A Perspective on Ontario’s Adult Guardianship Law: The Role of Law in Adjudicating Disputes Caused by Old Men Marrying Young Women.

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The Role of Law in Adjudicating Disputes

Caused by Old Men Marrying Young Women

Israel Doron, D.Jur.
Abstract

The well-publicized American legal battle of the “young and sexy” Anne Nicole Smith over the estate of her late “rich old husband,” J. Marshall Howard, provides an opportunity to examine the relationship between popular stereotypes and adult guardianship law. Under popular impressions of “rich old men marrying sexy young women,” impressions that cross borders and cultures, law serves as a stage on which old men, young women, their families, lawyers, physicians and other actors struggle over the “old men’s” property and autonomy.

This study provides a narrow perspective on how these popular and stereotypical stories are mirrored in real court cases in the Province of Ontario, Canada. The case-law perspective provides the empirical ground for raising the argument that when ageism and sexism are involved, the law might be diverted from its intended use as a positive protective tool to become just another negative social mechanism of elder abuse.

KEYWORDS. Guardianship; Ageism; Sexism; Elder Law; Elder Abuse.
A Perspective on Ontario’s Adult Guardianship Law

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Caused by Young Women Marrying Old Men

Dr. Israel Doron

“Soon, if all goes according to her plan, Anna Nicole Smith – ninth-grade dropout and 1993 Playboy Playmate of the Year – will emerge from a Los Angeles bankruptcy court a very rich woman. . . . An oil baron whose holdings are now estimated to be worth as much as $1.6 billion, J. Howard had met Anna when she was dancing in a Houston strip club four years earlier. He was in a wheelchair and was depressed by the deaths of his wife, Bettye, and his mistress, Diane (Lady) Walker. An aide thought, Anna Nicole could cheer J. Howard up, and she did. Within months Marshall was alternatively proposing to either marry Smith or adopt her, and their wedding took place in 1994. As J. Howard became increasingly feeble, Pierce Marshall [J. Howard Marshall’s son] moved to take control of his father’s finances. . . Now the two are fighting bitterly over Marshall’s vast wealth.”

Introduction

This paper is about elder people’s rights. It is about how law views the aged and how adult guardianship fails to address the real interests of the elderly. Within this context, Anna Nicole Smith’s opening Newsweek story is only an example that illustrates how social and legal relationships to elder guardianship law are represented by stereotypes and popular impressions surrounding stories about rich old men who decide to marry young
women. This is a stereotypical story that can be found in various societies ever since biblical times, with heroes and tales similar to those found in the *Newsweek* story.

Here, the “rich old man” is J. Howard Marshall, an 86-year-old American oil baron from Texas. The “sexy young woman” is Anna Nicole Smith, a ninth-grade dropout, a 1993 Playboy Playmate of the Year, and a strip club dancer. These heroes are joined by the “rich old man’s” family. In the *Newsweek* story, Pierce Marshall, the 56-year-old son of the “rich old man,” plays an important role as he “fights” the “sexy young woman” over the “rich old man’s” property, estimated at $1.6 billion dollars in the *Newsweek* story. Other players also join in: lawyers who represent the main heroes in court; physicians who provide expert opinions as to the “rich old man’s” legal capacity and mental competence; and finally, the judges or, more precisely, the law.

As the story unfolds, usually a mix of dramatic, tragic, and sometimes comic ingredients appear. In the *Newsweek* story, the “rich old man” meets the “sexy young woman,” falls in love and marries her. The son is hurt and fights to maintain control over his father’s property. The battle culminates in the courtroom, where the lawyers, experts, judges and the law attempt to decide who will eventually gain control over the “rich old man’s” property.

*Adult Guardianship Law and the Elderly*

Law plays a significant role in the “rich old men, sexy young women” stories. The players turn to the law in order to find a solution for their personal disagreements and inability to resolve the conflict. The law, for its part, provides a formal setting in which to make an ultimate determination as to who is the “good” hero (i.e., who should receive control over the “rich old man’s” property) and who is the “bad” hero (i.e., who should
end up with no part of or control over the “rich old man’s” property). The law provides diverse legal settings for the heroes’ actions, including complaints of elder abuse, appeals over mental incompetence, and even criminal charges. In the *Newsweek* story, the legal setting is a legal inheritance battle. The focus of this paper is a different legal setting: that of guardianship law or, more specifically, elder guardianship law in the province of Ontario, Canada.

Historically, the frail elderly, as well as other weak sectors of society who are unable to care for themselves, have been subject to legal proceedings known as guardianship. Guardianship refers to the legal relationship whereby the legal rights, possessions, and decision-making power of one person (the ward) are transferred to another (the guardian) once a court or other legal authority makes a determination that the ward is “incompetent” to handle his or her own affairs. The common rationale for guardianship is based on a paternalistic view in which the role of the state and the law is to protect and secure the fundamental rights of those who are unable to do so by themselves. Despite changes and reforms, adult guardianship law has survived as a fundamental legal institution aimed to protect the frail elderly as well as other incompetent adults.

