**Order Giving Directions – Estates List Proceedings – The Appointment of Section 3 Counsel (Sample Terms)**

| **Issue** | **Sample Clause** | **Annotation/Comments** |
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| ***Appointment*** | | |
| Appointment of Section 3 Counsel under the *Substitute Decisions Act, 1992* | THIS COURT ORDERS that the Public Guardian and Trustee (the “**PGT**”) shall arrange for legal representation to be provided for [the person], pursuant to Section 3 of the *Substitute Decisions* Act, 1992, S.O. 1992, c. 30 (**“Section 3 Counsel”**), and that [the person] shall be deemed to have capacity to instruct and retain counsel. | *Substitute Decisions Act*, *1992*, S.O. 1992, c. 30, as amended (“**SDA**”)  This language tracks the language from subsection 3(1) of the SDA.  There may be issues in dispute in the application beyond the jurisdiction of the SDA to which the Court and parties would benefit from the incapable or allegedly incapable person’s position. These issues should be set out in the appointment order.  Other interim orders that seek relief against the allegedly incapable person should be deferred until after section 3 counsel has had the opportunity to meet the client and respond to the application. For example, orders for the disclosure of financial information or personal health information or orders for capacity assessments under section 79 of the SDA. |
| Appointment of specified lawyer, subject to PGT's position | THIS COURT ORDERS AND DIRECTS the PGT to consider [name] of [law firm] as Section 3 Counsel for [the person], although nothing in this paragraph affects the PGT's ordinary discretion in arranging legal representation pursuant to section 3 of the *Substitute Decisions Act*, *1992*, or [lawyer’s name]'s ordinary discretion in determining his/her client retainers. |  |
| Access | THIS COURT ORDERS that Section 3 Counsel shall at all a times be advised of the current permanent address and any temporary address and current contact information of [the person] and shall be permitted uninterrupted, unfettered and private access to [the person]. | See, for example, “The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act,” by D’Arcy Hiltz, Trusts and Estates Division of the Ontario Bar Association, November 29, 2009.  This language assists section 3 counsel with communicating confidentially with the allegedly incapable person who may be living with other or adverse parties, family members or in congregate care facilities. |
| ***Fees*** | | |
| Legal Fees of Section 3 Counsel | THIS COURT ORDERS that [ACCOUNT HOLDER/ATTORNEY/ETC] shall provide Section 3 Counsel with the sum of [$] from the property of [the person] in trust to be held on account of legal fees and disbursements to be incurred representing [the person], payable from time to time and shall, promptly upon request, provide Section 3 Counsel with further deposits in trust. | Authority: *SDA* s. 3; *SDA* s. 39 (if there is a Continuing Power of Attorney for Property or existing guardianship); and inherent jurisdiction of the court (see *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3 from paragraphs 17 to 26) where there is no (Continuing Power of Attorney for Property or existing guardianship).  Subsection 3(2) of the SDA states that: “If legal representation is provided for a person in accordance with clause (1)(a) and no certificate is issued under the Legal Aid Services Act, 1998 in connection with the proceeding, the person is responsible for the legal fees.” The allegedly incapable person may not qualify for a Legal Aid Certificate and an appointed lawyer may not accept the appointment paid for by Legal Aid (which currently provides for 16 hours of preparation time plus hearing time subject to Legal Aid’s discretion). If the allegedly incapable person’s funds are managed or held by an attorney, trustee or frozen by a financial institution, the court can direct payment of section 3 counsel from the funds subject to the further direction of the court. How the appointed lawyer’s future accounts are to be reviewed and paid (while maintaining privilege) could also be addressed at the outset of the appointment. |
| Alternative Provision re legal fees | THIS COURT ORDERS that [the person’s] reasonable legal fees and disbursements incurred by Section 3 counsel, shall be paid from his/her property unless a Legal Aid Certificate is issued in connection with the [application/proceeding/court file #]. | Authority: Sec. 3(2) of the *Substitute Decision Act.* |
| Further alternative provision re legal fees where funds are disputed | THIS COURT ORDERS Section 3 Counsel shall be provided with the sum of [$] from the [specific account in the name account holder(s)] which sum shall be deposited in trust to [name of lawyer/firm for trust payment] and be held on account of legal fees and disbursements to be incurred in representing [the person], payable from time to time.  THIS COURT ORDERS that the preceding paragraph is without prejudice to any party advancing a position that funds paid to Section 3 Counsel are owned by another party and seeking reimbursement of them from any party to be paid following the final determination of the issue of the ownership of the funds. | Authority: *SDA* s. 3; *SDA* s. 39 (if there is a Continuing Power of Attorney for Property or existing guardianship); and *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3 from paragraphs 17 to 26 (where there is no Continuing Power of Attorney for Property or existing guardianship). |
