



Bob Aaron bob@aaron.ca

October 9 2004

Heed power of attorney

The importance of having carefully drawn-up powers of attorney for both personal care and property matters has been emphasized by a recently published decision of the Superior Court of Justice.

This important matter has also been emphasized by the publication of the story of a Toronto woman's battle against a lawyer who stole funds from her mother's estate.

In 1998, Joyce appointed her two daughters as attorneys under a power of attorney for personal care. (That document is sometimes incorrectly called a "living will." A living will only addresses treatment wishes and does not need to name someone to carry them out.)

Three years later, Joyce was diagnosed with Alzheimer's disease and placed in intensive care.

Later, she was placed on a ventilator and fed intravenously.

Her doctor met with the daughters and proposed that the ventilator and IV tubes be disconnected because of the "terrible toll" and "discomfort" they caused to the mother.

The medical team became convinced that the burdens imposed on Joyce and what they considered the lack of lasting beneficial effects outweighing the benefits of her treatment. But the daughters refused to consent to this proposal.

The doctor then asked the Consent and Capacity Board to overrule the wishes of the daughters and allow them to disconnect the life support.

After hearing the evidence, the tribunal decided that the daughters were not acting "properly" and instructed them to consent to withholding the procedures which would prolong their mother's life.

The daughters appealed to the Superior Court.

Justice Maurice Cullity ruled that the governing factor was what was in the patient's best interests. Joyce's daughters told the board that their mother had always expressed a belief in prolonging life.

The board was told that Joyce was Roman Catholic and believed in the sanctity of human life, but it decided that her religious beliefs were irrelevant because the church recognized the right to die with dignity.

Cullity overruled the board. He found that the patient's beliefs were more important than whether they correctly reflected the teachings of the church.

In addition, the board misunderstood the medical evidence and its decision was based on incorrect facts.

The lesson of the case is that in preparing a power of attorney for personal care, special consideration should be given to expressing whether life should be artificially prolonged in the event of a terminal illness.

Another lesson in powers of attorney comes from the publication this year of *The Heiress vs. The Establishment: Mrs. Campbell's Campaign for Legal Justice*, by Constance Backhouse, a law professor at the University of Ottawa, and Justice Nancy Backhouse of the Superior Court of Justice in Toronto (published for the Osgoode Society for Canadian Legal History by UBC Press, \$45).

Elizabeth Bethune Campbell was a Toronto-born socialite famous in the 1920s.

In 1884, her father, who was a prominent barrister and law society bencher, died, leaving between \$40,000 and \$60,000 (an enormous sum in those days) to his widow, also named Elizabeth, who later married Sir William Howland, becoming Lady Howland.

At the time, William Hogg was a pillar of the Toronto legal community. A law society bencher, he was respected throughout the legal profession and Ontario society. For decades he administered Lady Howland's funds, effectively acting as a power of attorney for her. When Lady Howland died in 1924, her estate was only \$17,450, an amount that seemed to her daughter, Elizabeth Campbell, to be substantially lower than it should have been.

For 13 years, Campbell was involved in litigation with Hogg and the Toronto General Trusts Corp. over the missing money and several "fictitious mortgages." Ultimately, she lost in every Ontario court. Unable to find a lawyer to represent her, she took the case herself to the Privy Council, the court of last resort in the British Empire at the time.

In London, Campbell achieved some celebrity status when she won her case and triumphed over the establishment that had fought her for so long.

Despite the council's ruling that missing money had to be returned, the law society of the time never took any action against Hogg.

The Heiress vs. The Establishment makes history come alive, firstly in Campbell's own words through the reprinting of her own 1940 self-published memoirs, *Where Angels Fear to Tread*, and then through an extensive and fascinating commentary on the case by the Backhouse sisters.

It's the best book I've read this year. Amidst all the fascinating social and legal background of the book, its message for Canadians today is to be very careful in choosing someone to act as power of attorney for property.

Bob Aaron is a Toronto real estate lawyer. He can be reached by e-mail at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit <http://www.aaron.ca>.