It was only in the 1960s that common-law scholars in North America began to raise questions as to whether guardianship truly protects the elderly or whether it actually further infringes on their fundamental rights. These questions were opened up to broader public and political debate by the *Associated Press Report* on guardianship, which was published in various newspapers throughout the United States in 1987. The report described guardianship as follows:

The nation’s guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect. A year-long investigation
by the Associated Press of courts in all 50 states and the District of Columbia
found a dangerously burdened and troubled system that regularly puts elderly lives
in the hands of others with little or no evidence of necessity, then fails to guard
against abuse, theft and neglect.\textsuperscript{8}

It was only natural for the United States House of Representatives Subcommittee on
Health and Long-Term Care to then call the American guardianship system at the time “a
national disgrace.”\textsuperscript{9} Such legal concerns about guardianship over the elderly have forced
legislatures around the world to change the legal landscape in this field of law. The
United States,\textsuperscript{10} Austria,\textsuperscript{11} Germany,\textsuperscript{12} Sweden,\textsuperscript{13} Holland,\textsuperscript{14} Japan,\textsuperscript{15} Australia\textsuperscript{16} and New
Zealand\textsuperscript{17} are all examples of the broad wave of law reform in this field that has swept the
developed world in recent decades.

The question of whether these legal reforms have been successful in reducing the
unnecessary infringements on elderly people’s rights is beyond the scope of this paper.
Here, a very specific and narrow dimension of this broad question will be examined: Was
Ontario’s adult guardianship law reform successful in eliminating ageism and sexism
from its guardianship process in cases of old men marrying young woman? Not only will
the present findings suggest that success has yet to be achieved, but it will be argued that
they may provide broader insight into fundamental weaknesses of the current wave of
elder guardianship law reform.

\textbf{Ontario’s Adult Guardianship Law Reform}

Until the early 1990s, Ontario had an adult guardianship regime that was based on the
legal concept of “mental incompetence.”\textsuperscript{18} According to this legal concept, any person:

\begin{itemize}
  \item[(i)] in whom there is such a condition of arrested or incomplete
development of mind, whether arising from inherent causes or induced
by disease or injury, or
\end{itemize}
(ii) who is suffering from such a disorder of the mind that he requires care, supervision and control for his protection and the protection of his property.\textsuperscript{19} would be placed under the control and protection of a guardian. However, as early as the 1960s, questions were raised with respect to the moral validity and legal effectiveness of this legal regime. Concerns were raised about the potential for abuse of power by the guardians, the far-reaching infringement on the rights of the elderly, and the absence of adequate due-process protections.\textsuperscript{20} To address these questions, the Ontario government nominated no less than three committees to study the different dimensions of its adult guardianship regime.\textsuperscript{21} In 1992, after a long political legislative process, Ontario abolished its mental incompetence guardianship regime and enacted three novel pieces of legislation: the \textit{Consent to Treatment Act};\textsuperscript{22} the \textit{Advocacy Act};\textsuperscript{23} and the \textit{Substitute Decision Act}.\textsuperscript{24}

The legal reform significantly changed the character of adult guardianship law in Ontario. The main goals of the reform were to promote the autonomy of elder persons and to prevent unnecessary legal intervention into their lives. This was to be achieved through the incorporation of several critical features. First, Ontario’s law uses a very narrow, marginal, and cognitive-based threshold for finding a person incapable of making legal decisions. The court has to tailor the guardian’s authority to the specific legal incapacities of the ward. For example, for the purpose of finding a person incapable of managing property, the legal assessment must be based on the following standard:

A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.\textsuperscript{25}
Second, Ontario provides the means to avoid guardianship altogether by executing a continuing power of attorney, both for property and for personal care. In such a case, the person expresses the intention that the authority granted to make decisions on his or her behalf may be exercised during his or her incapacity. Thus, whenever a person who has provided for such an authority becomes incapable, his or her attorney automatically becomes the substitute decision-maker without any need for formal guardianship proceedings.26

Finally, in the Health Care Consent Act (HCCA), Ontario has created a very simple procedure that recognizes the social position of family members as natural substitute decision-makers. Under section 20 of the Health Care Consent Act, whenever a physician finds a patient incapable of making a specific medical treatment decision, a family member automatically becomes that person’s substitute decision-maker, and the physician is mandated to receive the informed consent of that family member in order to pursue the recommended medical treatment. The HCCA lists a hierarchy of family members for substitute decision-makers, as follows: (1) the person’s spouse or partner; (2) a child or parent; (3) a brother or sister; (4) any other relative. It should be noted, however, that if the patient has granted the power of attorney for personal care or if a guardian has been appointed, then the attorney-in-fact becomes the substitute decision-maker and other family members lose their automatic status.

As Hoffman describes, Ontario’s elder guardianship law reform represents an overall shift in the socio-political balance “from the knowledge, technology, and authority of the professional to the wishes and autonomy of the patient.”27 This power-balance revolution can be understood only as part of the wider social movement that has evolved as a
reaction to the professional-paternalistic regime that existed in Ontario and in traditional Common Law.  

**Ontario’s Case Law**

**The Study**

The finding of the relationship between the stereotypical case of “rich old men marrying sexy young women” and elder guardianship was actually an unexpected by-product of a broader case-law study on Ontario’s elder guardianship law. The case-law study was based on gathering and analyzing all the cases involving adult guardianship in Ontario that had been reported in the Quicklaw computerized database since the law reform was proclaimed. The different computerized searches produced a total of 33 reported cases representing various aspects of adult guardianship, the overall findings of which have been discussed elsewhere.

**The Cases in Ontario**

Of the 33 cases handled by Ontario courts since the elder guardianship law reform was proclaimed, three cases fell into the broad popular lines of rich old men marrying young women. These cases are described and analyzed here.