| Directions for approval of Section 3 Counsel’s Legal Fees | THIS COURT ORDERS that [ACCOUNT HOLDER/ATTORNEY/ETC] shall pay fees and disbursements for legal services promptly upon an account being provided to the [ACCOUNT HOLDER/ATTORNEY/ETC] without further direction from this Court and that a judge hearing this application may review and approve the accounts at the request of Section 3 Counsel or, following the determination of the application, at the request of the [the person] or an attorney for property or guardian of property for [the person]. | Authority: *SDA* s.3(2); Solicitor’s Act, s.27  The fiduciary obligation of an attorney or guardian of property to act in the best interests of the allegedly incapable person had been interpreted as including an obligation to pay his or her legal accounts relating to the appointment of section 3 counsel: see Justice McEwen's decision in *Abbruzzese v Tucci*, 2018 CarswellOnt 12167, at para 5. |
| Court Approval of Section 3 Counsel's Legal Fees | THIS COURT ORDERS that the accounts of Section 3 Counsel appointed pursuant to [PARTICULARS OF APPOINTMENT ORDER] dated [date(s)] are approved and fixed at [$$$] and [shall be paid OR the outstanding balance of which in the amount of $$$ shall be paid] from the property of [THE PERSON] by [CAPABLE CLIENT or ATTORNEY or GUARDIAN] without prejudice to the rights of [ATTORNEY or GUARDIAN] to seek reimbursement of these costs from another party pursuant to subsection 131 of the Courts of Justice Act. | Authority: *SDA* s.3(2) |
| Costs Reserved | THIS COURT ORDERS that the costs of the parties for this appearance including those of Section 3 Counsel are reserved to the judge hearing this application. |  |
| Fees of the PGT | THIS COURT ORDERS that the Public Guardian and Trustee’s fee for reviewing this Application, as approved by the Attorney General in the amount of [$] plus HST of [$] shall be paid forthwith to the Public Guardian and Trustee from the property of [the person]. |  |
| ***Productions & Disclosure*** | | |
| Disclosure of Materials filed and Related Correspondence | THIS COURT ORDERS that the parties shall provide [the lawyer/s. 3 counsel] with copies of all materials filed and any correspondence that has been circulated to each other relevant to the issues raised in the [application/proceeding/court file #], forthwith upon request. | While the allegedly incapable person must be served with the application material, it is of benefit to appointed counsel to receive and review the material and any supplementary materials filed or produced prior to attempting to meet the allegedly incapable person. |
| Medical Records | THIS COURT ORDERS that [the lawyer/s.3 counsel], and [the assessor on a capacity assessment] shall, upon the request of Section 3 Counsel, be provided with all personal health information and medical reports obtained together with any other relevant documentation pertaining to capacity of [the person]. Any documents, records and information provided pursuant to this paragraph are deemed to be privileged and are not compellable as evidence by any other party without leave of the court. [NTD: may include pleadings/affidavits/materials/responding materials]. | There is case law in the context of the *Substitute Decisions Act, 1992*, that the Court may not have the jurisdiction, contrary to the patient’s wishes, to order the production of medical records. See Justice Penny’s decision in *Beretta v Beretta*, 2014 ONSC 7178, at para. 73. However, in *Borges v Borges*, 2018 ONSC 3451, at para. 25 the Court ordered the production of the medical records where the capacity of the alleged incapable person is in issue in an SDA proceeding.  Capacity Assessors assessing capacity under the *SDA* have separate authority to access personal health information pursuant to 43(1)(a) of the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A. |
| Financial Records | THIS COURT ORDERS that [the lawyer/s.3 counsel] shall, upon the request of Section 3 Counsel, be provided with all banking, investment and other financial records, including bank statements, for any bank account, investment account, credit card account, or investment of any nature on which [the person] is a named account-holder (whether jointly or not), named card-holder, named contributor or named beneficiary from [date] onwards, from any person, financial institution, or organization in possession of such documents. Any documents, records and information provided pursuant to this paragraph are deemed to be privileged and are not compellable as evidence by any other party without leave of the court. | In circumstances where the relevant financial records are within the possession, power, or control of an attorney or guardian of property rather than a financial institution, Section 32(6) of the *Substitute Decisions Act, 1992*, creates a fiduciary obligation on an attorney or guardian to keep accounts of all transactions. In addition, the addition of an adult child to an elderly parent’s account is sufficient to create a fiduciary duty in relation to the parent’s account. See *Borges v Borges*, 2018 ONSC 3451 at para. 27. |
| ***Additional Terms (If applicable)*** | | |
| Adjournment | THIS COURT ORDERS that the balance of this application is adjourned to \_\_\_\_\_\_\_\_\_. |  |
