidence that Fritz did not want to go, the son was physically pushing his father out the door, manhandling him to put his coat on and that Fritz was crying. Fritz came back to Ontario in December of 2005 and then the son came back and removed him again to B.C.

The Court focused on Fritz and what his intentions were when he was capable and found that if he were capable he had clearly said his wishes were to remain in Ontario and have his daughter manage his financial and personal/health care decisions. The Court found that the son had acted contrary to his father's wishes and that the daughter was the one most likely to act in Fritz' best interests, and appointed the daughter, therefore, committee of estate and person. With respect to the issue of returning Fritz to Ontario, the Court declined to make an order and left the decision up to the committee (the daughter) to decide where Fritz should live and what level of care he required. The Court ordered the daughter's costs from her father's estate (the usual rule) but the son, who brought the application, was to pay his own costs.

In another B.C. case (*Re: Neckel*, May 9, 2008) a woman was visiting her son in Illinois, became ill and was hospitalized. While she had lived in Illinois in the past, she had moved to B.C. and she had appointed her sisters as her attorneys under an enduring Power of Attorney. She had previously appointed her son

but had a falling out with him and did not want him to be her decision-maker. The majority of her relatives were in B.C. and other parts of Canada. Her son was planning to move to Ohio. Her son applied in Illinois to become her conservator but a professional conservator was appointed by the Court. Ms. Neckel expressed a wish to return to B.C. where her cost of care would be cheaper but the conservator would not take the steps necessary to accommodate her wish. The conservator applied in B.C. to have the monies on deposit at her bank here transferred to Illinois. The sisters/attorneys opposed but were not successful and the B.C. Court indicated that they ought to be pursuing matters in Illinois.

D. The Hague Convention 35

The Hague Convention 35 "Convention On The International Protection Of Adults" preamble states that its objects are (Article 1, s.2):

a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
c) to determine the law applicable to representation of the adult;
d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention. (Full text of the Convention is found at Appendix "B")

To date, Canada is not a signatory to this Convention nor is the U.S. The U.K. have signed but only so far as Scotland is concerned (See Appendix "C"). The only province to endorse the Convention is Saskatchewan. The other provinces appear to be trying to navigate these issues with the introduction of provincial legislation.

E. B.C.'s Proposed Legislation (Bill 29)

Bill 29 (2007) which has passed third reading but not yet proclaimed, provides for extrajurisdictional application of guardianship orders, statutory guardians, Powers of Attorney and Representation Agreements:

Extrajurisdictional guardianship orders (proposed new section of the *Adult Guardianship Act*)
s.31 Subject to any limitation or condition set out in the regulations, a person who
- (a) is authorized by judgment, decree or order of a court or tribunal to act outside British Columbia in a manner similar to a guardian, and
- (b) complies with any prescribed requirements may exercise powers and perform duties in British Columbia in respect of the adult for whom the person is acting, as if that person were a guardian under this Act.

Extrajurisdictional statutory property guardianship (proposed new section to *Adult Guardianship Act*)
s.39 (1) Subject to any limitation or condition set out in the regulations, a person who
- (a) holds a statutory position, under an enactment of a province of Canada, equivalent to the Public Guardian and Trustee,
- (b) is authorized by an enactment of a province of Canada to act in a manner similar to a statutory property guardian, and
- (c) complies with any prescribed requirements, may exercise powers and perform duties in British Columbia in respect of the adult for whom the person is acting, as if that person were a statutory property guardian under this Act.

(2) Subsection (1) also applies to a person who is acting under authority that has been delegated by a person described in subsection (1) (a).

Extrajurisdictional powers of attorney (proposed new section to Power of Attorney Act)

s. 38 Subject to any limitation or condition set out in the regulations, a power of attorney that
- (a) applies or continues to apply when an adult is incapable,
- (b) was made in a jurisdiction outside British Columbia, and
- (c) complies with any prescribed requirements is deemed to be an enduring power of attorney made under this Act.

Extrajurisdictional representation agreements (proposed new s.41 of Representation Agreement Act)

s.41 Subject to any limitation or condition set out in the regulations, an agreement that
- (a) performs the function of a representation agreement,
- (b) was made in a jurisdiction outside British Columbia, and
- (c) complies with any prescribed requirements is deemed to be a representation agreement made under this Act.

Given our mobile society and particularly in the case of snowbirds who spend half of the year in Canada and half in another warmer country, jurisdictional issues will continue to arise over the use of Powers of Attorney documents, Representation Agreements and guardianship Orders. Hopefully, Bill 29 will be reintroduced to give us some guidance with respect to extrajurisdictional documents and will hopefully avoid a Heli Munroe or Orshanshy situation should the adult arrive in B.C. from another jurisdiction with these documents already in place.

II. PRACTICE POINTS

A. Security/restriction on assets

Currently the practice has been to move away from committee bonds in favour of Orders that restrict access to certain assets: capital on deposit at a financial institution or real property. This move is in an effort to reduce the costs associated with the bonds and secondly the difficulties in pursuing the bond on behalf of the patient if there is a misappropriation or mismanagement of the funds by the committee. With respect to capital on deposit at financial institutions, the banks are not parties to the *Patients Property Act* proceeding yet have been Ordered not to release funds to the committee without further Court Order or on the written permission of the Public Guardian and Trustee. Where a bank makes a mistake and releases funds to the committee that it ought not to have and the committee improperly spends the money, the bank may well argue that they had no obligation under the Court Order since they were not parties to the original proceeding. The case of *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 describes how a bank (i.e. a stranger to a trust) might be found liable for a misapplication of trust funds. In this case the bank was liable since it had taken the trust funds to pay off a promissory note it held. If the committee is the one that uses the funds inappropriately, it will be hard to hold the bank liable for "knowing assistance" in the commission of a fraud unless one can show that the bank had actual knowledge, was reckless, or was wilfully blind to the commission of a breach of trust.

B. Bank accounts

Banks are still trying to put bank accounts of incapable adults into joint names with the committees. Make sure your clients know that this is wrong and that the account must remain in the name of the adult. The

committee cannot alienate the adult's property and can certainly not put accounts into joint names with right of survivorship (notwithstanding *Pecore*).

C. Passing of accounts

Ensure your clients know how important it is to keep accurate accounts. They should be discouraged from using bank cards to withdraw sums of money – invariably those sums go unaccounted for. They should write cheques to specific payees where possible and if they are reimbursing themselves for items purchased for the benefit of the adult, those receipts ought to be readily available and can be produced if the Public Guardian and Trustee asks for them. They ought not to be allowing family members to live rent free in the adult's apartment. The committee ought not to be lending money to any members of the family from the adult's funds. Nor should the committee be investing money in risky ventures. You must discourage your clients from thinking – "this will all be mine someday anyway"…clearly not a thought that would equate with acting in the best interests of the adult.

D. Incapable Young Adults

Children who have had a birth injury or other traumatic injury during their minority and then turn 19 also become the subject of "custody" disputes between parents. The case of *Bell v. Hagger*, 2009 BCSC 327 is an example of a custody struggle in the context of a *Patient Property* Act proceeding that extends beyond infant children. One of the issues in this case arose around the litigants (the parents) different philosophies of treatment and communicating with the incapacitated young adult child. The Respondent father had brought several applications regarding his access and communication issues with his son. The Court dealt with both issues but also ordered the Respondent be prohibited under s.18 of the *Supreme Court Act*, R.S.B.C. 1996, c.443 from brining any further applications respecting his son without leave of the Court.