*The Brown v. Glawdan Case*

The heroes and players of the *Brown v. Glawdan* case were as follows: The “rich old man” was Mr. Jan Victor Glawdan, an 88-year-old widower who had cash and deposits of over $3,000,000 plus a large residential property. Two close friends managed his property under power of attorney: Brown, his attorney, and Bernice Pentland, his housekeeper and his late wife’s secretary whom he had known for many years. The “sexy young woman” was Josefa Pilz, a woman in her late 60s. Both Josefa and Victor were of
Polish origin. Josefa met Victor in the 1950s, and they carried on a social relationship at the time along with their respective spouses. However, they lost touch in the 1970s. Josefa’s husband died in 1995, and after his death she went to meet Victor. While she did not meet him in person, she left a note written in Polish with his housekeeper. Josefa dropped by on several other occasions but never met with Victor in person.

On January 25, 1998, Victor called Josefa at 8:00 a.m. to arrange a meeting. When they finally met, Victor told Josefa that he had spent the whole night looking for her note and telephone number. After satisfying himself that Josefa had not remarried, he asked her to marry him. They were married five days later in the presence of their new attorney and his wife. On that same day, Victor executed a revocation of the power of attorney given to his previous attorney (Brown) and his housekeeper (Pentland) and made changes to his will. Since Victor did not have any other living family members, Brown and Pentland went to court to seek the appointment of a guardian over Victor “for his best interest.” They believed that Victor did not have the mental capacity for making the legal decisions to revoke the power of attorney and to make changes in his will.

Once before the court, other players joined the story and provided their perspectives. Victor’s new solicitor (who had known him for only several days) provided an affidavit stating: “In my professional opinion, Mr. Glawdan is intelligent and fully competent to handle his financial affairs.” Dr. Kralka, Victor’s family doctor, examined Victor on the day of his marriage and found him “competent to make testimonial or for that matter any other important decisions concerning his life.” However, five days earlier, the same Dr. Kralka wrote that under his impression:
Mr. Glawdan is an 88-year-old man who is very opinionated. He does not suffer from any mental illness and is competent to make decisions about his life. During the last two years, his physical health has deteriorated. For this reason, he should have a guardian and it is up to the patient to appoint one.\textsuperscript{34}

Finally, Dr. Nynkowsky examined Victor three days after his marriage at Dr. Kralka’s request. In his one-page letter he stated, “I think he is mentally competent to make decisions about his estate as well as the disposal of his assets.”\textsuperscript{35}

After reviewing all the facts and opinions in this case, the court decided to appoint the Public Guardian and Trustee as a temporary guardian over Victor’s property and person. The court also issued an order that a new capacity assessment be made. This decision was based on various considerations, amongst others, the court’s concern about Victor’s mental capacity:

Given that Glawdan is 88 years of age, and suddenly calls a woman at 8:00, with whom he has not socialized for years and asks her to marry him, and given that he had been up all night searching for the note, I am deeply concerned as to his mental and physical health.\textsuperscript{36}

\textit{The Deschamps v. Deschamps Case}\textsuperscript{37}

In the Deschamps case, the “rich old man” was Mr. Alexandre Deschamps, an 80-year-old man who suffered from serious health problems and some memory lapses. The “sexy young woman” was Ms. Lucia Tessiar, a woman about whose age, background or personality the court judgment provides no information. There is also very little information in the case about Mr. Deschamps’s property, and while it is clear that he owns a bank account and a house, no further information is provided about the value or
extent of these assets. The “rich man’s” family in this case included his sister, his son Alain Deschamps, and his daughter.

In the past, Mr. Deschamps’s two children had been given a continuing power of attorney to manage their father’s property. Once Alexandre’s family found out about his plans to marry Lucia, they indicated that no marriage would take place unless Ms. Tessier agreed to sign a pre-nuptial agreement. As such an agreement was not signed, they proceeded to do all that they could to prevent the wedding, even to the point of threatening any priest who would hold the marriage ceremony with legal action. Furthermore, Alain, through the use of his power of attorney, transferred the money in his father’s bank accounts to his own name and prevented Alexandre from having any access to his own funds. Alexandre became emotional, angry and violent toward his children when they attempted to discuss his health care, finances or Ms. Tessier, and he decided to revoke his son’s power of attorney. The family then applied to the court for a declaration that Alexandre was incapable of managing his personal and financial affairs and that they should be appointed as his guardians.

Once before the court, several experts voiced their opinions. Dr. Clarissa Bush’s report of October 1, 1997 stated that although Alexandre had undergone some mild cognitive changes, they were not of sufficient severity to interfere with his capacity to make a will or to grant power of attorney. A different expert, Dr. Andree Telliers, who was retained by the family, stated in her October 29, 1997 opinion that:

Mr. Deschamps is incapable of managing his finances. However, given Mr. Deschamps’ specific circumstances, I do question the need for substitute decision-maker. There appears to be a less restrictive way of handling his
financial affairs. In this case, the appointment of a guardian would appear to be far outweighed by the adverse consequences of such an action in terms of quality of life or psychological well-being.\textsuperscript{39}

In adopting Dr. Tellier’s opinion, the court dismissed the family’s application and did not appoint a guardian over Mr. Deschamps.

\textit{The Banton Case}\textsuperscript{40}

The “rich old man” in the Banton case was 92-year-old George Banton, who was born in England in 1906. He had five children with his first wife, who died in 1970. In 1971, he married her sister, who died in 1994. In 1990, George was diagnosed as having cancer of the prostate, for which he underwent several surgeries. He also suffered from hearing problems. In 1994, he moved to a retirement home. His house was sold, and a trust account was created in his name. His property was worth almost half a million dollars. The “sexy young woman” in this story was Muna Yassin, a waitress in the restaurant at the retirement home where Mr. Banton resided. She was 31 years old, and soon after Mr. Banton’s arrival to the retirement home, she began a friendly relationship with him.