| Application Transferred to Another Court | THIS COURT ORDERS that, notwithstanding the transfer of this application to the [new court: Estates List, Family Division, etc.], Section 3 Counsel will continue to be involved on behalf of [the person] in respect of this application but, for clarity, in no other respect. |  |
| Authority to Compel a Formal Passing of Accounts | THIS COURT ORDERS that Section 3 Counsel shall have the authority and power to compel all or a specified part of the accounts of an attorney or guardian of property to be passed, such authority to expire upon the earlier of the determination of [issue] or the termination of the retainer of [section 3 counsel] as lawyer for [the person]. | Authority: SDA s. 42. |
| Capacity Assessment | THIS COURT ORDERS that the [named assessor/doctor or geriatrician] shall conduct a capacity assessment in accordance with the provision of the *Substitute Decisions Act*  with respect to the matters raised in the [application/proceeding/court file number], in order to asses [person’s] capacity to [type(s) of capacity in question] such assessment to be conducted within [timeframe]. | The person’s wishes should be canvassed by Section 3 Counsel prior to making such an order and the person should be provided with the opportunity to oppose a court-ordered capacity assessment. If a person's capacity is in issue in a proceeding under the *Substitute Decisions Act, 1992*, and the Court is "satisfied that there are reasonable grounds to believe that the person is incapable", the Court may order that the person be assessed by a capacity assessor for the purpose of providing an opinion as to the party's capacity (s. 79). |
| Further Direction | THIS COURT ORDERS that counsel appointed under section 3 of the *Substitute Decisions Act, 1992*, may seek further direction from the court respecting his or her appointment. | Section 3 counsel may require need to seek direction to the court respecting access to the client or interference by other parties with the lawyer-client relationship without instructions to do so.  Section 3 counsel may need to seek direction without instructions from the allegedly incapable client, for example, to terminate the appointment if the allegedly incapable person cannot provide any instructions or otherwise to address the lawyer’s role in the proceeding(s). |
| Interim authority to pay bills and expenses of the allegedly incapable person. | THIS COURT ORDERS that [ATTORNEY/ACCOUNT HOLDER/ETC] shall pay the expenditures as defined in section 37 of the SDA from [the property of the person or funds in specific account] subject to the further order of this court without prejudice to the review of such expenditures in a passing of accounts. | Authority: *SDA* s. 39 (if there is a Continuing Power of Attorney for Property or existing guardianship); and *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3 from paragraphs 17 to 26 (where there is no (Continuing Power of Attorney for Property or existing guardianship). |
| Modification of Deadlines | THIS COURT ORDERS that the deadlines set out above may be modified by mutual consent of [parties] and section 3 counsel for [the person]. |  |
| Non-SDA issues raised in SDA applications | THIS COURT ORDERS that Section 3 Counsel may obtain and present evidence relating to [the person’s] position on [IDENTIFY ISSUES IN PROCEEDING THAT FALL OUTSIDE OF SDA]. | Authority: inherent jurisdiction of the court (see *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 (CanLII), [2013] 3 SCR 3 from paragraphs 17 to 26) |
| Prohibition Against Monitoring and Recording | THIS COURT ORDERS that [the parties] other than [the lawyer/s. 3 counsel] of [the person] shall be prohibited from tape recording, videotaping, recording, or otherwise monitoring any meetings or communications between [the person] and their [lawyer/s.3 counsel]. |  |
| Provision of Information re: Medical Information and Treatment Plan | THIS COURT ORDERS that [the party/parties] on consent and on a without prejudice basis shall provide information to [section 3 counsel, any other parties] on or before [date] respecting the current medical condition and treatment plan for [the person] and shall advise of any significant change in the condition, schedule or treatment plan for [the person] until the earlier of the determination of [issue] or the termination of the retainer of [section 3 counsel] as lawyer for [the person]. |  |
| Service of Responding Materials | THIS COURT ORDERS that [the party/parties] shall serve and file any responding materials within [# of days] of the date of the within Order |  |
| ***Termination of Appointment*** | | |
|  | THIS COURT ORDERS AND DECLARES that the appointment of [name of section 3 counsel] as counsel for [person], pursuant to the Order of the Honourable [judge] dated [date], is hereby at an end, that the reasonable costs of Section 3 Counsel incurred receiving and explaining this order to [the person] shall be paid by [attorney or guardian]and the Public Guardian and Trustee need not appoint another lawyer for [person] subject to the further order of the Court. |  |

Notable papers on the Role of Section 3 Counsel (each referring to various additional resourses):

Between A Rock And A Hard Place: The Complex Role And Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992 (http://welpartners.com/resources/WEL\_2012\_Section\_3\_Counsel\_paper.pdf)

The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward, Estates and Trust Summit, Day 1, October 16, 2019 (<http://pbplawyers.com/wp-content/uploads/2020/10/Procope-The-Ongoing-History-of-Section-3-Counsel.pdf>)