George’s family included five adult children and their respective families. Mr. Banton signed a power of attorney in 1987 that gave his sons the ability to manage his property. Once George’s family became aware of the developing social relationship between their father and Muna, they acted in two ways. First, they had him assessed by Dr. Lessard, who issued a Certificate of Incompetence under the Mental Health Act. As a result, the Public Guardian and Trustee was notified, and he issued a Notice of Continuance of the Certificate. Second, they used their power of attorney and moved their father’s money
into an irrevocable trust account in which George was the beneficiary during his lifetime, and the children after his death. They did not tell their father about this action.

The social relationship between Muna and George developed quickly. On December 17, 1994, George and Muna were married at her apartment and in the presence of the priest and his wife. George’s children were not told about the wedding nor were they invited. George slept that night at Muna’s apartment. When the retirement home staff discovered that George had not returned to his room and did not know where George was, they called his family, who in turn called the police. The next morning, upon Muna and George’s return to the retirement home, they were confronted by George’s children and a dispute erupted. According to Muna and George, George’s children acted violently in their attempt to physically take their father away from Muna. The next day, George and Muna went together to a lawyer to revoke the existing power of attorney and to make a new will and a new power of attorney, making Muna the substitute decision-maker. Moreover, according to the new will, George’s whole estate was to go to Muna.

In April 1995, George left the retirement home and moved into Muna’s apartment. George Banton’s new solicitor made an application to the Consent and Capacity Board to challenge Dr. Lessard’s finding of incompetence, an application that was dismissed for want of jurisdiction. This decision was followed by an application brought by the Public Guardian and Trustee to be appointed statutory guardian of Mr. Banton’s property, an application that was opposed by Mr. Banton and his newlywed wife.41

Once again, different expert opinions were brought before the court. Dr. Michel Silberfeld provided the following opinion to support Mr. Banton’s case:
Mr. Banton was a well dressed elderly man who walked into the office with a walker. He spoke spontaneously and in response to questions. He wore an amplifier, which worked well for him. He was goal directed in his response and seldom wandered from the topic at hand. His mood was good, perhaps slightly elevated. Thought process and content were normal. He was preoccupied with regaining control of his finances and the alleged ill-treatment from his children. His blanket denial of past difficulties raises questions about his judgment, which were not fully clarified by this examination.

Conclusion:

Mr. Banton does meet the usual criteria for capacity to manage his finances and to give power of attorney. The only reservation comes as a result of his inability/unwillingness to acknowledge personal limitations.42

The Public Guardian and Trustee based its position on Dr. Chung’s opinion:

Mr. Banton was coherent, friendly, co-operative and articulate. He denied that he had any problem with financial management. He stated that he did not think that he needed any help with financial management either. He felt angry at his children, and he believed that the Public Guardian and Trustee (PG&T) was imposing on him and depriving him of his freedom during the last part of his life.

I concluded that Mr. George Banton did not meet the minimal test for capacity to manage property. There were demonstrable but acceptable gaps in his ability to understand information relevant to make a decision for property. The most significant concern is the fact that Mr. Banton did not acknowledge
any personal weakness or the need for assistance in any aspect of property management, even after several examples of the deficiency had been demonstrated to him. Such deficiencies in insight, as well as in the capacity to retain and to process logically the relevant information (i.e., appreciation), secondary to generalized deterioration of mental function, make him unable to meet his needs for property management.⁴³

Based on these opinions and many other considerations, the court concluded that George did not have testamentary capacity when he signed the new will that made Muna his beneficiary. However, at the same time the court concluded that George did have legal capacity to marry Muna, so their marriage was considered valid and Muna had all the legal rights as George’s wife. In a sentence that may be viewed as a summary of the court’s view on the case, the judge stated that:

It is the case of a lonely, depressed, terminally ill, severely disabled and cognitively impaired old man whose enfeebled condition made him an easy prey for a person like Muna with designs on his property.⁴⁴

Discussion

It is obvious that no broad conclusions can be reached based upon three court cases, each of which was eventually decided in a different manner. The purpose of this discussion is not to provide answers, but to raise questions along with some thoughts about the possible directions where answers might be found.

Popular Impressions and Reality

Examining the stories of the “rich old men marrying sexy young women” in a real life context, one finds (not surprisingly) that reality is more complex than the stereotypes.
The “rich old man” is not necessarily rich (see the Deschamps case). The “sexy young woman” is not always young or sexy (see the Brown case). Family members are not always involved (see the Brown case). The women are sometimes self-interested and looking for “prey” (see the Banton case), while other times they are without any questionable intentions (see the Deschamps case). The families are sometimes loving and caring (see the Banton case) and other times act in a shameful manner (see the Deschamps case). Finally, sometimes the woman wins (see the Deschamps case), other times the family or close friends win (see the Brown case), and yet other times there are no clear winners or losers (see the Banton case). If and to the extent that the Newsweek story or other popular stories about “rich old men marrying sexy young women” is intended to represent a broader social phenomenon or reflect a stereotypical picture, this limited study shows the inaccuracy of such a picture. Indeed, reality is much more complex and diverse than popular impressions would lead us to believe.\(^{45}\)

**Ageism and Sexism**

Ageism can be seen as a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplishes this for skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills. Ageism allows the younger generations to see older people as different from themselves, thus they subtly cease to identify with their elders as human beings.\(^{46}\)

Despite the warning against drawing broad conclusions from this limited sample, one is tempted to ask the following question: If the men in these instances had been aged 45 or 55, would the cases have been brought to court and the mental capacity of these men questioned? The question appears to be rhetorical. Cultural stereotypes about the
sexuality of ageing people are embedded in general negative attitudes toward the aged. Old men may easily be perceived as sexually unfit and unattractive in light of characteristics that are commonly (but not necessarily) associated with old age, such as physical disability, illness or frailty. The popular view that sex is youth-oriented leads one to conclude that old men are so unattractive to young women that money is the only reason accounting for the willingness of younger women to be involved in a social (not to mention sexual) relationship with a man aged 85. Another side of the same ageist perspective of old men might view old men simply as “dirty old men.” Why else would an 85-year-old man engage in a relationship with a young woman if not for sex, and sex only? In other words, according to an ageist approach, there must be something abnormal, by definition, in a relationship between a rich old man and a sexy young woman.

The other side of this ageist picture is its sexist dimension. Young women are perceived in this context not only as sexual objects but also as “sexual predators” searching for “prey” in the shape of old and frail rich men. It is not their personality, charm, intellect, love or care that makes old men attracted to them; rather, it is their sexuality, which is purposely manipulated by these young women. These conceptions derive from broader sexist stereotypes about women and women’s bodies that deserve a much broader discussion beyond the scope of this paper.

Considering the impact of ageism and sexism on society’s perceptions, it is more easily understood why people often turn to guardianship law in order to obtain what they deem to be protection of the elderly. However, as illustrated in the three cases above, guardianship law in real life may only reflect and preserve ageist and sexist social
stereotypes. In such cases, family members and professionals tend to treat older men in a paternalistic manner and thus more easily infringe on their autonomy and independence. Furthermore, the courts are more inclined to view young women as sexual objects searching for frail elderly men to trap with their sexual bait. As such, law is used as a tool of power and control over the elderly, rather than means for protection or care. Thus, examining stories and cases of “rich old men marrying sexy young women” in real life raises questions about the ability of Ontario’s reformed guardianship law to provide constructive solutions for the complex social problems that surround old age.

Why Courts?

A different reaction to these three very different stories is to ask whether these disputes should have reached the courts at all. Could not have George Banton’s children come to terms with Muna Yassin themselves? Would it have been so difficult for Josefa Pilz to reach a common understanding with Mr. Brown’s old friends? And was it not possible for Alexandre Deschamps to reach a manageable solution with his children regarding his property? With growing awareness of alternative dispute resolution, these questions suggest the use of mediation as an alternative to the formal guardianship process handled by the courts. In none of the aforementioned cases was there any evidence of an attempt to avoid the court system through the use of mediation; in none of the cases was there any evidence of effort on the part of the courts themselves to resolve the dispute by means other than an adversary resolution. Is this situation inevitable?

In recent years, mediation has received professional and public attention as a mechanism of alternative dispute resolution. Mediation has proven to be a workable alternative to litigation in various types of disputes. As shown in the three cases
described above, elder guardianship in particular involves emotional interaction in ongoing personal relationships, such as in disputes over property management between older people and their close family members. In this context, it has been already recognized that “mediation can provide a beneficial alternative to the adversarial process in answering these questions.”\textsuperscript{52} As a potential tool to prevent or avoid formal elder guardianship, mediation offers various advantages, such as maintaining one’s privacy,\textsuperscript{53} addressing the non-legalistic emotional aspects of the dispute, and providing for unique and imaginative solutions,\textsuperscript{54} all at less cost than formal guardianship litigation.\textsuperscript{55}

From the standpoint of the “old man’s” best interests, the “woman,” the “family” and the rest of the players (the various doctors and professionals) should all attempt to maintain positive social relationships. They all should continue to interact and cooperate in order to provide the love, care and best support for the old man. Successful mediation could thus reduce the popular power of the “rich old man, sexy young woman” stories and transform them from an adversarial and “sensational” episodes into positive social interactions for all sides.

Real-life experience supports this idea, as some success has been reported in the field of elder guardianship.\textsuperscript{56} In the U.S., California and Oregon have experimented with mediation, and these experiments were then exported to Britain. From the perspective of promoting elder rights and empowering the aged, this limited study suggests that Ontario as well as other countries should consider utilizing mediation in the context of its new elder guardianship regime.
**Advance Directives**

One of the means provided to promote the autonomy of the elderly under Ontario’s elder guardianship law reform is the option for continuing powers of attorney. This legal instrument provides an alternative to formal guardianship by allowing a person to nominate an attorney of his or her own choosing to become one’s substitute decision maker in case of incapacity. This practice circumvents the need to resort to the court for the appointment of a formal guardian. However, as shown in all three cases here, advance directives suffer from very problematic shortcomings.

Continuing powers of attorney exist with almost no social or legal inspection or monitoring other than the internal interaction between the elderly individual and the attorney-in-fact. In Ontario, there is no statutory mechanism of supervision over the decisions made by the attorney-in-fact or over the actual relationship and interaction between the parties in the agency agreement. As seen in all three cases, simple decisions, such as the power to handle one’s bank accounts could be very easily turned into an abusive tool. Even if some formal supervision could be implemented, it would be very difficult to make sure that the attorney-in-fact actually makes the decisions based on the previous wishes or beliefs of the principal, when those are not clearly specified in the power of attorney. Unlike guardianship proceedings, the attorney-in-fact is not bonded and is not required to submit any security that would serve as some protective measure against abuse of power.

Another serious concern is that once an attorney-in-fact is nominated and his or her powers take effect, the elderly person is ignored and excluded from the decision-making process by third parties. In all three cases examined here, the financial institutions
suddenly stopped asking the elderly men about their wishes and stopped questioning or examining their actual mental capacity; instead, they automatically turned to the attorney-in-fact for consent and approval.\textsuperscript{59}

Finally, it should be noted that continuing powers of attorney are a voluntary mechanism. It is up to the elderly individuals themselves not only to decide who will be the attorney-in-fact, but also whether to nominate one altogether. Yet, as exemplified in all three cases of this study, the existence of an attorney-in-fact makes life much easier for third parties, especially ones with economic interests (such as family members) or with legal liability concerns (such as lawyers, bankers, nursing homes, etc.). Furthermore, it enables such third parties to evade the time-consuming efforts entailed in genuinely trying to ascertain the true wishes of the elderly. Thus, as illustrated here, it is not an uncommon experience for the elderly to be pressured into executing continuing powers of attorney, even though they might not feel the need or desire to do so, or would rather not use it because of personal or cultural preferences.\textsuperscript{60}

\textbf{Ontario’s Legal Definition of Mental Capacity}

All three cases examined involved contradicting expert opinions on the question of the mental capacity of the old men. This is significant in light of the fact that Ontario’s new legal definition for mental incapacity was viewed as one of the most important dimensions of its reform.\textsuperscript{61} The new definition is strictly a cognitive one insofar as all that matters is the person’s ability to understand the relevant information and the consequences of his or her decision. All three cases raise questions about the adequacy of this new legal definition. Is it sufficient to assess an elderly person’s capacity to manage his or her affairs solely on the basis of his or her cognitive abilities? Should we not look
into other important social elements, such as emotions, family relations, physical capabilities, and communal settings?

The vast majority of current academic literature on the assessment of elderly people acknowledges that the term mental capacity is multidimensional, encompassing a range of interacting social, psychological, interpersonal, and environmental factors. From this perspective, it is clear that Ontario’s legal focus on the individual’s decision-making capacity gives short shrift to the array of external factors that could facilitate or inhibit the exercise of such capacity. In particular, Ontario’s law has not attempted in any way to assess the relationship between the environment and the person’s capacity to make decisions, a relationship that psychologists view as paramount in assessing decisional capacity. Social functioning is interactive, involving people filling social roles, coping with socially derived stress, and interacting with each other and their environment. Conventional wisdom holds that the physical, mental and social well-being of an elderly individual are very closely interrelated. Functional independence, despite disease, physical or mental disability, is a more relevant indicator of well-being than is cognitive capacity among this population. As one scholar asserted:

Another conclusion that emerges from the accumulative experience with capacity standards is that, while cognitive functioning tests may be a necessary component, it is not sufficient in itself to establish incapacity in the guardianship context. Some form of consequential behavior elements remains essential to tests of capacity.

Furthermore, the reliance on a cognitive-based legal test assumes that this ability can be characterized as binary in nature, that is, either it exists or it does not. However, in
reality, this ability may diminish slowly over a long period of time. During this gradual process, while still cognitively capable, elderly persons may become victimized by predators or may be subject to neglect by themselves or by others.

The three cases of this study suggest that attempting to resolve the issues of caring for the elderly solely on cognitive grounds contradicts the social rationale of guardianship. The Banton case might serve as a good example of the limits of Ontario’s cognitive test: Should the legal decision on George’s capacity to execute a continuing power of attorney rest solely on his cognitive mental capacity? Should the court ignore, as it so did, the emotional, social and communal context in which this decision took place? Would George’s rights and interests have been better served by such an approach? It seems that in the context of “rich old men, sexy young women,” this reliance on strictly cognitive grounds fails the elderly and their caring surroundings. As long as the elderly person is deemed able in cognitive terms, the incapacity concept forbids the court from looking beyond individual boundaries to the social considerations that are so important to understanding the motives and limits of true autonomy and self-determination among the elderly.67

**Elder Guardianship as Elder Abuse**

The legal debate in all three cases shared one startling commonality: the focus on answering the question of who should control the money, assets and property of the “rich old man.” In none of the cases was the question of the actual care provided by the “sexy young woman” seriously discussed. Whether the old man was loved by, cared for, or provided with the important social, physical and mental support by the woman at his side was almost irrelevant to the legal discussion. Personal happiness and well-being were
overshadowed by the technical question of whether the individual was or was not capable of managing his own property. One can only speculate as to what would have happened if the old men in the three cases had no significant assets. Would guardianship law still have been utilized to “protect” them? Would their families or friends still have been willing to assume the legal burden of fighting to become their “protectors”?

The moral justification for guardianship is its function as a social protective tool. It institutes a legal mechanism that prevents harm from befalling those who lose their mental capacity to handle their own legal affairs. Guardianship provides for nominating a substitute decision-maker, who is obligated to carry out the past wishes and respect the values and beliefs of such elderly individuals. However, as it turns out, adult guardianship law can be abused and transformed from a protective tool into another form of elder abuse. This is particularly significant in that it is a unique and powerful form of elder abuse, one that is backed by the power of the state and its judicial authority.

**Conclusion**

Popular stories and impression about rich old men marrying sexy young women may be seen as a mirror: a small, twisted and broken mirror, but nonetheless a mirror that enables us to see how law and society view the elderly. It forces us to question the ability to overcome stereotypical social attitudes toward the elderly by formal law reforms. It suggests that the road for changing judicial traditions or social attitudes toward the elderly and toward elder guardianship is still long. It also shows that focusing on personal property and autonomy alone may blind the law from other social values, such as care and social support. Finally, it shows how the law itself might be abused and turned into another means of elder abuse. The contribution of this paper is not in the answers it
provides, but rather in the questions it raises and in the realization that there is still great need for further study and research into the ways in which law can and should intervene in the lives of older persons. Ontario and other jurisdictions reforming their adult guardianship laws cannot assume that the formal legal change will necessarily change the reality or achieve the underlying social goal of the legal reform. A much closer examination of the modes of operation of the new legal regimes should provide better knowledge and insight on how to further improve the law and release the elderly from ageism and negative stereotypes.

1 Dr. Israel Doron is a lecturer in the Center of Research and Studies on Aging at the University of Haifa, Haifa, Israel. The preliminary ideas of this paper were presented in I. Doron, “Rich Old Man, Sexy Young Women: What’s Law Got to Do with it?” (2nd National Conference on Elder Abuse, University of Toronto, 14 April 2000). I would like to thank Prof. Joan Gilmour, from Osgoode Hall Law School at York University, for her encouragement and support.

2 M. Miller, “Battling for a Billion” Newsweek (8 November 1999) 41. In October 2000, the federal bankruptcy judge awarded Anna Nicole Smith nearly $450 million, ruling that she was deprived of money that her late husband intended to leave her. See B. Begun, “Anna’s New Assets” Newsweek (9 October 2000) 59.

3 Maybe the most famous example of such a story is the biblical story about King David: “Now King David was old and advanced in years; and although they covered him with clothes, he could not get warm. Therefore his servants said to him, ‘Let a young maiden be sought for my lord the king, and let her wait upon the king, and be his nurse; let her lie in your bosom, that my lord the king may be warm.’ So they sought for a beautiful maiden throughout all the territory of Israel, and found Ab’ishag the Shu’nammite, and brought her to the king. The maiden was very beautiful, and she became the king’s nurse and ministered to him; but the king knew her not.” See 1 Kings, Chapter 1, 1.
4 In the Newsweek story, since the “rich old man” died, the legal battle was over the estate and not over guardianship.

5 While guardianship is the most common legal term used in North America, various legal jurisdictions have used other legal terms to describe basically the same legal institution. Such legal terms include: committeeship; conservatorship; trusteeship; curatorship; tutorship; and more. While there are naturally some differences between the various legal terms, guardianship will be used in this article as an umbrella term, which will cover all the legal institutions that encompass the same rationale and the same outcome as defined under guardianship.

6 This definition is based on Abuses in Guardianship of the Elderly and Infirm: A National Disgrace (Washington D.C.: Subcommittee on Health and Long Term Care, One Hundredth Congress, 1987) at 1.


8 F. Bayles & S. McCartney, Associated Press (1987), as published in A National Disgrace, ibid., at 13. The Associated Press investigation of the U.S. guardianship system took one year and was put together by a team of 67 AP reporters and editors in the 50 states and the District of Columbia. Hundreds of judges, lawyers, professors, social workers, wards and guardians were interviewed. AP staffers examined more than 2,000 guardianship files around the U.S., and their findings were placed in a computerized database for analysis. The project led to a six-day series of stories on AP’s national news wire and a package of stories for each state news wire, totaling more than 300 nationwide.

9 A National Disgrace, ibid.


11 Austrian law was reformed in this field as part of the law on administration for handicapped persons of 1983. See International Encyclopedia of Comparative Law, at 2-37. This reform replaced the guardian with an “administrator,” as the Court’s role is to tailor the authority of this entity.


18 The Mental Incompetency Act, R.S.O. 1937, c. 110. See also I. Doron, “From Lunacy to Incapacity and Beyond – Guardianship of the Elderly and the Ontario Experience in Defining Legal Incompetence” (1999) 19(4) Health Law in Canada 95.

19 The Mental Incompetency Act, ibid.


21 The Fram Committee studied the issues of substitute decision-making for incapable persons: see S. V. Fram, Chairman, Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (Toronto: Ontario Government Publications, 1987); the Weisstub Committee studied the legal definition of mental incompetence (The Weisstub Report, supra note 20); and the O’Sullivan Committee studied the elements of advocacy regarding guardianship and substitute decision-making (S. O’Sullivan, Chair, You’ve Got a Friend (Toronto: Ontario’s Ministry of Health, 1989).

22 The Consent to Treatment Act, S.O. 1992, c. 28 [hereinafter the Consent to Treatment Act].

23 The Advocacy Act, S.O. 1992, c. 26 [hereinafter the Advocacy Act]. It should be noted that in 1996, the Advocacy Act was repealed and the Consent to Treatment Act was replaced by the Health Care Consent Act [hereinafter HCCA]. This was done under the Advocacy, Consent and Substitute Decision Statute Law
Amendment Act, R.S.O. 1996, c.2. While significant changes were made under this amendment, the core rationale in Ontario’s shift from a medically-based guardianship regime to an autonomy-respecting guardianship regime was not changed.

24 The Substitute Decision Act, S.O. 1992, c. 30 [hereinafter the SDA or The Substitute Decision Act].

25 See the Substitute Decision Act, s. 6. The assessment of this standard is done by capacity assessors who are specially trained for this purpose. See section 1(1) of the Capacity Assessment Regulations of the Substitute Decision Act, O. Reg. 293/96.

26 See the Substitute Decision Act, s. 7.


28 Ontario’s guardianship law reform included many different elements, which were all aimed at securing the autonomy and independence of the elderly. For an overview and discussion of these elements, see I. Doron, From Guardianship to Long-Term Legal Care: Law and Caring for the Elderly (D.Jur. Thesis, Osgoode Hall Law School 2000) [unpublished] [hereinafter From Guardianship to Long-Term Legal Care] at 80-88. See also I. Doron, “From Lunacy to Incapacity and Beyond: Guardianship of the Elderly and the Ontario Experience in Defining ‘Legal Incompetence’” (1999) 19(4) Health Law in Canada 95.

29 QuickLaw is part of QL Systems Limited, which is the largest operator of legal textual database services in Canada. For general details on this service and its scope of coverage, see Guide to QuickLaw (Toronto: QL Systems Limited, 1997) 1-3. The courts that were covered included all those for which decisions are reported under QuickLaw’s Ontario Global Database and for which there is relevance to guardianship law in Ontario. The information provided by a QuickLaw representative was that all of the cases “released” by the courts are reported in QuickLaw. QuickLaw does not screen or make any decision as to which cases to include. However, judges do not release all of their decisions, but rather only those that they deem appropriate for release.
Cases of minor guardianship (custody over minors) and cases about minors with litigation guardianship were screened (along with many other “guardianship” related bodies and terms, such as “Guardian Insurance Company”).

See From Guardianship to Long-Term Legal Care, supra note 28, at 251-261.


Ibid. at page 382.

Ibid.

Ibid. at page 383.

Ibid. This decision was only the first decision made by the court in this case. As the order of the court to have Mr. Glawdan reassessed was not carried out due to lack of cooperation by him and his new wife, the case was returned to court for further instructions.

Deschamps v. Deschamps (12/3/97), Ottawa O.J.No. 4894 (Ont.), online: QL (ORP).

Ibid. at para. 9.

Ibid. at para. 11. The judgement also indicates that Dr. Pierre L’Heureux, the family physician, also gave an expert opinion supporting the argument that Mr. Deschamps did not have the capacity to manage his financial affairs; however, no further details are provided other than that this opinion was considered by the judge.


By the time the judgement was rendered, Mr. Banton had died and the legal questions were about the legal validity of the various legal actions made prior to his death and their influence on the property rights of the adversarial sides to the case.

Ibid. para. 38.

Ibid.

Ibid. para. 98.

After presenting this paper in a conference, one person from the audience pointed out that from her experience in the community, such cases also occur with older women establishing new social relationships
with younger men. Again, according to her experience, the typical response is resistance by family members (e.g., children) to their older mother’s “immoral” behavior.

46 This is a commonly quoted definition that was originally put forth by R.N. Butler & M.I. Lewis in Ageing and Mental Health (St. Louis: Mosby, 1973). For a broad discussion on the various dimensions of ageism, see also D.F. Hultsch & F. Deutsch, Adult Development and Aging: A Life-Span Perspective (N.Y.: McGraw and Hill, 1981).

47 One study found that both young (aged 18-25 years) and middle-aged (40-55 years) groups judged the old (65-79 years) as being less knowledgeable about sex, less desirous, and less capable. See P. Cameron, “The Generation Gap: Beliefs About Sexuality and Self-Reported Sexuality” (1970) 3 Developmental Psychology 272. For a broad overview of actual empirical studies on male sexuality in old age, see R.C. Schiavi, Aging and Male Sexuality (Cambridge: Cambridge U. Press, 1999).


50 The “rich old men, sexy young women” tale is a rich ground for an array of feminist and Marxist perspectives on male and capital dominance, on the politics of gender, and on the perceptions of women’s sexuality. However, a feminist or Marxist analysis of this narrative is beyond the scope of this paper. For a general overview of these potential dimensions, see J. Stockard & M. M. Johnson, Sex Roles: Sex Inequality and Sex Role Development (N.J.: Prentice-Hall, 1980).


53 Ibid. at 424.
E.g., family members can reach an agreement as to arranging some assistance for the elderly parent so that the appointment of a guardian will no longer be necessary. See ibid. at 429.

Ibid. at 431.


According to the Health Care Consent Act, there is a legal mechanism that allows for determining whether a substitute decision-maker has complied with the legal requirements to which he or she is bound in making the substituted decisions: see s. 37 and 54, and 69 of the HCCA.

Some states in the U.S. contain oversight provisions in their legislation: see, for example, New Hampshire RSA 506:7 Supp. 1989.

This point was made by Judith Wahl, the Director of the Advocacy Centre for the Elderly in Toronto at her presentation, “The Use and Abuse of Advance Directives in Long Term Care Settings,” XXVI International Congress on Law and Mental Health, Toronto, June 13-18, 1999 [unpublished]. Ms. Wahl reported that from her experience in dealing with elderly persons who executed powers of attorney, many reported that they found themselves totally excluded from the decision-making process by their surroundings. The Health Care Consent Act does require the substitute decision-maker to try to ascertain the wishes of the patient, even if incapable (see s. 21, 42 and 58). However, in many cases this is not actually being done, and there is neither a means of enforcement nor a monitoring mechanism to secure it.

In some cases, nursing homes have made it mandatory for elderly persons to execute a continuing power of attorney as a preliminary requirement for admittance. This point was also raised by Judith Wahl in her presentation, ibid.

The new definition was the most important recommendation of the Weisstub Report, supra note 20.


Ibid. at 1681.

65 Ibid. at 1.
